

PUNITIVE DAMAGES – A VIEW FROM ENGLAND

If this conference had been held in the year 2000, it would hardly have been worth anyone's while coming to it in order to discuss the English approach¹ to punitive damages. Although there has always been an undoubted jurisdiction to award them, for nearly forty years after the House of Lords gave judgment in *Rookes v Barnard*² they had languished in a recondite backwater of the law. Far from being encouraged as "an integral part of the common law tradition and the judicial arsenal,"³ they were regarded as a regrettable anomaly, grudgingly allowed only in very limited circumstances which openly owed everything to history and nothing to logic. The position was, in short, one almost unrecognisable to lawyers from most US jurisdictions or, for that matter, most Commonwealth countries; as such, not surprisingly, it greatly troubled the Law Commission when it reported on the matter in 1997. However, the landmark 2001 decision of the House of Lords in *Kuddus v Leicestershire Chief Constable*⁴, which followed the Law Commission report⁵ expressing considerable disquiet at the then position, has now removed much of the previous sclerosis. As a result there is now everything to play for, and a golden opportunity for academics and others to say where we should go from here.

History.

For the benefit of US lawyers and others not familiar with English damages law, a brief history is appropriate.

Perhaps surprisingly in the light of what has just been said above, until 1963 the position in England as regards the availability of punitive damages would not have been too unfamiliar to an American observer. Although it was accepted that there could be punitive damages in contract, in tort there were no particular limitations on their award. So in the first edition of *Winfield on Tort*, published in 1937, the author pithily stated:

“In exemplary damages⁶ [the court] can punish the defendant for misbehaviour. These represent the jury's indignation at an especially outrageous attack on the plaintiff's security, or at wanton misconduct on the defendant's part.”

Most of the pre-1963 cases concerned trespass⁷ and assault⁸, but there were also instances of

¹ I purposely refer to the English, rather than United Kingdom, position. Scots law is different from English, being in origin an uncodified civil law tradition. Its position on punitive damages can be stated succinctly: it does not allow them, period. (I should add, for completeness's sake, that the law of Northern Ireland, the third component of the UK, can be regarded as the same as that of England).

² [1964] A.C. 1129.

³ The phrase is Beam J's: *Barnes v Gorman*, 257 F.3d 738, 745 (2001) (CA8) (on appeal, 536 US 181 (2002)).

⁴ [2002] 2 A.C. 122.

⁵ Law Commission Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), esp Ch. 5.

⁶ In English usage exemplary and punitive damages are the same thing. “Exemplary” is the more traditional term: but the Law Commission preferred “punitive,” and so do I.

⁷ *Wilkes v Wood* (1763) Lofft 1. See too *Sharpe v Brice* (1774) 2 W. Bl. 942 (£500 for unlawful Customs search); *Loudon v Ryder* [1953] 2 All E.R. 202 (forcible eviction by lessor: £3,000 awarded over and above £2,500 for assault and trespass).

⁸ See, for example, the early political case of *Huckle v Money* (1763) 2 Wils K.B. 205 (wrongful arrest); and *Benson v Frederick* (1766) 3 Burr 1845 (common soldier flogged to satisfy an officer's *amour*

awards for nuisance⁹, false imprisonment¹⁰, libel¹¹ and malicious prosecution¹². Significantly, however, the only constraint was the need for some outrageous or wanton conduct by the defendant.

However, in 1963 came the decision in *Rookes v Barnard*¹³, referred to above. Trade unionists threatened a strike in a successful attempt to persuade an employer to discharge non-union labor. They were held liable to one of the non-unionists in the tort of intimidation. The jury trying the case were charged that if they found the defendants' conduct towards the plaintiff sufficiently egregious they could award punitive damages against the organizers of the labor union, and they duly did so. On appeal, the House of Lords reversed. Lord Devlin, giving the leading opinion, laid down the following principles. First, punitive damages were an anomaly, in that they not only injected a penal element into the civil law that should not be there but also imposed a penalty on the defendant without the due process safeguards inherent in the criminal law¹⁴. Secondly, even where they were available in respect of a given tort they should be given only in two cases. These were (a) where there was deliberate malpractice by a public officer or authority, or (b) where a tort was committed with the deliberate intent that the profits from it would exceed any compensatory damages payable¹⁵. In *Rookes* itself, the plaintiff's claim foundered on the second principle, since prior to that case punitive damages had never been given for the tort of intimidation. In a subsequent decision of the House of Lords, *Cassell & Co Ltd v Broome*¹⁶, a further limitation was suggested by two Law Lords¹⁷, and later accepted as representing the law¹⁸: namely, that since *Rookes* had been intended to halt any future expansion of punitive damages, they could not be given in respect of any tort where they had not been given before *Rookes* was decided.

The results of *Rookes* and *Cassell* were devastating. Until 2001 punitive damages were effectively limited to two cases. As regards public authority malpractice, the vast majority of the decisions (though admittedly not quite all) concerned police misconduct or brutality. As for torts committed with a view to ultimate profit, subject to very rare exceptions¹⁹ this was only ever applied to cases of libel, where defendants hoped that the gain from a bestselling publication would exceed the somewhat unpredictable award of compensatory damages by a jury²⁰. And even in these limited cases, punitive awards came under some scrutiny as regards their amount. As it happens, both the above situations come within the rare cases where the civil jury remains in England; and in the 1990s the courts²¹ and Parliament²² took a highly active role in causing the reduction of awards that could be

propre).

⁹ *Bell v Midland Ry Co* (1861) 10 C.B.N.S. 287.

¹⁰ *Wilkes v Wood* (1763) Lofft 1, above.

¹¹ *Ley v Hamilton* (1935) 153 L.T. 384.

¹² *Leith v Pope* (1779) 2 Wm Bl 1327.

¹³ [1964] A.C. 1129.

¹⁴ "I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law." – Lord Devlin, [1964] A.C. 1129, 1230.

¹⁵ [1964] A.C. 1129, 1226-1227. Lord Devlin added a third, namely where statute specifically authorized such damages: but today it seems that none does, so this is an empty set.

¹⁶ [1972] A.C. 1027.

¹⁷ Lords Hailsham and Diplock: see [1972] A.C. 1027 at pp.1076, 1131.

¹⁸ See *AB v South West Water Services Ltd* [1993] Q.B. 507.

¹⁹ One such was *Guppys (Bridport) Ltd v Brookling* (1984) 14 H.L.R. 1 (nuisance committed by lessor with intent to remove tenant and get clear title).

²⁰ The classic case was *Cassell & Co Ltd v Broome* [1972] A.C. 1027, above, concerning the publication of a patently libelous bestseller about the PQ17 convoy disaster in WWII.

²¹ For example, *John v Mirror Group Newspapers Ltd* [1997] QB 586 (striking down of very large punitive award for allegations about alleged curious eating habits of the rock star Elton John).

²² See s.8 of the Courts and Legal Services Act 1990, for the first time allowing appeal courts to substitute their own figure for a jury award thought to be excessive rather than simply empanel another jury.

regarded as disproportionate²³.

Rookes might have effectively corralled punitive awards and brought them under tight control: but little more could be said in its favor. The decision put English law entirely out of kilter not only with US developments but also with Commonwealth jurisdictions, which nearly all declined to follow it and continued to adopt the old, more expansive, view²⁴. Moreover, the means chosen to constrain punitive awards were, to say the least, curious. The “cause of action” limitation inferred by *Cassell* meant that the availability of such damages depended arbitrarily on the accidents of pre-1963 litigation in England²⁵. It also, significantly, excluded them entirely in two important areas where they might be thought eminently appropriate: personal injury and wrongful death (except, to pile anomaly on anomaly, where there had been an assault²⁶), and also environmental torts²⁷. Furthermore, it was difficult to see much logic in the view that torts committed by nongovernmental entities, however outrageous, could not attract punitive damages unless committed specifically with a view to profits exceeding damages.

The Law Commission took these points in 1997 in a report²⁸ that called for the abolition of both the limitations in *Rookes*, and advocated a general jurisdiction to give punitive damages for any wrong (other than a breach of contract) where there was shown to have been a deliberate and outrageous disregard of the plaintiff’s rights. The report itself, as is the way with such reports, gathered dust. But the courts then intervened. The problems of the “cause of action” test in *Rookes* were faced head-on by the House of Lords in *Kuddus v Leicestershire Chief Constable*²⁹. There it was alleged that an unscrupulous (or perhaps idle) police officer, faced with a troublesome complaint of theft made by a member of the public, had taken the easy way out by forging a document withdrawing it. If proved, this conduct amounted to the tort of misfeasance in public office – a tort, note, that had never been the subject of a punitive award pre-*Rookes*. A claim for damages, including punitive damages, ensued. The lower courts, following *Rookes*, struck the claim for punitive damages; but the House of Lords reinstated it, decisively rejecting for these purposes any arbitrary cause of action categorization.

As a result of *Kuddus*, the “cause of action” limitation in *Cassell* has now gone. Since the claim in *Kuddus* was in respect of police (i.e. governmental) malpractice, there was no need to decide whether Lord Devlin’s *Rookes* limitation of punitive awards against nongovernmental entities to “profitable” torts should also disappear. But at least one Law Lord in *Kuddus* clearly thought it should, on the basis that it made no more sense than the cause of action test³⁰. It seems a racing certainty that this latter view will prevail: certainly, since the decision in *Kuddus* courts have thought the point arguable enough to avoid summary judgment against a plaintiff on it. Thus in the high-profile litigation³¹ over illicit photographs allegedly taken of

²³ This is discussed further below.

²⁴ Canada: *Vorvis v Insurance Corporation of British Columbia* (1989) 58 D.L.R. (4th) 193. Australia: *Uren v. John Fairfax & Sons Pty. Ltd* (1966) 117 C.L.R. 118 (affirmed in the Privy Council, [1969] 1 A.C. 590). New Zealand: *Taylor v. Beere* [1982] 1 N.Z.L.R. 81 (C.A.). The Republic of Ireland later followed suit: *Conway v. Irish National Teachers' Organisation* [1991] 2 I.R. 305.

²⁵ To take a particularly striking example, there could be a punitive award for trespass to goods, but not conversion of them, because no case concerning the latter had ever come before the English courts.

²⁶ Since assault was a tort where they had been given pre-1963.

²⁷ See *A.B. v South West Water Services Ltd* [1993] Q.B. 507 (negligent metallic poisoning of domestic water supply).

²⁸ Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), § 5.46.

²⁹ [2002] 2 A.C. 122.

³⁰ “[The availability of a punitive award] should be co-extensive with its rationale. As already indicated, the underlying rationale lies in the sense of outrage which a defendant’s conduct sometimes evokes, a sense not always assuaged fully by a compensatory award of damages, even when the damages are increased to reflect emotional distress. . . . There is no obvious reason why, if exemplary damages are to be available, the profit motive should suffice but a malicious motive should not”: see Lord Nicholls at [2002] 2 A.C. 122, 144-145.

³¹ See *Douglas v Hello! Ltd (No 3)* [2003] E.M.L.R. 29. But it must be admitted that one case has continued to

Catherine Zeta-Jones's New York nuptials and subsequently published in a European celebrity magazine, Vice-Chancellor Morritt recently declined to strike a claim for punitive damages for civil conspiracy and breach of confidence against the magazine concerned³².

Where do we go from here?

Post-*Kuddus* and in the light of subsequent developments, two things seem clear.

First, punitive damages are here to stay in England. Some may regard this as unfortunate. There remain convincing arguments, both practical and theoretical, against the punitive principle as such: that it confuses civil and criminal law, that it leads to undeserved windfalls for plaintiffs, and so on³³. These considerations perhaps deserve more weight in the English context, since at least two of the American arguments in favor – the need to make sure that plaintiffs get disability insurance payouts without excessive argument, and the perception that plaintiffs should get back their attorney's fees³⁴ – do not really apply in England, where private disability insurance is less important as a source of compensation, and successful plaintiffs get their legal costs anyway. There is also a further point which is sometimes missed: namely that England, unlike most states in the US, has an additional category of "aggravated damages." This allows damages to be augmented where a tort is committed in particularly humiliating or distressing circumstances³⁵. But damages of this sort are essentially compensatory, intended to take account of the additional loss of dignity or *amour propre* on the plaintiff's part³⁶. Nonetheless, for better or worse, the illogic in the *Rookes v Barnard* compromise has been irretrievably resolved by extending the punitive principle and attempting to put it on a logical basis, rather than by abolition. The elimination of punitive damages, whatever its attractions, must be regarded as a lost cause.

Secondly, assuming there is no longer a need for nongovernmental defendants to have acted for profit, English law now has a relatively clean slate on which to write³⁷. What will be the precise basis of liability to punitive damages is not clear, but it is a fair inference that the test is likely to be one of outrageous or egregious wrongdoing or something similar, as has always been the case in the other Commonwealth jurisdictions³⁸.

If this is right, there are a number of specific points, both principled and practical, that we in England will now have to address. The rest of this paper aims to provide some pointers to the issues that are likely to arise.

apply the limitation: *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] All ER (D) 174 (Mar).

³² To complete the story, at a subsequent hearing Lindsay J held that even if exemplary damages were available, this was not a case for their award: *Douglas v Hello! Ltd (No 6)* [2003] E.M.L.R. 31.

³³ The arguments are very well-presented in Beever, *The Structure Of Aggravated And Exemplary Damages*, (2003) 23 OJLS 87.

³⁴ So much so that at least one state, Connecticut, limits punitive damages to attorney fees: see, e.g., *Vogel v Sylvester*, 174 A.2d 122 (1961).

³⁵ The distinction between aggravated and punitive damages is well explained in Beever, *The Structure Of Aggravated And Exemplary Damages*, (2003) 23 OJLS 87.

³⁶ "Aggravated damages are extra compensation to a plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted. Exemplary damages, on the other hand, are damages which, in certain instances only, are allowed to punish a defendant for his conduct in inflicting the harm contained of." – McCarthy J in the New Zealand case of *Huljich v Hall* [1973] 2 N.Z.L.R. 279, 287. The idea that such damages compensate for injured feelings is confirmed by the suggestion in *Khodaparast v Shad* [2000] 1 All E.R. 545, 556 that corporations, having no feelings to hurt, cannot claim them.

³⁷ A LEXIS search under "exemplary damages" in September 2003 revealed no English cases of substantial interest since the *Douglas v Hello! Ltd* litigation referred to above.

³⁸ See, for example, *McLaren Transport Ltd v Somerville* [1996] 3 N.Z.L.R. 424, 434 (an "outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment."). For a similar formulation, see *A v Bottrill* [2003] 1 AC 449, 455 (a decision of the Privy Council in a medical malpractice case on appeal from New Zealand).

The criteria for an award.

Although the post-*Kuddus* test for punitive damages is unlikely to raise too much difficulty, for the reasons mentioned above, the devil is (as always) in the detail. Two awkward matters immediately come to mind.

The first concerns the place of punitive damages in negligence and the other inadvertent torts, such as environmental liability. Since *Kuddus* there is no doubt that punitive damages are available on principle in all such cases, always assuming of course that the plaintiff manages to show some sufficiently crass or outrageous dereliction of duty. So it is not unlikely that we shall see fairly soon an English analogue of the notorious Ford Pinto³⁹ or Dalkon Shield⁴⁰ product liability cases, or a successful punitive claim for outrageous professional malpractice (for example, a lawyer or accountant consistently failing to take elementary steps to appear or protect his client's interest). At this point, however, English lawyers will have to address a problem that still bedevils US commentators: namely, what degree of negligence ought to be required? In particular, should there be any need for subjective wrongdoing or knowing risk-taking, as held in the majority of US state courts⁴¹, or should it equally be sufficient to show a very high degree of foolishness?⁴² The Law Commission in 1997 clearly preferred the former, subjective approach. Under its recommendations, punitive damages would be specifically limited to cases where the defendant had showed a "deliberate and outrageous disregard of the plaintiff's rights."⁴³ But this is not the end of the matter. The Commission did not discuss this point in any particular detail, no doubt because it thought that in practice the distinction was unlikely to be very significant anyway. Punitive damages are, after all, inevitably limited to very serious cases of negligence; and in the vast majority of such cases – dangerous products, professional malpractice, and so on – the very negligent defendant will almost certainly have had some idea of the risk he was taking, if not of its illegitimacy, and hence be amenable to a finding of deliberate or reckless wrongdoing. As luck would have it, however, a genuine case of serious but entirely inadvertent wrongdoing did arise in 2002 in the Privy Council⁴⁴, on an appeal from New Zealand (whose law is, since *Kuddus*, potentially very relevant to that of England). *A v Bottrill*⁴⁵ involved a medical malpractice suit arising from gross misreadings of cervical smears. The defendant physician was specifically found not to have been guilty of knowing or even reckless wrongdoing, but merely to have been extremely culpable. The trial court gave

³⁹ *Grimshaw v Ford Motor Co*, 119 Cal App 3d 757 (1981).

⁴⁰ *Tetuan v A H Robins Co*, 738 P 2d 1210 (1987) is one major decision in this saga, which is still continuing.

⁴¹ E.g., *National By-Products, Inc. v. Searcy House Moving Co.*, 292 Ark. 491, 731 S.W.2d 194 (1987); Prosser & Keeton, *Torts*, 5th ed, 1984, 9-10. The *Restatement 2d of Torts*, § 908, is to similar effect, demanding conduct that is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."

⁴² A standard adhered to by a minority of state courts, such as those of Kansas: e.g., *Wisker v Hart*, 766 P 2d 168 (1988).

⁴³ Law Commission Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), Draft Bill, s.3(6).

⁴⁴ The Privy Council, staffed largely by English judges, still hears appeals from a number of Commonwealth jurisdictions. It is one of the ironies of this jurisdiction that English judges may find themselves deciding points of common law principle in a different way from the way they would be determined in England. This indeed happened in the punitive damages case of *Uren v. John Fairfax & Sons Pty Ltd* [1969] 1 A.C. 590, heard on appeal from Australia, where the Privy Council endorsed the Australian refusal to follow *Rookes v Barnard*. Yet more ironically, one member of the Privy Council in *Uren*, Lord Pearce, had actually sat in *Rookes v Barnard* and had agreed in the result.

⁴⁵ *A v Bottrill* [2003] 1 A.C. 449.

punitive damages: the New Zealand Court of Appeal reversed⁴⁶. Restoring the judgment of the trial court and rejecting the Law Commission's more limited view, the Privy Council upheld the award of punitive damages.

With respect, it is suggested that in this respect the Privy Council was right and the Law Commission was wrong. True, it is, and should be, easier to penalise knowing than inadvertent behavior: hence only in fairly exceptional cases should mere stupidity give rise to a punitive award. Nevertheless, assuming that the law of civil damages does have a part to play in penalising egregious conduct, there seems no reason *a priori* to exclude inadvertent wrongdoing entirely from its effect, any more than from the effect of the criminal law.

Secondly, there is the question of the present status of torts committed for gain (i.e. where the defendant knew what he was doing was wrongful, but calculated that the lucre acceding to him would exceed any payout to the plaintiff). Under the pre-*Kuddus* regime this was, of course, a pre-requisite for any claim at all against a nongovernmental defendant. But it was also the case in practice that if the necessary intent was shown then the jury would be instructed almost as of course to consider a punitive award. In other words the calculation of gain was, practically speaking, regarded as not only necessary but sufficient. It is suggested, however, that this latter rule may now be open to reconsideration. The general criterion of outrageous or flagrant behavior ought presumably to be all-embracing and exclusive. Only to the extent that the intent to make a gain is an indication of behavior that merits punishment over and above compensatory damages should there be any question of a punitive award. Indeed, there is also a further reason to abandon the idea that a profit motive should suffice as such. Since the decision in *Rookes v Barnard* in 1963, there have been further developments which have made it largely redundant. To begin with, the idea of restitution for wrongs has been put on a firm footing in England⁴⁷, and there is now considerable learning on when gains made as a result of the commission of a wrong against the plaintiff fall to be disgorged on that basis⁴⁸. Furthermore, in the law of damages itself it is now recognised that in certain, fairly closely defined, circumstances a (non-punitive) award can be made based not on the loss to the plaintiff but on the profit or gain made by the defendant as a result of the wrong⁴⁹. In these circumstances, it is highly arguable that where the plaintiff wishes a remedy based specifically on the profit allegedly made by the defendant, this should be regarded as outside the law of punitive damages⁵⁰. The job can now be done by other parts of the law. The law on punitive damages should be left to concentrate on its proper rationale, namely the penalisation of seriously unacceptable conduct.

Punitive damages for breach of contract?⁵¹

⁴⁶ *Bottrill v A* [2001] 3 N.Z.L.R. 622.

⁴⁷ It is worth noting that Goff and Jones' *Law of Restitution*, the first systematic treatment of the subject in England, was first published only in 1966, some three years after *Rookes*.

⁴⁸ See Burrows, *Law of Restitution*, 2d ed 2002, Chap. 14. *Att-Gen v Blake* [2001] 1 AC 268, almost a carbon copy of *Snepp v US*, 444 U.S. 507 (1980), is a striking recent example.

⁴⁹ For example, where a defendant profits from trespassory activities on or under land, such as mining coal or unlawfully transporting his own goods across it, an award of compensatory damages may be made on the basis of that profit: e.g., *Phillips v Homfray* (1871) L.R. 6 Ch. App 770, *Jaggard v Sawyer* [1995] 2 All E.R. 189. This, of course, reflects developments in the US: see, for example, the classic Kentucky decision in *Edwards v Lee's Administrator*, 96 S.W.2d 1028 (1936).

⁵⁰ Persuasively argued in the Anglo-Canadian context in Berryman, *The Case for Restitutionary Damages over Punitive Damages: Teaching the Wrongdoer that Tort does not Pay* (1994) 73 Can Bar Rev 320. See too Heriot, *Civilizing Punitive Damages: Lessons From Restitution*, 36 Loy. L.A. L. Rev. 869 (2003).

⁵¹ See the instructive articles in John, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 Calif. L. Rev. 2033 (1986) and Dodge, *The Case for Punitive Damages in Contracts*, 48 Duke L.J. 629 (1999). Weinrib, *Punishment and disgorgement as contract remedies*, 78 Chi.-Kent. L. Rev. 55 (2003), helpfully analyzes the English and Canadian cases.

Whether there can, or should, be punitive damages for breach of contract has always been an awkward topic⁵². On the face of it, American authority is overwhelmingly negative⁵³. However, all is not as it seems. Where a contract is tainted with fraud on the defendant's part, some courts have allowed punitive awards⁵⁴. Moreover, there is massive authority that bad faith breach may engender punitive damages, notably where insurance carriers have declined to make payments plainly due⁵⁵. Admittedly, this is normally done on the basis that bad faith breach, or breach of a contractual duty of loyalty and good faith, gives rise to tort liability⁵⁶. But it is difficult to resist the conclusion that this is simply a piece of definitional sleight of hand, and that, in effect if not in name, certain well-defined categories of contract breach do give rise to a potential right to punitive damages.

As regards English case-law, pre-*Kuddus* there was no doubt on the matter: punitive damages were limited to tort, and breach of contract could not give rise to them⁵⁷. Since that case the matter must be regarded as less certain, however⁵⁸. Moreover, the matter has received a further airing as a result of the Canadian decision in *Whiten v Pilot Insurance Co*⁵⁹. There the Canadian Supreme Court upheld a punitive award in a bad-faith nonpayment suit against an insurance carrier, despite the fact that it regarded the claim as contractual and not, as it would have been in most US states, tortious. The potential effect of this case is, of course, considerable in England, where there is no tort of bad-faith breach of contract.

If there is no longer any necessary bar to punitive breach-of-contract awards, the question becomes one of policy: ought English law to recognise them, and if so when? The Law Commission, which thought at some length about the matter, thought they should not be available at all. In summary, they argued that such damages had never previously been awarded; that contract damages were largely about pecuniary losses, and that punitive awards were less appropriate in such cases; that punitive damages would compromise contractual certainty; that contracts were negotiated arrangements whereas there was no possibility for prior negotiation in a tort situation; and finally, that punitive damages would discourage efficient breach⁶⁰. To these there might be added a further point: namely, that punitive damages are outside any normal conception of corrective justice, which is normally the subject-matter of contract actions⁶¹.

⁵² This leaves aside cases where the same fact situation gives rise to both tortious and contractual liability. Here there seems no reason, on either side of the Atlantic, why there should not be punitive damages.

⁵³ E.g., 3 Farnsworth, *Contracts* § 12.8, (2d ed. 1998); *Restatement (2d) of Contracts*, § 355.

⁵⁴ For example, see the 8th Circuit decision on Iowa law in *Watkins v Lundell*, 169 F.3d 540 (1999) (composition agreement entered into fraudulently with knowledge that it could not be carried out). A similar case is *Suffolk Sports Center, Inc v. Belli Construction Corp*, 628 N.Y.S.2d 952 (1995) (breach by lessor of covenants in lease with sole intent of getting lessee out).

⁵⁵ See e.g., Ashley, *Bad Faith Liability* (1987), § 2:05; Graves, *Bad-Faith Denial Of Insurance Claims*, 65 Tul. L. Rev. 395, 402 (1990).

⁵⁶ The impetus for this development came from such cases as the California decision in *Comunale v. Traders & General Insurance Co*, 328 P.2d 198 (1958). But there has been reluctance to extend the theory beyond insurance: see e.g., the later California case of *Freeman & Mills, Inc. v. Belcher Oil Company*, 900 P.2d 669 (1995).

⁵⁷ *Perera v Vandiyar* [1953] 1 W.L.R. 672.

⁵⁸ It is a question of some nicety in England, since the apparent bar on contractual punitive awards in *Perera v Vandiyar* [1953] 1 W.L.R. 672 predates *Rookes v Barnard* [1964] A.C. 1129 and *Cassell & Co Ltd v Broome* [1972] A.C. 1037. It could therefore be argued that *Kuddus*, being concerned merely with the "cause of action" categorization in *Rookes*, has not removed it. It all depends on how widely the decision in *Kuddus* is read.

⁵⁹ (2002) 209 D.L.R. (4th) 257.

⁶⁰ Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), § 5.72.

⁶¹ Argued with crystal clarity in Weinrib, *Punishment and disgorgement as contract remedies*, 78 Chi.-Kent. L. Rev. 55, 84 et seq (2003).

It is tentatively suggested, however, that these arguments are less convincing than they look. To take the last first, while punitive damages are indeed not a part of corrective justice there is (it is submitted) no necessary reason why the function of contract damages should be strictly limited to achieving corrective justice. We live in an untidy legal world, and an absolute bar on punitive ideas in contract is certainly not self-evidently justified. The Law Commission's reasoning is also open to a number of objections. The fact that there have never been such awards is beside the point, particularly since the thrust of the Law Commission's recommendations elsewhere was to discountenance the holding in *Rookes* that punitive awards should be limited to where they had previously been given. As for the others, they seem predicated on the idea that in a case concerning (say) breach of a commodity sales agreement, or wrongful withdrawal of a ship under charter, damages should be fairly strictly limited to the actual loss suffered by the plaintiff. In particular, the circumstances of the breach, or the motives of the contract breaker, should not affect them⁶². Here the argument is indeed attractive: economic efficiency and commercial expectations do suggest that damages should be limited to actual proved loss. But there is no reason to think that these considerations necessarily apply to all contracts, or even all commercial contracts. Take the consumer context, for example where there is a gross failure to provide a contracted after-sales service on durable goods such as computers. Here there is much to be said for at least the possibility of a punitive award. The fact that the loss can be categorized as financial, or that theoretically the terms of the contract were open to negotiation, does not seem particularly relevant; and there can be no serious argument that this is the sort of efficient breach that ought to be encouraged. Again, it is perfectly possible to think of examples in commercial law, for example where a franchisor in blatant breach of contract fails to perform its part of the agreement by way of advertising and product support⁶³. If the breach is sufficiently egregious, there seems no reason on principle why a punitive award should be impossible. Certainly none of the arguments raised by the Law Commission raises a very strong case against it. Yet another example might arise from legal malpractice. Most malpractice suits can be brought in the tort of negligence, where since *Kuddus* there seems no doubt that punitive damages are available on principle. But not all suits necessarily lie in tort: suppose a lawyer is instructed at a late stage, at a time when no other lawyer can be found, to make a vital appearance at a hearing but fails to do so in circumstances showing an outrageous breach of duty. Here arguably the only cause of action is contract⁶⁴: it would be odd if, for that reason alone, punitive damages were barred.

If there is a place for punitive damages in the law of contract, what kinds of breach should be regarded as sufficiently outrageous and inexcusable to attract them? The question is an awkward one. The idea of transplanting the widespread American concept of "bad faith" breach is not propitious, if only because English contract law has no coherent concept of contractual good faith in general, and for that matter no discrete duty of good faith and fair dealing in performance either. Nor, unless we wish to see all avoidable breaches of sales contracts transformed into potential punitive damages suits, can it be enough that the breach is deliberate, unjustified or opportunistic. Absent any further guide, however, arguably a breach should be taken as outrageous enough if it satisfies one or more of three criteria. The first is where, although there may not have been any positive misrepresentation by the defendant, the defendant knew when contracting that he would almost certainly be unable to perform⁶⁵; this is

⁶² In a similar vein, English courts, like those in the US, have resisted the temptation to look to the profits made from the breach and award restitution in respect of them. See, e.g., *The Siboen* [1976] 1 Lloyd's Rep. 293 (profitable withdrawal of ship under charter) and *Nottingham University v Fishel* [2000] I.C.R. 1462 (employee moonlighting in breach of contract).

⁶³ A situation where, in most US jurisdictions, an award would be available by reference to breach of the implied covenant of good faith.

⁶⁴ Since there is no element of reliance by the client.

⁶⁵ For example, where a franchisor induces a customer to sink money in a business that the franchisor knows he cannot service properly, or for that matter where a seller of goods provides a guarantee which he knows is extremely unlikely to be met.

as near to tortious fraud as makes no difference, and ought to be treated no differently. The second, which might perhaps approximate most closely to the American “bad faith breach” cases, is where the breach (a) related to the defendant’s reliance interest, (b) to the defendant’s knowledge was likely to cause the plaintiff substantial danger, distress or consequential loss, and (c) there was no mitigating factor, such as that the defendant needed to save himself from financial meltdown or had two customers for given goods or services but could only satisfy one. The third is where the contract embodies a duty equivalent, or very nearly equivalent, to a fiduciary duty and the breach of that duty was deliberate⁶⁶. A straightforward example would be a company officer’s misuse of corporate opportunity which gained him nothing but only caused moderate actual loss to the corporation concerned. Fourthly, there is the case of professional misconduct. As pointed out above, contractual and tort claims in this regard are so closely intertwined that it seems foolish to draw a bright line between them.

Public defendants

Before the liberalization in *Kuddus*, in some respects the English position on punitive damages provided a curious photographic negative image of that obtaining in most US states. The availability of punitive damages against private defendants was severely limited, applying only to torts committed for gain, and even there being in practice almost entirely limited to libel. But awards against public authorities – particularly police authorities – flourished. In the US, by contrast, the private law action has burgeoned while punitive awards against public authorities are comparatively rare. Indeed, there is Supreme Court authority that in the federal jurisdiction municipalities and other public bodies are not amenable to punitive awards absent statutory warrant⁶⁷: and a number of States specifically prohibit them by statute⁶⁸.

The reason for the American distaste for punitive damages against public bodies is straightforward: as Blackmun J in the Supreme Court put it in the civil rights case of *City of Newport v. Fact Concerts, Inc.*⁶⁹, awards of this sort tend to “burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised”. Public bodies have limited funds available to carry out their duties: and however strong the claim of those suffering damage as a result of maladministration, every dollar (or pound) paid out by way of punitive damages reduces the amount available for its legitimate purposes.

This issue has never been met head-on by the English courts. They have simply accepted that public bodies, like other employers, are vicariously liable for the torts of their employees, and that in so far as the employee is amenable to punitive damages so also is the employer (though, to be fair, it is now the practice piously to warn juries contemplating punitive awards against governmental bodies of the possible effect on services provided by those bodies⁷⁰). Perhaps surprisingly, the Law Commission’s 1997 report – which otherwise looked at the issue of principle fairly closely – never chose to discuss whether special rules ought to apply to governmental defendants.

But, if we do have a relatively clean slate on which to write, there is much to be said for English courts adopting a radical solution and going at least some way toward the American position. As a matter of principle, punishing taxpayers for the sins of public servants is difficult

⁶⁶ This distinction is not unknown to English contract law: thus it has been held that breach of such a term may, exceptionally, allow the plaintiff to claim gain-based rather than loss-based damages. See *CMS Dolphin Ltd v Simonet* [2001] 2 B.C.L.C. 704.

⁶⁷ E.g., *City of Newport v Fact Concerts Inc*, 453 U.S. 247, 263 (1981); *Doe v County of Centre*, 242 F.3d 437 (2001). See too Baccari, *Governmental immunity - Pennsylvania Taxpayers No Longer Protected from Police Brutality*, 68 Temple L. Rev. 977 (1995) (attacking a rare case going the other way).

⁶⁸ E.g., Ala Code, § 6-11-26; Mass Ann Laws, Ch. 258, s.2; NH Rev Stat Ann, § 507-B:4.

⁶⁹ 453 U.S. 247, 263 (1981)

⁷⁰ Since *Thompson v Met. Police Comm’r* [1998] Q.B. 498: see particularly pp.513, 517.

to justify. In this respect they are essentially different from stockholders in a private corporation, who have at least chosen to invest in it and to that extent to ally their fortunes with those of the corporation itself. Moreover, even on a purely instrumental basis, it is a little hard to see what we gain by diverting funds from public services to a relatively undeserving plaintiff⁷¹. The argument that county treasurers, or for that matter taxpayers, will thereby be encouraged to exercise more control over what is done in their name seems, to say the least, far-fetched. Nor does there seem much to be said, even in civil rights suits, for the symbolic value of massive awards against taxpayers generally⁷². True, very occasionally there may be a case where an award will not overall increase the tax burden overall – for instance, where the governmental defendant has actually gained from its wrong and the punitive damages award does not exceed this gain⁷³ – but such exceptional situations aside, it is suggested that there is hardly ever any convincing justification for a punitive award against a local or other authority.

Liability: whose knowledge / outrageousness is in account?

Except for possible awards in traffic accident cases, acts potentially giving rise to punitive damages are almost invariably committed by those working for corporations, institutions or government. This immediately raises an acute problem of principle. Should the employer be liable, as he is for compensatory damages, on the simple basis of vicarious liability: that is, without considering his personal blameworthiness (if any)? Or should the decision on whether to make an award, and of how much, be based on the blameworthiness of the person being sued?

Hitherto the English approach has been to take the former position, though as with public defendants and municipalities the point has largely gone by default⁷⁴. Thus police authorities and government departments have been regularly held liable for brutality by (for example) police and prison officers, despite the lack of any indication that as employers they condoned, or connived at, it, or even that they failed to take reasonable steps to prevent it. By contrast, the tendency in the US is toward the second position, at least in demanding some degree of fault in the employer. Thus in *Kolstad v American Dental Ass'n*⁷⁵ the Supreme Court held that in employment discrimination suits under Title VII of the Civil Rights Act 1964 the employer would not without more be liable to punitive damages merely because a supervisor employed by him satisfied the necessary criteria. As a minimum, an employer who had taken all means to avoid the acts complained of should be free of liability. A number of States have

⁷¹ A specific English illustration would be medical malpractice where medical services are provided by the state under the National Health Service. Underfunded as the National Health Service is, the position would hardly be improved were it to be hit by regular awards of punitive damages against individual health authorities.

⁷² Hence the fact that a civil rights suit is involved has not generally persuaded US courts to give punitive awards against municipalities and others: *City of Newport v Fact Concerts Inc*, 453 U.S. 247 (1981); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67, (1989); *Evans v Port Authority of NY* 273 F.3d 346 (2001).

⁷³ For example, where a municipality outrageously breaks its duty to provide for an indigent who then dies, there is a case for an award limited to the amount that the municipality saved. Cf, in a slightly different context, *Cook County v US, ex rel Chandler*, 155 L. Ed. 2d 247 (2003). There, one reason why the Supreme Court allowed punitive damages against a municipality under the False Claims Act was that the taxpayers had actually benefited from the original overpayment: "This very case," said Souter J at p.259, "shows how FCA liability may expose only local taxpayers who have already enjoyed the indirect benefit of the fraud."

⁷⁴ As the Law Commission pointed out: Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), § 5.209.

⁷⁵ 527 U.S. 526 (1999). This cemented an earlier trend: e.g., *Patterson v P.H.P. Healthcare Corp.*, 90 F.3d 927, 944 (1996); *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 (1999).

code provisions to similar effect⁷⁶ or have reached the same result by judicial decision⁷⁷; and indeed it is stated in the *Restatement 2d of Torts* that it is “improper . . . to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.”⁷⁸

Logically, it is suggested that the second position – that there must be some fault in the employer personally – is the only defensible one. Punitive damages are there to punish for egregious conduct, not compensate for loss; it is entirely inconsistent with this rationale to impose a penal sanction on a given defendant independently of the blameworthiness of that defendant. The counter-argument that punishing an innocent employer will encourage him to take steps to rein in maverick employees in future⁷⁹ cannot, it is suggested, hold water: it has the same validity, and fairness, as the action of the British Crown when it had Admiral Byng executed merely *pour encourager les autres*⁸⁰. Nor is there any real substance in the argument that the employer ought to be liable because it is easier to collect from an employer than an employee: whatever the social need to ensure that compensation is actually received, no such need applies to a windfall punitive award.

In England, the merits of the second view have belatedly received some recognition. In *Kuddus*⁸¹ three out of five Law Lords⁸² found it curious that vicarious liability applied without modification to punitive damages, and only one showed any enthusiasm for the rule⁸³. This may presage a change of approach, and it is to be hoped that it does. But the omens are not good. The English practice is well-established, and the Law Commission in its Report was strongly in favour of its continuance⁸⁴, mainly on the basis of the two somewhat weak arguments outlined above.

Judge and jury

Despite the fact that the civil jury has largely disappeared in England, bench trials being the norm, by a quirk of fate the vast majority of punitive damage awards have been jury awards. This was because under the pre-*Kuddus* rules nearly all such trials in practice involved either police malpractice or libel: and in cases of assault, false imprisonment and libel it continues to be the law that jury trial is available as of right⁸⁵.

Although jury determinations of punitive damages are almost universal in the US, in England the prevalence of the jury in this area has caused some disquiet. As a result, in its 1997 Report the Law Commission expressed the very strong view that the law should be changed so that in future, even where the actual trial on liability and (non-punitive) damages was by jury, all questions of punitive damages – both whether they should be awarded at all, and if so how much – should be decided by the judge alone⁸⁶. The reasoning of the Law Commission was

⁷⁶ E.g., Ala Code, § 6-11-27(a).

⁷⁷ E.g., *White v Ultramar, Inc*, 21 Cal. 4th 563; 981 P.2d 944 (1999) (interpreting Cal Civ. Code, § 3294, subd. (b)).

⁷⁸ § 909, Comment b.

⁷⁹ E.g., Anderson, *Whose Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C.L. Rev. 799 (2000).

⁸⁰ Admiral John Byng had bravely, but unsuccessfully, attempted to defend Minorca from an attack by French forces in 1756 during the Seven Years' War. Despite his lack of blame, he was court-martialed and shot in 1757 as an example to other commanders. The quote is from Voltaire in *Candide* (“*Dans ce pay-ci, il est bon de tuer de temps en temps un amiral pour encourager les autres*”).

⁸¹ [2002] 2 A.C. 122.

⁸² Lords McKay, Nicholls and Scott: [2002] 2 A.C. 122, at pp. 140-141, 144-145 and 156-157.

⁸³ Lord Hutton: see [2002] 2 A.C. 122, 149.

⁸⁴ Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), §§ 5.209 - § 5.221.

⁸⁵ See Supreme Court Act 1981, s.69(1).

⁸⁶ Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997), § 5.81.

essentially that, though punitive damages were a desirable part of the courts' armory, awards should show both moderation and consistency; and that juries could not be trusted to provide either. In addition it felt that the duty of a judge to give reasons for his or her decisions would make appellate control a good deal easier

With respect, for all its plausibility this is not an easy view to accept. There are, of course, perfectly respectable grounds for simply abolishing the civil jury, and indeed the thrust of the Law Commission's reasoning would appear to apply to jury trial as a whole. But since the Commission accepted that juries would remain to decide non-punitive damages in some cases (for example, libel), the question is whether they are any less suitable to determine punitive awards. This seems doubtful. Take a classic case of litigation over incommensurables, a libel suit. One reason why juries are still allowed in such cases in England is that a jury is seen as best equipped to determine the merit of the plaintiff: i.e., how much should she receive in compensation for a smirched reputation? But if so, why is the same jury not just as fitted to decide the demerit of the defendant: that is, how badly he has behaved, and how much, if anything, he should pay by way of punishment? Indeed, if anything punitive damages would seem an even better bet for decision by juries than other forms of compensation. No awkward questions of calculation or valuation arise, as they do in (say) personal injury compensation. More importantly, prospects for standardisation – one of the supposed advantages of bench trial – seem remarkably limited, since degrees of culpability and other matters are likely to vary enormously. For the same reason, the scope for control by appeal courts seems pretty limited. In short, it is highly arguable that punitive damages deal largely in matters of moral and community judgment, where it is by no means clear what are the advantages of bench trial over jury determination⁸⁷.

The size of punitive awards.

There is no doubt that the amount of punitive awards has the potential to cause disquiet. Punitive damages, after all, have for a long time been one of the main targets of the tort reform movement in the US. A number of states, fazed by some very large high-profile awards, have legislated to control the sums awarded⁸⁸. Most such controls take the form of a reference to a multiple of the actual damages, and many also apply an overall limit⁸⁹. In addition to state controls, there may be constitutional implications. Thus two high-profile Supreme Court cases have struck down very large punitive awards on due process grounds⁹⁰, and in the later of them it was suggested that a ratio between actual and punitive damages in more than single figures would find it difficult to pass muster.

Since the 1980s, there have been parallel English developments, though they have taken a rather different, and more fluid, form. Thus it has been made clear by the Court of Appeal that juries must be instructed to, and a judge in a bench trial must, award merely the minimum necessary to punish the defendant⁹¹. It is also clear that account must be taken of the

⁸⁷ I leave aside the practical inconvenience and expense of having in effect two trials, the first (jury) to decide liability and compensatory damages and the second (judge) to determine any punitive award.

⁸⁸ See Ala. Code § 6-11-21; Alaska Stat. § 9.17.020(f)-(h); Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. § 52-240b; Fla. Stat. Ann. § 768.73(1)(b); Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3701; N.J. Stat. Ann. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); 23 Okl. St. § 9.1; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1. This list is taken from Schwartz et al, *Reining in punitive damages "run wild"*, 65 Brooklyn L. Rev. 1003, n.60 (1999). It is fair to say that many of these controls have been introduced to prevent constitutional challenges.

⁸⁹ E.g., Fla. Stat. Ann. § 768.73(1)(b) (three times damages with a \$500,000 limit).

⁹⁰ *BMW of North America, Inc v Gore*, 517 U.S. 559 (1996); *State Farm Mutual Ins Co v Campbell*, 123 S. Ct. 1513 (2003).

⁹¹ *John v Mirror Group Newspapers Ltd* [1997] QB 586, 619.

defendant's means⁹² and any circumstance mitigating his blameworthiness⁹³. Indeed, various "brackets" have been laid down by the Court of Appeal for particular circumstances, which apply even in jury trials (and, incidentally, may be made known to a jury)⁹⁴, though they are not strictly binding and may be departed from in extreme circumstances. Without any constitutional protection of the right to jury trial to contend with, Parliament has also had no difficulty in legislating to the effect that that the Court of Appeal may, if it thinks an award excessive, substitute its own figure without empaneling another jury⁹⁵.

Pre-*Kuddus*, of course, the task of controlling the amount of punitive awards was made easier by the fact that they were only available in a few types of case anyway. Only relatively simple guidelines were needed. Now that such awards are more widely available, however, it may well be that the English courts will be forced to move some way towards the position in a number of those American states which have legislated on the matter, and (at least in cases where there is a substantial amount of pecuniary loss) lay down guidelines on what multiples of actual damages are likely to be acceptable.

There is of course no overarching constitutional standard against which to measure punitive damages in England. On the other hand, at least two provisions of the European Convention on Human Rights, which is now incorporated as an English statute⁹⁶ and informs all judgments, may be relevant. The First Protocol, Art 1, provides that

"every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

This obviously has affinities with the due process clause, and although there is as yet no authority on its impact on the law of damages, it must be arguable that it will oblige the courts to constrain very large punitive awards. Furthermore, it should also be remembered that Art. 10, the Convention equivalent to the First Amendment, has been held to outlaw awards of non-punitive damages in libel where they are so large as to effectively suppress free speech on a matter of public concern⁹⁷.

Conclusion

England now has a unique opportunity to formulate a justifiable rule on the availability of punitive damages, free from almost all the constrictions of precedent which previously bedevilled the area. Moreover, the experience in America, where many of the problems have already been addressed (even if not necessarily solved), will obviously be informative here; in certain circumstances, such as the liability of public authorities, the American courts have developed a position which deserves serious scrutiny. On the other hand, a number of caveats are necessary. Even though the doctrine of precedent is not as strong as it was in England, English courts are likely to be wary of introducing major exceptions to established doctrines by

⁹² *Rookes v Barnard* [1964] A.C. 1129, 1228 (Lord Devlin); *Thompson v Met. Police Comm'r* [1998] Q.B. 498.

⁹³ *Holden v Lancs Chief Constable* [1987] Q.B. 380, 388.

⁹⁴ See *John v MGN Ltd* [[1997] Q.B. 586 and *Thompson v Met. Police Comm'r* [1998] Q.B. 498

⁹⁵ Courts and Legal Services Act 1990, s.8. It is worth noting, however, that the US Supreme Court managed to reach nearly the same result by saying that punitive damage findings by juries were not findings of fact and then mandating de novo review by appellate courts on that basis: *Cooper Industries Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424 (2001).

⁹⁶ Human Rights Act 1998.

⁹⁷ See the decision of the European Court of Human Rights in *Tolstoy-Miloslavsky v UK* (1995) 20 EHRR 442 (£1.5 million awarded by an English court regarded as excessive in respect of baseless allegation that plaintiff a war criminal).

judicial decision. For example, it would almost certainly take a decision of the House of Lords, and a radical House of Lords at that, to alter radically the established law of vicarious liability so as to distinguish between the conduct of an employee and the personal fault of the employer, and award punitive damages only in respect of the latter. Secondly, the recommendations of the Law Commission are likely to carry considerable weight in any future development of the law on punitive damages. Since at least some of these recommendations – for example, those on breach of contract – are a little illogical, it may be that developments will not be as wide-ranging as they might otherwise be. Thirdly, it has to be remembered, at least some of the conditions in the US which have led to the generous development of punitive damages – for instance the irrecoverability of attorney fees, or the extensive reliance on private insurance as a source of income for the disabled – do not obtain in England. This may mean that the further development of punitive damages is less extensive than one might otherwise expect. Lastly, there is a further intangible feature. English courts are increasingly looking for legal inspiration not to the US or the Commonwealth, but to the other members of the European Union⁹⁸. And within the European Union, England, Northern Ireland and Ireland are the only jurisdictions that recognize punitive damages at all. This may well in time cause the courts in England to be more hesitant in advancing the boundaries of punitive damages than they might otherwise have been.

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⁹⁸ Indeed, although the European Union does not have competence over private law per se, it has inspired and encouraged moves towards assimilation of private law in the member states. See, for example, von Bar, *The Common European Law of Torts* (Oxford UP, 1999), a magisterial study spawned by academic discussions taking place under the aegis of the European Union; and cf Banakas, *European Tort Law: Is it Possible?* (2002) 10 *Eur Rev Priv Law* 363.

Should double jeopardy apply?

Large numbers of claimants

Insurance

Breach of contract

Look to practicalities: many US paradigms don't fit England.