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## I. Introduction

*'[Punitive damages are] a monstrous heresy[,] [...] an unsightly and unhealthy excrescence, deforming the symmetry of the body of law'.<sup>1</sup>*

*'[Punitive damages are] an outgrowth of the English love of liberty regulated by law. [...] [They] elevate the jury as a responsible instrument of government, [...] restrain[ ] the strong, influential, and unscrupulous, vindicate[ ] the right of the weak, and encourage[ ] recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law'.<sup>2</sup>*

**1.1.** As the above excerpts indicate, punitive damages are a subject on which opinions differ, and differ sharply. Although both excerpts are decades old, they reflect the two diametrically opposing viewpoints regarding punitive damages to date. The view expressed in the second excerpt gradually came to prevail in the majority of states of the United States, but not without strong opposition, which in many respects continues to this date. By the middle of the 19th century, many states had imposed punitive damages for certain cases of aggravated, egregious misconduct, and, by the early part of the 20th century, all but five states had done likewise.<sup>3</sup> Today only one state, Nebraska, prohibits punitive damages in all cases.<sup>4</sup>

In the 1970s and early 1980s, the frequency and size of punitive damages awards appeared to increase dramatically, causing some observers to speak of a virtual 'explosion'.<sup>5</sup> Since then, punitive damages have become the target of a movement

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<sup>1</sup> *Fay v. Parker*, 53 N.H. 342, 382 (1872).

<sup>2</sup> *Luther v. Shaw*, 147 N.W. 18, 20 (Wis. 1914).

<sup>3</sup> See OWEN D./MADDEN M./DAVIS M., *Madden & Owen on Products Liability*, v. 2, § 18:1 n. 39 (3d ed. 2002). The five states were Louisiana, Massachusetts, New Hampshire, Nebraska, and Washington.

<sup>4</sup> See OWEN D./MADDEN M./DAVIS M. (note 3), at id. n. 41. Many states allow punitive damages only in certain narrowly defined cases. Among them is the mixed jurisdiction of Louisiana, which allows punitive damages for injury caused by drunk drivers, and for sexual abuse of minors. See La. Civ. Code arts. 2315.4 and 2315.7.

<sup>5</sup> See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting) ('Recent years [...] have witnessed an explosion in the frequency and size of punitive damages').

### *Resolving Punitive-Damages Conflicts*

known as ‘tort reform’,<sup>6</sup> which has had partial success in several states in limiting and/or making more difficult the recovery of punitive damages. The most common reforms have: (1) imposed monetary caps on punitive damages awards (20 states);<sup>7</sup> (2) raised the standard of proof for recovering punitive damages (19 states);<sup>8</sup> (3) bifurcated the trial by separating punitive damages from other issues (16 states);<sup>9</sup> (4) diverted a portion of the punitive damages award to a public fund (9 states);<sup>10</sup> or (5) reformed jury instructions or assigned to judges rather than to jurors the assessment of punitive damages (2 states).<sup>11</sup> In the meantime, the United States Supreme Court has also entered the fray by articulating criteria for defining the constitutionally permissible size of punitive-damage awards.<sup>12</sup>

**1.2.** In the rest of the world, the vast majority of civil-law systems continue to reject punitive damages, and to regard them as an aberration if not an abomination. Naturally, this is a judgment these systems are entitled to make for themselves. Indeed, the history, philosophy, and contemporary structure of most civil-law systems make their rejection of punitive damages *for fully domestic* cases entirely understandable. What is debatable, however, is whether this rejection should encompass all those *multistate* cases that, under the forum's choice-of-law rules, are governed by a foreign law that imposes punitive damages. Many civil-law systems have taken this very position. For example, some recent private international law (PIL) codifications contain blanket prohibitions against awarding punitive damages under any circumstances.<sup>13</sup> The same hostility towards punitive damages surfaces in recent efforts to

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<sup>6</sup> For this movement, see DANIELS S./MARTIN J., *Civil Juries and the Politics of Reform* (1995); DANIELS S./MARTIN J., ‘The Impact That It Has Had Is Between People’s Ears: Tort Reform, Mass Culture, and Plaintiffs’ Lawyers’, in: 50 *DePaul L. Rev.* 453 (2000).

<sup>7</sup> See ROBBENNOLT J., ‘Determining Punitive Damages: Empirical Insights and Implications for Reform’, in: 50 *Buff. L. Rev.* 103, 168-69 (2002).

<sup>8</sup> See *id.* at 176.

<sup>9</sup> See *id.* at 178.

<sup>10</sup> See *id.* at 180; *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002).

<sup>11</sup> See ROBBENNOLT J. (note 7), at 188, 184.

<sup>12</sup> See *infra*, §§ 3.1-3.7.

<sup>13</sup> For example, articles 135(2) and 137(2) of the Swiss PIL codification provide that, in products liability and obstruction to competition cases governed by foreign law, ‘no damages may be awarded in Switzerland other than those provided [...] under Swiss law’. Similarly, article 40(3) of the EGBGB (Rev. 1999) prohibits non-compensatory or ‘excessive’ damages, while article 34 of the Hungarian PIL Decree of 1979 provides somewhat more cryptically that Hungarian courts ‘shall not [...] impose legal consequences not known to Hungarian law’.

draft a new convention on judgment recognition under the auspices of the Hague Conference of PIL.<sup>14</sup>

It seems that implicit in these prohibitions is an *a priori* legislative assumption that punitive damages are so fundamentally repugnant to the forum's sense of justice and fairness that a forum court should not be allowed to contaminate itself by even considering the possibility of permitting them in multistate cases. This assumption operates even if the forum country has no connections (besides the jurisdictional nexus) that would implicate its prohibition of punitive damages, such as an affiliation with the defendant or the occurrence of critical events within its territory.<sup>15</sup> These prohibitions revoke in advance any and all discretion a court has in employing the traditional *ordre public* reservation, and effectively erase all the fine classical distinctions between *ordre public interne* and *ordre public international*. Why? Why have these systems *a priori* singled out punitive damages for such treatment and have not done so for slavery, prostitution, or polygamy?

**1.3.** This essay does not attempt to answer this rhetorical and partly facetious question. Nor does the essay purport to propose ways in which civil-law courts should resolve punitive-damages conflicts. However, the essay does aspire to facilitate a better understanding of these conflicts – or at least to dispel certain common misunderstandings about them – by discussing the way in which American courts have resolved tort conflicts involving punitive damages during the last three decades. Because most of these cases involve American interstate conflicts, and because most American states allow punitive damages, one might assume that these conflicts cannot be as acute as international conflicts. This assumption is not necessarily accurate. Although most American states allow punitive damages in general, these states often disagree on the specific cases, causes of action, or other circumstances in which punitive damages are available. When such disagreements exist, the resulting conflicts are as intense as they come, if only because they involve large sums of money. American courts have confronted these conflicts day in and day out, and have accumulated a rich experience that should have some relevance outside the United States.

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<sup>14</sup> See Art. 33 of the Hague Preliminary Draft Convention on Jurisdiction and Recognition of Foreign Judgments in Civil and Commercial Matters of 30 October 1999 (providing that a foreign judgment that awards exemplary damages shall be recognized, but only to the extent that similar or comparable damages could have been awarded in the recognizing state).

<sup>15</sup> See *infra*, § 8.2.

## **II. The Purpose, Function, and Controversial Character of Punitive Damages**

**2.1.** Punitive or exemplary damages are money damages assessed against a defendant in a civil action for misconduct that the legal system regards as heinous or egregious.<sup>16</sup> The adjectives ‘punitive’ and ‘exemplary’ are often used interchangeably and express the two purposes of punitive damages – punishment and deterrence. Punishment or retribution is individual but backward looking, in that it focuses on the individual wrongdoer and his or her specific misconduct. The degree of punishment depends on both the egregiousness of the specific misconduct, and the wrongdoer’s financial capacity to bear and internalize the punishment. Deterrence or prevention is more general and forward looking, in that it focuses not only on the individual wrongdoer, but on others who might consider engaging in similar misconduct in the future. Deterrence is achieved by attaching on certain conduct a price tag that is much higher than the gains one might expect from engaging in that conduct. Thus, punitive damages differ in important respects from compensatory damages, the purpose of which is to compensate the victim, and hence are proportional to the victim’s harm or loss.<sup>17</sup>

**2.2.** The fact that punitive damages are awarded to a private plaintiff, in a civil trial, indicates their differences from criminal and civil fines, both of which inure to a public fund. Although a recent movement to direct a portion of punitive damages to a public fund tends to blur this distinction, that movement has had only limited success so far.<sup>18</sup> At the same time, the fact that in a civil trial the defendant does not enjoy certain procedural protections of the criminal law (such as proof beyond a reasonable doubt, the right against self-incrimination, and the protection from double jeopardy and excessive fines) is one of the reasons for which punitive damages are controversial. Yet, precisely because punitive damages are sought, and their prerequisites proven, by private plaintiffs rather than by the state, one could argue that the above

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<sup>16</sup> For the standard treatises on punitive damages, see BOSTON G., *Punitive Damages in Tort Law* (1993); GHIARDI J./ KIRCHER J., *Punitive Damages Law and Practice* (1994); and SCHUETER L./ REDDEN K., *Punitive Damages* (2d ed. 1989). For a state-by-state survey, see BLATT R./ HAMMERSFAHR R./ NUGENT L., *Punitive Damages: A State-by-State Guide to Law and Practice* (2002). For punitive damages in products liability cases, see OWEN D./ MADDEN M./ DAVIS M. (note 3).

<sup>17</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct.1513 at 1519 (2003) (‘[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes [...]. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct [...]. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution’) (internal quotation marks omitted).

<sup>18</sup> See *supra*, § 1.1.

procedural protections of the criminal law are largely unnecessary and perhaps inappropriate.<sup>19</sup> For private plaintiffs possess neither the coercive power of the state nor its superior investigatory resources. Moreover, while punitive damages can carry severe economic consequences, they do not endanger the defendant's life or liberty. In any event, many states recently have raised the burden of proof for punitive damages from 'preponderance of the evidence' (which is the typical standard in civil cases) to 'clear and convincing evidence'.<sup>20</sup>

**2.3.** However, the major reason for which punitive damages are controversial has little to do with the conceptual anomaly of mixing criminal-law and civil-law objectives and means, and everything to do with the large size of punitive damages awards, at least those reported in the popular press. Perhaps the most notorious is the McDonald's 'hot coffee case' in which a New Mexico jury awarded \$2.7 million in punitive damages to a 79-year old customer who suffered third degree burns after spilling on her lap a cup of MacDonald's exceedingly hot coffee.<sup>21</sup> The story circled the globe,<sup>22</sup> described as 'the epitome of frivolity'<sup>23</sup> and perhaps seen as one more example of 'American excessiveness'. The popular press hardly mentioned that the trial court reduced the award to \$480,000, nor did it report that the case was later settled for an undisclosed lower amount. Nor was there much discussion of the fact that, even before being reduced by the court, the amount awarded by the jury corresponded to only two days of McDonald's national coffee sales, and that McDonald's had previously received more than 700 complaints of burns and had failed to warn its customers.<sup>24</sup>

**2.4.** This story suggests that simplistic or sensational reporting combined with shrewd campaigning by 'tort reformers' can generate a widespread impression of an out-of-control, arbitrary regime of frequent and exorbitant punitive damages awards. Yet, empirical studies covering different but partly overlapping periods and territories reveal that this impression is not borne out by the facts. For example, three recent

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<sup>19</sup> For an excellent exposition of this argument, see GALANTER M./LUBAN D., 'Poetic Justice: Punitive Damages and Legal Pluralism', in: 42 *Am. U. L. Rev.* 1393 (1993).

<sup>20</sup> See *supra*, § 1.1. One state, Colorado, has further raised the standard to 'beyond reasonable doubt', which is the criminal law standard.

<sup>21</sup> *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309 (N.M. Dist. Ct. 1994).

<sup>22</sup> See MEAD, 'Punitive Damages and the Spill Felt Round the World: A U.S. Perspective', in: 17 *Loy. L.A. Int'l & Comp. L.J.* 829 (1995).

<sup>23</sup> TORRY S., 'Tort and Retort: The Battle over Reform Heats Up', *Washington Post*, Mar. 6, 1995, at F7.

<sup>24</sup> See OWEN D./MADDEN M./DAVIS M. (note 3), at § 18:1.