Exemplary Damages:
A Critical History

Nikolaos Emmanouil Sinanis
Student Number: [redacted]

University College London

A thesis submitted for the
requirements of a Doctor of Philosophy.

I, Nikolaos Emmanouil Sinanis, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

Controversy continues to surround awards of tort damages that exceed compensation and aim to punish defendants. It remains a widely held view, especially among theorists of tort law, that the doctrine of civil damages that continues to allow for such awards – exemplary damages – should be abolished. The history of exemplary damages also continues to generate interest among historians of the common law, with the third quarter of the eighteenth-century remaining widely accepted as a convenient starting point.

This thesis presents a systematic account of the English practice of extra-compensatory punitive recovery in tort law adjudication from the turn of the seventeenth-century to 1964. It critically explores this historical period through the prism of the only mode of civil trial used in tort actions in England's common law courts before the middle of the nineteenth-century – trial by jury.

Explored through this critical historical prism, this thesis suggests that, in tort law's longer past, awards of exemplary damages were part of a practice of adjudicating tort actions that was not only structurally different from that of the present, but undergirded by different assumptions as well. Its central claim is that, until quite recently, the determination of a tort defendant's full financial liability did not involve the application of legal damages doctrines that common law judges administered. Rather it occurred within a 'non-rule-based' province of adjudication that belonged to the jury. Within this largely unexplored province of historical tort law adjudication, the normative principles according to which the relationship between tort plaintiff and tort defendant was rebalanced was fundamentally a matter for jurors, not judges.

Ultimately, this account will upset settled historical narratives concerning the common law origins and growth of the award of exemplary damages, as well as complicate modern theoretical criticisms of the doctrine of exemplary damages.

Impact Statement

The knowledge and insight presented in this thesis can be put to beneficial uses, both inside and outside academia. Inside academia, this thesis makes a new contribution to the discipline of legal history. It does so by critically exploring an aspect of the history of the common law that historians have not fully examined – the histories of those damages awards available in modern civil actions, tort actions in particular. The principal historical focus of this thesis is on the English common law. Nonetheless, it explores a longer past to which, not only England, but many common law jurisdictions trace their own peculiar modern practices of awarding punitive damages over and above compensation in civil actions. These include the United States, Canada, Australia and New Zealand. In turn, the longer perspective that this thesis seeks to open up and explore is one that, despite their significant differences, these modern jurisdictions share.

This thesis also seeks to have an interdisciplinary impact within twenty-first-century legal academia. The prospects of a more constructive dialogue between modern legal theorists and legal historians has been a field of considerable scholarly endeavour in recent years. Exploring ways to bring distinctly historical and theoretical perspectives on the common law of obligations, especially tort law, into closer alignment has attracted particular attention. By making the complication of modern theoretical treatments of exemplary damages a core critical aspiration of this thesis' historical account, it aims to contribute to this emerging interdisciplinary activity in a way that has not been attempted to date.

Outside academia, the discoveries of this thesis will be relevant to future efforts of law reform. The law relating to exemplary damages in modern civil actions has been the focus of law reform groups in recent times. Both in England and in other jurisdictions, reform debates about exemplary damages have involved analyzing the common law doctrine of exemplary damages and recommending how judges and legislators might improve it. However, these debates have not been solely concerned with how exemplary damages can fit into a more principled body of civil damages doctrine. They have also been concerned with the roles of judge and jury in awarding them.

By critically exploring exemplary damages as part of the constantly evolving structure of civil law adjudication – and the place of a lay element within it – this thesis can enrich law reform debates about the place of exemplary damages in the prevailing practice of adjudicating tort disputes. In this sense, this thesis has the unique capacity to impact a perennial issue of civil justice reform more broadly, both in England and elsewhere. This is the issue of the appropriate role of a lay adjudicative element in deciding whether a civil wrongdoer should be punished and, if so, how much of it is necessary. By showing how awards of exemplary damages have expressed shifting conceptions of civil justice across the common law's existence through time, reforming the modern practice of exemplary damages can benefit from a deeper critical historical perspective.

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CHAPTER 1

Introduction

A. Exemplary Damages: Past and Present

Civil damages awards given beyond compensation and for the distinct purpose of punishment have a long history at common law. They have been most prominently awarded in tort actions. In modern times, however, awards of exemplary damages have attracted controversy. The controversy has been particularly pronounced in theoretical quarters of modern tort law scholarship. Corrective justice theorists have taken an especially critical view of exemplary damages. From the corrective justice standpoint, modern tort law's central remedial concern with compensating tort plaintiffs is a conspicuous way in which tort law conforms to the principle of corrective justice. Yet, full conformity, it is argued, requires the abolition of any damages doctrine that goes above and beyond compensation, and allows for a tort defendant to be punished.

With these modern theoretical criticisms in mind, this thesis sets out to provide a systematic account of the origins and growth of the award of exemplary damages at English common law. It charts an expansive period, from the turn of the seventeenth-century to the landmark case that fashioned the doctrine of exemplary damages administered in modern English tort actions today – *Rookes v Barnard*.[1] In doing so, this thesis opens up a longer critical perspective. It suggests that more can be understood about the controversial practice of extra-compensatory punitive recovery by exploring its past through the prism of a central feature of the historical common law practice of adjudicating civil tort actions – the 'peculiarly English'[2] institution of trial by jury.

Explored through this critical prism, this thesis' historical account will ultimately upset settled narratives concerning the genesis and development of exemplary damages at

[1] [1964] AC 1129 (HL).
[2] Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons 1956) 7.

common law, as well as complicate modern theoretical criticisms of the civil damages doctrine that continues to allow for awards of such a character.

i. A present sketch of extra-compensatory punitive recovery

Awards of monetary damages are how defendants characteristically make answer to plaintiffs for committing the wrongs recognized by modern tort law.

(a) Compensatory tort damages

Most often, the monetary damages awarded to plaintiffs in modern tort actions are compensatory in their remedial effect.[3] Compensatory damages awards are a 'plaintiff-centred' response to tortious wrongdoing. Their remedial function is to repair all of the harmful consequences that the defendant's tortious wrong caused the plaintiff to suffer. Thus, it is often said that compensatory damages awards have the effect of making the plaintiff who has suffered whole again.[4]

Awards of compensatory damages may include different elements of damage. Often, they include both pecuniary and non-pecuniary elements. Pecuniary elements of damage compensate for pecuniary harms that tort plaintiffs may suffer, and are therefore viewed as capable of being measured more or less objectively in terms of money. By contrast, non-pecuniary elements of damage compensate for harms like pain and suffering and loss of amenity. Unlike pecuniary elements of damage, they are not as 'susceptible of measurement in money'.[5]

In some cases, modern compensatory damages awards may also include aggravated elements of damage. Such elements compensate for further non-pecuniary – essentially intangible – harms that can be inferred from the nature of, and circumstances surrounding,

[3] Jules L Coleman, 'The Structure of Tort Law' (1988) 97 Yale LJ 1233, 1249.
[4] Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Geo LJ 695, 696.
[5] *H West & Son Ltd v Shephard* [1964] AC 326 (HL) 346 (Lord Morris).

a defendant's tortious wrong.[6] Like non-pecuniary elements of damages, aggravated elements are similarly unsusceptible to being objectively measured in money terms. According to Tilbury, the justification for including aggravated elements of damage in modern compensatory tort awards is to avoid 'the risk of under-compensation'.[7]

(b) Extra-compensatory punitive tort damages

Yet, not all monetary damages awarded to plaintiffs in modern tort actions are compensatory in their remedial effect. Occasionally, they may go beyond making plaintiffs whole as well. One example are awards of exemplary damages. Exemplary damages are often characterized as an '*extra*-compensatory' damages award: they permit a tort plaintiff to collect an award of damages over and above an award of full compensatory damages, including any aggravated elements of damage it may contain. Unlike compensatory damages, therefore, awards of exemplary damages are seen to be a 'defendant-centred' response to tortious wrongdoing. Their remedial function is not to repair all of the harmful consequences that the defendant's tortious wrong caused the plaintiff to suffer. Rather it is to subject the defendant to various forms of punitive treatment.[8]

Unlike compensatory damages, exemplary damages are also not tort law's typical remedial response to tortious wrongdoing. This is reflected by the relative infrequency with which exemplary damages are pleaded and awarded in the litigation and adjudication of modern English tort actions.[9] In 2001, in *Kuddus v Chief Constable of Leicestershire Constabulary*,[10] the United Kingdom House of Lords described them as a 'remedy of last

[6] It has been argued that aggravated compensatory damages afford protection for a tort plaintiff's 'dignitary interest', see John Murphy, 'The Nature and Domain of Aggravated Damages' (2010) 69 CLJ 353, 353–377.

[7] Michael Tilbury, 'Aggravated Damages' (2018) 71 CLP 215, 215.

[8] Another collateral function of exemplary damages is to (specifically and generally) deter future tortious wrongdoing, see James Edelman, 'In Defence of Exemplary Damages' in CEF Rickett (ed), *Justifying Private Law Remedies* (Bloomsbury Publishing 2008) 247. For the corrective justice objection to the pursuit of deterrence goals via institutions of private law enforcement, like tort law, see Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 102.

[9] For an empirical analysis of exemplary damages awards in modern English tort actions, see James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2017) 38 OJLS 90, 90–122.

[10] [2002] 2 AC 122 (HL).

resort'.[11] In his speech in *Kuddus*, Lord Nicholls characterized the award of exemplary damages in the following terms:

> From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done.[12]

As this statement shows, the continued availability of extra-compensatory, distinctly punitive, elements of recovery are seen to be a source of modern English tort law's institutional strength. Typically, their justification is the robust enforcement of the most egregious of tortious wrongdoing. On this view, exemplary damages fill a 'lacuna'[13] in the law of civil remedies that would exist if awards of tort damages could never exceed the make-whole limit.[14]

(c) The modern theoretical criticism: corrective justice and correlativity

In 1965, in the pages of the *Modern Law Review*, the great scholar of the English law of damages, Harvey McGregor, declared: 'That the object of an award of damages is to compensate the plaintiff for his loss and not to punish the defendant for his wrongdoing is a modern notion'.[15] To this point, Englard recently emphasizes that '[i]t was only in relatively modern times that the combination of punishment and compensation was conceived to raise methodological and conceptual problems'.[16]

The modern controversy in which extra-compensatory punitive tort damages awards remain 'encased'[17] long predates the modern scholarly rise of tort theory. This includes the

[11] ibid 145 (Lord Nicholls).
[12] ibid 144–145.
[13] ibid 145.
[14] See Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 113–115, and arguing, therefore, that aggravated damages rather than exemplary damages should be 'abolished' (114).
[15] Harvey McGregor, 'Compensation Versus Punishment in Damages Awards' (1965) 28 MLR 629, 629.
[16] Izhak Englard, 'Punitive Damages – A Modern Conundrum of Ancient Origin' (2012) 3 JETL 1, 4.
[17] Ernest J Weinrib, *Corrective Justice* (OUP 2012) 171.

advent of corrective justice theories of tort law in the final quarter of the twentieth-century.[18] In 1877, in the often cited Supreme Court of New Hampshire case of *Fay v Parker*, Foster J had already designated distinctly punitive elements of tortious recovery as 'out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd'.[19] By the early 1930s, the American damages scholar, Charles T McCormick, went on to emphatically declare that 'in the framing of a model code of damages today for use in a country unhampered by legal tradition, the doctrine of exemplary damages would find no place'.[20]

That being said, in the final quarter of the twentieth-century and beyond modern tort theorists have presented among the most sophisticated treatments of the 'problem' of punishment in tort law. Corrective justice tort theorists, in particular, have put forward among the strongest reasons for the complete abolition of the doctrine that continues to allow for it. Often drawing inspiration from the ethical writings of Aristotle,[21] corrective justice theorists 'share the basic idea that tort law is essentially an institutional manifestation of a principle of corrective justice'.[22]

At its broadest, '[t]he principle of corrective justice is simply one of the norms that applies when we are somehow connected with the misfortunes of others'.[23] According to Coleman, the central concern of the principle of corrective justice 'is the consequences of various sorts of doings'.[24] In this respect, it differs from other principles of justice; for example, retributive justice (or, as it sometimes characterized, the principle of 'just desert'[25]). The

[18] For a historical survey of modern tort theory, see David G Owen, 'Why Philosophy Matters to Tort Law' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 1–28.
[19] *Fay v Parker*, 53 NH 342, 16 Am Rep 270 (1872), 270.
[20] Charles T McCormick, 'Some Phases of the Doctrine of Exemplary Damages' (1930) 8 NC L Rev 129, 130.
[21] See Aristotle, *Nicomachean Ethics* (RC Bartlett and SD Collins tr, Chicago Press 2012) 1130b–1132a, where Aristotle first distinguished between corrective justice and distributive justice. Ernest J Weinrib, 'Aristotle's Forms of Justice' (1989) 2 RJuris 211, 211–226; Allan Beever, 'Aristotle on Equity, Law, and Justice' (2004) 10 LT 33, 33–50.
[22] Hanoch Sheinman, 'Tort Law and Corrective Justice' (2003) 22 LPhil 21, 51.
[23] Jules Coleman, 'The Practice of Corrective Justice' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 56.
[24] Jules L Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 Ind LJ 349, 370.
[25] Ronen Perry, 'The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory' (2006) 73 Tenn L Rev 177, 177.

principle of retributive justice is not centrally concerned with repairing the harmful consequences of wrongdoing. It holds rather that 'wrongdoing deserves its comeuppance: a measure of pain, suffering or deprivation should be exacted from wrongdoers, and the deprivation should reflect the nature and magnitude of the wrongdoing'.[26] The institution of legal enforcement that readily manifests such a principle is not tort law, but criminal law.

The formal feature of tort law that is said to manifest a principle of corrective justice is its correlative structure. According to corrective justice theorists, it is the notion of correlativity that captures the bilateral relationship between the parties to a tort action.[27] So central is the notion of correlativity in tort law that it is said to determine the ways in which tortious wrongs may be legitimately remedied. As Weinrib – 'the High Priest of corrective justice'[28] – powerfully argues, legitimate ways of remedying tortious wrongs are strictly limited to those remedies whose 'normative force applies simultaneously to both parties'.[29] From the corrective justice standpoint, tort law's paradigmatic 'correlative' remedy is the award of compensatory damages. Because its remedial function is to repair all the harmful consequences that a defendant's tortious wrong causes the plaintiff to suffer, it legitimately 'reflect[s] the parties' correlative standing as *doer* and *sufferer* of the same injustice'.[30]

Yet, not all tort remedies are capable of reflecting the correlative standing of tort plaintiff and defendant in this way. Perhaps tort law's paradigmatic 'non-correlative' remedy is the award of exemplary damages, which explains why corrective justice theorists have relentlessly challenged its legitimacy. Because its remedial function is to punish the defendant – as 'doer' – the 'normative force' of exemplary damages does not

[26] Jules L Coleman, 'Justice and the Argument for No-Fault' (1974) 3 SocTheoryPract 161, 169.
[27] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471, 471.
[28] Jonathan Morgan, 'Causation, Politics and Law: The English – and Scottish – Asbestos Saga' in R Goldberg (ed), *Perspectives on Causation* (Bloomsbury Publishing 2011) 71.
[29] Weinrib, *Corrective Justice* (n 17) 11.
[30] Ernest J Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 Theor Inq L 1, 1. (Emphasis added). Unlike exemplary damages, aggravated (compensatory) awards are seen to be legitimate by corrective justice tort theorists, see Ernest J Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 FlaStU L Rev 273, 292, approvingly describing aggravated damages as 'compensat[ing], in accordance with corrective justice, for the injury that high-handed wrongdoing does to the plaintiff's dignity'.

simultaneously apply to both parties. Rather it applies exclusively to one of them. Therefore, unlike (correlative) compensatory damages, (non-correlative) exemplary damages do not encompass 'the correlative situation of the other',[31] namely, the plaintiff – as 'sufferer'.

Ultimately, as Weinrib explains, all theories of tort law, including corrective justice theories, inevitably encompass a 'critical dimension'.[32] Within its critical dimension, corrective justice theory 'approves of features of law that conform to [the principle of corrective justice] . . . and regards features that do not so conform as erroneous'.[33] From the corrective justice standpoint, the 'non-correlative' award of exemplary damages ranks among modern tort law's most 'erroneous' doctrinal contents. Beever, another leading corrective justice theorist, describes it as 'logically an anomaly'.[34] On that basis, he has joined the theoretical call for it to be 'expunged'[35] from the modern law of tort.

ii. A past sketch of extra-compensatory punitive recovery

Although controversial, exemplary damages are not a new damages remedy. Their origins lie very deep at common law. Precisely identifying those origins, however, has proved difficult. 'Precisely when English law recognised the award of punitive damages', remark Goudkamp and Katsampouka, 'is obscured by the mists of time'.[36] Lunney agrees that its origins 'remain shrouded in some mystery'.[37]

[31] Weinrib, 'Civil Recourse and Corrective Justice' (n 30) 290.
[32] Ernest J Weinrib, 'Formalism and its Canadian Critics' in KD Cooper-Stephenson (ed), *Tort Theory* (Captus Press 1993) 10.
[33] ibid.
[34] Beever, 'Aggravated and Exemplary Damages' (n 8) 110.
[35] ibid.
[36] James Goudkamp and Eleni Katsampouka, 'Form and Substance in the Law of Punitive Damages' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Bloomsbury Publishing 2019) 333.
[37] Mark Lunney, 'Uren v John Fairfax & Sons Pty Ltd (1966)' in D Rolph (ed), *Landmark Cases in Defamation Law* (Hart Publishing 2019) 158.

(a) Premodern statutory origins

Historical attempts to trace the origins of exemplary damages have tended to extend very far back in time. Premodern precursors have been identified across numerous ancient legal texts, including the Babylonian Code of Hammurabi, the Hindu Manusmruti, the Tanakh of Judaism, Solon's Athenian constitution, and the Twelve Tables of Rome.[38] All of these texts made provision for so-called 'multiple damages'.

Multiple damages awards functioned by increasing an award of compensatory damages by mechanically applying a fixed statutory multiplier. Jolowicz suggested that the remedial principle 'guiding'[39] multiple statutory recovery was not reparation but punishment. Provisions allowing for multiple damages were important features of landmark English legislation enacted in the post-conquest period. In their magisterial account of the period, Pollock and Maitland described multiple damages as a 'favourite device'[40] of England's Norman legislatures, especially those of Edward I. The 1275 and 1278 statutes of Westminster I and Gloucester, respectively, made provision for double and treble damages for certain types of wrongdoing.[41] Taliadoros recently suggests that these thirteenth-century English statutory provisions were influenced by Roman legal ideas; in particular, the Roman law of delict and the notion of *iniuria* that figured so centrally within it.[42]

[38] For a detailed premodern survey, see Michael Rustad and Thomas Koenig, 'The Historical Continuity of Punitive Damages: Reforming the Tort Reformers' (1993) 42 AmU L Rev 1269, 1285–56.

[39] HF Jolowicz, *The Assessment of Penalties in Primitive Law* (PH Winfield and A McNair eds, Cambridge Legal Essays 1926) 216: 'The penalty is made to fit, not the amount of damage inflicted by the tort, but the nature of the tort itself'.

[40] Frederick Pollock and Frederic W Maitland, *The History of English Law Before the Time of Edward I*, vol 2 (first published 1898, Lawbook Exchange 2013) 522.

[41] See, earlier, Merton 1235 (20 Hen 3 c 6); Westm 1 1275 (3 Edw 1 c 1), which made it a wrong remediable by multiple damages 'to take away any goods or food from that religious house without consent of that house'; Glouc 1278 (6 Edw 1 c 5), which made it a wrong remediable by multiple damages to cut down or destroy 'forests, woods, or any thickets suitable as food or lair'.

[42] Jason Taliadoros, 'The Roots of Punitive Damages at Common Law: A Longer History' (2016) 64 CleveSt L Rev 251, 278–280; Jason Taliadoros, 'Thirteenth-Century Origins of Punitive or Exemplary Damages: The Statute of Westminster I (1275) and Roman Law' (2018) 39 JLeg Hist 278, 278–283.

Yet, in discussing Roman statutory provisions of multiple damages, Buckland and McNair challenged claims of continuity between premodern multiple damages and common law exemplary damages. They pointed out that the two kinds of recovery were not 'functional[ly] equivalent'.[43] Under premodern statutory multiple damages, they noted that the extra-compensatory punitive element could not be other than a fixed multiple (whether double or treble) of the total sum given as compensation. This meant that punitive elements of multiple damages awards could be equal to, but never less than, compensatory elements of damage.

But this is not the case with modern exemplary damages. Modern punitive elements of recovery are not strict multiples of sums given by way of compensation; indeed, since the House of Lords' decision in *Rookes*, the incorporation of a punitive element into a modern tort plaintiff's award is legally predicated on a determination of the likely punitive effect of all other compensatory elements, including any further compensatory sum given by way of aggravated damages.[44] In their modern form, in turn, exemplary damages characteristically function as a 'topping up'[45] device.[46] This explains why modern punitive elements of tortious recovery are generally quite modest compared to all other compensatory elements.

(b) Modern common law origins

Despite premodern connections with statutory multiple recovery, the origins of the modern – common law – doctrine of exemplary damages are seen to be rather less obscure. Edelman states that '[t]he modern law of exemplary damages arose out of two cases'.[47] Both cases were litigated in the aftermath of the publication of an especially controversial issue of political newspaper, the *North Briton*. After attempts by George III's

[43] William Buckland and Arnold B McNair, *Roman Law and Common Law* (2nd ed, CUP 1952) 344–348.
[44] *Rookes* (n 1) 1129 (Lord Devlin); *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) 1062 (Lord Hailsham) and 1126 (Lord Diplock).
[45] *Cassell* (n 44) 1099 (Lord Morris).
[46] See Goudkamp and Katsampouka, 'An Empirical Study of Punitive Damages' (n 9) 92, and concluding that the modesty of punitive awards 'contrasts sharply with the perception that punitive damages awards are unpredictable and frequently excessive' (92).
[47] Edelman (n 8) 228.

administration to stifle its circulation, two individuals linked to the 45th issue obtained common law writs of trespass in which they sought substantial damages.

These individuals were William Huckle, a journeyman printer who was believed to have participated in printing it, and John Wilkes, the renowned parliamentarian and radical journalist who was believed to have authored it. The two tort actions that Huckle and Wilkes successively brought against servants of the crown gave rise to the famous *North Briton* decisions – *Huckle v Money*[48] and *Wilkes v Wood*.[49] The former was ultimately determined during Michaelmas Term 1763. The latter was decided immediately after it. In *Huckle*, at an in banc hearing at Westminster Hall, the then Chief Justice of the Court of Common Pleas, Pratt CJ, is reported to have first used the phrase 'exemplary damages' to describe the large award given by the *Huckle* jury at trial. In *Wilkes*, Pratt CJ is believed to have gone on to direct the *Wilkes* jury that they could lawfully determine his damages award according to various extra-compensatory, distinctly punitive, principles of recovery.[50]

The combined effect of *Huckle* and *Wilkes* has been thought very significant. According to a settled historical narrative, they combined to install modern exemplary damages as a new doctrine of English civil remedies. In turn, 1763 has been heralded as when the modern exemplary damages award 'first appeared in English jurisprudence'.[51] By choosing to use the phrase 'exemplary damages' in his in banc *Huckle* judgment, Pratt CJ employed it 'as a formal legal doctrine'.[52] This, in turn, prompted English courts of common to administer the exemplary damages doctrine 'from that point on'.[53] After shaping the remedial outcome in *Wilkes*, the narrative says that the common law doctrine of exemplary damages came to be applied in a wide range of English tort actions. Writing from an American perspective, Rustad and Koenig state that, at the close of eighteenth-century, 'exemplary damages were firmly entrenched in the Anglo-American tradition'.[54]

[48] (1763) 2 Wils KB 205, 95 ER 768.
[49] (1763) Lofft 1, 98 ER 489.
[50] ibid 498; see *Rookes* (n 1) 1222 (Lord Devlin).
[51] Goudkamp and Katsampouka, 'Form and Substance in the Law of Punitive Damages' (n 36) 333.
[52] Rustad and Koenig (n 38) 1287.
[53] ibid.
[54] ibid 1290.

According to Edelman, in the emergent jurisdictions of the British Commonwealth, 'exemplary damages followed a consistent pattern of expansion'.[55]

The expansion of the award of exemplary damages continued until the intervention of the House of Lords at the bicentenary of 'the *cause célèbre* of John Wilkes and the *North Briton*'.[56] Under the guidance of Lord Devlin, in 1964 the House of Lords drastically restricted the historical common law doctrine of exemplary damages first recognized in in 1763 in the *North Briton* cases.[57] In the decades that have followed, Lord Devlin's judgment in *Rookes* has been equally commended and criticized as one of the most significant theoretically inspired judicial reforms of the English common law.

B. A Longer Critical Perspective

Speaking of the period after *Rookes* was decided, Goudkamp suggests that 'the attention that scholars have lavished on exemplary damages is plainly disproportionate to their practical importance'.[58] Yet, of the period before the House's decision, no systematic historical investigation of exemplary damages at English common law has yet been undertaken. In a seminal article published at the turn of the twentieth-century, Birks called attention to what he termed a 'pre-*Rookes* v. *Barnard* truth'.[59] By all but abolishing the English doctrine of exemplary damages in 1964, he criticized Lord Devlin's *Rookes* judgment for weakening the protection that, for centuries, the common law of England had given to a tort plaintiff's 'interest in equality of respect'.[60]

i. Legal history in a critical mode

[55] Edelman (n 8) 228.
[56] *Rookes* (n 1) 1222 (Lord Devlin).
[57] ibid 1226–27.
[58] James Goudkamp, 'Exemplary Damages' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 319.
[59] Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1999) 32 Ir Jur 1, 16.
[60] ibid.

There are many 'pre-*Rookes v Barnard*' truths. The aim of this thesis is to illuminate another. Although this thesis enters what Baker terms 'the further dimension of time',[61] it aims to do so by leaving as much of the present behind as possible. In 1933, the English legal and political theorist, Michael Oakeshott, stated: 'What the historian is interested in is a dead past; a past unlike the present'.[62] 'The *differentia* of the historical past', Oakeshott asserted, 'lie in its very disparity of what is contemporary'.[63] With Oakeshott's words in mind, this thesis sets out to explore how the common law practice of awarding exemplary damages in English tort actions has changed through time.[64] This particular historical undertaking is directed towards an ultimately critical end: it seeks to produce a critical account of the practice of giving exemplary damages in tort actions across the English common law's varied historical existence before 1964. Gordon describes a critical historical perspective as:

> any approach to the past that produces disturbances in the field that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives . . . or that posits alternative trajectories that might have produced a very different present – in short, any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.[65]

By purporting to enter a past independent of the present, this thesis seeks to open up a new critical perspective on the pre-*Rookes v Barnard* practice of extra-compensatory punitive recovery. In doing so, it does not only set out to unsettle what common law historians believe about how the exemplary damages doctrine first emerged. It also aims to complicate what theoretically inclined tort scholars see as the anomaly inherent in the

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[61] John H Baker, 'Why the History of English Law has not Been Finished' (2000) 59 CLJ 62, 66.

[62] Michael Oakeshott, *Experience and its Modes* (first published 1933, CUP 1985) 106.

[63] ibid.

[64] Recently, historical inquiries seeking out temporal variation in law have been promoted by scholars intent on establishing a closer dialogue between legal theorists and legal historians, see Michael Lobban, 'Legal Theory and Legal History: Prospects for Dialogue' in M Del Mar and M Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart Publishing 2016) 18: 'much legal philosophy deals with law in a static state, we need to remember that law exists in time, and that time is not static'; Maksymilian Del Mar, 'Philosophical Analysis and Historical Inquiry: Theorizing Normativity, Law, and Legal Thought' in MD Dubber and C Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018) 5.

[65] Robert W Gordon, 'Foreword: The Arrival of Critical Historicism' (1997) 49 Yale LJ 1023, 1024. Also see Robert W Gordon, 'Critical Legal Histories' (1984) 36 Stan L Rev 57, 57–125, and more recently Robert W Gordon, *Taming the Past: Essay on Law in History and History in Law* (CUP 2017) 8.

modern doctrine. The following sections address the '*differentia*' that this thesis will explore.

(a) The '*passive acceptance*' *of exemplary damages*

Critiquing modern tort theory, Cane queries theoretical calls for the abolition of common law tort doctrines that are seen not to conform with a particular unifying theoretical principle, like that of corrective justice.[66] Rarely, he notes, are tort law's most 'erroneous' doctrines recent additions to its positive legal content. In many cases, their roots lie very deep at common law.[67] For this reason, Cane calls for caution in response to distinctly theoretical calls for tort doctrines – like that of exemplary damages – to be 'cast into categorical hell'.[68] Characteristically, these calls tend to involve what he describes as a 'passive acceptance of received legal categories'.[69] As part of this passive acceptance, modern tort theorists often insufficiently appreciate that many of modern tort law's most controversial doctrines have, as Cane puts it, 'resulted from the operation of pluralistic and (relatively) uncoordinated processes over long periods of time'.[70]

By adopting a longer critical perspective, this thesis strives to show that the modern legal category of exemplary damages is one that modern tort theorists – corrective justice theorists in particular – have tended to passively accept. In calling for its complete abolition, it is suggested that corrective justice theorists passively accept that awards of exemplary damages have always been made as part of a positivist practice of tort law adjudication with which modern tort lawyers are familiar.

ii. Exemplary damages and the positivist adjudicative paradigm

In modern English tort actions, exemplary damages are awarded as part of a positivist practice of adjudicating tort actions. This means that, in each case, the award of exemplary

[66] Peter Cane, 'General and Special Tort Law: Uses and (Abuses) of Theory' in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (Bloomsbury Publishing 2007) 28.
[67] ibid.
[68] ibid.
[69] ibid.
[70] ibid.

damages is predicated on a trial judge determining whether the applicable doctrine as to exemplary damages applies to the facts of the case.[71] Since 1964, English judges have administered the revised common 'law' as to exemplary damages as laid down by Lord Devlin in his judgment in *Rookes*. Where a tort plaintiff's claim is tried by judge alone, the trial judge decides whether to apply Lord Devlin's doctrine of exemplary damages to facts about the defendant's tortious wrong.

In England, juries continue to be empanelled in a limited number of civil tort actions.[72] Where a plaintiff's claim is tried by judge and jury, the trial judge tells the jury as much about Lord Devlin's *Rookes* doctrine as is necessary for them to apply it to the facts. After the judge properly lays it down, it is for the jury – in their sole discretion – to decide whether the doctrine of exemplary damages applies to facts about the defendant's tortious wrong that they find to have been proved by the plaintiff's evidence.[73] If the jury decides that the doctrine does apply, they must then assess the quantum of a distinctly punitive award to be given over and above compensatory damages.

(a) Historically challenging the positivist paradigm

In criticizing the doctrine of exemplary damages, it is suggested that modern tort theorists presuppose that a tort defendant's punishment has always been administered as part of a positivist practice of adjudicating tort actions. From the modern corrective justice standpoint, when modern judges determine that the doctrine of exemplary damages applies to proven facts about tortious wrongdoing, they fail to fulfil the adjudicative demands that a normatively coherent understanding of modern tort law's constitutive doctrines makes possible. A correct understanding of those demands shows that tort law adjudication has no room for a tort defendant's punishment. For corrective justice theorists, the fact that the (anomalous) doctrine of exemplary damages has a long history of application at common law is irrelevant. Regarding the place of punishment in historical tort, Beever suggests that

[71] Note the Civil Procedure Rules 1998, 16.4(1)(c), requiring a plaintiff who seeks exemplary damages to make a statement to that effect, as well as her grounds for claiming them, in his or her particulars of claim.
[72] See Supreme Court Act 1981, s 69: where an English tort plaintiff's claim is 'in respect of libel, slander, malicious prosecution or false imprisonment . . . the action shall be tried with a jury'.
[73] On the modern jury's role in assessing exemplary damages post-*Rookes v Barnard*, see Andrew Tettenborn, 'Punitive Damages – A View from England' (2004) 41 SanDieg L Rev 1551, 1568–70.

modern corrective justice tort theorists have 'good reason to doubt the traditional wisdom of the common law in this area'.[74]

This thesis sets out to challenge the prevailing positivist paradigm outlined above. It seeks to show that, in tort law's longer and less familiar past, the practice of awarding exemplary damages in aggravated tort actions operated very differently from that of the present. Moreover, it was undergirded by very different assumptions. Ultimately, a deeper understanding of this historical adjudicative tort practice will show modern tort theorists in particular that the common law's 'traditional wisdom' in awarding exemplary damages in tort actions was quite different from what they assume.

In opening up a new critical perspective, this thesis sets out to explore the practice of extra-compensatory, distinctly punitive, tortious recovery at historical common law through a particular prism. Writing in 1965, the American punitive damages scholar, James D Ghiardi,[75] declared exemplary damages 'indigenous only to the Common Law'.[76] His use of the adjective 'indigenous' is striking. It suggests that the award of exemplary damages – however controversial in more modern times – is to be understood as occurring naturally within, or deeply connected to, the common law as a distinctive legal tradition and, indeed, culture.

C. The Critical Prism of Trial by Jury

In his influential book, *A Natural History of the Common Law*, the great English legal historian, SFC Milsom, declared it 'a fact central to the development of the common law' that unabated until the middle of the nineteenth-century, '*all* tort actions were tried by jury'.[77] This thesis critically explores the pre-*Rookes v Barnard* practice of extra-compensatory, distinctly punitive, recovery through the prism of the English common law

[74] Beever, 'Aggravated and Exemplary Damages' (n 8) 93.
[75] See, for example, James D Ghiardi and John J Kircher, *Punitive Damages: Law and Practice* (Clark Boardman Callaghan 1981).
[76] James D Ghiardi, 'Should Punitive Damages be Abolished! – A Statement for the Affirmative' (1965) 311 FacPubPaper 282, 283.
[77] SFC Milsom, *A Natural History of the Common Law* (CUP 2003) xiii. (Emphasis added).

jury's adjudicative province in civil tort actions. It suggests that the full extent of the normative role that the English civil jury served at the remedial stage of common law tort actions represents an important way in which the practice of adjudicating tort actions operated differently in tort law's longer past, including the very different assumptions that undergirded it.

i. The jury's remedial province of adjudication

According to Plucknett, with the emergence of the general writ of trespass in the thirteenth-century, 'jury trial almost immediately became normal'.[78] During the earliest centuries of tort law's existence, however, the English jury was that of the medieval locality. Under the medieval conception of civil tort trial by jury, jurors were knowledgeable local folk.[79] At least in theory, they were expected to collectively know the facts necessary to determine a tort defendant's liability to pay the plaintiff damages, as well as assess the amount of the plaintiff's damages award.[80]

Over time, however, the ability to summon jurors from outside the localities where tortious wrongs were committed, coupled with increased reliance on formal witness testimony, undermined the basic medieval conception of jury trial as a mode of local proof. This gradually caused the English jury to shed its former, essentially testimonial, adjudicative role and evolve into its modern recognizable institutional form. By the eighteenth-century, trial by jury had substantially become a matter of unknowledgeable jurors collectively judging evidence presented to, and tested before, them in open court.[81] The earliest historical period examined in this thesis captures the English jury during the latter stages

[78] TFT Plucknett, *A Concise History of the Common Law* (Lawbook Exchange 2001) 130.

[79] On the testimonial conception of the English jury's late medieval function being largely theoretical and in tension with practice, see Mike Macnair, 'Vicinage and the Antecedents of the Jury' (1999) 17 L&Hist Rev 537, 537–590. On the competing modes of medieval proof, see James B Thayer, 'The Older Modes of Trial' (1891) 5 Harv L Rev 45, 45–70.

[80] ibid 537–538.

[81] The late medieval English jury's institutional transition is beyond the purview of this thesis. For two concise historical accounts, see John Marshall Mitnick, 'From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror' (1988) 32 Am J LegH 201–235; Stephen C Yeazell, 'The New Jury and the Ancient Jury Conflict' (1990) UChi L For 87–117.

of this evolution, and which by the time of the *North Briton* cases, was essentially complete.

(a) A historically '*non-positivist*' *remedial practice*

Writing in 1919, the American jurist, Ralph S Bauer, opined that '[t]he strongest objection to the doctrine of exemplary damages, independent of statute, is that it has no positive basis in the early common law'.[82] As outlined above, according to the settled historical narrative, the award of exemplary damages was first given a 'positive basis' at common law by Pratt CJ in his famous successive decisions in *Huckle* and *Wilkes* 1763.

By critically exploring the historical period before Michaelmas Term 1763 through the prism of the jury's evolving adjudicative role at the remedial stage of historical tort actions, this thesis suggests that perhaps too much has been made of Pratt CJ's decisions in the emergence of the award of exemplary damages. As a means of subjecting aggravated tortious wrongdoers to especially harsh treatment, extra-compensatory punitive principles may have influenced the remedial outcomes of tort cases decided well before the third quarter of the eighteenth-century. Yet, to the extent exemplary damages were awarded before the *North Briton* cases, English juries did not award them within a familiar positivist adjudicative practice grounded in the consistent and impartial judicial administration of positive damages doctrines by judges. Instead, they were awarded within a 'non-rule-based' province of tort law adjudication – one, indeed, that was seen as belonging fundamentally to the jury.

Against this pre-*North Briton* background, new questions can be raised about the extent to which Pratt CJ's decisions in 1763 really did have the effect of situating the seemingly pre-existing award of exemplary damages on a positive legal basis. Indeed, the prism of trial by jury allows the decisions of *Huckle* and *Wilkes* cases to be critically recast. Their true significance, it is suggested, may not lie not in the common law's positive recognition of a 'formal legal doctrine' of exemplary damages. Properly understood, Pratt CJ's intervention in the *North Briton cases* served to limit the common law judges' legal-

[82] Ralph S Bauer, *Essentials of the Law of Damages* (Callaghan & Co 1919) 120.

doctrinal authority over a jury's remedial judgment. Indeed, for a very long time after 1763, the subjection of aggravated tortious wrongdoers to especially harsh treatment appears to have continued to occur within the jury's proper – indeed, even constitutional – province of tort law adjudication. Within this province, the normative principles according to which the relationship between tort plaintiff and tort defendant was rebalanced was fundamentally a matter for the jury.

(b) Towards a positive basis at common 'law'

According to the critical historical perspective put forward in this thesis, the modern doctrine of exemplary damages was not given a 'positive basis' by any single act of adjudication by a common law court. Instead, the modern legal emergence of exemplary damages is better understood in terms of an adjudicative practice that became, to use Weinrib's phrase, 'ensconced in positive law'[83] in a haphazard and protracted way.

This historical process, however, has not been very closely examined. As part of this process, it suggested that – as a modern doctrine of civil remedies – exemplary damages did not properly emerge until the 'century of positivism'.[84] It was not until the second half of the nineteenth-century that decisions to respond punitively to aggravated tortious wrongs showed signs of becoming 'judicialized' – that is to say, brought within the purview of a judicially administered body of legal doctrines of civil recovery. It was during this largely unexplored period when, as Gordon puts it, 'the ideal of the rule of law as primarily enforced by judges through an autonomous legal order was at its peak of influence'.[85] Significantly, it is this later nineteenth-century civil damages doctrine that modern corrective justice tort theorists have 'received', and whose abolition they continue to advocate.

Yet, as this thesis will ultimately seek to show, even beyond the second half of the nineteenth-century, the English jury continued to play a very important adjudicative role at the remedial stage of tort actions. Indeed, up and until *Rookes* was decided in 1964,

[83] Ernest J Weinrib, 'Deterrence and Corrective Justice' (2002) 50 UCLA L Rev 621, 638.
[84] Robert Cryer, '*Déjà vu* in International Law' (2002) 65 MLR 931, 942.
[85] Gordon, 'Critical Legal Histories' (n 65) 67.

English common law judiciary's legal-doctrinal authority over the jury's remedial judgment was not yet complete. This was particularly so in aggravated tort cases. Despite the emergence and increased elaboration of the modern legal doctrine of exemplary damages, well into the twentieth-century, the question of an aggravated tort defendant's full financial liability was still widely seen as a question for the adjudicative body to whom it had been entrusted for centuries – the jury.

D. Chapter Summary

This thesis comprises seven chapters.

Chapter 2 begins by examining the decision which fashioned the contemporary exemplary damages doctrine applied in modern English civil courts – *Rookes v Barnard*. It aims to illuminate the mid-twentieth-century context and contingency in which Lord Devlin fashioned his *Rookes* judgment. It focusses in particular on the effect of Professor Harry Street's recent scholarly contribution to the English law of damages upon Lord Devlin's thinking around extra-compensatory punitive recovery. In doing so, it presents his drastic restriction of the English doctrine of exemplary damages (and official recognition of 'aggravated damages') as an appellate judicial activity aimed at guiding the historical common law in retrieving its deep and enduring principle of civil recovery – '*restitutio in integrum*'. The chapter goes on to relate this judicial activity to ideas about common law adjudication that Lord Devlin expressed in extra-judicial writings before and after he delivered his judgment in *Rookes*.

Chapter 3 then enters the further 'pre-*Rookes v Barnard*' dimension of time. It examines the historical period spanning from the beginning of the seventeenth-century to Michaelmas Term 1763. As stated above, this was a period of continued institutional evolution for the jury. It challenges the claim that, before *Huckle* and *Wilkes* were decided, damages in aggravated tort cases were only ever increased in conformity with a principle of *restitutio in integrum*. In presenting this challenge, this chapter systematically accounts for how aggravated cases were litigated in actions of trespass and case, as well as explores the relationship between judge and jury in those cases where, in giving allegedly excessive

damages, juries had seemed to take account of aggravating matters. Against the background of this analysis, it calls into doubt the proposition that the remedial effect of aggravating matter upon the full extent of a tortfeasor's financial liability before 1763 was solely determined by a principle of full reparation. Acting within their proper province of tort law adjudication, in select cases juries may have applied extra-compensatory punitive principles too.

Chapter 4 proceeds linearly. It critically explores the role that the *North Briton* cases are accepted as having served in the common law's official recognition of the doctrine of exemplary damages. It challenges the widely accepted claim that the *North Briton* decisions made it 'the law' that extra-compensatory, distinctly punitive, damages could be awarded in tort actions. In fact, aggravated tortious recovery appears to have been practised no differently after 1763 than before it: the adjudicative province within which decisions about an aggravated tortfeasor's ultimate financial fate were made fundamentally belonged to the jury. This chapter suggests that Pratt CJ's role in the *North Briton* cases should be understood as having resoundingly defended this province, even assigning to it a special constitutional significance.

Chapter 5 examines the period from the turn of the nineteenth-century to 1861. It sets out to show that a legal doctrine of exemplary damages did not emerge until a long time after *Huckle* and *Wilkes* were decided. It suggests that two – distinctly nineteenth-century – causes were especially catalytic in its emergence. The first cause concerned the common law's recognition of a different method by which unsuccessful tortfeasors could take issue with the aggravated awards awarded against them – judicial misdirection. The second cause concerned the rise of a different, distinctly nineteenth-century, genre of legal literature – the legal treatise. Ultimately, it is suggested that these two factors cultivated the intellectual and procedural conditions necessary for the judicial formulation and elaboration of a common law exemplary damages doctrine that judges would administer and juries would apply in appropriate aggravated cases.

Chapter 6 explores the historical period spanning from the 1860s to Lord Devlin's judgment on damages in *Rookes* one century later. It focusses on those late nineteenth and twentieth-century attempts to elaborate a common law doctrine of exemplary damages

made by leading proponents of treatises and textbooks devoted to the laws of damages and torts. Looking back to the past, these writers primarily aimed to articulate when the law would permit an award of exemplary damages to be given, whether styled as ‘exemplary’, ‘vindictive’, or ‘punitive’. Despite these influential attempts to expound a legal doctrine of exemplary damages, the need to definitively align it, either with a compensatory or punitive principle, was not widely felt. It is suggested that this owed to the lingering conception of the question of damages, particularly in aggravated tort cases, as being inherently better suited to the collective answer of a jury rather than a judge. Indeed, it was not, in turn, until the middle of the twentieth-century that the previously hardly felt theoretical necessity to remove principles of punishment from English civil tort liability was underlined, and controversially, in *Rookes*, acted upon.

Chapter 7 concludes the thesis. It does so by setting out the critical implications of its historical findings for modern historical and theoretical accounts of the controversial exemplary damages award.

CHAPTER 2

Rookes v Barnard: *Recovering the Principle* 'Restitutio in Integrum'

A. Introduction

The 1964 decision of the House of Lords in *Rookes v Barnard*[1] ushered in the contemporary English doctrine of exemplary damages. Although it did not entirely abolish it, modern corrective justice tort theorists celebrate the court's decision as a 'fundamental development'.[2] '[T]he House of Lords', says Weinrib, 'unequivocally repudiating punitive damages as anomalous, restricted their scope to the minimum allowed by precedent'.[3] It is said, in turn, that 'the common-law jurisdiction whose attitude regarding punitive damages comes closest to conformity to corrective justice is England'.[4] This chapter revisits the decision of the House of Lords in *Rookes* with the aim of setting it more vividly in the context of space and time in which it was given.

The primary effect of Lord Devlin's judgment in *Rookes* was to drastically curtail the availability of extra-compensatory, distinctly punitive, damages in English tort actions. It restricted it to just three situations. In the first two, exemplary damages would only be available where a defendant's violation of a primary tort duty could fit into one of two general categories of civil wrongdoing: first, 'oppressive, arbitrary or unconstitutional action by the servants of the government';[5] secondly, where a 'defendant's conduct has

[1] AC 1129 (HL) (Lord Devlin, with whom Lord Reid, Lord Evershed, Lord Hodson, and Lord Pearce agreed); the Court of Appeal trenchantly criticized the 'categories test' in *Broome v Cassell & Co Ltd* [1971] *2* QB 354 (CA) 371–384 (Lord Denning MR). It was later affirmed by the House of Lords in *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) 1054 (Lord Hailsham).

[2] Ernest J Weinrib, *Corrective Justice* (OUP 2012) 171. For corrective justice-based approbations of *Rookes*, see Ernest J Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 FlaStU L Rev 273, 292; Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 88; Ernest J Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chi-K L Rev 55, 84.

[3] ibid.

[4] Ernest J Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44 Duke LJ 277, 294.

[5] *Rookes* (n 1) 1226.

been calculated by him to make a profit for himself'.[6] In the third situation, exemplary damages would be available whenever provided for by statute.[7] A second collateral effect of Lord Devlin's *Rookes* judgment (also commended by modern correctivists) was its official recognition of 'aggravated damages'.[8] According to Tilbury, modern aggravated damages were first formally recognized in 1964 as 'a by-product of the rationalisation of the law of exemplary damages'.[9] As a matter of principle, they fundamentally differ from exemplary damages. Aggravated damages purport to repair, not punish: they operate by increasing the quantum of damages given by way of compensation by inferring further injurious consequences from the nature of tortious wrongdoing and the circumstances surrounding its commission; for example, the infliction of a further intangible injury to a plaintiff's 'proper feelings of dignity and pride'.[10]

The inspiration of Lord Devlin's judgment on damages in *Rookes* is often singularly ascribed to Lord Devlin himself. In 2001 in *Kuddus v Chief Constable of Leicestershire Constabulary*,[11] for example, Lord Mackay spoke of '[w]hen Lord Devlin came to apply *his* general principles to the facts of *Rookes v Barnard*'.[12] This chapter contextualizes Lord Devlin's principled intervention in *Rookes*, identifying and analyzing the key contemporary influences that worked upon it. Specifically, it critically explores Lord Devlin's judgment through the prism of mid-twentieth-century common law thinking about the underlying principle of civil recovery – the principle '*restitutio in integrum*' (a total repair of all the harm done). In doing so, this chapter examines the overlooked influence on Lord Devlin's thinking of a particular contribution to the contemporary damages literature – namely, Professor Harry Street's unprecedented theorization of the proper principles for the assessment of damages in aggravated tort cases.[13] Through a judicial-scholarly exchange of ideas, this chapter argues that Lord Devlin's intervention

[6] ibid.
[7] ibid 1227.
[8] ibid 1226. Also see Weinrib, 'Civil Recourse and Corrective Justice' (n 2) 292.
[9] Michael Tilbury, 'Aggravated Damages' (2018) 71 CLP 215, 220; Tilbury argues that, properly understood, modern aggravated damages are not 'an independent head of damage' (215).
[10] *Rookes* (n 1) 1221; other non-pecuniary intangible harms which aggravated damages might repair was 'humiliation' (1226), as well 'insult' and 'pain' (1231).
[11] [2001] 2 AC 122 (HL).
[12] ibid 138. (Emphasis added).
[13] Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962).

Rookes is best understood as a determined – though carefully crafted – exercise in judicial lawmaking aimed at affirming the enduring *restitutio* principle over the English law of damages writ large. This chapter concludes by examining Lord Devlin's judgment in view of his ambivalent attitude towards the jury's contemporary assessment of damages function in tort actions.

B. A Dialogue on Aggravated Tortious Recovery

Douglas Edwin Rookes worked at London Airport as a skilled draftsman. He was employed by the British Overseas Airways Corporation. During his employment, he had been a member of the Association of Engineering and Shipbuilding Draughtsmen, a trade union. Rookes became dissatisfied with the union's representation, which caused him to revoke his membership and refuse to ever re-join. Pressured by the local union branch, Rookes' employer responded by initially suspending him, then terminating his employment. Aggrieved, Rookes brought an action for damages against three local union officials, including the local branch chairman, Alfred James Barnard.[14] His claim was grounded in tort.[15] The trial of Rookes' claim came before Sachs J and a jury in the Queen's Bench Division of the High Court on the 24th of April 1961.[16] Judgment was given for Rookes with undifferentiated damages in the sum of £7500. The defendants appealed.[17] Appearing for the appellants was the advocate of the age 'who seemed most to epitomise progress'[18] – Mr Gerald Gardiner QC. Among the grounds of the defendants' appeal was that Sachs J had erred in concluding that the doctrine of exemplary damages applied to facts about the defendants' conduct. In argument in the House of Lords, Gardiner

[14] The second and third defendants, respectively, were Reginald John Silverthorne (the union's divisional organiser), and Trevor John Fistal (the union's shop steward at London Airport).

[15] The tortious grounds were: 'unlawful means to induce the corporation to terminate its contract of service with him, and/or conspiring to have him dismissed by threatening the corporation with strike action by members of the union if he were retained': *Rookes v Barnard* [1963] 1 QB 623 (CA) 624.

[16] *Rookes v Barnard* [1961] 2 All ER 825.

[17] The primary ground of the defendants' appeal was that Sachs J had erred in concluding that the defendant's conduct constituted the torts of inducing breach of contract and intimidation, see (n 15).

[18] Geoffrey Robertson, *The Justice Game* (Random House 2011) 11.

submitted: 'The jury should not have been directed that they were bound to award exemplary damages'.[19]

i. Professor Street's new book on damages

Their Lordships sat to hear argument in *Rookes* on the 1st of July 1963. In August 1962 – less than a year before – a new book on damages was published with Sweet and Maxwell. It was entitled *Principles of the Law of Damages*.[20] Its author was the then Professor of English Law at the University of Manchester – Harry Street. Street's foray into the subject of civil recovery signalled a new direction in a well-established academic career.[21] His scholarly interest in the law of damages appears to have been aroused in the late 1950s. As Street's memoirist, JC Smith, recounted: 'During the 1950s, the Harvard Law School was in the habit of inviting an English law teacher each year to be visiting professor'.[22] In 1957-58, an invitation was extended to Street. In addition to seminars on tort and administrative law, during his visit, he gave a seminar on tort and contract damages.

(a) A different scholarly contribution to the subject

Street's fresh contribution to a subject 'less well-served by legal writers'[23] was a timely one. John D Mayne's mid-nineteenth-century treatise on damages was now over one hundred years old. In Street's blunt assessment, a new twelfth edition was 'badly needed'.[24] That need – 'a well written and comprehensive treatise on the whole subject'[25]

[19] *Rookes* (n 1) 1159; as Lord Devlin characterized it: 'The cardinal feature of the summing-up on this part of the case was a direction to the jury that they might (Mr. Gardiner submits that it amounted almost to "must") award exemplary damages' (1220).
[20] See (n 13).
[21] John AG Griffith and Harry *Street, Principles of Administrative Law* (Stevens & Sons 1951). Also see Harry Street, *The Law of Torts* (Butterworths 1955), where Street strove to rectify some of the deficiencies in each of Pollock, Salmond, and Winfield's classic torts treatises. For the novelty of Street's undertaking in the regard, see Wolfgang G Friedman (1957) 57 Col L Rev 145, 145.
[22] JC Smith, *Harry Street 1919–1985*, vol 72 (Proceedings of the British Academy 1986) 483.
[23] JA Jolowicz (1963) 21 CLJ 144, 145. Also see CP Harvey (1962) 25 MLR 375, 377.
[24] Street, *Principles of the Law of Damages* (n 13) v; fifteen years had elapsed since the County Court judge William G Earengey's eleventh edition, see WG Earengey, *Mayne on Damages* (11th edn, Sweet & Maxwell 1946).
[25] Jolowicz (n 23) 144.

– had been met a year before the publication of Street's book; in August 1962, the young Scottish advocate, Harvey McGregor QC, had inherited the editorship of Mayne's treatise from the judge, William G Earengey.[26] '[I]n place of the unloved Mayne',[27] McGregor single-handedly produced the twelfth edition.

Unlike McGregor, however, Street did not intend his book to be a treatise on damages, much less a practitioner's text. According to Burrows, Street's title was deliberately chosen. Its aim was to 'make people sit up and think'.[28] Many did. In 1963, Waller announced with enthusiasm: 'this is a book of principles'.[29] In the preface, Street acknowledged that were areas of the subject where the case law is 'reasonably certain'.[30] Street deliberately eschewed the more certain areas of the subject. As he described it, the essential aim of his book was 'to make a more detailed examination' of select topics 'where nothing previously has been written'.[31] As Waller noted, Street's different approach was marked by what previous treatments of the subject lacked – 'polite, lucid but often devastating criticism of judicial, professional and academic views'.[32]

Early reviewers were quick to discern the differences between McGregor and Street's contributions to the same subject. In a 1963 review published in the *Cambridge Law Journal*, JA Jolowicz wrote: *'Mayne & McGregor* tells the reader what the law is. Street tells him, as often as not, what is wrong with it'.[33] Jolowicz's prediction was that McGregor's authoritative exposition would become 'an indispensable part of the furnishings of chambers in the Temple'.[34] Street's critical appraisal, Jolowicz noted, more strongly communicated the academic English lawyer's disinclination 'to accept what the cases offer uncritically'.[35]

[26] Harvey McGregor, *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961).
[27] Jolowicz (n 23) 144.
[28] Andrew Burrows, 'Damages and Rights' in D Nolan and A Robertson (eds), *Rights and Private Law* (Bloomsbury Publishing 2011) 276.
[29] PL Waller (1963) 4 MULR 288, 288.
[30] Street, *Principles of the Law of Damages* (n 13) v.
[31] ibid. For Street's novel discussion of actuarial techniques for the assessment of damages, see William Phillips (1962) 88 JInstAct 253–255.
[32] Waller (n 29) 288.
[33] Jolowicz (n 23) 145.
[34] ibid.
[35] ibid.

During his early rise, first as a barrister, and then as a judge, Lord Devlin remained close to academic law. In 1926, his former law teacher at Cambridge, AL Goodhart, took over the general editorship of the *Law Quarterly Review*.[36] While a young barrister at Gray's Inn, Lord Devlin served under Goodhart as a contributing editor.[37] Following a successful commercial practice, Lord Devlin was appointed a judge of the King's Bench Division of the High Court in 1948. In January 1960, he was appointed a Lord Justice of Appeal; in October 1961, he was raised to the House of Lords.[38] For JD Feltham, writing in 1963, Lord Devlin was the consummate academic judge. '[I]n his judicial opinions and in his published works', Feltham observed, 'he has never been unwilling to look beyond particular cases to the broader principles of law operating in particular fields'.[39] Lord Devlin's opinion in *Rookes* was the very last he gave before his unexpectedly early retirement. The House's judgment was delivered on the 21st of January 1964. Lord Devlin was 58.[40]

ii. Street's figuring in *Rookes*

As counsel for the appellants, Gardiner led argument on the issue of exemplary damages in the House of Lords in July 1963. He submitted that '[t]here is something called exemplary damages, which has been awarded for some 200 years'.[41] Such damages were

[36] Tony Honoré, 'Devlin, Patrick Arthur, Baron Devlin (1905–1992)' in *Oxford Dictionary of National Biography* (OUP 2004, online edn Jan 2012) <www.oxforddnb.com/view/article/50969> accessed 10 August 2019.
[37] ibid.
[38] As Lord Neuberger states, '[f]rom the 1950s, relations between judge and professor had taken on an entirely different, more honest, sensible and constructive, complexion', see Lord Neuberger, 'Judges and Professors – Ships Passing in the Night?' (2013) 77 RabelsZ CIPL 233, 244.
[39] JD Feltham (1963) 4 MULR 158, 158; see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 528 where Lord Devlin cited Percy H Winfield, *Pollock's Principles of Contract* (13th edn, Stevens & Sons 1950) 140. As to the defendants' liability in *Rookes*, Lord Devlin also cited the general editor of the *Cambridge Law Journal*, Professor Hamson's running commentary of the case, see *Rookes* (n 1) 1206–77; CJ Hamson, 'A Note on *Rookes* v. *Barnard*: Intimidation – Joint Tortfeasors – Trade Disputes Act, 1906' (1961) 19 CLJ 189.
[40] Honoré, 'Devlin, Patrick Arthur' (n 36).
[41] *Rookes* (n 1) 1163.

generally available 'for outrageous conduct'.[42] That being said, Gardiner conceded that the case law disclosed 'no apparent reason why exemplary damages are allowed in some cases and not in others'.[43]

(a) Reference to Street's book in argument

Gardiner also added that exemplary damages were '[u]nlike any other damages'.[44] What was different about them, he argued, was '[they are] not compensatory but punitive'.[45] In developing this argument, Gardiner referred their Lordships to an English legal scholar's recent contribution to the debate – 'Professor Street in Principles of the Law of Damages (1962)'.[46] For Street, the principles governing the recovery of damages in aggravated tort cases was an area of the subject that lacked reasonable certainty. As part of his principled approach to the problem, he forged a distinction between aggravated and exemplary damages: aggravated damages were to be aligned with a principle of compensation; exemplary damages, with a principle of punishment. In argument, Gardiner specifically referred their Lordships to the sharp cleavage Street had created 'between aggravated and exemplary damages'.[47] Street's insistence that aggravated damages were to be treated as conceptually distinct from exemplary damages was novel. It was the subject of disagreement between counsel in *Rookes*.

[42] McGregor's 1961 treatise (which Gardiner did not refer to in argument) suggested a rather wider application: 'They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or . . . where he acts in contumelious disregard of the plaintiff's rights'; McGregor, *McGregor on Damages* (n 26) 196–197.

[43] *Rookes* (n 1) 1162.

[44] ibid 1164.

[45] ibid.

[46] ibid 1163.

[47] ibid. Notably, McGregor's treatise was only cited in argument by plaintiff's counsel, and only to show that parliament had sanctioned exemplary damages: 'Parliament accepts the existence of exemplary damages as something additional which can be awarded because the defendant behaved badly', see *Rookes* (n 1) 1162; Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s 13(2), see McGregor, *McGregor on Damages* (n 26) 196, 199, 200.

*(b) The '*aggravated-exemplary*' distinction argued*

Counsel for the plaintiff, Mr Samuel Silkin QC, for example, conceived exemplary damages as synonymous with aggravated damages. 'Aggravated damages', he told their Lordships, 'have two aspects'.[48] In their first aspect, aggravated damages function as 'a fine, with a punitive effect on the defendant'.[49] In their second aspect, they function as 'a recompense for the plaintiff's hurt feelings'.[50] As to the availability of exemplary damages, Silkin stated that they 'can be awarded in the majority of actions . . . including whether the conduct complained of was obnoxious and pursued unscrupulously'.[51] Lord Devlin interjected. He asked Silkin if all 'deliberate torts, and indeed breaches of contract, are unscrupulous',[52] and if so, whether they would 'all involve exemplary damages?'[53] Silkin's response was direct, though perhaps not to Lord Devlin's satisfaction:

> Exemplary damages can be awarded; *non constat* that they have to be. It is for the jury to assess the degree to which the various adjectives of wilful, contumacious, malicious, unscrupulous, etc., are applicable to each case.[54]

Yet, as Lord Devlin later recalled in his judgment, it was on damages that counsel had engaged their Lordships in a 'very penetrating discussion about the nature of exemplary damages and the circumstances in which an award is appropriate'.[55]

(c) Street and Lord Devlin on the question of damages

Whether it was Gardner who first brought Street's book to Lord Devlin's attention cannot be known for certain. It is significant, however, that Lord Devlin had already weighed on contemporary debates regarding damages whilst a trial judge. He had done so in the eighth Hamlyn Lecture, which he delivered in 1956. Entitled 'Trial by Jury', Lord Devlin's aim was to, in his words, 'lay bare the workings of the jury system as it exists in England to-

[48] ibid 1160.
[49] ibid.
[50] ibid.
[51] ibid.
[52] ibid 1160–61.
[53] ibid 1161.
[54] ibid.
[55] ibid 1220.

day'.[56] In chapter 6, however, Lord Devlin expressed concerns about the jury's traditional role in the assessment of tort damages. He bemoaned the fact that a defendant's financial liability too often depended on a jury's '"value judgment" in the literal sense of the word'.[57] In his view, this had contributed to undesirable disparities in the awards given in similar cases, involving similar harms. Lord Devlin's proposed solution in chapter 6 was to subject the jury's assessment of damages function to stricter judicial controls.

It was a controversial solution. In his book on the subject, Street delivered a sustained critique of what he described as Lord Devlin's 'scholarly defence'[58] of a far more controlling judiciary vis-à-vis the jury's adjudicative function of settling the question of damages. Street's main concern was that, by strengthening the judiciary's controls, individual awards of tort damages would no longer truly reflect 'society's attitudes'.[59] In spite of familiar problems of fluctuation, Street's firm view was that the 'proper function'[60] of assessing damages was for 'juries, not judges'.[61]

(d) Lord Devlin's ultimate reference to Street in Rookes

Evidently, therefore, Street and Lord Devlin did not agree on all aspects of the subject of damages. They did agree, however, that the question of recovery in aggravated tort cases was one of its most under-theorized dimensions, and that principled reform was long overdue. One of Lord Devlin's close Cambridge acquaintances, CJ Hamson,[62] noted that in writing his judgment in *Rookes* Lord Devlin 'had the advantage of Professor Street's

[56] Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons 1956). All references to curial and extra-curial writings, both before and after Lord Devlin became a peer in October 1961, are to 'Lord Devlin'.
[57] ibid 143.
[58] ibid. On the scholarly quality of Lord Devlin's discourse on jury trial in England, see HA Hammelmann (1957) 20 MLR 515, 515–517.
[59] ibid 12.
[60] ibid 6.
[61] ibid. Street's view had enjoyed wide judicial support, see *Beeston v Harland and Woolf* (1946) 91 L1 L Rep 556, 560 (Croom-Johnson J), describing judges as 'an unsatisfactory tribunal' for assessing damages. In the Court of Appeal, see *Bocock v Enfield Rolling Mills Ltd* [1954] 1 WLR 1303 (CA) 1305 (Singleton LJ, with whom Morris and Denning LJJ agreed): 'a judge sitting by himself is not in as good a position to assess damages as are twelve members of a jury'.
[62] Charles J Hamson (1974) 33 CLJ 1, 6: 'When I was still reading the Classics, I made the acquaintance of one Patrick Devlin. He is a year my academic senior, but, as I have had occasion in the past to remind him, he is in fact two days younger than me'.

recent work, to which he referred appreciatively'.[63] Significantly, Street's was the only scholarly work on damages that Lord Devlin cited. His specific choice of citation, however, was curious. Lord Devlin did not credit Street for having intervened in an area of English common law 'less guided by authority laying down definite principles than on almost any other'.[64] His citation was more circumspect. He only credited Street for his succinct account of the origins of exemplary damages at common law: 'The history of exemplary damages is briefly and clearly stated by Professor Street in his recent work on the law of damages at page 28'.[65]

Page 28 was part of chapter 2 of Street's book. It was entitled 'A Vocabulary of the Law of Damages'.[66] In it, Street aimed to provide 'succinct explanations of the various adjectives with which lawyers prefix the word 'damages''.[67] Street introduced the adjective 'exemplary' at page 28 of chapter 2. The introduction to which Lord Devlin 'appreciatively' referred was as follows:

> In a series of eighteenth-century cases complaining of arbitrary interference by public officials with the private rights of citizens – especially those arising out of governmental attempts to stifle Wilkes' publication of the *North Briton* – awards of damages far in excess of the material harm caused by the trespasses were awarded by juries. Often the courts justified these awards by regarding them as "aggravated damages" which were to compensate the plaintiff for the insult and distress resulting from the circumstances of the trespass. However, in 1763, Lord Camden justified one of these [aggravated damages] awards as "exemplary damages" in a judgment which implied that the award was not solely based merely on compensation to the plaintiff for his humiliation and affronted dignity.[68]

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[63] Charles J Hamson, 'A Further Note on *Rookes v Barnard*' (1964) 22 CLR 159, 176.

[64] *Admiralty Commissioners v SS Susquehanna* [1925] P 196 (CA) 210 (Atkin LJ). It was with this quote that Street opened the first chapter of his book, see Street, *Principles of the Law of Damages* (n 13) 1.

[65] *Rookes* (n 1) 1224.

[66] Street, *Principles of the Law of Damages* (n 13) 14.

[67] Waller (n 29) 289.

[68] Street, *Principles of the Law of Damages* (n 13) 28–29. Street was referring to the first *North Briton* case, *Huckle v Money* (1763) 2 Wils KB 205, 207; 95 ER 768, 769 (Pratt CJ), which was where the term 'exemplary damages' first appeared in the printed cases. It was not until his penultimate year as Chief Justice of the Common Pleas that Charles Pratt was created 1st Baron Camden of Camden Place, in Chislehurst, Kent, see Peter DG Thomas, 'Pratt, Charles, first Earl Camden (1714–1794)' *Oxford Dictionary of National Biography* (OUP 2004, online edn Jan 2008) <www.oxforddnb.com/view/article/22699> accessed 3 October 2019.

As to the origins of exemplary damages, Street went on to declare at page 29: 'Since the seventeen-sixties, then, it has been the law that damages going beyond mere compensation may be awarded in tort'.[69] On the basis of Street's 'brief' and 'clear' historical account, Lord Devlin settled that exemplary damages 'originated just 200 years ago'.[70]

(e) Street on the origins of exemplary damages

It is not difficult to suppose why Street's historical account appealed to Lord Devlin. It seems to have provided Lord Devlin with a neat temporal frame within which to discuss the damages remedy now under appellate review. Following Street, Lord Devlin affirmed that exemplary damages became formally part of the common law of England in 'the *cause célèbre* of John Wilkes and the *North Briton*'.[71] According to Lord Devlin, it was in the second the *North Briton* case – *Wilkes v Wood*[72] – where the award of exemplary damages received, as he put it, its 'first explicit recognition'.[73] This occurred during Pratt CJ's summing-up of the evidence at the trial of Wilkes' claim. Lord Devlin attributed to Pratt CJ a 'direction'[74] regarding the legal bases upon which Wilkes could have his damages assessed. Before submitting the case to the jury, Pratt CJ ostensibly told them that (were they to decide in Wilkes' favour) the common 'law' now permitted them to assess his damages 'not only as a satisfaction . . . but likewise as a punishment'.[75]

Despite its brevity and clarity, Street's characterization of the origins of exemplary damages should not be seen as lacking an interpretive strategy of its own. In its interpretive aspect, Street's historical claim was that – before the *North Briton* cases – common law judges had only ever justified very large damages 'by regarding them as "aggravated damages"'.[76] As 'aggravated damages', such awards, he argued, had a historically settled rationale; their purpose had been to compensate plaintiffs for various intangible harms.

[69] ibid 29.
[70] *Rookes* (n 1) 1221.
[71] ibid 1222.
[72] (1763) Lofft 1, 98 ER 489.
[73] Street, *Principles of the Law of Damages* (n 13) 29.
[74] *Rookes* (n 1) 1222.
[75] *Wilkes* (n 72) 498.
[76] Street, *Principles of the Law of Damages* (n 13) 29.

Street gave two examples of such harms: 'the insult and distress resulting from the circumstances of the trespass',[77] and the plaintiff's 'humiliation and affronted dignity'.[78] Thus, under the wider historical interpretation that Lord Devlin referred to in his *Rookes* judgment, Pratt CJ had been portrayed as having created a new doctrine of civil remedies that set its face against the pre-1763 rationale for giving very large damages in aggravated tort cases. Indeed, as Street emphatically put it in chapter 2, the effect of the *North Briton* decisions had been to recognize an 'alien head of damages'.[79]

To properly understand Street's characterization of punishment as an 'alien' idea in the determination of tortious recovery, it is necessary to couch his account of exemplary damages within the broader argument of his book. It is to this argument – and Lord Devlin's engagement with it in *Rookes* – that the next section turns.

C. The Contemporary 'Quest' for Principle

Street's principal aim in *Principles of the Law of Damages* was to reclaim and restore the underlying principle of redress in English civil actions. This was the singular focus of his book's first chapter, which he entitled 'A Quest for General Principles'.[80] As Street had remarked in the preface, the relevant general principles were latent 'in the case law of the British Commonwealth'.[81] His aim in chapter 1 was to 'extract'[82] them.

i. The principle *restitutio in integrum*

Despite principled deviations over the centuries, Street's view was that the historical body of English judicial opinion expressed support for 'one overriding principle'.[83] He found its

[77] ibid 23.
[78] ibid.
[79] ibid 34.
[80] ibid 1.
[81] ibid.
[82] ibid.
[83] ibid 2–3.

explicit articulation in Lord Blackburn's often-cited late nineteenth-century speech in *Livingstone v Rawyards Coal Co*.[84] As Lord Blackburn remarked:

> in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong.[85]

The appeal of Lord Blackburn's statement of principle was that it embraced almost the entire suite of modern civil damages remedies: 'the function of all heads of damages', Street proclaimed, 'is to compensate the plaintiff on the principle *restitutio in integrum*'.[86] 'The exception'[87] were exemplary damages.

(a) The non-pecuniary damage dilemma

The main attraction of Lord Blackburn's formulation in *Livingstone* was its capacity to resolve an old, though often unappreciated, problem in the law of damages: this was the problem of the assessment of non-pecuniary elements of damage in matters of tort. Street lamented that the principles according to which non-pecuniary elements of tort damages had been assessed were not always clear. The problem was especially acute in aggravated tort cases.

In many cases, Street argued that the full extent of a tort plaintiff's suffering required an examination of the nature and circumstances of the defendant's wrongdoing. He gave the example of a tortious assault. In the ordinary case, Street argued that an assaulted plaintiff received damages for 'the effect on the plaintiff's mental state produced by the defendant's threats'.[88] But suppose, he added, that 'the defendant was a drunken, swearing, fifteen-stone, notorious rapist, and that the plaintiff was a delicate unaccompanied girl'.[89] These additional facts spoke to the nature and circumstances of the defendant's assault. They

[84] (1880) 5 App Cas 25.
[85] ibid 39.
[86] Street, *Principles of the Law of Damages* (n 13) 3.
[87] ibid.
[88] ibid 22.
[89] ibid 22–23.

were matters of aggravation: they indicated that – in addition to the injurious effect of the plaintiff's apprehension of immediate harmful contact on her mental state – she had suffered a further intangible injury. In such a case, Street argued that a plaintiff would be entitled to additional compensatory damages; specifically, for 'insult or humiliation'.[90] With didactic clarity, Street stated that 'there are *principles* for assessing non-pecuniary elements of damage'.[91] Lord Blackburn's speech in *Livingstone* had made it clear that '[t]hese damages are to be compensatory'.[92] '[T]hey are not punitive'.[93] In aggravated cases, therefore, increasing a tort plaintiff's award would need to be measured strictly 'in relation to the various effects which they [the aggravating matter] produce on the plaintiff'.[94]

(b) Non-pecuniary elements giving rise to '*aggravated damages*'

In chapter 2, Street went on to formally introduce the pre-fix 'aggravated' into his revamped damages vocabulary. In doing so, Street's purpose was to make the case the recognition of – compensatory – 'aggravated damages' as a 'new term of art'[95] in the law of damages. Nevertheless, as Silkin's argument in *Rookes* made clear,[96] in their working damages vocabulary, English civil lawyers often used the terms 'exemplary' and 'aggravated' interchangeably.[97]

For Street, it was this tendency that could explain the unprincipled way in which common law courts traditionally responded to matters of aggravation through the medium of damages. Where tort plaintiffs had suffered intangible harms ('insult', 'distress', 'humiliation' and 'affronted dignity'), they often received extra-compensatory, distinctly punitive, damages. This was because the aggravated conduct that typically inflicted these

[90] ibid.
[91] ibid 6. (Original emphasis).
[92] ibid.
[93] ibid.
[94] ibid.
[95] ibid 24.
[96] See (n 51).
[97] So had senior appellate judges, see, for example, *The Mediana* [1900] AC 113 (HL) 118 (Lord Halsbury LC): 'I put aside cases of trespass where a high-handed procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages'.

further intangible harms could often be described using adjectives like 'wilful, contumacious, malicious, unscrupulous',[98] and the like. Indeed, as pre-1964 aggravated tort cases show, where such 'epithets'[99] could be used to described aggravated tortious wrongdoing, judges tended to conclude that damages of an exemplary nature were available.[100]

For Street, making the case for the separate recognition of 'aggravated damages' was important. In order to do so, however, he recognized that it would not be sufficient to simply posit an 'essential formal distinction'[101] between aggravated (compensatory) damages and exemplary (punitive) damages. Rather it would also be necessary to ground his 'compensation-based' conception of 'aggravated damages' in the common law's historical experience. To this end, Street set out to make good the following proposition in chapter 2: 'For at least two hundred years, aggravated damages have been given for trespasses which have inflicted insult or humiliation upon the plaintiff'.[102]

(c) Antecedents of '*aggravated damages*' *(for insult or humiliation)*

In order to make good this proposition, Street made passing reference to a number of historical tort cases,[103] one of which was the early Victorian libel case of *Goslin v Corry*.[104] In a public advertisement, the defendant had accused the plaintiff of being a fraud. The

[98] See (n 54).
[99] *Rookes* (n 1) 1229.
[100] See, for example, Lord Devlin's trial direction in *Loudon v Ryder* [1953] 2 QB 202 (CA) 203 telling the jury that they could apply exemplary damages to make 'quite clear what view you took of a wanton and wilful disregard of the law, or for somebody else's rights'. In *Rookes*, Sachs J's direction to the *Rookes* jury was 'that any deliberate illegality might be punished by exemplary damages', see *Rookes* (n 1) 1130. Also see (n 40).
[101] Street, *Principles of the Law of Damages* (n 13) 30. Formally stated, the distinction was as follows: 'aggravated damages purport to measure harm – however intangible – to the plaintiff, whereas exemplary damages are related solely to the defendant's conduct' (30).
[102] ibid 6.
[103] By way of footnote, Street also cited the following historical tort cases: *Bruce v Rawlins and others* (1770) 3 Wils KB 61, 95 ER 934; *Chamberlain v Greenfield* (1773) 3 Wils KB 292, 95 ER 1061; *Forde v Skinner* (1830) 4 Car & P 239, 172 ER 687, see ibid 23. The specific formulation 'aggravated damages' appears to have been first used by Pollock CB in the trespass to the person case of *Clark v Newsam and Edwards* (1847) 1 Ex 131, 140; 154 ER 55, 59: 'In such case the plaintiff ought to select the party against whom he means to get aggravated damages'.
[104] (1844) 7 Man & G 342, 135 ER 143.

advertisement also offered a monetary reward to anyone who could procure the plaintiff's arrest. Street thought it particularly significant that, in his summing-up of the case, the trial judge did not explicitly tell the *Goslin* jury to discount the fact that the plaintiff had been ultimately arrested when assessing damages.[105] Significantly, the term 'aggravated' did not appear in the report.[106] For Street, however, this did not mean that the plaintiff did not receive 'aggravated damages': based on the jury's ultimate award of £50 damages, it could be reasonably supposed that the jury had accounted for more harm than the plaintiff's mere reputational injury.[107] According to Street's interpretation of the case, the *Goslin* jury had seemed to compensate the plaintiff for 'the insult and distress'[108] that his ultimate arrest had further caused him to suffer.[109] Although often not referred to as such, Street concluded that 'aggravated damages' for various intangible harms had unmistakeably formed part of historical tort awards.

Yet, as his introduction of the adjective 'exemplary' on page 28 showed, Street's view was not simply that aggravated damages were historically well-founded: their common law roots also ran much deeper than those of exemplary damages.[110] Indeed, it was from aggravated (compensatory) damages, Street argued, that in the early 1760s exemplary (punitive) damages originally sprang. According to Street's wider historical interpretation, it was expedient to portray the 'alien' award of exemplary damages as a late 'excrescence'[111] from the far more enduring and – until 1763 – formerly 'unrestricted principle of *restitutio in integrum*'.[112]

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[105] ibid 145 (Cresswell J).

[106] The term did not appear in *Forde* (n 103) either, where the court accepted that if the defendant's action was a 'degradation, and not with a view to cleanliness . . . will be an aggravation, and go to increase the damages' (687). The term 'degradation' might suggest the jury may have aggravated their award because of a further intangible injury on the plaintiff. The *Forde* jury gave large damages of £60.

[107] Although the terms 'aggravates' and 'aggravate' appear in *Bruce* (n 103) 935, and *Chamberlain* (n 103) 1063, there is no explicit mention that the damages to be given were for intangible harms, like insult, humiliation, and the like.

[108] Street, *Principles of the Law of Damages* (n 13) 24.

[109] ibid.

[110] See (n 68).

[111] The phrase was famously used by New Hampshire's Foster J in a passage reflecting on how exemplary damages came to be recognized at common law, see *Fay v Parker*, 53 NH 342, 16 Am Rep 270 (1872), 270.

[112] Street, *Principles of the Law of Damages* (n 13) 6.

ii. Lord Devlin joins the principled quest

At any rate, it was with the benefit of what Waller described as Street's 'new solutions for old (and sometimes unrealized and unappreciated) problems',[113] that Lord Devlin got to work on his judgment in *Rookes*. His sense of the appellate occasion is indicated in the very first paragraph of his judgment on damages.

(a) A judicial return to first principles

Referring to the defendants' appeal against Sachs J's direction on damages, Lord Devlin emphasized: 'The Court of Appeal, having found for the Respondents on liability did not consider this issue'.[114] Because Sellers, Donovan and Pearson LJJ had not considered the legal accuracy of Sachs J's direction to the *Rookes* jury regarding damages, Hamson believed that Lord Devlin was inclined to regard the defendants' appeal on damages as '*primae impressionis*'.[115] Indeed, Lord Devlin's invitation to the other Law Lords who sat on the appeal was to 'begin at the beginning'.[116] Evidently, the 'beginning' meant a return to first principles. As Lord Devlin remarked:

> Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law.[117]

Engaged in an appellate exercise of common law adjudication, it was inevitable that Lord Devlin would root his discussion in precedent as much as principle. Nonetheless, standing

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[113] Waller (n 29) 288.

[114] *Rookes* (n 1) 1221; *Rookes* (n 13) 675 (Sellers J): 'Unusual praise was given by counsel to the judge's summing-up, to which little reference has been made and to which I do not further refer as no question of damages now arises for consideration'.

[115] Hamson, 'A Further Note on *Rookes*' (n 63) 176.

[116] *Rookes* (n 1) 1221.

[117] ibid. Lord Devlin's account of the 'object of exemplary damages' was suspiciously similar to the 'objects of exemplary damages' Street had enumerated in chapter 2: '"Exemplary damages" will often witness the court's desire to make an example of the defendant, to deter others from committing the same wrong, to make the court's condemnation of the defendant's misbehaviour', see Street, *Principles of the Law of Damages* (n 13) 33.

in the way of a legitimate judicial solution to the problem of damages in aggravated cases would be a previously decided case that 'may have the weight of a precedent'.[118]

(b) Exemplary damages and the problem of precedent

At the very beginning of his *Rookes* speech, Lord Devlin made what turned out to be a controversial assertion: 'There is not any decision of this House', he declared, 'approving an award of exemplary damages'.[119] Eight years later, in *Broome v Cassell & Co Ltd*,[120] it was scathingly criticized by the Court of Appeal. With what McGregor called out as 'extraordinary bravado',[121] Lord Denning MR supposed: 'If ever there was a decision of the House of Lords given *per incuriam* this was it'.[122] His accusation was that, in *Rookes*, Lord Devlin had broken the *incuria* rule – either he forgot, or worse, had ignored, previous House of Lords' decisions that were technically binding on the court.[123] According to Lord Denning MR, 'Lord Devlin must have overlooked them or misunderstood them'.[124]

After parliament amended the House of Lords' appellate jurisdiction in 1876, Lord Denning MR claimed that the court had previously approved extra-compensatory, distinctly punitive, damages. To use Salmond's vivid expression, Law Lords had 'forg[ed] fetters for their own feet'[125] on two earlier occasions: first, in 1910 in *Hulton v Jone*s[126] in a speech by Lord Loreburn LC; secondly, in 1935 in *Ley v Hamilton*[127] in a speech by Lord

[118] John C Gray, *The Nature and Sources of the Law* (2nd edn, Macmillan 1921) 261.
[119] *Rookes* (n 1) 1221.
[120] See (n 1).
[121] Harvey McGregor, 'In Defence of Lord Devlin' (1971) 34 MLR 520, 520; *Broome* (n 1) 382.
[122] *Broome* (n 1) 382. See, generally, RWM Dias, 'The House of Lords and *Per Incuriam*' (1971) 29 CLJ 187, 187: 'The award of exemplary damages had a long history'; *Morelle Ltd v Wakeling* [1955] 2 QB 389 (CA) 406 (Lord Evershed MR): 'the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned'.
[123] *London Street Tramways Co Ltd v London County Council* [1898] AC 375 (HL) 379 (Lord Halsbury): 'a decision of this House once given upon a point of law is conclusive upon this House afterwards'.
[124] *Broome* (n 1) 381.
[125] John W Salmond, *Jurisprudence* (5th edn, Sweet & Maxwell 1916) 174.
[126] [1910] AC 20 (HL) 25.
[127] [1935] 153 LT 384, 386.

Atkin.[128] Both were defamation cases. In *Hulton*, the jury found for the plaintiff with £1750 damages. A new trial was sought in the House of Lords, *inter alia*, on the ground that the jury's award was 'excessive and out of all proportion to the injury suffered'.[129] In dismissing this ground of appeal, Lord Loreburn LC had acknowledged that the jury's award was, as he put it, 'certainly heavy'.[130]

Discussing the *Hulton* 'precedent', however, McGregor was emphatically of the view that 'there is not a single mention, express or by implication, of exemplary damages throughout the speeches in the House'.[131] In turn, despite Lord Denning MR's strong protestation in *Broome*, Lord Lorebun LC's speech in *Hulton* could hardly be regarded as having previously 'approved' exemplary damages. This probably explains why Lord Devlin did not mention *Hulton* in his *Rookes* speech, much less that it was 'not open to the House'[132] to avoid the precedent that it had putatively set.

(c) Ley *and the law's problematic aggravated vocabulary*

However, Lord Atkin's speech in *Ley* was different. Indeed, as Salmon LJ later stated in *Broome*: 'exemplary damages were what *Ley v Hamilton* . . . was all about'.[133] More that *Hulton*, *Ley* could be more plausibly said to have approved the incorporation of distinctly

[128] As it turns out, seemingly extra-compensatory elements of recovery had been alluded to (though perhaps not approved) in more previous House of Lords decisions than Lord Denning MR (and Lord Devlin) supposed. See *Allen v Flood* [1898] AC 1 (HL) 79 (Lord Halsbury LC): 'exemplary damages could be recovered from a defendant who knowingly procured a servant to leave a master whom she had contracted'; *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 (HL) 304 (Lord Collins): 'I think it is not a case for exemplary or punitive as distinguished from compensatory damages'; *Neville v London Express Newspaper Ltd* [1919] AC 368 (HL) 393 (Viscount Haldane): 'I think that justice will be done if judgment . . . is entered for him for merely nominal damages, unless the jury on a new trial think that exemplary damages should be given'; *Tolley v JS Fry and Sons Ltd* [1931] AC 333 (HL) 348 (Lord Blanesburgh): 'I cannot doubt that such an allegation, if made and proved, would have amounted to a serious imputation on the honour of the appellant, and, not being justified, might well have instructed exemplary damages'.

[129] *Hulton* (n 126) 22 (Mr Craig KC).

[130] ibid 24. Lord Loreburn LC refused to interfere with the jury's award.

[131] McGregor, 'In Defence of Lord Devlin' (n 121) 520.

[132] *Broome* (n 1) 381. Counsel for the plaintiff in the Court of Appeal contended that – in both cases – the awards 'were expressly approved in terms showing that they were recognised as containing a punitive element' (367).

[133] ibid 389.

punitive elements in tort damages awards. Lord Devlin, however, was more circumspect. His circumspection is perhaps reflected by where he chose to locate his discussion of *Ley* (the only previous House of Lords case Lord Devlin referred to) in his *Rookes* judgment. Out of the twenty-two cases Lord Devlin mentioned, *Ley* was the very last that he considered.[134]

Lord Atkin's speech in *Ley* addressed difficulties regarding the assessment of damages in defamation actions. The difficulties arose from the fact that defamation awards were almost entirely made up of non-pecuniary elements. 'It is precisely because the 'real' damage cannot be ascertained and established', Lord Atkin remarked, 'that the damages are at large'.[135] In many cases, Lord Atkin accepted that damages were not only designed to, as he put it, 'track the scandal'.[136] In addition to a plaintiff's ('real') reputational injury, further non-pecuniary harm tended to also include 'the insult offered or the pain of a false accusation'.[137] It was the way that Lord Atkin had described those additional non-pecuniary elements that was striking. Courts did not, he thought, 'determin[e] the 'real' damage and add to that a sum by way of vindictive or punitive damages'.[138] In his view, '[t]he 'punitive' element' is not something which is or can be added to some known factor which is nonpunitive'.[139]

The question for Lord Devlin was whether these remarks by Lord Atkin in *Ley* had 'approved' damages of a distinctly punitive (as opposed to a compensatory) character. Lord Devlin's decision to defer any consideration of the 'precedent' in *Ley* until the end of his speech in *Rookes* no doubt expressed his own reluctance to uncritically accept the proposition for which *Ley* was thought to stand. As far as Lord Devlin was concerned, exemplary (punitive) damages were not, in fact, what *Ley* was 'all about'.[140] Although Lord Atkin had said that defamation awards often contained a ''punitive' element', Lord Devlin doubted whether Lord Atkin was actually thinking in terms of an extra-

[134] Crucially, it was mentioned after Lord Devlin set out his 'categories test' at 1226–27.
[135] *Ley* (n 127) 386.
[136] ibid.
[137] ibid.
[138] ibid.
[139] ibid.
[140] See (n 133).

compensatory, distinctly punitive, element of tortious recovery. This was borne out by the fact that Lord Atkin had supposed that awards of 'vindictive or punitive damages' intended to repair 'the insult offered or the pain of a false accusation'.[141] In support of his interpretation, Lord Devlin noted Lord Atkin's placement of the adjective 'punitive' in inverted commas. For Lord Devlin, it was a suggestive use of punctuation – a sure indication that Lord Atkin knew that he was using the term 'punitive', if not inaccurately, then certainly loosely. '"So-called punitive"', Lord Devlin asserted, 'is what I think he means'.[142] Indeed, for Lord Devlin, Lord Atkin's 1935 speech attested to an insidious problem in the case law, and that his detractors failed to appreciate. This was the pervasive judicial tendency to describe tort awards using the language of punishment, but in ways that did not reflect a clear principled commitment to punishment as opposed to compensation.[143] Casting a critical eye on the historical cases, Lord Devlin stated that it was 'not at all easy to say whether the idea of compensation or the idea of punishment has prevailed'.[144] For Lord Devlin, Lord Atkin's speech in *Ley* showed that even the House of Lords had contributed to that problem.

(d) A different judicial engagement with the past

Lord Devlin's conclusion, therefore, was that exemplary damages had not been previously approved by the House of Lords. On this basis, he was entitled to ask 'whether it is open to the House to remove an anomaly from the law of England'.[145] Much of Lord Devlin's judgment on damages in *Rookes* was an attempt to answer that question. In answering it, Lord Devlin's firm view was that no superior common law court could legitimately 'remove' a historical common law doctrine merely because it considered it anomalous at the level of principle. Fundamentally, a court would have to take its direction from all that

[141] *Ley* (n 127) 386.
[142] *Rookes* (n 1) 1231.
[143] This included uses of words that might suggest a principle of punishment informed large and aggravated awards: 'They (judges) have used numerous epithets – wilful, wanton, high-handed, oppressive, malicious, outrageous – but these sorts of adjectives are used in the judgments by way of comment on the facts of a particular case. It would . . . be a mistake to suppose that any of them can be selected as definitive, and a jury directed, for example, that it can award exemplary damages whenever it finds conduct that is wilful or wanton', see *Rookes* (n 1) 1229.
[144] ibid 1221.
[145] ibid.

the historical common law had said about it. Regarding the common law doctrine of exemplary damages, the House's first task, in Lord Devlin's view, was to determine 'how far and in what sort of cases the exemplary principle has been recognised'.[146]

Lord Devlin's use of the term 'exemplary *principle*' is striking. It suggests that, in handling the past, Lord Devlin was not prepared to have regard to a historical tort case simply because the term 'exemplary damages' appeared in the report. Indeed, as Lord Atkin's misinterpreted speech in *Ley* had shown, the language that English judges had used to describe aggravated tort awards had been normatively confused and often inconsistent; so much so, that historical uses of punitive language could not be accepted as recognitions of the 'exemplary principle'. For this reason, Lord Devlin proposed to engage rather differently with the past. His purpose, as he described, was to find 'cases in the books where the awards given cannot be explained as compensatory'.[147] As Street's book had seemed to reassure Lord Devlin,[148] the first cases in the law reports that deviated from the so-called 'compensatory principle'[149] were the *North Briton* cases. Thus, in surveying the scope of the 'exemplary principle' at common law, 1763 was where legal history started. Alongside *Huckle* and *Wilkes*, however, Lord Devlin referred to another case that had been decided in the 1760s – *Benson v Frederick*.[150] *Benson* was an aggravated action for battery. Upon a writ of inquiry, the jury found for the plaintiff with large damages of £150. However, unlike Pratt CJ's Common Pleas in the *North Briton* cases, Lord Mansfield's Court of King's Bench in *Benson* did not use explicitly punitive terms to describe the jury's award; indeed, the phrase 'exemplary damages' does not appear in the report at all.[151] In refusing to the lay aside the jury's verdict on the ground of excessive damages, the court

[146] ibid.
[147] ibid.
[148] See (n 71).
[149] *Rookes* (n 1) 1131.
[150] (1766) 3 Burr 1845, 97 ER 1130.
[151] ibid 1130. Out of the cases Lord Devlin gave in support of his second historically situated category, only in *Bell v Midland Railway Co* (1861) 10 C B (N S) 287, 307, 308; 142 ER 462, 470 (Willes J), 471 (Byles J), and *Crouch v Great Northern Railway Co* (1856) 11 Ex 742, 759; 156 ER 1031, 1038 (Martin B), was apparently punitive language used by judges to describe the basis on which the trial jury had given (or might give) damages in such a case. In *Williams v Currie* (1845) 1 CB 841, 846; 135 ER 774, 776, counsel for the plaintiff merely supposed that the defendant's 'trespass was of a very aggravated description, very injurious to the plaintiff, and committed by the defendant for his own profit'.

in banc conceded that their £150 award was 'very great'.[152] Furthermore, it had also supposed that it had gone 'beyond the proportion of what the man had suffered'.[153]

Lord Devlin thought that Lord Mansfield's supposition was correct: decided in the aftermath of the *North Briton* cases, in *Benson,* his court had repeated the same mistake of recognizing the anomalous 'exemplary principle'. For Lord Devlin, what was most significant about *Benson* was not that it was decided soon after 1763. Indeed, if time mattered, then Lord Devlin should have also mentioned the earlier 1764 tort case of *Grey v Sir Alexander Grant*.[154] Unlike in *Benson,* in *Grey*, Pratt CJ had explicitly used the phrase 'exemplary damages'[155] to describe the jury's award. Lord Devlin may have forgotten *Grey*, though it is perhaps more likely that he deliberately overlooked it.

The reason that Lord Devlin referred to *Benson* (but not ignored *Grey*) was that it linked up neatly with *Huckle* and *Wilkes*. All three cases did not merely involve aggravated trespasses; they all involved the same aggravating matter. In *Benson*, the defendant was a servant of the crown in his capacity as an army colonel. It was shown that he had ordered the plaintiff to be beaten 'merely out of spite to his [the plaintiff's] major'.[156] In turn, Lord Mansfield thought that the trial jury's 'very great' award was explicable on the basis that the defendant had 'acted arbitrarily, unjustifiably and unreasonably'.[157] Like *Benson*, *Huckle* and *Wilkes* had also been, as Street categorized them, 'cases complaining of arbitrary interference by public officials with the private rights of citizens'.[158] For Lord Devlin, *Huckle, Wilkes* and *Benson* were to be regarded as three cases where the 'exemplary principle' had been recognized, and whose outcomes were inexplicable in terms of compensation. On this basis, he emphatically concluded that for the House to

[152] ibid.
[153] ibid. Lord Mansfield's remarks in *Benson* are almost identical to Lord Loreburn LC's in *Hulton* see (n 129) and (n 130). However, Lord Devlin only referred to the former (and in direct support of his first 'category'); the latter he did not mention at all.
[154] (1764) 2 Wils KB 252, 95 ER 794.
[155] ibid 795. *Grey* also involved an aggravated trespass, but not aggravation in the form of arbitrary government action.
[156] *Benson* (n 150) 1130.
[157] ibid.
[158] See (n 68).

intervene by 'removing' exemplary damages in tort actions involving oppressive government action would be to 'complete[ly] disregard . . . precedent'.[159]

(e) Presentism in Lord Devlin's Rookes *categories*

It is important to see, however, that the two historically grounded 'categories' that Lord Devlin expounded in his *Rookes* opinion did not follow from a comprehensive review of the historical cases. To a significant extent, it is clear that the cases that Lord Devlin gave in support of his two accepted categories were heavily determined by the demands of the present. This is demonstrated by Lord Devlin's revealing use of the present tense when he set forth his categories.

In expounding his first category, for example, Lord Devlin said that *Huckle*, *Wilkes* and *Benson* all 'clearly justify the use of the exemplary principle'.[160] He went on to add that to permit an extra-compensatory, distinctly punitive, response in civil tort actions involving oppressive government action 'serves a valuable purpose in restraining the arbitrary and outrageous use of executive power'.[161] Most strikingly, he asserted that 'the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law'.[162] These statements strongly suggest that Lord Devlin's historical survey of 'how far and in what sort of cases the exemplary principle has been recognised' was forcefully guided by the presentist conviction that such a principle 'ought logically to belong to the criminal [law]'.[163] Because government oppression was still not sanctioned by contemporary English criminal law, Lord Devlin appears to have seen the *North Briton* cases – as supplemented by *Benson* – as providing sufficient historical justification for English civil law continuing to sanction it (however anomalously) via the exemplary principle.

[159] *Rookes* (n 1) 1226.
[160] ibid.
[161] ibid 1223.
[162] ibid 1230.
[163] ibid.

In further critiquing Lord Devlin's use of the past in his *Rookes* speech, the next section probes deeper into his theoretical views about the role of England's appellate courts in developing the common law as a whole. It concludes by exploring Lord Devlin's sceptical attitude towards the common law civil jury's role in meting-out punishment in contemporary tort law adjudication.

D. Judges as Lawmakers, Jurors as Punishers

Before his appointment to the House of Lords in October 1961, Lord Devlin had published a short volume of essays.[164] Entitled *Samples of Lawmaking*, he took as his theme the proper limits of judicial lawmaking in a common law system of precedent. According to Feltham, Lord Devlin had levelled a measured accusation of 'judicial timidity'.[165] The accusation was aimed at the House of Lords. In Dworkin's view, the House's characteristically timid brand of appellate adjudication had often seen it blindly follow 'a previous undesirable decision, even though deploring it'.[166] For Lord Devlin, this had allowed much that was 'outmoded'[167] about the common law to continue. In Lord Devlin's view, the House of Lords needed to be more willing 'to lay down broad principles'.[168]

i. Lord Devlin and judicial lawmaking

That it was Lord Devlin who took up this theme was perhaps not surprising. In a review of Lord Devlin's book, the English barrister, John Creese, wrote: 'it would be surprising if so powerful and original a mind conceived of his judicial role in a passive or mechanical way'.[169] Equally, however, Creese doubted whether Lord Devlin's most recent scholarly book would entirely satisfy those who 'expect the judges in their decision-making to

[164] Sir Patrick Devlin, *Samples of Lawmaking* (OUP 1962).
[165] Feltham (n 39) 159.
[166] Gerald Dworkin, 'Stare Decisis in the House of Lords' (1962) 25 MLR 163, 165; also see John Hanna, 'The Role of Precedent in Judicial Decision' (1957) 2 Vill L Rev 367, 372.
[167] Devlin, *Samples of Lawmaking* (n 164) 21.
[168] Feltham (n 39) 159.
[169] John Creese (1962) 11 ICLQ 1257, 1257.

develop and reform the law'.[170] Lord Devlin's contribution to mid-century debates about judging in a common law system was a distinctive one. Unlike his judicial contemporaries, Lord Denning MR most notably, he balked at calls for active legislation from the bench.[171] As Creese noted, *Samples of Lawmaking* did not call for a dynamic mode of judicial lawmaking. Lord Devlin's critique was more melancholy than motivational – 'a lamentation', as Stevens described it, 'that judicial legislation was dead'.[172] For Lord Devlin, judges could legitimately make law. As a mode of legislation, however, judicial lawmaking was different from the kind of lawmaking carried out in parliament; whereas parliament's ability to legislate was unrestrained, the lawmaking performed by judges was not.

(a) Precedent as the 'life force' of the common law

The great restraint on judicial lawmaking was what Lord Devlin characterized as the common law's 'life force'[173] – precedent. 'Life force' was a striking metaphor. It suggests a deep commitment to an 'English theory of precedent'[174] that Lord Devlin's teacher and mentor, AL Goodhart, had earlier expounded.[175] In a seminal article published in the *Law Quarterly Review* in 1934, Goodhart had set out various reasons that English common lawyers habitually gave in justification of their practice of precedent.[176] Among them, Goodhart argued, was 'the desire for *elegantia iuris*'.[177] Writing in the late nineteenth-century, Holmes had described *elegantia iuris* as a positive legal system's commitment to 'logical integrity'.[178] By attaching special importance to previously decided cases,

[170] ibid. Other reviewers also noted Lord Devlin's pessimism, see J Dawson (1964) 15 UTLJ 478, 480: '[Lord Devlin's] conclusion is clear – judges will contribute little more to the development of English law'.
[171] See Lord Denning, 'From Precedent to Precedent' (Romanes Lecture, Oxford, 21 May 1959), where Lord Denning MR described the House of Lords as 'the Court of Parliament itself'.
[172] Robert Stevens, 'Judicial Legislation and the Law Lords: Four Interpretations – II' (1975) 10 Ir Jur 216, 238.
[173] Devlin, *Samples of Lawmaking* (n 164) 116.
[174] Arthur L Goodhart, 'Precedent in English and Continental Law' (1934) 50 LQR 40, 43, 44. The same year, Goodhart published Arthur L Goodhart, *Precedent in English and Continental Law* (Stevens & Sons 1934).
[175] ibid. Lord Devlin personally dedicated his 1962 compendium to AL Goodhart, exalting him as a scholar 'who speaks with great authority in the legal world', see Devlin, *Samples of Lawmaking* (n 164) 1.
[176] ibid 44.
[177] ibid 52.
[178] Oliver W Holmes Jr (1880) 14 Am L Rev 233, 234.

Goodhart accepted that *elegantia iuris* was comparatively harder to pursue in common law systems.[179] Nonetheless, he still thought it possessed 'practical' and 'aesthetic value'.[180] In an (uncodified) judge-made common law system, it would detract from *elegantia iuris* if judges decided 'each new case . . . without any consideration of prior cases'.[181] The likely result, Goodhart thought, would be the common law's inevitable 'degenerat[ion] into a wilderness of individual and unconnected instances'.[182]

(b) '*Life-force*' *and* 'elegantia iuris'

Lord Devlin's characterization of precedent as the common law's 'life force' suggests a commitment to the value of '*elegantia iuris*'. In *Samples of Lawmaking,* Lord Devlin had elaborated the 'life-force' metaphor using biological imagery. Using the image of a tree, Lord Devlin said:

> So precedent, when finally established, becomes as rigid as the branch of a tree. There are still young shoots that can be trained this way or that but the branch itself can only be lopped or pruned. Once the tree is fully grown the area which it can shade is determined and cannot be extended.[183]

As to the role of the House of Lords in attending to the 'tree', Lord Devlin added:

> If the House of Lords did not treat itself as bound by its own decisions, it might do its own lopping and pruning . . . and perhaps even a little grafting, instead of leaving all that to the legislature. But it could not greatly alter the shape of the tree.[184]

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[179] See Heinrich B Gerland, *Die Englische Gerichtsverfassung: Eine Systematische Darstellung* (GJ Göschensche Verlagshandlung 1910) 772. About the common law system, Goodhart added: 'for at any moment a single judgment of the House of Lords or of the Court of Appeal may overthrow what has previously been thought to be a general principle of law', see Goodhart, 'Precedent in English and Continental Law' (n 174) 53.

[180] Goodhart, 'Precedent in English and Continental Law' (n 174) 53; *Mirehouse v Rennell* (1833) 7 Bligh N S 241, 255; 5 ER 759, 765 (Parke B): 'It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science'.

[181] ibid.

[182] ibid.

[183] Devlin, *Samples of Lawmaking* (n 164) 116. Lord Devlin also compared the common law to the body of a living 'organism', made up of the dividing and multiplying 'cells' of precedent (115).

[184] ibid 115.

These metaphors show a desire to train the doctrinal 'branches' of the common law towards the formation of a more logically integrated whole. Mitchell has argued that Lord Devlin's desire to prevent the law of negligence from 'collapsing into a collection of single instances'[185] inspired his 1964 appellate intervention in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[186] Looking back to Lord Atkin's 1932 exposition of the 'general duty' principle in *Donoghue v Stevenson*,[187] Lord Devlin asked: 'is there any reason in logic why the duty laid down in *Donoghue* . . . should not be extended to every sort of injury of which the law takes cognizance?'[188] For Lord Devlin, the emergent principle laid down in *Donoghue* had not 'fully grown'. *Hedley Byrne*, therefore, presented an opportunity for the House of Lords to further extend its 'shade' over another type of negligently inflicted injury – pure economic loss.[189]

(c) To 'lop' or 'prune' the exemplary branch?

Like *Hedley Byrne*, *Rookes* was seen by Lord Devlin as presenting an opportunity to attend to another of the common law's doctrinal branches. Unlike *Hedley Byrne*, however, *Rookes* involved a case where a (seemingly) rigid tree branch might be either 'lopped' or 'pruned'. To not attend to it, would see the law of damages persist as a bundle of 'individual and unconnected' heads of recovery.

The reform that Lord Devlin enacted in *Rookes* might be seen as more radical than his earlier intervention in *Hedley Byrne*. To 'lop' the wayward branch of extra-compensatory punitive recovery would have gone as far as to 'greatly alter the shape of the tree'.[190] Thus,

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[185] Paul Mitchell, '*Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (Bloomsbury Publishing 2010) 186.

[186] See (n 39).

[187] [1932] AC 562 (HL) 599 (Lord Atkin): 'I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances'.

[188] Devlin, *Samples of Lawmaking* (n 164) 8.

[189] Regarding the doctrine of negligence (as opposed to exemplary damages), Lord Devlin purported to rest his conclusions almost entirely on previous House of Lords decisions: 'I shall now examine the relevant authorities, and your Lordships will, I hope pardon me if with one exception I attend only to those that have been decided in this House, for I have made it plain that I will not in this matter yield to persuasion but only to compulsion', see *Hedley Byrne* (n 39) 517.

[190] Devlin, *Samples of Lawmaking* (n 164) 115.

although Lord Devlin believed it was 'open to the House to remove an anomaly' from the law of damages, removing the common law exemplary damages doctrine entirely would have been outside the scope of permissible judicial lawmaking. The desire for Law Lords to be less timid was not a call for them to actively legislate. The more cautious approach, therefore, was not to 'lop' the doctrinal branch of exemplary damages but to 'prune' it. The difficulty for Lord Devlin was how much to prune. As his interpretation of Lord Atkin's speech in *Ley* showed, the 200-year-old 'branch' of exemplary damages was not as rigid as very many earlier cases seemed to suggest. Having explored 'how far and in what sort of cases the exemplary principle has been recognised', Lord Devlin concluded that – although an old branch of the common law tree – the 'exemplary principle' was not as established as many believed.

(d) 'Pruning' in the traditional way

But the mere fact that the House in *Rookes* was not bound by one of its previous decisions did not mean that the doctrine of exemplary damages could be uprooted as 'a bit of historical nonsense'.[191] How much to prune back, and how much to keep, was a decision that needed to be grounded in, and guided by, the historical common law. 'Cases in the books' could not be dispensed with simply because they were not 'precedents' in the technical sense. Indeed, as Mitchell observes, in giving support to his two historically situated categories, Lord Devlin went as far as to derive propositions from previously decided cases 'for which they were not strictly authority'.[192]

For Lord Devlin, the practice of precedent in the English common law tradition was not limited to what AL Goodhart described as 'the doctrine of the individual binding precedent'.[193] It was much wider than that. In the Hamlyn Lectures, Lord Devlin described the common law as an accretion of 'the decisions of judges upon what was fair and just

[191] *Southern Pacific Co v Jensen*, 244 US 205 (1917), 231 (Holmes J), on whether the contractual doctrine of consideration could be abrogated by judicial decision.
[192] Paul Mitchell, *The Making of the Modern Law of Defamation* (Bloomsbury Publishing 2004) 68.
[193] Goodhart, 'Precedent in English and Continental Law' (n 174) 41. Goodhart later styled it 'the principle of the absolute authority of an individual precedent' (64). Also see Arthur L Goodhart, 'Determining the *Ratio Decidendi* of a Case' (1930) 40 Yale LJ 161, 161–183.

being gathered together as precedents'.[194] In his 1962 book, Street had given an account of what would fulfil the conditions of *elegantia iuris* in the law of civil damages; in doing so, he laid bare the 'anomaly inherent in exemplary damages'.[195] But in deciding how much of the doctrine to prune back, Lord Devlin appeared to accept that there were (select) cases in the books where the application of the 'exemplary principle' might still be said to have produced fair and just outcomes. In deciding not to entirely remove the anomaly, Lord Devlin may well have heeded AL Goodhart's advice:

> this desire for *elegantia iuris*, if carried too far, may degenerate into legal scholasticism . . . In seeking for logical perfection in law we may forget that the purpose of law is to do justice between man and man. [196]

For Lord Devlin, the fulfilment of civil justice in cases involving oppressive government action (and profit-motivated wrongdoing), continued to call, as they had in the past, for a response beyond compensation. These categories of wrongdoing were not 'conjured out of the air'.[197] Rather they comprised the decisions of earlier generations of English judges 'upon what was fair and just'.[198]

Despite choosing not to lop the exemplary doctrine entirely, some judges thought that Lord Devlin's intervention in *Rookes* had too 'greatly alter[ed] the shape of the tree'. In *Broome*, Lord Denning MR said that Lord Devlin 'threw over all that we ever knew about exemplary damages'.[199] The illegitimate effect of his judgment was to 'la[y] down a new doctrine about exemplary damages'.[200] The insinuation was clear: Lord Devlin had not simply reformed the law of exemplary damages, but rewritten it.[201] '[T]he House, as a

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[194] Devlin, *Trial by Jury* (n 56) 100.

[195] *Rookes* (n 1) 1227.

[196] Goodhart, 'Precedent in English and Continental Law' (n 174) 53.

[197] *Broome* (n 1) 391. Lord Devlin's *Rookes* speech had its admirers, see Hamson, 'A Further Note on *Rookes*' (n 63) 176: 'it bears all the marks of a classical pronouncement, in the authentic style of a judge who has combined great powers of intellectual penetration'.

[198] Lord Devlin's only qualification was henceforth these categories would 'impose limits not hitherto expressed on such [exemplary] awards': *Rookes* (n 1) 1226.

[199] *Broome* (n 1) 380, adding that Lord Devlin had 'knocked down the common law as it had existed for centuries' (380).

[200] ibid.

[201] See Dias (n 122) 187, dubbing the new 'categories test' 'Lord Devlin's doctrine', and more recently, 'Lord Devlin's restatement', see Michael Tilbury and Harold Luntz, 'Punitive Damages in Australian Law' (1995) 17 LoyLAInt'l&Comp L Rev 769, 774. It is likely that Lord Devlin would have taken special

matter of legal theory', Lord Denning MR concluded, 'thought that exemplary damages had no place in the civil code, and ought to be eliminated from it'.[202]

(e) Defending Rookes' *lawmaking legacy*

Lord Devlin's opportunity to defend the legacy of *Rookes* arose in the fourth Chorley Lecture. Delivered at the London School of Economics in 1975, again, Lord Devlin's theme was the legitimate scope of judicial lawmaking in a common law system. Entitled 'Judges and Lawmakers', he expounded an imperative of legitimacy: an English judge, Lord Devlin claimed, should never enact reform 'in advance of the consensus'.[203]

Lord Devlin's view was that a 'consensus' could be presumed when – regarding a given law reform proposal – the public's attitude could be said to be 'either 'indifferent' or 'all one way'.'[204] For Lord Devlin, there were many law reform proposals that 'the man in the jury-box'[205] would almost certainly meet with indifference. Generally, Lord Devlin's view was the '[t]he public is not interested in the common law as a whole'.[206] This is not to say that the public would never become 'interested in any particular section of it'.[207] But whenever the public would become interested, Lord Devlin's view was that a statute would be necessary. In many cases, however, the public would not take an interest. For Lord Devlin, the situations where 'the inclination of the layman is to leave it to the judges'[208] were wide-ranging. Good examples were fundamental aspects of English private law. Lord Devlin used the example of Lord Atkin's reform of the modern tort of negligence in

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exception to such portrayals of him as 'law-giver'. In *Samples of Lawmaking*, Lord Devlin supposed that if a judge did not take guidance from earlier decisions when changing the law, 'a man's future would be at the mercy of the individual [judicial] mind uncontrolled by due process of law', see Devlin *Samples of Lawmaking* (n 164) 119.

[202] *Broome* (n 1) 382.

[203] Sir Patrick Devlin, *The Judge* (OUP 1979) 5; Patrick Devlin, *The Enforcement of Morals* (OUP 1965) 94: 'what the lawmaker has to ascertain is not the true belief but the common belief'. For 'deference to the masses' as a component of Lord Devlin's own theory of judging, see Robert Stevens, 'Judicial Legislation and the Law Lords: Four Interpretations – I' (1975) 10 Ir Jur 15, 15–23.

[204] J Skelly Wright (1980) 33 Stan L Rev 179, 196.

[205] Devlin, *The Enforcement of Morals* (n 203) 90.

[206] Devlin, *The Judge* (n 203) 11.

[207] ibid.

[208] ibid.

Donoghue. Whether a consumer injured by a defective chattel should have a remedy against both its manufacturer and ultimate seller was not a proposition that attracted the public's interest; based on a sort of 'consensus of indifference', Lord Devlin argued that in situations like these the public grants a 'general warrant for judicial lawmaking'.[209]

Lord Devlin did not see his reform of the common law doctrine of exemplary damages as very different to Lord Atkin's reform of the common law tort of negligence. If, and when, civil damages beyond compensation should be available was a proposition for which the public gives its 'general warrant' for judges to get on with reform. In a comment squarely aimed at Lord Denning MR's Court of Appeal, Lord Devlin remarked: '*Rookes* v. *Barnard* on punitive damages created a legal commotion surfacing in the Court of Appeal . . . [but] it left the public cold'.[210]

Lord Devlin described the warrant the public gives judges to develop and reform the common law as 'an informal and rather negative one'.[211] It amounted to:

> a willingness to let the judges get on with their traditional work on two conditions – first, that they do it in the traditional way, i.e. in accordance with precedent, and second, that parliamentary interference should be regarded as unobjectionable.[212]

Lord Devlin used the Chorley Lecture to defend his action in *Rookes* against the accusation that, as an appellate judge, he had usurped a legislative function. Although enacting a far-reaching reform of a part of the common law, the House in *Rookes* did not form its judgment other than 'in the traditional way'. Despite having one 'eye on the effect of their decision on the law in general',[213] another looked back to the past.

[209] ibid.
[210] ibid.
[211] ibid.
[212] ibid.
[213] ibid 5.

i. The tort jury's assessment of damages function

Lord Devlin's support for what he described as 'the lay element in the administration of English justice',[214] was well-known. In the 1956 Hamlyn Lecture Lord Devlin agreed that 'of all the institutions that have been created by English law, there is none other that has a better claim to be called . . . "the privilege of the Common People of the United Kingdom"'.[215] In tort, Lord Devlin accepted that decisions had to be made where it would be obvious that the judgment of 'twelve minds are better than one'.[216] He gave the example of twelve jurors collectively deciding on the level of care that a reasonable person would have exercised in the circumstances. The same, however, could not be said of other decisions materially affecting the remedial outcomes of individual cases.

(a) Jury-assessed non-pecuniary injury

Entrusting the assessment of non-pecuniary elements of damages to the collective 'value judgment'[217] of a trial jury was problematic. On this issue, Lord Devlin had already expressed scepticism in chapter 6 of the Hamlyn Lecture, entitled 'The Decline of the Jury and its Strength'.[218] In that chapter, Lord Devlin's aim was 'to discuss this diminution and to compare trial by jury with trial by judge'.[219] After a decade as a puisne High Court judge, he had seen the problems associated with juries assessing elements of tort damages that were both 'incalculable and at large'.[220] It was the problem of 'fluctuation'.[221] 'All litigants want justice', Lord Devlin accepted, 'but they also want to know whether they are

[214] Lord Devlin, 'Law, Democracy, and Morality' (1962) 110 UnivPa L Rev 635, 640.
[215] Devlin, *Trial by Jury* (n 56) 3.
[216] ibid 149. '[T]he man in the jury box' was a central part of Lord Devlin's belief in the enforcement of a society's 'common morality' through its criminal laws, see Devlin, 'Law, Democracy, and Morality' (n 214) 647: 'If the only question the jury had to decide was whether or not a moral belief was generally held in the community, the jury would, I think, be an excellent tribunal'. As to the acceptability of moral beliefs, Dworkin engaged Lord Devlin, declaring it not enough 'to report that the ordinary man – within or without the jury box – turns his thumb down', see Ronald M Dworkin, 'Lord Devlin and the Enforcement of Morals' (1966) 75 Yale LJ 987, 1005.
[217] See (n 57).
[218] Devlin, *Trial by Jury* (n 56) 129.
[219] ibid.
[220] *H West & Son Ltd v Shephard* [1964] AC 326 (HL) 354 (Lord Devlin).
[221] Devlin, *Trial by Jury* (n 56) 143, see (n 57).

likely to win or lose'.[222] This included knowing 'how much'[223] – in terms of money – was at stake. In chapter 6, Lord Devlin declared it 'an essential attribute of justice in a community that similar decisions should be given in similar cases'.[224]

To illustrate the point, Lord Devlin used the example of recovery for non-pecuniary elements of damage in personal injury cases. '[T]here is', he asserted, 'no means of assessing the pain and suffering and deprivation that follows from the loss of a hand'.[225] The real problem, however, was not whether the amount decided by a jury might be thought satisfactory in a single case; rather it was whether consistency could be achieved across a number of like cases. As Lord Devlin explained:

> If only one hand were lost in a year, a figure that twelve men thought appropriate would be more likely to give satisfaction than one fixed by a single man. But where a number of hands is lost each year, there will be general dissatisfaction if the sums awarded do not conform to type.[226]

In an ideal world, consistent remedial outcomes could be achieved 'if justice on earth were divine and not human' – that is, 'if there were only one judge and he always remembered to decide everything the same way and he went on living for ever'.[227] In reality, however, remedial consistency could only be achieved 'by following the law'.[228] For Lord Devlin, in turn, the case for trial judges effectively forcing jurors to make awards 'within conventional limits'[229] was compelling.[230]

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[222] ibid 144.
[223] ibid.
[224] ibid 133.
[225] ibid 142.
[226] ibid 143. It was an argument with which Lord Denning MR agreed, see *James v Ward* [1966] 1 QB 273 (CA) 299–300: 'Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good'.
[227] ibid 133.
[228] ibid 153
[229] ibid 143.
[230] ibid. As for the limits themselves it would be for judges 'to know what they are' (143); when a jury 'strays too far outside them it must be brought back to the norm by the Court of Appeal' (142). Street disagreed, arguing that Lord Devlin's proposal would give judges a 'monopoly of decision' over tort awards, see Street, *Principles of the Law of Damages* (n 13) 11.

(b) Juries and the quantum of pecuniary punishment

Especially compelling was for jurors to be forced to do so when assessing non-pecuniary – punitive – elements of tort damages. For Lord Devlin, the measure of pain or suffering to exact from tortfeasors was the *par excellence* example of civil liability being left at the whim of lay 'value judgments'. Awards of exemplary damages were especially susceptible to fluctuation from case to case. As Lord Devlin regrettably recalled in *Rookes*: 'Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely . . . if the conduct were criminal'.[231] Significantly, he doubted the adequacy of the customary judicial technique used to curb jury-assessed punishments – 'exhortations to be moderate'.[232] Further judicial control was therefore necessary. In line with previous House precedents,[233] he insisted that further control should take the form of an 'arbitrary limit on awards of damages that are made by way of punishment'.[234]

In turn, Lord Devlin's pruning back of extra-compensatory punitive damages should not only be seen as a response to a principled anomaly in the law of damages. For Lord Devlin, of the common law's modern disparate heads of civil damages, those designed to punish were least suitable to lay decision. As he punctuated in his *Rookes* speech: 'the power to award exemplary damages constitutes a weapon'.[235] He conceded that, in some cases,

[231] *Rookes* (n 1) 1227. For example, in the (aggravated) trespass to land and assault case of *Loudon* (n 100), the jury gave the following differentiated award: '£1500 damages for trespass, and £1000 for assault; and £3000 as exemplary damages, making £5500 in all' (1225).

[232] ibid. By the middle of the century, where juries gave excessive extra-compensatory sums, setting their verdict aside required an appellate court to be 'satisfied that the verdict on damages is such that it is out of all proportion to the circumstances of the case': *Davies v Powell Duffryn* [1942] AC 601 (HL) 616 (Lord Wright).

[233] Lord Devlin added: 'It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham* v. *Gambling*', see *Rookes* (n 1) 1227. In *Benham v Gambling* [1941] AC 157 (HL) 166 (Viscount Simon LC), the assessment of damages for loss of expectation of life was described as 'more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of law'. The case established that 'moderate figures only were appropriate to this head of damages', see George Langton, 'Damages for Loss of Expectation of Life: A Suggestion' (1942) 58 LQR 53, 55. For a contemporary analysis, see Otto Kahn-Freund, 'Expectation of Happiness' (1941) 5 MLR 81–102. In *Naylor v Yorkshire Electricity Board* [1968] AC 529 (HL) 550 Lord Devlin argued that the only way of preventing the relaxation of the rule in *Benham v Gambling* would be 'if this head of damage was abolished and replaced by a short Act of Parliament fixing a suitable sum'.

[234] *Rookes* (n 1) 1228.

[235] ibid.

English juries had laudably used this weapon 'in defence of liberty'.[236] The outstanding examples were those that first recognized the exemplary principle – 'the *Wilkes* cases'.[237] Equally, however, Lord Devlin emphasized that lay jurors (far more than professional judges) were inclined to use it 'against liberty'.[238] For Lord Devlin, punishment – whether imposed in a civil or criminal proceeding – involved the state's most serious intrusion upon individual liberty. In uncompromising terms, he stated: 'I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint'.[239]

(c) Aggravated damages: a solution to an unappreciated problem

However, by drastically limiting the availability of exemplary awards (and, in turn, the role of jurors in making them), Lord Devlin did not alleviate the jury's task of assessing non-pecuniary elements of damage in tort cases: in fact, endorsing 'aggravated damages' meant that, instead of punishment, jurors would now have more insult, distress, humiliation, and indignity to assign monetary sums to. Importantly, without some directive requiring juries to give only moderate sums for such aggravating (compensatory) elements, the problems of fluctuation and inconsistency would persist.[240]

For Lord Devlin, it seems, getting aggravated damages to 'do most, if not all, of the work'[241] of exemplary damages was thought to make more than a symbolic difference at the level of adjudicative competence. Of course, the overall effect was not to limit the range non-pecuniary elements of damage that could be recovered in tort actions. It did, nonetheless, undermine the English jury's competence in respect of one non-pecuniary element – punishment. A closer look at Lord Devlin's *Rookes* speech shows that the jury's contemporary assessment of damages function in aggravated cases was central to his

[236] ibid.
[237] ibid.
[238] ibid.
[239] ibid.
[240] Indeed, as Lord Devlin noted: 'Some juries have . . . been very liberal in their ideas of what a round sum should be, and the courts, which have always been very reluctant to interfere with awards of damages by a jury, have allowed very liberal awards to stand', see ibid 1228.
[241] ibid 1230. At the level of principle Lord Devlin did not accept that this rebalance would 'rob the law of its strength which it ought to have' (1227).

Rookes reform. In a didactic statement aimed at first-instance judges, he stated that '[a] case for exemplary damages must be presented quite differently from one for compensatory damages'.[242] With the civil jury's competence to punish clearly front of mind, Lord Devlin added: 'A judge should not allow the [exemplary damages] doctrine to be left to the jury unless he is satisfied that it can be brought within the categories'.[243] Lord Devlin's *Rookes* reform, therefore, was not merely an attempt to all but remove an principled anomaly from the law of damages. It also aimed to deprive English jurors of a remedial 'weapon' that – for some 200 years – they had often too freely wielded.

E. Conclusion

This chapter has revisited Lord Devlin's landmark judgment on damages in *Rookes* with the aim of rendering it more intelligible by reference to the particular historical context in which it was formed. It has critically examined the principal influences that worked upon it. Foremost among them was a mid-century push – instigated by Professor Street's 'profoundly disturbing'[244] book – to relocate the common law of civil recovery upon the principled foundation that it had entirely rested on before 1763 – *restitutio in integrum*. In *Rookes*, Lord Devlin set about guiding the common law in doing so. He had the difficult task, however, of curtailing an established common law doctrine through recourse to underlying principles, whilst, at the same time, taking guidance from the common law as a repository of tradition.

In post-curial writings, Lord Devlin deprecated as 'arcane'[245] the theory that the common law never changes: judges were its caretakers, and through their judicial decisions, they did more than simply 'utter it'.[246] In developing its doctrines with a view to improving the common law as a whole, judges needed to ensure that, in Lord Devlin's apt phrase, '[t]he revelation of the future illuminates the past'.[247] Among the overlooked influences upon

[242] ibid 1228.
[243] ibid.
[244] Jolowicz (n 23) 145.
[245] Patrick Devlin, 'Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment' (1980) 80 Col L Rev 43, 65.
[246] ibid.
[247] ibid.

Lord Devlin's judgment was his peculiar judicial attitude towards the legitimate role of the jury in assessing damages intended by way of punishment in civil tort actions. The following chapters enter the further 'pre-*Rookes v Barnard*' dimension of the practice of extra-compensatory, distinctly punitive, recovery at English common law.

CHAPTER 3

Aggravation in Tort and its Responses, 1600–Michaelmas Term 1763

A. Introduction

The previous chapter revisited Lord Devlin's 1964 attempt to all but abolish the punishment of tort defendants from contemporary exercises of civil law jurisdiction in England. It set out to situate his controversial judgment on damages in *Rookes v Barnard* in a mid-twentieth-century historical context.[1] The following four chapters of this thesis enter the further pre-*Rookes v Barnard* dimension of time. This chapter goes back the furthest in time. It examines the period from the turn of the seventeenth-century to the eve of the famous *North Briton* decisions in Michaelmas Term 1763.

As the previous chapter demonstrated, shortly before Lord Devlin delivered his landmark judgment in *Rookes v Barnard* in 1964, Professor Harry Street had similarly traced modern exemplary damages back to Pratt CJ's famous *North Briton* decisions.[2] In doing so, he propounded the interpretation that in aggravated tort cases decided before the third quarter of the eighteenth-century, English juries had only ever awarded what he termed 'aggravated damages'.[3] Street contended that the principled purpose of these damages had been limited – 'to compensate the plaintiff for the insult and distress resulting from the circumstances of the trespass'.[4] According to his historical account, *Huckle* and *Wilkes* were the first aggravated tort cases in which juries gave damages, not merely to compensate the plaintiff for further, essentially intangible, injuries, but to punish the defendant for his wrong. Adhering to this interpretation, Chapman more recently suggests:

[1] [1964] AC 1129 (HL).

[2] Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 29.

[3] ibid.

[4] ibid. Problematically, the earliest tort case Street cited for his proposition was *Bruce v Rawlins and others* (1770) 3 Wils KB 61, 63; 95 ER 934, 935 (Gould J), decided seven years after the *North Briton* cases in late 1763.

'English juries first awarded modern exemplary damages as a remedy for civil wrongdoing in the companion cases of *Wilkes* v. *Wood* and *Huckle* v. *Money*'.[5]

This chapter attempts to shed new light on the recovery of damages given beyond compensation, and for the distinct purpose of punishing tort defendants before Michaelmas Term 1763. It does so by seeking to provide the first systematic account of the place of 'aggravation' in the pre-1763 practice of pleading and adjudicating actions of trespass and case. It examines the period from *circa* 1600 to Pratt CJ's *North Briton* decisions in late 1763. Across this period the English jury continued its protracted evolution from an apparently 'testimonial' body in the later medieval period into one that increasingly found facts (including facts of aggravating matter) not on the basis of what it already knew about particular controversies, but on the basis of evidence presented to it in open court.

This chapter suggests that, although sparse and discontinuous, the historical evidence is sufficient to challenge conceptions of pre-1763 aggravated tortious recovery as aligned exclusively with a full compensatory or reparative principle – a principle '*restitutio in integrum*'. Of course, in aggravated cases decided before those that arose from the *North Briton No. 45*, juries did increase their awards to further and fully compensate tort victims for various intangible injuries, including those injuries that, in the aftermath of Lord Delvin's analysis in *Rookes*, have been explicitly compensated via awards of aggravated compensatory damages: insult, distress, humiliation, affronted dignity and the like.[6] However, the suggestion that the damages settled by juries in aggravated tort cases before *Huckle* and *Wilkes* were decided were entirely dissociated from all extra-compensatory punitive principles is untenable. Seen by judges as acting within their proper province of tort law adjudication, juries could and in select cases appear to have subjected aggravated wrongdoers to various forms of punishment, including exemplary punishments.

[5] Nathan S Chapman, 'Punishment by the People: Rethinking the Jury's Political Role in Assigning Punitive Damages' (2007) 56 Duke LJ 1119, 1125. Barker has recently supposed that the common law 'story' of a specifically exemplary (or deterrent) function of civil damages awards 'started' with Pratt CJ's decision in *Wilkes*, see Kit Barker, 'Punishment in Private Law – No Such Thing (Any More)' in E Bant, W Courtney, J Goudkamp and JM Paterson (eds), *Punishment and Private Law* (Hart Publishing 2021) 52.
[6] See chapter 2 A.

B. Presenting Aggravated Tort Cases

Tort proceedings in the English courts of common law began with pleadings. The plaintiff's original statement of his case was his 'declaration', to which the defendant pleaded in response. The ultimate aim of this pretrial stage of common law tort litigation was the production of a single issue of fact. Typically, it was produced by the defendant pleading 'Not guilty' to the particular tort declared by the plaintiff.[7] As part of pretrial pleading – and before local juries were summoned to 'find' the disputed facts – there were means by which tort plaintiffs could at least allude to the aggravated nature of, and circumstances surrounding, the defendant's wrong. How this was done, however, depended on the type of common law writ out of which plaintiffs originally sued – writs of trespass or case.

i. Laying aggravation on the record

Tort plaintiffs who used *vi et armis* writs of trespass were required to first formally state their case according to various stereotyped pleading forms. These forms differed depending on whether the defendant had forcibly interfered with the plaintiff's person, land, or chattels. Milsom characterized them as 'administrative drill',[8] meaning the court's jurisdiction over the matter necessarily depended on their use. The rigidly stylized way in which plaintiffs stated their grievance also affected how aggravating matter was pleaded in *vi et armis* actions. From as early as the thirteenth-century there had been some opportunity for plaintiffs to openly state facts that would tend to make worse what 'would anyway be wrongful'[9] in the form of a preliminary preamble clause that began with the Latin preposition '*cum*', meaning 'whereas'.[10] In *vi et armis* writs, however, the so-called 'device of the preamble'[11] had been very restrictive. Although this did not prevent a plaintiff's pleader from charging the defendant with an aggravated wrong on the face of

[7] For a concise summary, see John H Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) chapter 5.
[8] SFC Milsom, 'Law and Fact in Legal Development' (1967) 17 UTLJ 1, 3.
[9] SFC Milsom, 'On the Medieval Personal Actions' in S.F.C. Milsom ed., *Studies in the History of the Common Law* (CUP 1985) 32.
[10] ibid.
[11] ibid.

the record, it did severely limit his pretrial capacity to specifically mention facts supporting such a charge.

(a) 'Vi et armis' *writs and the clause* 'alia enormia'

Like the formulaic statement of other parts of his case, on the record, the plaintiff 'concealed' facts of aggravation behind a particular stereotyped pleading form. This was the clause '*alia enormia*'. The *alia enormia* clause was as old as the writ of trespass *vi et armis* itself.[12] It appeared with formulaic repetition in the final phrase of every such writ.[13] After stating the actionable wrong upon which the plaintiff had sued, the following phrase was inserted: '*et alia enormia ei intulerunt, ad grave damnum ipsius . . .*'.[14] The phrase had three operative parts. In the first part, the plaintiff alleged that the defendant's wrong had been attended by 'other' unspecified 'wrongs',[15] 'evils',[16] or in Sir Edward Coke's early seventeenth-century translation, 'outrages'.[17] In the second part, the plaintiff declared that what the defendant had done had caused him 'serious loss'. Finally (and as a matter of 'off the record' evidence), the plaintiff concluded the phrase by laying the total sum of money to which he felt entitled.[18]

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[12] See George E Woodbine, 'The Origins of the Action of Trespass' (1925) 34 Yale LJ 343, 358, suggesting that the clause was first used in the period after Henry III's conflict with his baronage when land invasions were particularly destructive.

[13] *Sir William Chancey's case* (1611) 2 Bl & Golds 18, 19; 123 ER 790, 790–791: 'in every action of trespasse the word is used *(Et alia enormia ei intulit)*'.

[14] Anthony Fitzherbert, *The New Natura Brevium . . . Corrected and Revised* (first published 1534, G Sawbridge, T Roycroft & W Rawlins 1677) 192.

[15] For *enormia* translated as 'wrongs', see Giles Jacob, *A New Law Dictionary*: *Containing the New Interpretation and Definitions of Words and Terms used in the Law* (5th edn, H Lintot 1744) sv. 'Form of a Common *Writ of Trespass*'; Frederic W Maitland, *The Forms of Action at Common Law: A Course of Lectures* (AH Chaytor & WJ Whittaker eds, CUP 1936) 73.

[16] For *enormia* translated as 'evils', see Woodbine (n 12) 358.

[17] 2 Co Inst 418, where discussing the phrase '*nisi pro enormis transgressione*' in West 2 1285 (13 Edw 1 c 29) Coke stated: 'Transgression here is to be taken in a large sense, for any outrage or misdemeanour'. The translation 'other outrages' also appears in John Lilly, *Modern Entries: Being a Collection of Select Pleadings in the Courts of Kings Bench, Common Pleas and Exchequer* (2nd edn, H Lintot 1741) 425–457; and more recently, John S Beckerman, 'Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass' in MS Arnold (ed), *On the Laws and Customs of England: Essays in Honour of Samuel E Thorne* (UNCP 1981) 177: 'and he did other *outrageous* things to me'. (Original emphasis).

[18] See, generally, David J Ibbetson, 'The Assessment of Contractual Damages at Common Law in the Late Sixteenth Century' in M Dyson and DJ Ibbetson (eds), *Law and Legal Process: Substantive Law and*

(b) Writs of case and the longer preamble

The element of outrage connoted by the words '*alia enormia*' in *vi et armis* actions was expressed differently by tort plaintiffs suing out writs of case. In actions on the case, it was the device of the preamble that tort plaintiffs used to first allude to the defendant's aggravated wrong in their pleadings. For example, in *Aldred v Benton* in 1610, the plaintiff in an action on the case for nuisance declared that, by raising a pile of wood 'so high that it stopped the windows and light in the plaintiff's hall and rooms', the defendant had been 'maliciously scheming and intending to hinder and deprive the plaintiff of [his] house'.[19]

A key feature of all pleading in actions on the case were allegations that the defendant had acted with some degree of fault, whether intentionally or negligently.[20] Indeed, in some actions, these allegations often rose to the level that the defendant seemingly bore the plaintiff personal malice, and were laid using the adverbial form 'maliciously'. Not unlike the *alia enormia* clause, such flourishes appear with formulaic repetition in nuisance[21] and slander[22] pleadings, including where the defendant could not possibly have borne personal malice to the plaintiff.[23] In many cases, plaintiffs did not always use these adverbial forms because they intended to prove, either that the defendant's conduct was actuated by malice or that he had maliciously intended to cause harmful consequences.[24] Indeed, within a general conception of tort liability that was not 'equated with a subjective intention to

Procedure in English Legal History (CUP 2013) 143: 'The sum claimed by the plaintiff did not purport to be an accurate assessment of his loss, but rather the upper bound of his optimistic hopes'.

[19] (1610) 9 Co Rep 57 b, 57 b; 77 ER 816, 820.

[20] See the adverbial forms laid on the record in *Coggs v Barnard* (1703) 3 Ld Raym 152, 152; 92 ER 622, 622.

[21] Coquillette shows that by the early seventeenth century allegations of malice in nuisance pleadings were no more than 'words of art', see Daniel R Coquillette, 'Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment (1979) 64 Corn L Rev 761, 777.

[22] See, for example, *Smith v Richardson* (1737) Willes 20, 24; 125 ER 1034, 1036, where the court in banc seemed to agree with counsel's statement that in slander pleadings 'words are always laid to be spoken . . . *malitiose*'.

[23] For example, *Jones v Powell* (1629) Hutton 135; 123 ER 1155, where the plaintiff declared that his neighbour had 'maliciously' built a brewhouse fuelled by harmful sea coal.

[24] Although a defendant's malice was more relevant in slander than nuisance, it was (rebuttably) presumed after a plaintiff proved that the defendant had spoken actionable words about him, meaning evidence that a defendant had *not* been malicious was often admitted, see *Smith* (n 22) 1034.

cause harm',[25] evidence that a defendant was particularly blameworthy was surplus to the requirements of establishing his right to recover damages from the defendant. Yet, this does not mean that the 'fault-laden' language that appeared in writs of case was always 'empty formality'.[26] Because the pleadings defined the factual issues in dispute, the facts laid on the record determined the evidence that plaintiffs could give at trial in order to prove their pleaded cases. By using what in 1664 Wyndham J termed 'flourishes in a declaration',[27] aggravated wrongdoing could be made affirmatively part of pleaded actions on the case. Like the *alia enormia* clause in *vi et armis* pleadings, their use permitted early tort plaintiffs to give evidence of specific matters of aggravation, and for the purpose of inducing the jury at trial to increase the full extent of their recovery.

ii. Aggravating matter admissible in evidence

It is not until the seventeenth-century that the reports of actions of trespass and case contain considered discussion of aggravation in tort. The earliest judicial consideration of the *alia enormia* clause occured in the context of a particular species of post-trial motion in banc: the motion in arrest of judgment. It was a means by which tort defendants against whom a verdict had passed could prevent judgment being entered in accordance with a trial jury's verdict[28] on the ground that the plaintiff had originally 'failed in his declaration'.[29] The failures raised in this species of post-trial motion concerned 'Matter Intrinsick, that is, such that appears by the record itself'.[30] Such matter encompassed aggravating matter that tort

[25] John H Baker, *The Oxford History of the Laws of England vol VI: 1483–1558* (OUP 2003) 755. Also see, albeit examining an earlier period, Morris S Arnold, 'Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts' (1979) 128 PennSt L Rev 361, 370, showing that the defendant's state of mind '[did] not affect the plaintiff's right to damages'.

[26] Coquillette (n 21) 777.

[27] *Terry v Hooper* (1664) Raym Sir T 86, 87; 83 ER 47, 48.

[28] See Thomas Wood, *An Institute of the Laws of England: Or, the Laws of England in their Natural Order, According to Common Use* (first published 1720, 4th edn, J Watts 1724) 604: 'to move in Arrest of Judgment is to shew Cause why Judgment should be stopp'd'.

[29] The phrase appears in *Tong v Harrison* (1730) 1 Barnardiston KB 367, 367; 94 ER 247, 247 (Serjeant Raby), and in the context of an (ultimately rejected) argument by the plaintiff's counsel that evidence that the defendant's had intercourse with the plaintiff's wife consequential upon an unlawful entry could be given in aggravation of damages.

[30] Giles Duncombe, *Trial Per Pais: Or, the Law Concerning Juries by Nisi Prius and with a Compleat Treatise of the Law of Evidence* (first published 1665, 6th edn, E & R Nutt 1725) 289. The sixth (1725) edition of Samson Euer's earlier 1665 work is formerly attributed to Duncombe, but given his likely death

plaintiffs were accused of having originally failed to lay, or having mislaid, in their pleadings.

(a) Challenging '*intrinsic*' *aggravating matter in banc*

Pigot v Rogers[31] provides an example in the context of an action on the case. Upon a motion in arrest of judgment, counsel for the defendant argued that the plaintiff's 'declaration was not good'[32] because it had originally failed to specify matter argued to be essential to the cause of action, but which the plaintiff had gone on to give in evidence at trial. The Court of Exchequer Chamber, however, unanimously affirmed the trial judgment in King's Bench, holding that matters 'which go only in aggravation of damages need not be stated in the declaration'.[33] Well into the seventeenth-century, therefore, judges seem to have considered the 'flourishes' used in the pleading of actions on the case entirely adequate for the purpose of laying an aggravated case on the record.

Similarly, plaintiffs who sued using *vi et armis* writs appear to have only used the (nonspecific) *alia enormia* form, even in cases when they actually intended to give evidence of specific matters of aggravation. For example, in a 1649 *vi et armis* action for trespass to land, the plaintiff's counsel told the court that the *alia enormia* form was not merely used as a 'matter of form'[34] alone. '[T]he words *alia enormia* were purposely put in', the court in banc was told, 'so that all matters touching this trespass might be brought into question, to encrease damages'.[35] By the eighteenth-century, however, judges accepted that – in trespass as much as case – plaintiffs could specifically mention on the record all matters of aggravation that they intended to give in evidence at trial. In *Russel v Corn*, for example, Holt CJ stated that although a plaintiff suing out a *vi et* armis writ might conceal (in the customary way) matter tending to make the defendant's wrong worse, and

in the early 1720s, and the structural revisions that appeared in the fifth (1718) edition, it is likely Duncombe was only responsible for the second, third and fourth editions.

[31] (1620) Cro Jac 561, 79 ER 481.

[32] ibid 481.

[33] ibid.

[34] *Thomlins v Hoe* (1623) Cro Jac 664, 664; 79 ER 574, 574.

[35] *Watson v Norbury* (1649) Style 201, 201; 82 ER 645, 645. In *Shippon v Basset* (1664) 1 Keble 787, 83 ER 1243, a *vi et armis* action for trespass to land, the plaintiff gave evidence under *alia enormia* that the intruder was a 'suitor to his daughter, and defiled her, which was the cause of great damages given'.

simply 'give it in evidence within the *alia enormia*',[36] it was equally permissible for him to use his declaration's preamble to particularize it.[37]

During the period examination, the main difficulty courts faced was clarifying the kind of evidentiary matter that tort plaintiffs might properly give in aggravation of damages. In the mid-seventeenth-century *vi et armis* action of *Watson* v *Norbury*, Rolle CJ stated that the 'words *alia enormia* shall not be intended of collateral matter, but of matter incident to the act done'.[38] Distinguishing 'incidental' from 'collateral' matter, however, often proved difficult.

(b) '*Incidental*' *versus* '*collateral*' *matter*

As a cluster of early eighteenth-century reports later clearly attest to, as a matter of evidentiary law, evidence of aggravation would be permitted where it could support the commission of a single tort of an aggravated character, rather than multiple distinct tortious acts. *Newman v Smith*,[39] a 1707 *vi et armis* action for trespass to land, is illustrative. At the trial of the plaintiff's claim, testimonial evidence was given under *alia enormia* showing that in the course of forcibly breaking and entering his home, the defendant assaulted and frightened the plaintiff's children and servants. After the jury found a verdict for the plaintiff with substantial damages, the defendant moved in arrest of judgment. Counsel for the defendant's submission before Holt CJ's Court of King's Bench was that the defendant's assault was a distinct trespass, and therefore should not have been given in evidence because, in his pleadings, the plaintiff had not originally laid any special damage that it had caused.[40] But the Chief Justice disagreed. Although an independently actionable

[36] *Russell v Corn* (1704) 6 Mod 127, 127; 87 ER 884, 884.

[37] Also see *Newman v Smith* (1707) Holt 669, 670; 90 ER 1286, 1286 (Holt CJ): 'alledging it [the aggravating matter] in the declaration will not hurt', though the report is later abridged from the original source, *Newman v Smith* (1707) 2 Salk 642, 91 ER 542. The cases do suggest that the more substantial the matter 'touching' the tort sued upon, the more insistent the judges were that it be specifically pleaded, see *R v Turner* (1719) 1 Strange 139, 140; 93 ER 435, 435 (Eyre J): 'If in trespass the plaintiff would give beating his servants in aggravation of damages, it *must* be laid in the declaration'. (Emphasis added).

[38] *Watson* (n 35) 645.

[39] (1707) 2 Salk 642, 91 ER 542.

[40] ibid 542 (Serjeant King). For example, Serjeant King suggested that the plaintiff pleader should have alleged '*per quod servitium* of his servant's *amisit*' on the record.

trespass, the assault of the children and servants was sufficiently 'part of'[41] the trespass declared upon to be regarded as merely incidental to, rather than collateral upon it.[42] By giving evidence of it, the plaintiff had merely sought to give the jury a sense of the nature and circumstances of the defendant's unlawful entry – as the Chief Justice put it, 'to shew what sort of trespass is committed'.[43] Because the fright that the assault caused had been properly given 'by way of *aggravation*,'[44] the plaintiff's declaration was held 'good'.[45]

iii. Self-informing juries and the device of judicial comment

Importantly, the mode of proving aggravating matter did not solely take the form of evidence, typically testimonial evidence, presented to entirely unknowledgeable juries at trial. As a mid-seventeenth-century *vi et armis* case shows, matters tending to prove aggravation appear to have been capable of being 'inquire[d] into'[46] by juries themselves, seemingly on the basis of local knowledge that at least some of their members may have already had.[47] In the first half of the seventeenth-century, Sir Edward Coke suggests that the jury had further shed its former testimonial function, stating that 'most commonly

[41] Holt CJ had used this phrase in the earlier and factually analogous case, *Russell v Corne* (1704) 2 Ld Raym 1031, 1032; 92 ER 185, 186.

[42] *Newman* (n 39) 542. Holt CJ emphasized that, for the purposes of aggravating damages, the evidence of the defendant's assault could not have permissibly taken the form of 'special damage' (like the pecuniary loss of the services of his children or servants), see 542. Notably, Holt CJ would have treated the subsequent wounding of a child or servant as collateral matter, the particular point coming out more emphatically in *Newman* (n 37) 1286.

[43] In the context of *vi et armis* trespasses to the person, see *Ferrer v Beale* (1702) 1 Ld Raym 692, 692; 91 ER 1361, 1361 (Holt CJ): 'The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that [the battery] is only in aggravation of damages'. In the context of an action on the case for negligence, see *Stanyon v Davis* (1705) 6 Mod 223, 224; 87 ER 974, 975.

[44] *Russell* (n 36) 884.

[45] The same general position was adopted in *Dix v Brookes* (1717) 1 Strange 61, 61; 93 ER 585, 585–586 (Pratt CJ): 'the breaking and entering . . . was the cause of action, and the beating the wife alledged only in aggravation of damages: and if that had not been alledged, it may have been given in evidence under the *alia enormia*'. In *Anderson v Buckton* (1719) Strange 192, 192; 93 ER 467, 467 (Pratt CJ, Powys and Fortescue JJ), the King's Bench in banc unanimously agreed that '[t]he true distinction is, where the matter alleged by way of aggravation will intitle the party to a distinct satisfaction'.

[46] *Davis v Lord Foliot* (1651) Style 310, 310; 82 ER 735, 735 (Rolle CJ), referring to a writ of inquiry jury's cognizance of the 'circumstances' of an aggravated trespass to the person.

[47] Significantly, it was not until the statute 1705 (4 Ann c 16) that all civil jurors could come from the 'country at large' as opposed to some of them from the 'vicinity' (or neighbourhood).

juries are led by deposition of witnesses'.[48] That being said, Serjeant-at-Law, Samson Euer, in his 1655 treatise on the law concerning juries, underscored that, even still, a 'Jury may give a Verdict without testimony, or against testimony, when they themselves have Conuzans [knowledge] of the fact'.[49] And famously in *Bushell's case* in 1670, the Chief Justice of the Common Pleas suggested that a court cannot punish the jury for a verdict given against evidence for the reason that a jury is entitled to decide on their own knowledge.[50]

(a) Where aggravating evidence was given

Yet, where the factual basis of a jury's verdict was in some part informed by external evidence (testimonial or otherwise), the contemporary sources attest to a practice of judges seeking to regulate, not just the evidence that might be given to juries, but what they might make of it as well. Writing most likely in the third quarter of the seventeenth-century, Sir Matthew Hale spoke of a seemingly inveterate practice that involved trial judges shedding:

> great Light and Assistance by weighing the Evidence before them [the jurors], and observing where the Question and Knot of the Business lies, and by showing them [their] Opinion even in Matter of Fact, which is a great Advantage and Light to Lay Men.[51]

The device of judicial comment on the evidence to which Hale referred must have exercised considerable influence over how juries settled damages in matters of tort. Examining contemporary slander actions, for example, Helmholz argues that the device of 'judicial comment on the evidence provided an element of control in guiding the discretion of juries in making the award'.[52] This must have been especially so in aggravated tort cases, where the facts grounding a defendant's full financial liability were, certainly during

[48] 3 Co Inst 163.
[49] Samson Euer, *Trial Per Pais: Or, the Law Concerning Juries by Nisi Prius* (J Streater, J Flesher & H Twyford 1665) 137–138.
[50] (1670) Vaugh 135, 140; 124 ER 1006, 1009 (Vaughan CJ).
[51] Sir Matthew Hale, *The History of the Common Law of England: Divided into Twelve Chapters* (J Walthoe 1713) 259. This was a posthumous publication; Hale died in 1676. Also see, Paul Brand, 'Judges and Juries in Civil Litigation in Later Medieval England: The Millon Thesis Reconsidered' (2016) 37 J LegH 1, challenging, *inter alia*, the claim that later medieval judges did not routinely undertake to summarize the evidence for juries, or comment upon it.
[52] Richard H Helmholz, 'Damages in Actions for Slander at Common Law' (1987) 103 LQR 624, 627.

the seventeenth-century, often not specifically pleaded beforehand but given in evidence later at trial (even in cases where trial judges supposed that some jurors might have had already known them).

Across the period under examination, however, there is sparse evidence of what trial judges actually said to juries about the question of damages in aggravated cases. This is because almost all contemporary tort reports are of post-trial hearings in banc rather than the fact-finding proceedings from which they arose.[53] Nonetheless, it can be reasonably supposed that judges readily commented on evidence of aggravation that plaintiffs gave at trial. Indeed, by the middle of eighteenth-century, Lord Mansfield noted the propensity of trial advocates to, as he put it, 'artfully'[54] press certain types of evidence upon the minds of local lay jurors. In cases where plaintiffs gave inadmissible aggravating evidence, or where advocates told juries what damages admissible evidence called for, the device of judicial comment would have been a particularly effective way of either affirming or disaffirming what jurors were told about the acceptability and interpretation of aggravating evidence.

C. Judicial Interference with Aggravated and Excessive Damages

When a tort defendant lost an aggravated case, his ability to thwart the plaintiff's case did not solely depend on challenging the propriety with which the plaintiff laid aggravating matter on the record. By the middle of the seventeenth-century, there emerged a different species of post-trial motion: unsuccessful tort defendants were permitted to return to the common law court where proceedings against them began and ask the central judges to interfere by setting aside the jury's verdict on the sole ground of the excessiveness of the damages. Unlike motions in arrest of judgment, however, motions for new trials on the ground of excessive damages were not concerned with the propriety of the plaintiff's pleaded case; their particular concern was with the acceptability of the jury's finding of one especially contested 'fact' – the full extent of a tort plaintiff's suffering.

[53] ibid.

[54] *Bright v Eynon* (1757) 1 Burr 390, 398; 97 ER 365, 368, though in this case, Lord Mansfield referring to the 'artfulness' of the defendant's counsel regarding evidence going to lability, not aggravation of damages.

i. The precedent of 1655

The first reported instance of the writ *venire de novo* being issued, and on the apparently sole ground of the excessiveness of the damages given by a jury, was *Wood v Gunston* in 1655.[55] The plaintiff brought an action on the case for words alleging that Gunston, in his capacity as counsel in a legal action, had called him a traitor. Upon the trial of the plaintiff's case at bar,[56] the Chief Justice of the King's Bench, Glyn CJ, ruled that an action on the case could not lie in this situation because it was counsel's 'duty to speak for his clyent'.[57] The jury, however, appear to have disregarded the Chief Justice's direction on point of law and instead returned a verdict for the plaintiff with very large damages in the sum of £1500.

The defendant is reported to have moved for a new trial on 'a supposition of excessive damages given by the jury'.[58] As it was suggestively described, the 'miscarriage of the jury'[59] appears to have been their rejection of the judge's trial direction to find that the defendant was not liable to pay the plaintiff any damages. As Glyn CJ stated: 'if the Court do believe that the jury gave their verdict against their direction, the Court may grant a new tryal'.[60] Glyn CJ seemed to be referring to the trial judge's direction on point of law. Although very large, therefore, the *Wood* jury's ultimate award does not appear to have been the sole reason for the King's Bench setting aside their verdict. Indeed, Twysden J took the same view eight years later in the decision of the same court in *Roe v Hawkes,*[61] in which a jury was similarly alleged to have given excessive slander damages of £700. Seeking to set aside the verdict, the defendant's counsel 'cited *Wood v Gunston's case* in

[55] (1655) Style 462, 82 ER 864.
[56] Trials at bar at Westminster Hall were reserved for cases of 'of difficulty,' those requiring 'great examination', or involving 'something of value', see *Dalby v Wells* (1732) Andr 271, 272; 95 ER 394, 394.
[57] *Wood* (n 55) 864.
[58] ibid.
[59] ibid.
[60] ibid.
[61] (1663) 1 Lev 97, 83 ER 316. The defendant had said of a custom-house officer: 'He set his hand to the petition to bring the King to justice' (316). In a *vi et armis* action the following year, the same court refused to disturb an allegedly 'outragious' £60 tort verdict where evidence of aggravation had been given under *alia enormia* (and seemingly responded to by the jury), see *Sippora v Bassett* (1664) 1 Sid 224, 225; 82 ER 1071, 1071.

Style's Reports'.[62] Twysden J, however, took exception to the ground of the defendant's motion, stating that in *Wood* 'the new trial was not granted . . . meerly for the excessiveness of the damages'.[63]

(a) Early signs of judicial hesitancy

The issue of whether a jury's verdict could be set aside solely on the ground of excess soon came before North CJ's Common Pleas in the 1676 *scandalum magnatum* case of *Lord Townsend v Hughes*.[64] The Lord Lieutenant of Norfolk, Lord Townsend, brought an action upon the Statute of Gloucester of 1378 after the defendant called him 'an unworthy man . . . [who] acts against law and reason'.[65] Upon a trial of the plaintiff's claim at nisi prius, the jury returned a very large £4000 verdict for the plaintiff. Upon a motion to set it aside, Atkins J evoked 'the case of *Gouldston* v. *Wood* in the King's Bench'[66] in accepting that the central judges could 'lay their hands upon'[67] excessive verdicts. In defamation actions, he supposed the central judges could 'with one eye to look upon the [jury's] verdict, so with the other they ought to take notice what is contained in the declaration, and then to consider whether the words and damages bear any proportion'.[68] Atkins J was in a single minority. North CJ, with whom Wyndham and Scroggs JJ concurred, balked at his readiness to interfere with the *Townsend* jury's verdict, emphatically declaring that in respect of damages 'the jury are the proper judges'.[69]

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[62] ibid 316.

[63] ibid, with Twysden J supposing there had been a 'tampering with the *Wood* jury'. Wyndham J further opined that 'if the damages are excessive an attaint lies', suggesting that *Wood* did not suddenly eclipse the medieval attaint remedy (which punished juries for rendering 'perjurious' verdicts). In 1665, Euer attests to two, seemingly coexisting, means of impeaching large damages, see Euer (n 49) 154 and 177. At the end of the period, the attaint was generally dismissed by Lord Mansfield as not even 'pretend[ing] to be a remedy', see *Bright* (n 54) 366.

[64] (1676) 2 Mod 150, 86 ER 994.

[65] ibid 994. See Glouc 1378 (2 Rich 2 c 5): 'None shall devise or tell any false news of Prelates, or Lords, or of Chancellor, Treasurer, Privy Seal, Steward of the King's House, Judges whereby any discord or slander may arise, or mischief come to the realm, on pain of punishment, as is ordained in West I'.

[66] ibid 995.

[67] ibid.

[68] ibid.

[69] ibid 994.

Decided in the aftermath of *Bushell's case*, the Common Pleas' denial of Hughes' motion came at a time where, as Macnair shows, 'the relation of judge and jury were matters of controversy'.[70] Although very large, there is nothing in the report suggesting that the *Townsend* jury gave their large verdict against the trial judge's direction, or indeed the weight of the evidence presented at trial.[71] It should not be supposed, however, that North CJ would have always been hesitant to interfere with a tort jury's verdict on the sole ground of excess, giving the example of tort cases in which plaintiffs wholly grounded their claims in a 'particular averment of special damages'.[72] By seeking an essentially fixed sum, and therefore subject to little variation or ambiguity, the Chief Justice's view was that, in such cases, centralized interference with excessively inaccurate verdicts would be legitimate.[73] The issue, however, was that *scandalum magnatum* plaintiffs did not seek such sums. As for the instant *Townsend* jury's £4000 verdict, North CJ conceded that 'he could neither lessen the sum or grant a new trial'.[74] This was because 'as a Judge he could not tell what value to set upon' a major component of *scandalum magnatum* recovery – 'the honour of the plaintiff'.[75] In a strong three-to-one majority, therefore, the Common Pleas in *Townsend* leaned firmly in favour of the proposition that 'by the law the jury are judges of the damages'.[76]

Hesitancy from the central common law benches about granting new trials for excessive tort verdicts persisted beyond the political turmoil of 1688. In 1696, Holt CJ's King's Bench was moved to do so in *Ash v Ash*, a *vi et armis* action in which a mother had

[70] Mike Macnair, 'A Fragment on Proof by Francis North, Lord Guilford' (1993) 8 Sev Cent 143, 145.
[71] Macnair further suggests that during this period (and in which *Townsend* was decided), 'North wanted to allow the jury more leeway than his Whig opponents, but he is careful not to concede the arguments against judicial control of the jury', see ibid.
[72] *Townsend* (n 64) 994.
[73] *Earl of Peterborough v Sadler* (1700) Holt KB 703, 703; 88 ER 1371, 1371, where a local 'jury of farmers' was summoned to value improvements to land in an action for waste and the King's Bench set aside their excessive £200 valuation, believing that the improvements at issue required 're-examination'.
[74] *Townsend* (n 64) 994.
[75] ibid. On a more pragmatic note, North CJ also alluded to the inconvenience of the central judges 'examin[ing] upon what account they [the jury] gave their verdict' each time a defendant felt aggrieved by its size, see ibid 995.
[76] ibid 994–995. In the report of a separate motion in arrest of judgment in which the plaintiff challenged the actionability of his words under the statute, North CJ was rather more emphatically reported to have characterized the jury as 'the sole judges of the damages', *Lord Townsend v Hughes* (1676) 1 Mod 232, 233; 86 ER 850, 850.

pretended that her daughter was 'troubled in mind'[77] and hired an apothecary to give her medicine against her will. The plaintiff declared that her mother had assaulted, beaten and falsely imprisoned her. A nisi prius jury found for the plaintiff on all three counts of trespass with allegedly excessive damages of £2000. In banc, the King's Bench ultimately concluded that the *Ash* jury had made a 'mistake'.[78] As Holt CJ characterized it, they had all been 'very shy of giving a reason of their verdict, thinking they have an absolute despotick power'.[79] In banc, the Chief Justice insisted that juries 'are to try causes with the assistance of the Judges, and ought to give reasons when required, that, if they go upon any mistake, they may be set right'.[80] It might be that the trial judge had asked the jury to shed light on their large verdict, but refused to answer him.[81]

The wider circumstances of the case may explain why the *Ash* jury was induced to weigh 'unmercifully'[82] on the mother. The plaintiff's father, Sir Joseph Ash, a royalist merchant and Whig parliamentarian, had died a decade earlier. Under his will, he left the larger portion of £7000 to his unmarried daughter, Anne. As executrix of her late husband's will, Dame Ash appears to have feared Anne's inheritance becoming owned by her husband upon her marrying.[83] Her attempts to establish her daughter's insanity, in turn, were probably designed to prevent her from marrying and thus to preserve the £7000. As for the £2000 *vi et armis* verdict, a reasonable guess is that it was a calculated attempt by the jury to force Dame Ash to admit her daughter's sanity, and therefore to allow her to marry. The trial judge's questioning of the *Ash* jury suggests he reasonably supposed their award had been influenced by their local knowledge of the wider controversy surrounding the truth of the insanity issue. Indeed, the reason they, as a later century commentator put it,

[77] (1696) Holt 710, 710; 90 ER 1287, 1287, though the report was later abridged from the original source, *Ash v* (*Lady) Ash* (1696) Comb 357, 358; 90 ER 526, 526.
[78] ibid 1287.
[79] ibid.
[80] ibid. In *Argent v Darrell* (1700) Holt 702, 702; 90 ER 1288, 1288, Holt CJ said it was just as important to 'not make ourselves absolute Judges of law and fact too'.
[81] The practice of trial judges querying juries is generally attested to in *Bushell's case* (1670) Vaugh 135, 144; 124 ER 1006, 1010 (Vaughan CJ): 'when the jury find unexpectedly for the plaintiff or defendant, the Judge will ask, how do you find such a fact in particular'.
[82] See *Croutch v Drury* (1661) 1 Keble 40, 40; 83 ER 799, 799 (Twisden J), using the suggestive phrase 'unmerciful damages' in the context of a debate whether *Wood*, decided very recently, had been right to seemingly extend the availability of new trials.
[83] Part of the wider context appears in *Packer v Wyndham* (1715) Prec Ch 412, 24 ER 184.

'misbehaved in refusing to answer'[84] him was because they recognized that the damages were inexplicable as an award for the trespasses proved (however aggravated). Nonetheless, it remains that among the chief reasons the that the central King's Bench interfered in *Ash* was as much for the purpose of chastizing an errant jury than to overturn an award with which it substantively disagreed.

(b) Hesitancy into the eighteenth-century

Accordingly, other than in cases in which merely special damages were claimed, by the turn of the eighteenth-century it is rather difficult to identify a clear instance of a tort verdict being centrally setting aside *solely* on the ground of excess. The next important case was *Chambers v Robinson*,[85] a 1726 action on the case for malicious prosecution. Upon a trial of the plaintiff's claim, the nisi prius jury returned a £1000 verdict, but the defendant moved to have it set aside for being excessive. The report notes that pending the plaintiff's criminal prosecution for perjury, the defendant had put a public advertisement into the papers; importantly, however, the advertisement had not only referred to the plaintiff's alleged perjury, but to other 'scandalous matter'[86] as well. For that reason, the defendant's counsel in the malicious prosecution action had urged Raymond CJ (who had presided at nisi prius) not to admit the advertisement into evidence. The Chief Justice was not so inclined: although the advertisement contained extraneous matter, it was still probative of the defendant's malice, being a fact that the plaintiff had to prove in order to win his case.[87]

Yet, the report of the defendant's in banc motion suggests that, although prepared to admit the document into evidence, Raymond CJ had used the device of judicial comment to affirm its proper effect upon the jury's verdict. He appears to have directed them that, although given in support of the defendant's malice, they were not to account for it in

[84] Joseph Sayer, *The Law of Damages* (W Strahan & M Woodfall 1770) 224.
[85] (1726) 2 Strange 691, 93 ER 844.
[86] ibid 844.
[87] See *Traverse v Daws* (1673) 1 Free 324, 325; 89 ER 240, 240–241 (Hale CJ): 'for the jury could not have found for the plaintiff, unless they had found the malice, as well as the falsity [of the charge]'; *Jones v Givin* (1713) Gilb Cas 185, 193; 93 ER 300, 302 (Parker CJ), stating: 'malice and maliciously I take to be terms of law which in the legal sense always exclude a just cause'.

aggravation of damages.[88] For this reason, the jury's ultimately very large award appears to have convinced the Chief Justice that, in settling the plaintiff's damages, they had defied his direction *not* to treat the defendant's tort as aggravated by the malice evidenced by the public advertisement. If this interpretation of *Chambers* is correct, then, again, the reason Raymond CJ's King's Bench granted the defendant's motion was not solely because it disapproved of the size of the jury's award, but because they had settled it in apparent defiance of his direction.[89]

During the period under examination, it is important to note that tort damages were routinely settled outside the context of tort trials, either at bar or at nisi prius. Often, they were assessed upon writ of inquiry, typically where tort plaintiffs won judgment by default. As a matter of form, writs of inquiry were an 'inquest of office': they personally commanded sheriffs (royal outpost officers) to 'diligently enquire' in their local sheriff courts what damages plaintiffs sustained, albeit relying on 'the oath of good and lawful men'[90] of the particular county in which torts were committed.[91] The extent of the plaintiff's recovery appears to have depended on the quality and quantity of the evidence given by the plaintiff in support of the sum originally laid in his declaration, including evidence of aggravating matter.[92] The defendant could attend the execution of the writ, test the plaintiff's evidence,[93] as well as give evidence of his own in mitigation of damages.[94]

[88] *Chambers* (n 85) 844.

[89] ibid 845. Notably, the second *Chambers* jury gave the same sum, though the court refused to try a third jury: 'It was not in their power to grant a third trial' (845); *Tomkins v Hill* (1702) Holt 705, 705; 90 ER 1289, 1289, where Holt CJ had reportedly refused to order a third trial 'because there ought to be an end of things', though the report was later abridged from the original source *Thomkins v Hill* (1702) 7 Mod 64, 64; 87 ER 1097, 1097.

[90] *Crosse v Bilson* (1704) 6 Mod 102, 102; 97 ER 858, 858.

[91] Although occasionally assessed by judges in early periods, by the beginning of the period under examination, the judges seem to have increasingly insisted on juries assessing damages upon writ of inquiry, see *Ognell's case* (1588) 3 Leon 213, 213; 74 ER 640, 640, where the court designated trespass damages 'local matter' because the sum 'may be greater or less according to the value of the cattel, and the circumstances of the taking'; *Goodwin v Welshe* (1610) Yelv 151, 152; 80 ER 102, 102; *Wood v Brook* (1627) Latch 212, 212; 82 ER 351, 351.

[92] *Billers v Bowles* (1741) Barnes 233, 233; 94 ER 892, 892.

[93] *Yate v Swaine* (1741) Barnes 233, 233; 94 ER 891, 891–892.

[94] ibid.

At the beginning of the period under examination there is evidence of the central court strongly resisting defendants who 'sought a mitigation by the Court'[95] where allegedly excessive damages had been assessed by juries upon writ of inquiry. No different to cases where excessive damages were alleged to have been assessed upon a full trial of the pleaded factual issues, those aggrieved by the size of writ of inquiry awards were required to move for the first writ to be set aside and for a second to be issued.[96] Nonetheless, the central courts appear to have been less hesitant about setting aside excessive writ of inquiry awards than those given upon trials. Two key reasons help explain this lesser judicial hesitancy. First, a significant historical consequence of the writ of inquiry 'being no Verdict upon Issue joined, but an Inquest of Office'[97] had been that writ of inquiry juries carried out their assessment task with impunity: in short, it had not been possible to 'attaint' them for assessing 'perjurious' awards.[98] Secondly, the sources suggest that local sheriffs were rather less scrupulous in their selection of writ of inquiry jurors than their trial counterparts.[99] For these principal reasons the central judges came to discern a 'difference between a principal verdict of a jury, and a writ of inquiry of damages'.[100] According to Pratt CJ, 'the latter . . . [were] only an inquest of office to inform the conscience of the Court'.[101] Therefore, where a defendant accused a writ of inquiry jury of assessing excessive damages, the central judges were more willing to 'put themselves in the stead of the jury by way of appeal'.[102]

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[95] *Stanley's case* (1628) Hetley 93, 93; 124 ER 368, 368.

[96] Such motions appear to have been granted sparingly into the eighteenth-century, see John Lilly, *A Continuation of the Practical Register in Two Parts* (J Nutt 1710) 76: 'The Court will . . . upon an extraordinary occasion grant a new writ of inquiry, but it is often denied'.

[97] Henry Curson, *The Office and Duty of Executors* (E Nutt & R Gosling 1728) 166, with the author further noting that writ of inquiry jurors had been impervious to 'challenge' by the parties.

[98] See John Lilly, *The Practical Register: Or, A General Abridgement of the Law*, vol 2 (H Lintot 1745) 880.

[99] *Sparrow v Reed* (1741) Barnes 235, 235; 94 ER 892, 892: 'Juries are returned in a much better manner at the assizes, than usually, for writs of inquiry'.

[100] *Beardmore v Carrington and others* (1764) 2 Wils KB 244, 248; 95 ER 790, 792 (Pratt CJ).

[101] ibid.

[102] *Barker v Dixie* (1736) Cas t Hard 279, 281; 95 ER 180, 181. That being said, the excessiveness still needed to be significant, see *Dove v Martin* (1689) Comb 169, 170; 91 ER 410, 411 (Holt CJ): 'Court will not grant a new trial or a new writ of enquiry upon every excessiveness of damage, but only where they are extravagantly excessive'. (The quote seems to be displaced upwards by the printer from *Stephenson v Etherick* (1689) Comb 170, 91 ER 411). In the false imprisonment case of *Yate* (n 93) 892, a £250 writ of inquiry verdict was set aside for being excessive, 'it appearing that plaintiff was confined for no longer time than 26 days, and plaintiff himself making no affidavit about the damages or imprisonment'.

ii. Articulation of the threshold of judicial interference

It was not until over a century after the apparent 1655 'precedent' in *Wood* was set that the central courts are reported to have subjected their jurisdiction to set aside excessive verdicts in matters of tort to sustained appellate scrutiny. The first of these attempts appears to have been undertaken in 1758 by Lord Mansfield in the action on the case for criminal conversation, *Wilford v Berkley*.[103]

(a) Lord Mansfield's King's Bench

Upon a trial before a special jury[104] at nisi prius, a verdict for the plaintiff was returned with allegedly excessive damages in the sum of £500. In banc, Lord Mansfield's King's Bench is reported to had 'no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessive damages'.[105] In matters of tort, however, the Chief Justice's view was that a central court could only properly exercise such a discretion where:

> the quantum of the damage really suffered by the plaintiff could be apparent, or they were of such a nature that the Court could properly judge of the degree of the injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury.[106]

Lord Mansfield's apparent distinction between damages designed to quantify 'damage' on the one hand, and judge the degree of 'injury' on the other is significant. The former seems to have signified tortious harm that was thought capable of admitting of a more or less certain equivalent in money terms; for example, in actions involving the carrying away or destruction of property, determining what the plaintiff 'really suffered' would ordinarily

[103] (1758) 1 Burr 609, 97 ER 472.
[104] For the history of the special jury ('juries of higher-than-ordinary social standing and juries of persons with special knowledge or expertise') before its first legislative recognition in the statute 1730 (3 Geo 2, c 25), see James C Oldham, 'The Origins of the Special Jury' (1983) 50 UChi L Rev 137, 140, and more generally 137–221.
[105] *Wilford* (n 103) 472.
[106] ibid.

have involved quantifying the property's value.[107] In most tort cases, however, settling the damages necessarily involved juries exercising quite a degree of discretionary judgment. So much so, that in an earlier 1736 action for malicious prosecution, Hardwicke CJ declared that 'in torts the damages are uncertain always', and owing to this universal uncertainty, 'the language of the law', as the Chief Justice put it, 'is that the jury are judges of damages'.[108] In *Wilford* itself, the jury's uncertain task ostensibly involved judging the 'injury suffered by the husband'[109] with whose wife the defendant had committed adultery.

Yet, as Lord Mansfield importantly conceded in his *Wilford* speech, the question of tortious recovery was not only in its nature uncertain, but further obscured by the fact that in many cases its full extent greatly 'depended on circumstances'.[110] Indeed, because of the peculiar circumstances in which adulterous controversies were typically embroiled, Lord Mansfield's view was that in respect of criminal conversation recovery, 'the estimate of the damages to be assessed must, in their nature depend *entirely* upon circumstances'.[111] As the King's Bench importantly underscored, where a jury's settlement of the question of damages had taken account of circumstances (aggravating or mitigating), the central courts' discretionary power to set aside an allegedly excessive tort verdict would be 'very different'.[112] As Lord Mansfield explained, this was because the circumstances of individual tortious controversies were 'properly and solely under the cognizance of the jury'.[113] In the instant case, this meant that the question of Berkeley's full financial liability to Wilford had been 'strictly and properly the province of the jury to judge of'.[114] As for

[107] Even so, contemplating 'the English courts of common law', the Scottish jurist and philosopher, Lord Kames, perceived no 'accurate distinction made between damage certain and uncertain. Damages are taxed by the jury, who give such damages as in conscience they think sufficient to make up the loss', see Henry Home, Lord Kames, *Principles of Equity* (first published 1760, 2nd edn, A Millar, A Kincaid & J Bell 1767) i.

[108] *Barker* (n 102) 181. Malicious prosecution damages exceeded the plaintiff's certain 'expence' in defending the false accusation, to include less certain injury to his 'person' and 'fame', and 'circumstances may increase or lessen the damages', see *Jones* (n 87) 302.

[109] *Wilford* (n 103) 472. That loss of consortium was the remedial gist of the temporal remedy for adultery is suggested by the phrase husbands laid by way of preliminary *cum* clause: 'whereby he lost her help and companionship', see, generally, Baker, *Introduction to English Legal History* (n 7) 491.

[110] ibid.

[111] ibid. (Emphasis added).

[112] ibid.

[113] ibid.

[114] ibid.

the *Wilford* jury's ultimate £500 award, Lord Mansfield strikingly conceded that – as a judge – he was not competent to 'say that 500*l* was too much; or that 50*l* would have been too little'.[115] For the King's Bench, therefore, interfering with damages in tort cases where the jury had seemed to incorporate the circumstances into their award would be for judges to improperly put themselves in the jury's 'stead'.

(b) The higher threshold of Pratt CJ's Common Pleas

Before Michaelmas Term 1763, the central courts' proper jurisdiction to set aside excessive tort verdicts again fell to scrutiny, this time in Pratt CJ's Common Pleas. In *Leeman v Allen and others*, the plaintiff alleged that, upon a suspicion that the 'Rummer Tavern' in Chancery Lane was 'lewd and disorderly',[116] an armed cadre of reforming constables unlawfully entered the property, assaulted and falsely imprisoned her. At the trial of her claim, a nisi prius jury found for the plaintiff on all three counts of trespass with allegedly excessive damages of £300.

Following the King's Bench, in Easter Term 1763 Pratt CJ's Common Pleas confirmed the legitimate jurisdiction of his court to set aside excessive tort verdicts, even regarding 'the rule in the case of *Ash and Ash* . . . laid down by Lord Holt . . . a good one'.[117] The report of Pratt CJ's in banc speech in *Leeman* creates the strong impression that Pratt CJ was not entirely satisfied with how the central courts' jurisdiction to set aside excessive tort verdicts had been articulated. '[A]s to the excessiveness of damages', he very strongly stated that 'Courts should be very cautious how they overthrow verdicts that have been given by twelve men upon their oaths'.[118] For Pratt CJ, it seems, no central common law court (including Lord Mansfield's King's Bench) had yet to satisfactorily articulate the proper threshold level of judicial interference with tort damages. Going decidedly further than Lord Mansfield had in *Wilford* in 1758, Pratt CJ appears to have seized the appellate occasion in *Leeman* to articulate when the judicial 'overthrow' of a trial jury's remedial

[115] ibid.
[116] (1763) 2 Wils KB 160, 161; 95 ER 742, 743.
[117] ibid.
[118] ibid.

judgment would be legitimate. In matters of tort, any legitimate overthrow would depend on a jury's award of tort damages being:

> unreasonable and outrageous indeed, as if 2000*l* or 3000*l* was to be given in a little battery, which all mankind might see to be unreasonable at first blush; certainly a Court would set aside such a verdict, and try whether a second jury would not be more reasonable.[119]

The Chief Justice then rhetorically asked (and then answered): 'What rule has the court to govern themselves by in matters of torts? I answer, the Court must be able to say that the damages are beyond all measure unreasonable'.[120]

Pratt CJ's reference to £2000 or £3000 damages being given for a 'little battery' is striking. By 'little', he presumably had in mind any battery that did not inflict a serious bodily injury, like a wounding.[121] As for the phrase 'all mankind', it perhaps indicates a preference that, in determining the outrage generated by a particular award, a central court would need to have regard to the public's outrage at large rather than its own. Of particular note, however, is what appears to have been the Chief Justice's preference for a further requirement that the setting aside of any allegedly excessive tort verdict be predicated on it being unreasonable 'beyond *all measure*'. The phrase may indicate his opposition to judges interposing themselves upon a post-trial suspicion that, in giving very large damages, a jury had employed a 'measure' of damages that the judges might not have had the full extent of a plaintiff's recovery properly been theirs' to determine. It is perhaps not unreasonable to assume that Pratt CJ had in mind measures designed to punish tort defendants as much as compensate.

(c) Mansfield, Pratt and the adjudicative province of seditious libel juries

Upon a closer consideration of the contemporary reports in banc, therefore, Lord Mansfield's King's Bench and Pratt CJ's Common Pleas appear to have held different views about how easily a nisi prius jury's verdict could be set aside by the king's judges

[119] ibid.
[120] ibid.
[121] See *Davis* (n 47) 735 (Rolle CJ), where upon writ of inquiry a jury gave £200 for a 'foul' and wounding battery.

merely on the ground of excessive damages. However, there is a plausible basis on which to suggest that this apparent disagreement regarding the reviewability of jury-assessed damages in tort was part a deeper ideological divergence between both Chief Justices.

Before becoming Chief Justice of the Common Pleas in early 1762, Charles Pratt had enjoyed a distinguished career at the bar.[122] His advocacy, particularly in criminal cases, however, was marked by a strong championing of popular rights. This included the role of the jury as the ancient guardian of English liberties. A very good example was Pratt's celebrated appearance for the London printer, William Owen, upon his criminal prosecution by the crown in 1752. The previous year, Owen had printed the British satirist Paul Whitehead's controversial pamphlet, *The Case of Alexander Murray, Esq*,[123] which had come to the defence of Alexander Murray, a failed parliamentary candidate who had been gaoled at London Newgate for a seditious libel of parliament.[124] After Whitehead fled the jurisdiction (and absent any immunity for mere disseminators of subversive literature), the crown's censure fell on the unsuspecting printer.[125]

Lead counsel for the crown in Owen's trial was the Solicitor-General, William Murray, later Lord Mansfield. As the eighteenth-century journalist, John Almon, recalled: 'On this occasion was first shewn the great difference in their opinions concerning the law of libel'.[126] Pratt and Mansfield disagreed over the extent of the jury's adjudicative role in determining the defendant's guilt. Murray's contention was that the jury's competence only extended to a finding of the mere fact of publication.[127] Pratt, however, was of a different view. At Owen's trial, he advanced what the early nineteenth-century lawyer,

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[122] Pratt was not appointed King's Counsel until 1755, see Peter DG Thomas, 'Pratt, Charles, first Earl Camden (1714–1794)' *Oxford Dictionary of National Biography* (OUP 2004, online edn Jan 2008) <www.oxforddnb.com/view/article/22699> accessed 3 October 2019.

[123] Anon, *The Case of the Honourable Alexander Murray, Esq, In an Appeal to the People of Great Britain, More Particularly, the Inhabitants of the City and Liberty of Westminster* (C Pugh 1751).

[124] Thomas B Howell, *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, vol 18 (R Bagshaw 1813) 1203–34.

[125] See, generally, Philip A Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 Stan L Rev 661, 725–765.

[126] John Almon, *Biographical, Literary and Political Anecdotes of Several of the Most Eminent Persons of the Present Age* (TN Longman & LB Seeley 1797) 369.

[127] Murray maintained this position as Chief Justice of the Court of King's Bench; see, for example, his direction to the jury in *R v Horne* (1777) 2 Cowp 672, 98; ER 1300, 1304 (Lord Mansfield): 'The only question to be tried is, "whether the words laid, are written of the King's Government"'.

George W Cook, later celebrated as 'a bold and constitutional argument'.[128] Whether the material was a seditious libel, he argued, was not a question of law for the king's judges. '[T]here was', he argued, 'another fact besides the publication which was equally necessary to be proved; this was the fact of the charge in the Attorney-General's information'.[129] Against Mansfield, Pratt urged the court to consider this a proper question for the jury. Mansfield's forerunner on the court, Lee CJ, rejected Pratt's argument. In the course of submitting the case to the jury, his firm direction was that if the 'fact of publication was fully proved', then the jury 'ought to find the defendant guilty'.[130] Despite the weight of the evidence in support of publication, the *Owen* jurors ignored the Chief Justice's recommendation for conviction. Stirred by Pratt's argument, they famously acquitted Owen.

Evidently, throughout his career Pratt CJ had shown a strong commitment to, not only preserving, but expanding, the jury's adjudicative role in the dispensation of royal justice.[131] It was a commitment that Lord Mansfield did not share, certainly not to the same degree. Pratt CJ's later 1763 *Leeman* judgment underscores how committed he was to protecting the nisi prius jury's adjudicative function of assessing damages against centralized magisterial interference.

D. Extra-Compensatory Responses to Aggravating Matter

Against the background of the two preceding sections, the final section shall examine how the medium of damages may have been used to respond to aggravating matter before Michaelmas Term 1763. In actions of trespass and case, the evidence suggests that juries did not increase their awards exclusively for the purpose of repairing tort plaintiffs for further intangible injury. Affirmed as the 'proper judges' of the remedial effect of matters

[128] George W Cooke, *The History of Party: From the Rise of the Whig and Tory Factions, in the Reign of Charles II to the Passing of the Reform Bill 1714–1762*, vol 2 (Macrone 1837) 390.
[129] *R v Owen* (1752) 18 St Tr 1203, 1228.
[130] ibid.
[131] William Cornish, *Life Stories and Legal Histories* (Selden Society 2015).

of aggravation, increasing damages for purposes beyond compensation appears to have been possible, and in select cases, even encouraged.

i. Aggravated compensatory damages for intangible suffering

In the fifth chapter of his essay, 'An Investigation of the Moral Laws of Society,' the Scottish judge – and Lord Mansfield's 'zealous friend'[132] – Lord Kames, came to expound what he described as a 'capital part of the moral system' – namely, 'reparation'.[133] According to Lobban, although the lawbook of which Lord Kames' essay served as a 'Preliminary Discourse',[134] *Principles of Equity*, was 'primarily about Scottish law, it was written for a legal audience throughout Great Britain'.[135] Perhaps in contemplation, therefore, of the English practice of juries in actions for damages, Lord Kames referred to 'numberless instances, where the mischief done admits not an equivalent in money'.[136] He said of them: 'the sum, it is true, is awarded to the person injured; but this cannot be to make up his loss, which money cannot do, but only as a *solatium* for what he has suffered'.[137]

(a) English examples in trespass and case

An illustrative example in England's common law courts were statutory *scandalum magnatum* awards. In *Earl of Leicester v Mandy* in 1657, the defendant had scandalized the plaintiff as being 'an enemy to the Reformation in England'.[138] At trial, the jury found in the plaintiff's favour with £500 damages, with the plaintiff's counsel describing the very

[132] Kames, *Principles of Equity* (n 107) i.
[133] ibid 25.
[134] ibid 1. This essay was included in the second (1767) edition of *Principles of Equity*, first published in 1760, and to supply what he acknowledged had been a 'defect' in the first edition, see ibid vi. Though possibly before, the essay was probably written between 1760 and 1767.
[135] Henry Home, Lord Kames, *Principles of Equity* (first published 1760, 3rd edn, J Bell, W Creech & T Cadel 1778, M Lobban ed, Liberty Fund 2014) xv.
[136] Home, *Principles of Equity* (n 107) 28, giving the specific examples of 'defamation', 'contemptuous treatment' and 'the breaking one's peace of mind'.
[137] ibid 29. Lord Kames later specifically related 'compensation as a *solatium*' to the injury 'distress of mind', see ibid 231.
[138] (1657) 2 Sid 21, 22, 82 ER 1234, 1234.

gist of the statutory action as concerned with 'the preservation of the plaintiff's honour'.[139] It is, in turn, unsurprising that a plaintiff's circumstances of social rank and situation heavily influenced if, and to what extent, damages would be increased.[140] Indeed, Atkins J later observed that recovery in damages for *scandalum magnatum* was routinely 'aggravated by the eminency of the person against whom they [the scandalous words] were spoke'.[141]

English juries appear to have been particularly responsive to matters of aggravation in slander actions at common law. Helmholz argues that juries accounted for such matters in getting a sense of the total 'harm suffered and the consequent damage award'.[142] An early example is the 1593 action for words, *Hilliard v Cunstable*,[143] in which Elizabeth I's Solicitor-General, Sir Edward Coke, addressed the issue of the effect of accompanying, though nonactionable, words upon slander damages.[144] The case was litigated after the entrenchment of the mitior sensus rule; the rule of 'construing ambiguous words in the milder sense (*in mitior sensu*) so that they would be nonactionable'.[145] Coke offered the example of the slanderer who says: 'Thou art a cosening knave and a murderer'.[146] It would be difficult to find ambiguity in the latter words. But the former words – 'cosening knave' – were not separately actionable: describing a man as dishonest and unscrupulous was a common insult,[147] and prefixing it with the adverb 'cosening' was only for emphasis or as an expression of the plaintiff's anger. For Coke, nonetheless, evidence that the former

[139] ibid. Also see *Earl of Lincoln v Roughton* (1606) Cro Jac 196, 196; 79 ER 171, 171 (Croke and Williams JJ), accepting that the defendant's words had 'touched' the plaintiff 'in his honour and dignity'.
[140] See *Owen v Ievon* (1651) Style 277, 277; 82 ER 708, 708 (Serjeant Glyn), where upon a motion in arrest of judgment, it was argued for the plaintiff that alleging that the defendant had committed adultery 'since the last statute made against adultery . . . doth aggravate the words and make them more actionable'.
[141] *Townsend* (n 64) 1000.
[142] Helmholz (n 52) 627.
[143] (KB 1593) CUL MS Ii 5 16, fols, 265v–266, quoted in ibid.
[144] Also see *Webb v Nicholls* (1637) Cro Car 459, 460; 79 ER 998, 998 (Serjeant Heath).
[145] Baker, *Introduction to English Legal History* (n 7) 491.
[146] Helmholz (n 52) 627.
[147] In *Selby v Carrier* (1615) Cro Jac 345, 345; 79 ER 295, 295, the defendant called the plaintiff a 'bankruptly knave', but was held nonactionable because the material allegation (bankruptcy) was used as an adjective rather than a substantive. By the 1630s, allegations that the plaintiff was a 'knave' were held actionable, providing the plaintiff was a merchant and his trade depended on 'faithful dealing', see *Webb* (n 143) 998 (Serjeant Heath); *Seaman v Bigg* (1638) Cro Car 480, 481; 79 ER 1015.

words were spoken indicated that the defendant had spoken an aggravated slander,[148] meaning 'the damages will be increased by reason of the first words, but no action lies for them'.[149] Indeed, Helmholz has suggested that juries increased slander awards on an assumption that accompanying aggravating words tended to inflict further 'harm';[150] specifically in the form of intangible injury to feelings of dignity and pride.[151]

The same may be said of other torts, particularly those involving sexual mischief. In a thickly circumstanced 1739 criminal conversation action, the plaintiff's counsel indulged a special jury in a poignant portrayal of the full extent of the aggrieved husband's suffering:

> 'the Injury done to the Plaintiff was of the most tender Concern to his Peace of Mind, Happiness and Hopes of Posterity; and was the highest of all injuries for which he could come before them [the jury] to seek a Recompence or Satisfaction in Damages; and that it was impossible to give a pecuniary Satisfaction adequate to the Injury; For that no Sum of Money could restore a Man's Tranquillity of Mind'.[152]

In mitigation, however, the defendant successfully proved that husband and wife were 'artful people' who laid a 'snare for the affections of an unwary young gentleman',[153] and even profited from the affair. Far from increasing damages for the purpose of further compensating the husband's non-pecuniary intangible suffering, the jury was induced to decrease damages to £10, despite him having laid £5000 in his declaration.[154]

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[148] Contemporary slander pleaders were reciting sundry aggravating matter by way of preamble, see Anon, *The Practick Part of the Law: Showing the Office of a Compleat Attorney* (T Roycroft 1654) 24.

[149] Helmholz (n 52) 627; *King and Long v Lorking* (1612) 1 Bulst 147, 147; 80 ER 840, 840 (Williams J), a puisne judge remarking that the defendant's additional nonactionable call for the plaintiffs to be hanged would 'very much aggravate the matter of the scandal [an accusation of thievery]'.

[150] ibid 626.

[151] Discussing defamation recovery in the seventeenth and eighteenth centuries, Dent recently argues that 'reputation as it is now understood was not the focus', and that a plaintiff's 'personal harm' more broadly encompassed honour in the sense of 'sensitivity to injury and insult', see Chris Dent, 'The Locus of Defamation Law Since the Constitution of Oxford' (2018) 44 MonU L Rev 491, especially 511–514.

[152] Anon, *The Tryal of a Cause for Criminal Conversation, Between Theophilus Gibber, Gent. Plaintiff and William Sloper, Esq. Defendant* (T Trott 1739) 4.

[153] ibid 32.

[154] ibid. Although no cases from the period under examination have been found in direct support, Baker suggests the same may be said for actions on the case for seduction ('*per quod servitium amisit*'), see Baker, *Introduction to English Legal History* (n 9) 491: 'Provided some loss of service was made out, the courts allowed juries to assess aggravated damages for the dishonour and injured feelings caused by the sexual misconduct'. Although just after the period under examination in this chapter, see *Tullidge v Wade* (1769) 3 Wils KB 18, 19; 95 ER 909, 909 (Wilmot CJ).

In *vi et armis* actions, it is similarly probable that juries responded to evidence of aggravating matter given to show 'how enormous'[155] the defendant's trespass was for the purpose of compensating the plaintiff for further intangible injury. This may have been especially so in those cases where the defendant's unlawful entry had frightened his family members or servants. In 1604 in *Semayne's case*, Yelverton CJ's King's Bench declared 'the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose'.[156] In addition, therefore, to what Holt CJ a century later referred to a defendant's 'invasion of his property',[157] it is reasonable to assume that jurors regarded particularly aggravated unlawful entries as insulting or humiliating to plaintiffs, and therefore apt to inflict a wound upon their feelings of dignity and pride.[158]

ii. Aggravated allowances of punishment

Definitively proving that pre-1763 juries aggravated tort damages awards for the purpose of punishing defendants, including for example's sake, is more difficult. But there are several important shards of evidence that have not been examined. In *Watson*, the plaintiff had originally brought a *vi et armis* action after the defendant had trespassed onto his land and taken away his chattels.[159] In his declaration, the plaintiff had 'purposely' used the words '*alia enormia*'[160] and apparently given evidence of various matters of aggravation under them at the trial of his claim.[161] After recovering seemingly substantial damages in this first *vi et armis* action, the plaintiff brought a second action on the case against the same defendant. In his second declaration, the plaintiff alleged that the defendant had

[155] *Russel v Corn* (1704) Holt 669, 669; 90 ER 1286, 1286, though the case is a later abridgment of *Russell* (n 36).
[156] (1604) 5 Co Rep 91a, 91b; 77 ER 194, 195.
[157] *Ashby v White* (1703) 2 Ld Raym 938, 955; 92 ER 126, 137 (Holt CJ).
[158] Compensation for the same intangible injuries may have also mingled in aggravated battery awards, see *Fitter v Veal* (1702) 12 Mod 542, 543; 88 ER 1506, 1507, where Holt CJ said that evidence of 'a wounding and maiming' given by way of aggravation would allow the plaintiff to get 'entire satisfaction for the battery'.
[159] *Watson* (n 35) 645.
[160] ibid 645.
[161] This seems to have included evidence that, in incidental to being taken, the defendant had also chased the plaintiff's cattle, see ibid 645.

entered his home under the false pretence that the plaintiff was a bankrupt, which caused him to be 'empaired in his credit, and hindred in his trade'.[162]

In response to the plaintiff's second declaration, the defendant pleaded that the plaintiff had already substantially recovered for various aggravating matter incidental to the defendant's unlawful entry, including damages 'to repair the plaintiff's credit'.[163] Upon demurrer, the King Bench agreed. Expressing how much 'the law hates double vexation',[164] Rolle CJ accepted that the former *alia enormia* clause, as well as the evidence given under it, substantially 'comprehend[ed] the matter for which this action is now brought'.[165] But it was the Chief Justice's description of the common law's aversion to double recovery that is significant. He added:

> It doth here appear to the Court, that the former action of trespasse was brought for the same things, and damages were therein given for them, and it is unreasonable to punish one twice for one and the same offence, and the [defendant's] averment is good, and doth shew that both actions are for one and the same cause, and he hath recovered damages already for all the wrong he sustained.[166]

It is not clear whether Rolle CJ was directly involved in the plaintiff's first *vi et armis* case. It is plausible to assume that he knew that the plaintiff's award in that action had been substantial. Indeed, his apparent suggestion was that in the first *vi et armis* action the jury's response (at least to some evidence given under *alia enormia*) may have had the effect of punishing the defendant as much as compensating him. Indeed, to have let the plaintiff's second action proceed may have been to expose the defendant to the same fate – that is, recovering twice for damages intended, not merely as compensation, but in some measure as a punishment for an aggravated wrong.

Another shadowy allusion to a punitive principle being used to determine tort damages occurs in the aggravated *vi et armis* action of *Davis v Lord Foliot* in 1651.[167] The plaintiff brought an action for battery against the defendant, in which he defaulted. Upon writ of

[162] ibid.
[163] ibid.
[164] ibid 646.
[165] ibid 645.
[166] ibid 646.
[167] *Davis* (n 46) 735.

inquiry, the jury awarded the plaintiff substantial damages of £200, the plaintiff having given in evidence the dagger that the defendant had used to inflict a serious wound.[168] On this occasion it was the plaintiff who moved the King's Bench for a new writ of inquiry on the ground that the jury's award was insufficient. Rolle CJ rejected the ground of the plaintiff's motion, thus seemingly agreeing with Serjeant Twisden that, absent proof of a 'miscarriage . . . in [the] execution of the writ',[169] a court was powerless to increase a small verdict. Yet, clearly sympathetic to the plaintiff's grievance, the Chief Justice accepted:

> Though we grant not a new writ, yet we can increase the damages upon view of the wound, and here appears to have been a foul battery by the dagger produced in the Court, and by the party himself that is wounded.[170]

Serjeant Twisden contested the Chief Justice's supposition, submitting that the judges' proper power to increase tort damages was confined to cases involving 'maiming' injuries, and which could 'be viewed by the court'.[171] On this occasion, however, the plaintiff had seemingly not specifically declared[172] (much less proved) that he had suffered what, in 1607, Regius Professor, John Cowell, had defined as a 'corporal Hurt, by which a Man loseth the use of any Member, that is or might be any defence unto him in Battel'.[173] Nonetheless, Rolle CJ seems to have been of the view that, although not conventionally maimed,[174] the wound that the defendant's 'foul battery'[175] had inflicted upon the plaintiff was sufficiently visible to the court.[176] After examining surgeons under oath, he concluded

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[168] ibid.

[169] ibid. Serjeant Twisden resisted the plaintiff's motion, arguing that there was nothing suggesting the writ of inquiry had not been 'well-executed', see ibid.

[170] ibid.

[171] ibid.

[172] In *Cook v Beal* (1697) 1 Ld Raym 177, 177; 91 ER 1014, 1014, it was resolved: 'if the word *mayhemiavit* is not in the declaration, yet if the declaration be particular, so that it appears by the description, that the wound was a maim, it is sufficient, and the Court may increase damages'.

[173] John Cowell, *The Interpreter: Or, Booke Containing the Signification of Words* (J Legate 1607) sv. 'maim'.

[174] In *Brown v Seymour* (1742) 1 Wils KB 5, 95 ER 461, the plaintiff had lost three fingers from the defendant's gunshot.

[175] *Davis* (n 46) 735 (Rolle CJ).

[176] By the end of the period, the Common Pleas suggested it would only increase small damages given for a wounding if it was more than 'trifling and inconsiderable', see *Milbourn v Reade* (1744) 7 Mod 470, 475; 87 ER 1362, 1365 (Willes CJ).

that the £200 damages assessed by the jury 'were too small, and therefore they increased them to 400*l*'.[177]

Significantly, however, the Chief Justice suggested that the instant case was not one where the central judges could legitimately increase the jury's damages by a proportion greater than double. As the reporter concluded by noting:

> They [the reviewing judges] would not encrease them more, because they could not inquire into all the circumstances of the fact, as the jury might, but they thought fitting to encrease them in some proportion, because the offence was great, and such outragious acts are not to be slightly punished.[178]

Rolle CJ's apparent supposition was that, in settling their £200 award, the *Davis* jurors had responded to the 'foul' nature of Lord Foliot's trespass for the particular purpose of punishing him, albeit 'slightly'.[179] Yet, as far as he was concerned, the punitive element that had mingled in the plaintiff's recovery had been insufficient.[180] On this point, the Chief Justice tacitly acknowledged that although his court could properly enhance the plaintiff's recovery in some proportion (not just upon a view of the maim, but to impose a more sufficient punishment), it could not legitimately give him the full sum of damages to which it considered him entitled. This was because, as judges, they were ignorant of a remedially critical aspect of the particular controversy – its 'circumstances'. As Rolle CJ seemed to suggest, it was properly for the *Davis* jury to 'inquire into all the circumstances' that had

[177] *Davis* (n 46) 735 (Rolle CJ).

[178] ibid.

[179] For the suggestion that 'punishment' may have been more likely to mingle in *vi et armis* awards where the defendant 'continues obstinate and perseveres in his Malice', see Anon, *A Treatise Concerning Trespasses* vi et armis (J Walthoe 1704) preface.

[180] It is significant that, at the time of the execution of the writ of inquiry, Lord Foliot had been earlier 'indicted' for the same 'foul battery' at the London Sessions, see *David v Lord Foliot* (1651) Style 299, 82 ER 726. Significantly, the indictment (formally brought by a royal official) would not have precluded the felon (Lord Foliot's) victim from subsequently obtaining a civil writ of trespass, and under which Davis may have *personally* sought Foliot's punishment as part of his civil remedy, see David J Seipp, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 BostU L Rev 59, 72–76; David Lieberman, 'Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence' in N Landau (ed), *Law, Crime and English Society, 1660–1830* (CUP 2002) 149.

touched it, and upon which the full extent of Lord Foliot's financial liability to Davis depended.[181]

iii. Responding to aggravation for example's sake

Before Michaelmas Term 1763, there is also evidence of damages being increased for the discrete punitive purpose of holding out aggravated tortious wrongdoers as public examples. In an early eighteenth-century criminal proceeding, Holt CJ stated that the judicial imposition of exemplary punishments was fundamentally aimed at what he termed 'discouragement'.[182]

(a) Statutory actions scandalum magnatum

The first reported allusion to civil tort damages being increased according to an exemplary principle appear in comments Jeffreys CJ made upon the evidence in the 1684 *scandalum magnatum* trial between Charles II's younger brother, Prince James, the Duke of York, and the English cleric, Titus Oates.[183] The case arose from the Popish Plot, in which the anti-catholic demagogue Oates falsely accused the catholic sympathizing Duke of conspiring to bring down the protestant establishment, with the aim of thwarting the Duke's succession to the throne.

The Duke's statutory action arose from allegations of treachery Oates had made against him in his letters.[184] In his declaration, he laid royally large damages of £100,000. Oates

[181] In *Brown* (n 174) 461, Lee CJ's King's Bench refused to exercise its 'discretionary power' to increase a 'great sum' of £200 because the jury appeared to have considered mitigating evidence of provocation.
[182] *R v Buck* (1705) 6 Mod 306, 307; 87 ER 1046, 1046, where the criminal conduct of two tax collectors who had embezzled tax revenues was characterized as of 'dangerous consequence . . . very pernicious to the Government, of very ill example, and too much practised of late'. Also see *R v Smith* (1713) Gilb Cas 56, 93 ER 259; *R v Daniel* (1704) 6 Mod 99, 99; 87 ER 856, 856 (Holt CJ): 'Surely this is a matter indictable, for it breaks that trust which is between master and apprentice, with very ill example and publick influence to all the apprentices in England'.
[183] Anon, *The Account of the Manner of Executing a Writ of Inquiry of Damages between His Royal Highness James Duke of York and Titus Oates* (B Tooke 1684).
[184] The statute 1369 (2 Rich 2 c 5) reiterated the criminal offence that Westm 1 1275 (3 Edw 1 c 34) first created, see ibid 3. Until 1640, corporal punishments for the crime of *scandalum magnatum* were imposed by Court of Star Chamber, see *Earl of Northampton's case* (1613) 12 Co Rep 132, 134; 77 ER 1407, 1410:

allowing 'Judgment to go against him by default', the King's Bench issued a writ of inquiry to 'the Sheriff of the County of Middlesex to enquire . . . what Damages the Plaintiff had sustained'.[185] Extraordinarily, Jeffreys CJ's King's Bench offered a day to Oates to 'shew cause why that Writ of Inquiry should not be executed at the Bar of that Court'.[186] Seemingly resigned to his fate, Oates failed to respond again, and it was, in turn, 'ordered that it [the writ] should be executed at the Bar'.[187] On the day of the writ's execution, both the sheriff and under-sheriff 'were placed at the table at the judges feet'[188] and the special jurors summoned from their county were duly sworn in. For the plaintiff, Charles II's Attorney-General, Serjeant Robert Sawyer, paraded a host of witnesses before the jury. Before summing-up their evidence, the Chief Justice asked from the central King's Bench: 'Is there any Body here for Mr. Otes, to offer any thing to lessen the Damages?'.[189] No reply was offered.

What Jeffreys CJ then gave was more a 'lengthy oration'[190] than choice comments upon the plaintiff's evidence. He affirmed the Attorney-General's contention that 'there will need nothing to be said for the Aggravation of them [Oates' words], they are Words of the highest Nature'.[191] Unabashedly championing the royal cause, the Chief Justice's request that the jurors show Oates no mercy in damages was as follows:

> As the Case is extraordinary in its Nature, so ought the Example of it to be made as Publick as can be in order to satisfie all People what a sort of Fellow this Defendant is, who has been so much adored and looked upon with an Eye of Admiration, courted with so wonderful an Affection, and so, I had almost said, *Hosanna'd* among People that have been Factious and Tumultuous to the Government.

'the party grieved, and the King's Attorney, if the offenders deny it, may exhibit a bill in the Star-Chamber against the offender, in which the King shall have a fine, and the party shall be imprisoned, and the Court of Star-Chamber may inflict corporal punishment, as to stand upon the pillory, and to have papers about his head'.

[185] Anon, *Duke of York and Titus Oates* (n 183) 22.

[186] ibid.

[187] ibid. It is not clear that Oates actually had an option to appear to contest the case.

[188] ibid.

[189] ibid 21.

[190] John C Lassiter, 'Defamation of Peers: The Rise and Decline of the Action for *Scandalum Magnatum*, 1497–1773' (1978) 22 AmJLegH 216, 230.

[191] Anon, *Duke of York and Titus Oates* (n 183) 22.

> Such as he, ought to be made Publick Examples of; and therefore the King's Counsel have desired that this Cause might be canvased here at the Bar, and the Defendant as he has made himself Eminent for some particular Qualifications, might be made a Publick Example.[192]

After reiterating Oates's personal malice to the jury, Jeffreys CJ even more fervently continued:

> These things I think my self obliged to take Notice of for Example's sake, and to induce all People to consider to what a height of Corruption we were grown when such Scoundrel Fellows as this dare to take such base words into his Mouth, of the Royal Family.[193]

Once Jeffreys CJ finished, the under-sheriff said to the jurors: 'Lay your Heads together Gentlemen, and consider of your Verdict'.[194] Without a moment's deliberation, the foreman of the writ of inquiry jury announced to the court that they had found 'Full Damages, an Hundred Thousand Pounds'.[195] It is difficult to discount that, in addition to giving damages such, as Serjeant Sawyer had said, 'as may be fit to repair the Plaintiff's honour',[196] the special Middlesex jury had obeyed the Chief Justice's exhortation to increase them in order to hold Oates out as an example in the royal precincts of justice at Westminster.

(b) Holt CJ's shadowy allusion

During the period under examination, evidence of tort damages being aggravated according to an exemplary principle appears only rarely in comments judges actually made to juries. Its next apparent appearance is in 1703 in Serjeant Raymond's report of the defendant's in banc motion in *Ashby v White*.[197] After arriving 'to be polled as a burgher

[192] ibid 22.
[193] ibid 28.
[194] ibid 30.
[195] ibid 31.
[196] ibid 10 (Serjeant Sawyer). In *Townsend*, North CJ had insisted on separating the civil *scandalum magnatum* damages remedy from the punishable statutory offence: 'in civil actions the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof', see *Townsend* (n 64) 994.
[197] See (n 157).

duly qualified'[198] at a Buckinghamshire polling station, a returning officer denied the voter his ballot. In turn, the plaintiff brought an action upon his special case, which resulted in a £5 verdict. For the returning officer, Serjeant Whitacre moved in arrest of judgment on the ground that an action on the case could not lie merely for the 'invasion of another's franchise'.[199] In Holt CJ's King's Bench, Powell J (with whom Powys and Gould JJ concurred) held that an action on the case could not lie where there was no 'hurt or damage to the plaintiff'.[200]

The Chief Justice, however, did not join the majority opinion, believing his colleagues to have adopted too narrow a conception of recoverable tortious harm:

> My brother Powell indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing . . . for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.[201]

According to Holt CJ, in such cases, substantial damages were still recoverable despite a plaintiff not having suffered pecuniary damage. More emphatically, he added: 'If public officers will infringe men's rights they ought to pay greater damages than other men'.[202] For the Chief Justice, this was would be especially so where the infringed right at issue concerned 'vot[ing] at the election of a person to represent him in parliament'.[203] Indeed, evoking the Statute of Westminster I of 1275, Holt CJ further noted chapter 5's 'constitutional' provision: 'because elections ought to be free, the King commandeth upon great Forfeiture, that no man by force of Arms, nor by Malice, or Menacing, shall disturb to make a free Election'.[204] For this reason, Holt CJ seems to have regarded it as appropriate for a jury in a civil tort proceeding to increase damages where a constitutionally recognized right had been infringed, particularly in a manner sanctioned

[198] *Ashby v White* (1703) 1 Bro PC 62, 63; 1 ER 417, 417–418.
[199] *Ashby* (n 157) 137.
[200] ibid.
[201] ibid. Holt CJ drew an analogy with damages in actions of waste, see *Hunt v Dowman* (1619) Cro Jac 478, 478; 79 ER 407, 407 'so if he be disturbed in his entrance and view (which is the sole means to have remedy), the law will not leave him without remedy'.
[202] ibid.
[203] ibid 136.
[204] ibid; Westm 1 1275 (3 Edw 1 c 5).

by a relevant statute.[205] Possibly inspired by the punitive aims of chapter 5, he added that such awards might be designed as a discouragement – as he put it, 'to deter and hinder other officers from the like offence'.[206]

(c) Actions on the case for criminal conversation

Before 1763, the exemplary principle is attested to again in actions of criminal conversation. In 1739, Theophilus Gibber, the renowned thespian, brought an action *vi et armis* declaring that his estranged wife had been taken away by her new lover. This was despite Gibber having recovered substantial criminal conversation damages against the same man the year before. At the trial of the plaintiff's *vi et armis* claim before Lee CJ in the King's Bench, George I's Solicitor-General, Serjeant John Strange, told a special jury that the 'defendant has not been deterred by the Verdict of last year', and that therefore there 'appears no remedy against this conduct except another verdict as may be a sufficient warning to him'.[207] Again in a 1757 criminal conversation case against a senior British navy officer, second counsel for the plaintiff asked the jury 'to give a just judgment'.[208] Justice, it was explained, demanded 'sufficient Damages for the injured Plaintiff, *and* to punish the Defendant as to deter all Persons for the future from being guilty of such atrocious Crimes'.[209] Although 'last[ing] near Three Quarters of an Hour',[210] Lord Mansfield's summing-up of the evidence to the jury reportedly did not address the question of damages, much less affirm (or disaffirm) second counsel's plea that the jury give punitive damages carrying the appropriate deterrent sting.

[205] For the English barrister, William Petyt, 'The Rights of the Liberties of the Commons of England consistent chiefly in these three Things', the first of which was the principle embodied in chapter 5, see William Petyt, Jus Parliamentarium: *Or, the Ancient Power, Jurisdiction, Rights and Liberties of the Most Ancient Court of Parliament* (J Nourse 1739) 235. This was a posthumous publication; Petyt died in 1707.
[206] *Ashby* (n 157) 137.
[207] Anon, *The Tryals of Two Causes Between Theophilus Gibber, Gent., Plaintiff, and William Sloper, Esq., Defendan*t (T Trott 1740) 26.
[208] Anon, *The Proceedings on the Trial of Captain Gambier, Late of His Majesty's Ship the* Severn (H Owen 1757) 11.
[209] ibid. (Emphasis added).
[210] ibid 56.

Second counsel's description of the defendant's wrong as a 'Crime' is significant. Although criminal conversation plaintiffs formally declared their principal civil injury to be the loss of their wives' help and companionship, the action must have had an unmistakably punitive dimension. As was noted in the fourth volume of Matthew Bacon's abridgment in 1759, adultery was 'punishable in the Ecclesiastical courts'.[211] He further added that an aggrieved husband's decision to proceed spiritually[212] did not 'Bar'[213] him from seeking his (temporal) common law remedy. Thus, plaintiffs who chose to sue out writs of case appear to have pressed particularly hard on evidence of the nature and circumstances of the adulterer's (canonically) punishable conduct in order to induce an aggravation of damages.[214] Indeed, a common explanation for the very large civil awards awarded against the adulterer was that juries 'generally punished with the Loss of his fortune'.[215]

In 1758, the exemplary principle appears yet again, this time in a manuscript report of the defendant's motion for a new trial in *Wilford v Berkeley*.[216] Unlike Serjeant Burrow's report of the same in banc hearing, the manuscript author further noted speculative comments Lord Mansfield had made about the principles according to which the *Wilford* jury may have settled their (allegedly excessive) £500 award. Lord Mansfield supposed their response to the aggravating circumstances given in evidence at nisi prius had been

[211] Matthew Bacon, *A New Abridgment of the Law*, vol 4 (C Lintot 1759) 260. Bacon died in or before 1757, so the fourth (1759) volume was either a posthumous publication or the work of another editor.
[212] On the public aspect of the canonical punishments imposed for the spiritual crime of adultery, see Henry C Consett, *The Practice of the Spiritual or Ecclesiastical Courts* (2nd edn, W Battersby 1700) chapter 3.
[213] Matthew Bacon, *A New Abridgment of the Law*, vol 3 (E & R Nutt & R Gosling 1740) 581.
[214] This appears to have been achieved in civil pleadings by plaintiffs using the '*vi et armis*' form in their declarations, see *Cook v Sayer* (1758) 3 Keny 371, 371; 96 ER 214, 214.
[215] Dudley Bradstreet, *Bradstreet's Lives: Being a Genuine History of Several Gentlemen and Ladies* (S Powell 1757) 182. Also see Anon, *The Political State of Great Britain*, vol 57 (T Cooper 1739) 188, where a short report of a criminal conversation case says: 'one cannot sufficiently commend the Wisdom and Integrity of such juries as endeavouring by Verdicts like this [£400] to show a just Indignation against such scandalous Practices'. In *Wilford* (n 103) 472 (Serjeant Whitacre), the defendant's counsel alluded to the plaintiff's little wealth ('a clerk in the Exchequer, during pleasure, at a salary of 50*l* a year') as a reason for annulling the jury's excessive £500 verdict.
[216] (KB 1758) ITL MS 195, fol, 250, cited in James Oldham, *English Common Law in the Age of Mansfield* (NCP 2005) 342.

'for public example, as well as private recompence'.[217] It is rather curious why Burrow did not note Lord Mansfield's supposition that the *Wilford* jury had, at least in part, awarded exemplary damages. A possible explanation is that passing judicial comments about damages were not thought to have much reportable value. For Burrow, it seems, the most valuable part of Lord Mansfield's in banc speech was his insistence that, although very large, the *Wilford* jury's verdict was not one that his common law court could legitimately interfere with. Indeed, both Burrow and the manuscript report noted Lord Mansfield's dictum that 'in matters of tort the jury are the proper judges of the damages',[218] the latter source even ascribing to his court the view that, in most tort cases, a central court 'has nothing to do with it'.[219]

E. Conclusion

In deciding that the common law of Australia would not follow Lord Devlin's 1964 judgment on damages in *Rookes*, the High Court judge and legal historian, Sir Victor Windeyer, 'doubt[ed] whether what has been called the exemplary principle is of such recent appearance in the law as the second half of the eighteenth century'.[220] This chapter has called into question the settled narrative that the origins of the practice of giving damages exceeding full compensation and for the purpose of subjecting tortfeasors to various forms of punishment can only be traced as far back as 'the famous cases concerning Wilkes and the *North Briton*'.[221]

It has sought to do so by systematically examining aggravated tort cases litigated in the historical period before Michaelmas Term 1763. Whether traditionally via the *alia enormia* allegation in *vi et armis* actions, or via a longer preamble device in actions on the case, the early common law facilitated the laying of aggravated wrongdoing on the record of pleaded tort cases. This chapter has specifically challenged the interpretation, first propounded by

[217] ibid. Curiously, Lord Kames suggested that soothing effect of awards given for intangible harm may have simultaneously functioned 'as a kind of punishment, in order to deter him [the defendant] from a reiteration from such injuries', see Home, *Principles of Equity* (n 107) 29.
[218] ibid; *Wilford* (n 103) 472
[219] ibid.
[220] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 152.
[221] ibid (Windeyer J).

Professor Street, that prior to the famous decisions in *Huckle* and *Wilkes*, English civil juries responded to evidence of the aggravated nature and circumstances of tortious wrongdoing exclusively to compensate plaintiffs for the full extent of their suffering. In addition to repairing further essentially intangible injuries, there is sufficient evidence to conclude that such aggravating matter likely had induced pre-1763 juries to increase their awards for purposes other than the application of a principle of full reparation – '*restitutio in integrum*'. Such evidence appears sporadically in comments reportedly made by counsel for plaintiffs at trial or writ of inquiry; and on one extraordinary occasion, in a Chief Justice's comments upon evidence given in the context of the latter proceeding. Most frequently, however, evidence of extra-compensatory punitive and, more specifically, exemplary principles being applied at the remedial stage of aggravated tort trials are attested to in post-trial remarks by judges taking up motions at Westminster. The select cases in which such evidence characteristically appears is also of note. Indeed, the only category of tort case in which strong evidence of punitive or exemplary principles recurs before Michaelmas Term 1763 are in adulterous controversies; and where, significantly, canonical punitive sanctions and the temporal common law damages remedy were not mutually exclusive.

This chapter has also attempted to shed light on an underexplored dimension of the historical tort jury's adjudicative province; indeed, one that two tort cases decided shortly before the *North Briton* cases finally brought into sharp relief. Both Lord Mansfield's King's Bench and then, with greater conviction, Pratt CJ's Common Pleas, pointedly addressed the issue of the propriety of a central court interfering with excessive tort verdicts returned by the 'proper judges of damages' – the jury. In tortious controversies 'touched' by circumstances, the central judges came to express a very deep hesitancy to upset a jury's judgment about a tortfeasor's full financial liability. In some of the remedial judgments formed within this province, punishment and compensation appear to have coexisted, even before *Huckle* and *Wilkes* were decided.

CHAPTER 4

The North Briton *and the Doctrinal Origins of Exemplary Damages, 1763–1800*

A. Introduction

The previous chapter explored how early tort practice took account of, and responded via the medium of damages to, matters of aggravation in actions of trespass and case. It set out to show that, even before Michaelmas Term 1763, English juries may have responded to the nature and circumstances in which aggravated torts were committed for purposes other than compensating plaintiffs for the full extent of their suffering; in select cases, juries appear to have increased their awards, not only to broadly punish the defendant, but more specifically, to hold him out as a public example as well. It was also suggested that the application of these principles at the remedial stage of tort trials occurred within the jury's 'proper' adjudicative province. This chapter shifts its attention to developments that occurred in Michaelmas Term 1763 and beyond. It charts a critical four-decade period – from the famous cases arising from the controversial 45th issue of the *North Briton* newspaper, to the end of the eighteenth-century.

According to the English common law's official sources, Pratt CJ's Michaelmas Term 1763 speech in *Huckle v Money* is the first instance of a common law judge using the term 'exemplary damages'.[1] That case was soon followed by the second *North Briton* case, *Wilkes v Wood*,[2] decided during the same court's nisi prius sittings after Michaelmas Term 1763. Following his earlier use of the term 'exemplary damages' in *Huckle*, Pratt CJ has been believed to have directed the *Wilkes* jury that the common law now permitted them to fix John Wilkes' damages, not only to compensate him for the full extent of his suffering,

[1] (1763) 2 Wils KB 205, 207; 95 ER 768, 769 (Pratt CJ).
[2] (1763) Lofft 1, 98 ER 489.

but also to punish the defendant who had done him wrong. According to many contemporary scholars, the combined effect of the decisions in *Huckle* and *Wilkes* was the official recognition of the modern legal doctrine of exemplary damages. For example, according to McCormick, writing in 1930, it was the *North Briton* cases that first laid down 'where early judges were most prone to sanction exemplary damages, and by which they justified and rationalized the doctrine'.[3] Similarly for Street, writing in the prelude to *Rookes* in 1961, 1763 marked the occasion on which Pratt CJ's Common Pleas made it '*the law* that damages going beyond mere compensation may be awarded in tort'.[4] More recently, it has been suggested that 1763 was 'when the doctrine of punitive damages was first articulated'.[5]

On a simple positivist view of the historical common law, the doctrines of the common law have been created by judges deciding individual cases. This chapter contests that the true significance of Pratt CJ's 1763 decisions in *Huckle* and *Wilkes* lies in them combining to make exemplary damages a positive part of the English common 'law' of damages. It suggests that this widely held view problematically presumes that the adjudication of tort disputes during the eighteenth-century was practised entirely within a familiar conception of the common law 'as a body of rules'.[6] In turn, this chapter offers a critical re-

[3] Charles T McCormick, 'Some Phases of the Doctrine of Exemplary Damages' (1930) 8 NC L Rev 129, 137.

[4] Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 29. (Emphasis added).

[5] Griffin B Bell and Perry E Pearce, 'Punitive Damages and the Tort System' (1987) 22 URich L Rev 1, 1. For substantially similar broad-brush claims about the 1763 constituting the doctrinal origins of modern exemplary (or punitive) damages awards see Alan Calnan, 'Ending the Punitive Damage Debate' (1995) 45 DePaul L Rev 101, 105: 'Punitive damages were first formally recognized in the eighteenth century English precedents of Wilkes v. Wood and Huckle v. Money'; Paul Mogin, 'Why Judges, not Juries, Should Set Punitive Damages' (1998) 65 UChi L Rev 179, 204; 'although the common law had developed over several centuries, punitive damages were first recognized in 1763'; James Goudkamp and Eleni Katsampouka, 'Form and Substance in the Law of Punitive Damages' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 333. Also see, most recently, Jason Taliadoros, 'The Roots of Punitive Damages at Common Law: A Longer History' (2016) 64 ClevSt L Rev 251, 255: 'The two seminal cases of *Wilkes* v. *Wood* and *Huckle* v. *Money* are the first explicit articulation of the doctrine of punitive damages'. (Emphasis added).

[6] Sean Coyle, 'Positivism, Idealism and the Rule of Law' (2006) 26 OJLS 257, 257. On the relationship between legal positivism and the historical nature of the common law, see AWB Simpson, 'The Common Law and Legal Theory' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Second Series, Clarendon Press 1973) 77; David Ibbetson, 'What is Legal History a History of?' in A Lewis and M Lobban (eds), *Law and History: Current Legal Issues*, vol 6 (OUP 2003) 2–4.

examination of the post-1763 historical record in a way that seeks to avoid the reductivism of a positivist historical account.

This chapter's central claim is that legal historians have not only generally overstated Pratt CJ's intervention in the *North Briton* cases, but perhaps misunderstood it as well. Despite how significantly *Huckle* and *Wilkes* loom in the common lawyer's legal imagination, they did not substantially change the way in which English juries determined damages in aggravated tort cases. Well beyond Michaelmas Term 1763, decisions to increase an aggravated tortfeasor's full financial liability according to extra-compensatory principles of punishment and in some cases, example, continued to be made within the jury's adjudicative province.

Ultimately, this chapter will suggest that the unappreciated significance of Pratt CJ's *North Briton* decisions was, in fact, to protect this province of civil jury adjudication. They only reinforced the proposition (first propounded well before 1763) that 'in matters of tort the jury are the proper judges of the damages'.[7] By doing so, this chapter will contend that Pratt CJ actually helped to prevent the question of damages – especially in what De Grey CJ styled 'peculiarly circumstanced'[8] tortious controversies – from submitting to the legal-doctrinal authority of the common law judges. Indeed, properly understood, his *North Briton* decisions were instrumental in the later eighteenth-century common law's explicit endorsement of the jury as the 'constitutional' judges of damages in matters of tort. This chapter will ultimately conclude that the significance that modern doctrinal histories of exemplary damages have attributed to the decisions in *Huckle* and *Wilkes* has been largely misplaced.

B. Pratt CJ and the *North Briton No. 45* Cases

Since its inception in June 1762, the Whig-affiliated *North Briton* newspaper was published every week on a Saturday. Its 45th issue was printed on Saturday the 23rd of April

[7] *Wilford v Berkeley* (KB 1758) Inner Temple Library MS 195, fol, 250 (Lord Mansfield), cited in James Oldham, *English Common Law in the Age of Mansfield* (North Carolina Press 2005) 342.
[8] *Sharpe v Brice* (1774) 2 Black M 942, 943; 96 ER 557, 557.

1763 and presented a 'severe and reproachful'[9] criticism of the peace terms that George III and his ministry had brokered with Bourbon France with the aim of ending the Seven Years' War. Although the authorship of the *North Briton* had always been anonymous, there was more than some consensus over who lay behind the controversial 45th issue.

John Wilkes was an influential member of parliament for the Whig party in Middlesex. He had also been a notoriously outspoken supporter of Britain's involvement in the Seven Years War.[10] By the time the *North Briton No. 45* was published, Wilkes had earned a reputation for a radical brand of journalism.[11] In the view of many, the *No. 45* had brought George III and his government into contempt. In turn, Wilkes was pursued by the Secretary of State (for the Southern Department) on the basis that the *No. 45* was a seditious libel.[12] At the time, that cabinet position was held by George Montague-Dunk, the second Earl of Halifax. Lord Halifax's response to the *No. 45* was swift, issuing general warrants that authorized raids on the premises and residences of those suspected of being linked to it. Although not unprecedented, the constitutionality of 'warrants describing no particular persons'[13] was dubious at the time. This was essentially because they imposed few checks on the crown's powers of search and arrest.[14] Upon Lord Halifax issuing general warrants, several of His Majesty's messengers in ordinary were dispatched to two separate London locations: John Wilkes' residence in Westminster and Dryden Leach's printing workshop located just off of Fleet Street. Among Leach's workmen was William Huckle, a journeyman printer. In the latter half of 1763, both Huckle and Wilkes claimed that the agents of the crown who had participated in the enforcement of the government's criminal laws against seditious libel had forcibly interfered with their persons and property. Suing out of *vi et armis* writs of trespass, they each sought substantial damages in the Court of Common Pleas.

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[9] John Noorthouck, *A New History of London, Including Westminster and Southwark* (R Baldwin 1773) 420.

[10] Arthur Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (YUP 2008) 96–103. (Knopf Doubleday 2007) 65–70.

[11] Martin Conboy, *Journalism: A Critical History* (SAGE 2004) 82–83.

[12] For a historical overview, see Noorthouck (n 9).

[13] ibid 420.

[14] See Tom Hickman, 'Revisiting *Entick v Carrington*: Seditious Libel and State Security Laws in Eighteenth-Century England' in A Tomkins and P Scott (eds), Entick v Carrington *250 Years of the Rule of Law* (Hart Publishing 2015) 62–64.

i. A (new?) epithet to describe very large damages

On the 29th of April 1763, four royal messengers entered Dryden Leach's printing workshop on the suspicion that he was the offending publisher of the *No. 45*. The messengers had acted under a warrant that authorized them 'to apprehend and seize the printers and publishers of a paper called the North Briton, Number 45'.[15] The warrant was 'general' in the sense that it did not contain 'any information or charge laid before the Secretary of State'.[16] It was also 'nameless' in the sense that it failed to name 'any person whatsoever'.[17] Huckle, who was present at Leach's workshop at the time of the raid, declared that John Money (who had ushered in the raiding party) assaulted and then falsely imprisoned him.[18] The trial of Huckle's claim took place before Pratt CJ on the 12th of July 1763 at his court's nisi prius sittings at Guildhall in the City of London.

Based on the evidence presented at trial, the jury returned a verdict in Huckle's favour with substantial damages of £300. The defendant moved for a new trial on the ground that the damages were 'most outrageous'.[19] Serjeant Whitacre appeared for the defendant before the Common Pleas in Westminster in Michaelmas Term 1763. In support of his motion, he cited the earlier century King's Bench case – *Chambers v Robinson*.[20] It was a prime example, he argued, of a nisi prius verdict having been set aside merely on the ground that the jury's award was excessive.

Whitacre gave two reasons for why Pratt CJ's court should give Money the chance of a second jury. His first reason had to do with standing of the plaintiff in the case. Huckle, it was argued, was 'only a journeyman to Leech the printer at the weekly wages of a

[15] *Huckle* (n 1) 768. Dryden Leach succeeded in his own civil action for damages after his own home was raided in late April 1763, see *Leach v Money and others* (1765) 19 St Tr 1001, 1004.
[16] ibid.
[17] ibid.
[18] ibid.
[19] ibid.
[20] (1726) 2 Strange 691, 93 ER 844, see chapter 3 C i (b). The following year, in *Beardmore v Carrington and others* (1764) 2 Wils KB 244, 249; 95 ER 790, 793, Pratt CJ supposed that *Chambers* 'seems to be the case where ever a new trial was granted merely for the excessiveness of damages *only*'. (Original emphasis).

guinea'.[21] Pratt CJ agreed with Whitacre insofar as the 'inconsiderableness of station and rank in life'[22] was not an irrelevant circumstance in fixing the damages in a tort action. Whitacre's second ground for a new trial was that Huckle had only been 'confined but a few hours, and very civilly and well-treated by the defendant'.[23] In fact, the evidence given by the defendant showed that seemingly deliberate attempts had been made to ensure that Huckle 'suffered very little or no damages',[24] with Huckle's trespassers even having treated him to beef-steak and beer. The argument, in turn, was that even if a man of Huckle's worth was thought deserving of such a large award, £300 was out of all proportion to any loss or injury that he could reasonably claim to have suffered.

(a) '*Very little or no damages*'

Appearing for Huckle in banc was Serjeant Burland. Seeking to uphold the jury's £300 verdict, he referred Pratt CJ to his own Easter Term speech in *Leeman v Allen and others*[25] decided the very same year. He attributed to the Chief Justice the proposition that 'in cases of tort the Court will never interpose in setting aside verdicts for excessive damages'.[26] This was more hyperbolae on Burland's part than an accurate recount of what Pratt CJ had actually held in *Leeman*. In denying the defendants' motion for a new trial in that case, Pratt CJ did not, in fact, say that a local jury's verdict could never be set aside on account of damages being excessive. As the previous chapter showed, he had simply clarified the threshold level of centralized interference that would need to be met before a reviewing could properly do so.[27]

Pratt CJ began his response in banc by emphatically characterizing the present tortious controversy as one where damages would very much depend on the circumstances. '[I]n all motions for new trial', Pratt CJ said that it would be 'absolutely necessary for the Court

[21] *Huckle* (n 1) 768.
[22] ibid 769.
[23] ibid 768.
[24] ibid. Pratt CJ made the same observation the following year in *Entick v Carrington* (1764) 2 Wils KB 276, 277–278; 95 ER 807, 808: 'they the defendants doing as little damage to the plaintiff as they possibly could'.
[25] (1763) 2 Wils KB 160, 95 ER 742.
[26] *Huckle* (n 1) 768.
[27] See chapter 3 C ii (b).

to enter into the nature of the cause, the evidence, facts, and circumstances of the case'.[28] A closer examination of Pratt CJ's in banc opinion suggests that at nisi prius the plaintiff's counsel had elaborated on the impugned general warrant for the specific purpose of inducing the *Huckle* jury to increase the damages that they might otherwise have given. In turn, whereas Lord Halifax's general warrant regime had formed the basis of the defendant's trial argument that the actions in question were legally justified,[29] counsel for Huckle appear to have tactfully presented it as the decisive circumstance of the case going in aggravation of damages. It appears that the argument that the defendant's counsel had made against the general warrant aggravating damages was that it had been issued by Lord Halifax rather than Money. It was not, in other words, the individual who Huckle had chosen to sue who had 'directed [the general warrant] upon the plaintiff'.[30] Money was merely the messenger; for this reason, the tort Money had committed against Huckle had not been sufficiently touched by the 'arbitrary power'[31] allegedly represented by the government's general warrant regime so as to make it proper for the jury to increase damages on that basis. Pratt CJ was unpersuaded. In a resounding part of his speech in banc, he remarked:

> the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta.[32]

'To enter a man's house by virtue of a nameless warrant in order to procure evidence', Pratt CJ then added, 'is worse than the Spanish Inquisition'.[33] These emphatic remarks suggest that counsel for Huckle had succeeded in portraying Lord Halifax's general warrant as tending to show how enormous the particular defendant's trespass had been. Of course, it is unknown if and in what way Pratt CJ had commented on this important part of the evidence before leaving the case to the *Huckle* jury at nisi prius. Based on the tone of his banc opinion, however, it can be reasonably assumed that he had left it

[28] *Huckle* (n 1) 768.
[29] ibid.
[30] ibid.
[31] ibid 769. In *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) 1128, Lord Diplock much later characterized the plaintiff as 'the whipping-boy for the . . . government'.
[32] ibid.
[33] ibid.

fundamentally for the jury to decide the question of if, and how, they would respond to it in damages. At any rate, it is clear that as far as Pratt CJ was concerned, the general warrant was the decisive aggravating matter that substantially explained the *Huckle* jury's allegedly excessive £300 award, and despite the fact that 'the personal injury done [to Huckle] . . . was very small'.[34]

(b) A non-rule-based direction on damages

Unsurprisingly, therefore, Pratt CJ denied the defendant's motion to set aside the *Huckle* jury's award. In the course of doing so, he underlined the central courts' hesitancy to interfere with damages assessed by jurors upon trials at nisi prius. On this occasion, however, Pratt CJ made a further point. The court's reluctance, he suggested, owed to the fact that, in determining damages, juries decided according to 'law' that the presiding nisi prius judges directed them to apply to the facts of each case. '[T]he law', he declared, 'has not laid down what shall be the measure of damages in actions of tort'.[35] Significantly, this was not the first time that Pratt CJ had made this point during the *North Briton* litigation. He had previously made it at the trial of Huckle's claim, specifically in response to the Solicitor-General's argument that the law bound the jury to assess damages according to the loss or injury suffered by the plaintiff.

Referring back to his summing-up of the case at nisi prius, Pratt CJ recalled that he 'directed and told them [the *Huckle* jurors] they were not bound to any certain damages'.[36] Indeed, during Michaelmas Term, Bathurst J, who sat alongside Pratt CJ in banc, chose to express his support for this particular part of the Chief Justice's general direction to the jury regarding damages. 'I am of my Lord's opinion, and particularly in the matter of damages', Bathurst J remarked, 'wherein he directed the jury that they were not bound to certain damages'.[37] In *Huckle*, therefore, the notion that (certainly in circumstanced tort

[34] ibid 768. Responding to Serjeant Whitacre, Pratt CJ even supposed that if the jury had only based their calculation on 'the personal injury only done, perhaps 20*l* damages would have been thought damages sufficient'.
[35] ibid.
[36] ibid 769.
[37] ibid.

cases) a jury's determination of damages could be reduced to measured legal certainty was rejected, both at first-instance and later on appeal.

In his banc opinion in *Huckle*, Pratt CJ also went drew attention to the jury's oath of office. He seemed to present it as the key source of the jury's remedial jurisdiction in tort cases. As Blackstone was soon to state in Book III of his *Commentaries*, in civil actions, jurors swore 'well and truly to try the issue between the parties, and a true verdict to give according to the evidence'.[38] Pratt CJ's in banc opinion in *Huckle* was not the first occasion where he had referred to the normatively significant role of the jury's oath in civil actions. He had previously done so when his court recently denied the defendants' motion for a new trial in *Leeman*. In the course of that in banc hearing, Pratt CJ had rather unsympathetically described the new trial remedy for excessive damages in terms of the 'overthrow' of 'verdicts . . . given by twelve men upon their oaths'.[39] For Pratt CJ, any attempt (either by counsel or judge) to bind the jury's remedial inquiry to a proper legal 'measure' of damages hampered the exercise of their oath-bound duty to try each case 'according to the evidence, and their conscience'.[40] In turn, the Solicitor-General's submission at trial that in assessing the plaintiff's damages, the *Huckle* jurors were 'confined by their oath to consider the mere personal injury',[41] was seemingly both wrong and misleading.

(c) The exemplary principle reiterated

Evidently, Pratt CJ's denial of the defendant's motion for a new trial in *Huckle* was very firm. There is much to suggest that he strongly agreed with Serjeant Burland's surely considered description of the jury as 'the sole judges of the damages'.[42] It was in the context of Pratt CJ's passionate defence of the jury's assessment of damages function in matters of tort that Pratt CJ used the term 'exemplary damages'. He is reported to have employed it immediately after his own passionate description of the liberty-denying

[38] 3 Bl Comm 394.
[39] *Leeman* (n 25) 743.
[40] Thomas Smith, *De Republica Anglorum: A Discourse on the Commonwealth of England* (first printed 1583, W Stansby 1621) 73.
[41] *Huckle* (n 1) 768.
[42] ibid.

character of the general warrant that had sufficiently touched the defendant's actionable wrong. In a display of solidarity for a jury whose verdict had fallen subject to a very dogged attempt to overthrow it, Pratt CJ declared that the *Huckle* jury had 'done right in giving exemplary damages'.[43]

Pratt CJ was, of course, not the first common law judge to refer to the relevance of an exemplary principle in juries aggravating their awards in tort cases.[44] He was, nevertheless, the first judge to do so by using the specific formulation 'exemplary damages'. On this basis, although the exemplary principle is clearly attested to long before 1763, Pratt CJ's intervention in *Huckle* may be seen as having assigned a more specific label to a previously fluid set of phrases that reviewing judges had reportedly used to describe damages given beyond compensation, and for the distinct purpose of discouraging the particular defendant, as well as other tortfeasors from behaving similarly in the future.

For modern scholars, however, Pratt CJ's use of the phrase 'exemplary damages' in his in banc speech in *Huckle* in Michaelmas Term 1763 was decisive in creating the modern common law doctrine of exemplary damages. According to Rustad and Koenig, it 'comprised the first use of the phrase as a formal legal doctrine'.[45] They further suggest that 'English courts employed the remedy from that point on to punish and deter'.[46] The first 'employment' of this new doctrine as to damages is widely believed to have occurred immediately after the *Huckle* decision. It is said to have been employed in the course of what has been characterized as the 'direction'[47] that Pratt CJ gave to the jury regarding damages immediately after Michaelmas Term at the trial of John Wilkes' claim.

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[43] ibid 769.

[44] See chapter 3 D iii (a).

[45] Michael Rustad and Thomas Koenig, 'The Historical Continuity of Punitive Damages: Reforming the Tort Reformers' (1993) 42 AmU L Rev 1269, 1287.

[46] ibid.

[47] Lord Devlin characterized Pratt CJ's *Wilkes* opinion as a judicial 'direction' given to the jury, see *Rookes v Barnard* [1964] AC 1129 (HL) 1222. This interpretation has persisted, see Mogin (n 5) 206: 'the report of *Wilkes v Wood* . . . indicates that Lord Pratt gave instructions to the jury . . . This instruction identified punishment as an additional purpose of damages'.

ii. A new damages doctrine 'employed'?

Late in the morning of the 30th of April 1763, several royal messengers who were accompanied by a constable arrived at John Wilkes' residence on Great George Street, Westminster. Again, they did so under the authority of a general warrant issued by Lord Halifax. This time, they were led Robert Wood, an undersecretary of state. According to the evidence adduced at nisi prius, upon Wilkes' demand that Wood 'shew his authority . . . much wrangling then ensued'.[48] Wilkes was then arrested, upon which his lawyers immediately applied for a *habeas corpus* to release him from the crown's custody.[49] After the king's messengers entered Wilkes' house, Wood allegedly gave orders for Wilkes' locks to be broken and for his private papers to be seized. According to the evidence, Wilkes' papers were then put into a sack, and carried away. By his writ, Wilkes alleged that Wood had committed an unlawful trespass to land. In his pleadings, he laid very large damages of £5000.[50]

(a) An argumentative weapon of counsel

Wilkes' *vi et armis* claim came for trial on the 6th of December 1763, at which judge Pratt CJ presided. That Pratt CJ had very recently used the phrase 'exemplary damages' at the final determination of Huckle's case in Michaelmas Term, and in so similarly circumstanced a case, appears to have set something of a tone. For those appearing for Wilkes, it indicated that the government's general warrant regime could once again be pressed firmly as a matter going in aggravation of damages. For those appearing for Wood, it underlined the importance of pressing mitigating matter that might induce the jury to give Wilkes smaller damages.

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[48] *Wilkes* (n 2) 493.

[49] Pratt CJ, who had heard the *habeas corpus* matter, agreed with Wilkes' counsel 'that he [Wilkes] is a member of Parliament . . . and entitled to privilege to be free from arrests in all cases except treason, felony, and actual breach of the peace, and therefore ought to be discharged from imprisonment without bail', see *R v Wilkes* (1763) 2 Wils KB 151,159; 95 ER 727, 742.

[50] Wood's response to Wilke's declaration was twofold: first, he entered the general issue 'Not guilty', which involved showing how minor a role Wood had played in the tortious event; second, he pleaded a special justification, which involved trying to prove that the general warrant regime rendered lawful actions that otherwise would not have been, see *Wilkes* (n 2) 493, 497 and 498.

The report of Wilkes' case shows that the phrase 'exemplary damages' was on the lips of the serjeants who took to the bar at Guildhall. Serjeant Glynn, Wilkes' lead counsel, was first to address the court and is reported to have opened by 'enlarg[ing] fully, on the particular circumstances of the case'.[51] His tone was reminiscent of Pratt CJ's firm denial of the defendant's very recent motion for a new trial in *Huckle,* which the government had presented. '[I]n France or Spain', Glynn declared, 'even in the Inquisition itself, they never delegate an infinite power to search'.[52] Glynn's immediate and surely calculated focus on the government's constitutionally dubious general warrant regime appears to have been accompanied by an equally calculated contention that, like in *Huckle*, assessing the full extent of the Wilkes' recovery would be mired in uncertainty.

This is reflected by the way in which counsel for Wilkes described what may have been thought the least vague and unambiguous component of the harm that Wilkes might be said to have suffered. Discussing the confiscation of his private papers, it was asserted that 'of all offences, the seizure of papers was the least capable of reparation'.[53] By characterizing the loss suffered as a result of Wood's unlawful entry as essentially irreparable, Glynn's apparent intention at trial was to reassure the jury that the question of damages would, again, be 'solely' within their adjudicative province. Before concluding his opening remarks, Glynn also put forward the general warrant executed upon Wilkes as a proper evidentiary basis on which they might aggravate their award. In a tone that the presiding nisi prius judge would undoubtedly have welcomed, he specifically told them that their 'resentment . . . was to be expressed by large and exemplary damages'.[54] The alternative, which he characterized as 'trifling damages', he argued, 'would put no stop at all to such proceedings'.[55]

[51] ibid 490.
[52] ibid.
[53] ibid. The reason, Serjeant Glynn argued, was because the papers contained 'affairs of the most secret personal nature'. Also see *Entick* (n 24) 817–818: 'for papers are often the dearest property a man can have'.
[54] ibid.
[55] ibid.

Again, at trial, lead counsel for the defendant was the first Solicitor-General appointed after George III's accession, Sir Fletcher Norton.[56] Norton had been appointed to the office in 1761 on the advice of Lord Mansfield following a distinguished career at the bar.[57] In *Wilkes*, he followed Serjeant Glynn's opening remarks by expressing confusion about the claim that, on this occasion, the undersecretary had been called on to answer. He confessed to being at:

> at a loss . . . to understand what Mr Wilkes meant by bringing an action against Mr Wood as he was neither the issuer of the warrant, nor the executioner of it. If the constitution had been in such an egregious manner attacked, why not bring the Secretaries of State, themselves, into court? . . . This was the first time he ever knew a private action represented as the cause of all the good people of England.[58]

The Solicitor-General conceded that '[t]he messengers went bunglingly about their business'.[59] But as for Wood, he 'was only sent to see they did their duty'.[60] Notwithstanding doubts about Wood's role in the tortious event that had come to pass in Westminster (indeed, whether he ought to have been sued at all), the Solicitor-General targeted key submissions at the question of damages. In an attempt to take the sting out of Glynn's remarks, he asked the jury rhetorically: 'Is Mr, Wilkes, at any event entitled to tenfold damages?'[61]

A closer examination of his remarks show that he pressed one mitigating circumstance on the jury. Hoping to dissuade them from gratifying the avarice that Wilkes' pleaded damages reflected, Norton shifted the spotlight onto the *North Briton No. 45* itself. He reminded the jury that its anonymous, though ill-famed, author had peddled:

> a libel of such a nature, that when it was before the two House of Parliament not one single person, in either House, ever uttered one single word in defence of it. That the whole of *The North Briton* were of such a nature, that it astonished most considerate

[56] See Horace Walpole, *Memoirs of the Reign of King George III*, vol 2 (first published 1845, D Jarrett ed, YUP 1986) 189.
[57] Lewis Namier and John Brooke, *The House of Commons 1754–1790* (Boydell & Brewer 1985) 214.
[58] *Wilkes* (n 2) 490.
[59] ibid.
[60] ibid.
[61] ibid 493.

> persons how they should have passed so long unnoticed; that it had attacked private persons, persons in public stations, with their names written at full length . . .[62]

Turning the government's attack on Wilkes himself, Norton added:

> if he [Wilkes] should be proved to be the author of that paper, which he [Norton] was confident he should be able to prove, to the full satisfaction of the Court and jury; in that case, so far from thinking him worthy of exemplary damages, he was certain they would view him in his true and native colours, as a most vile and wicked incendiary, and sower of dissention among His Majesty's subjects.[63]

Norton's strategy was clear. Even if the jury were to return a verdict for Wilkes, the enormity of the libel at the core of the wider struggle between Wilkes and George III's administration entitled him to a sum much smaller than that which he had laid in his pleadings; one, indeed, confined to the suffering that could be said to have been caused by the raiding party that Wood had led and seemingly instructed.

Before Pratt CJ commented on the evidence that had been presented to the jury, Serjeant Glynn took his final chance to counteract the Solicitor-General's firm submissions on damages. He assured the jury that government's general warrant regime meant that 'very improper persons'[64] had interfered with Wilkes' private affairs, which he insisted properly merited 'an increase of damages on that score'.[65] In a final plea to them, Glynn told them of his personal confidence that 'they would find a verdict for the plaintiff, with large and exemplary damages'.[66]

(b) An earlier informal lawyerly usage?

The repeated use of the term 'exemplary damages' in argument by both sides in *Wilkes* raises interesting questions. Arguably, there is a scant basis on which to conclude that counsel were using a phrase that Pratt CJ had first given currency to in his earlier in banc opinion in *Huckle*. During the decade of the 1760s, the only other legal text in which the

[62] ibid.
[63] ibid.
[64] ibid 498.
[65] ibid.
[66] ibid.

phrase ‘exemplary damages’ appears is Sir William Blackstone’s *Commentaries*. Specifically, it appears in Book III, ‘Of Private Wrongs’, first published in May 1768 – five years after it is reported to have first officially entered the English common lawyer’s remedial vocabulary.[67] Blackstone used the phrase ‘exemplary damages’ twice in his discussion in Book III.

He first used it in chapter 8, entitled ‘Of Wrongs and their Remedies, Respecting the Rights of Persons’.[68] Referring to criminal conversation cases, Blackstone said as follows: ‘the law gives a satisfaction to the husband for it by an action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary’.[69] Blackstone’s general description of the tort of criminal conversation as a ‘*vi et armis*’ action against the adulterer is significant. The implicit suggestion is that the essential gist of the (non-ecclesiastical) civil action for damages was widely considered to be the defendant’s adulterous intercourse with the plaintiff’s wife *per se*, not its impingement, however intangible, on the aggrieved husband himself.[70]

The second time that the term ‘exemplary damages’ appears is in chapter 13 of Book III. There Blackstone discussed the action on the case for nuisance. He observed that, in certain cases, ‘very exemplary damages will probably be given’.[71] The typical case, he supposed, was where defendants had what he described as the ‘hardiness’[72] to continue nuisances for which juries had already found them liable.[73] It is significant that in Book III Blackstone

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[67] Sir William Blackstone, *Commentaries on the Laws of England: Book III: Of Private Wrongs* (TP Gallanis ed, OUP 2016) vii: ‘in the newspapers of the day, the first announcement of Book III’s publication appears in the Gazetteer and New Daily Advertiser of 11 May 1768’.

[68] 3 Bl Comm 78.

[69] ibid 94.

[70] See chapter 3 D iii (c). The gist of the civil action for criminal conversation remained a point of some disagreement for some time, see contemporaneously, see *Morris v Miller* (1767) 4 Burr 2057, 2059; 98 ER 73, 74 (Lord Mansfield): ‘This is a sort of criminal action, there is no other way of punishing this crime at common law’. The matter seems to have been resolved in *Weedon v Timbrell* (1793) 5 TR 357, 360; 101 ER 199, 201 (Kenyon CJ): ‘the plaintiff contends that it is the criminal act; but that I deny. I think it is a civil action, brought to recover satisfaction for a civil injury done to the husband, and not to punish the defendant for having broken the laws of morality and decency. But what injury is done to the plaintiff, who has voluntarily relinquished his wife?’.

[71] 3 Bl Comm 147.

[72] ibid.

[73] This remained an important sub-category of tort case in which exemplary damages were likely and proper, see for example, Anon, *The Citizen’s Law Companion, Containing a Faithful and Judicious*

did not refer to any of Pratt CJ's judgments as the putative first instances of 'exemplary damages' being awarded in tort actions. This does not, of course, mean that Pratt CJ was not the first English judge to have used the term 'exemplary damages' in a judicial decision. It does, however, suggest that throughout the 1760s the practice of increasing damages for the discrete purpose of making public examples of tort defendants in select cases were not regarded as unique to, or deriving exclusively from, the *North Briton* cases.

It is also significant that the only report of the in banc hearing in *Huckle* was written by the Serjeant-at-Law, George Wilson. Most significantly, Wilson did not publish his reports until 1770 – two years after Blackstone published Book III.[74] Unless Blackstone had accessed Wilson's notebook before it was published it is possible that he did not know that the term 'exemplary damages' had been repeatedly used in late 1763.[75] But this is improbable. Given the political noise generated by the *North Briton* cases, it is difficult to doubt that Blackstone knew that the term had been used with some repetition, first at Westminster Hall, then at Guildhall at the close of 1763. Indeed, the phrase Blackstone used in chapter 8 – 'large and exemplary damages' – was the same phrase Serjeant Glynn had used in his opening submissions in *Wilkes*.[76] The suggestion that Blackstone borrowed the phrase from Glynn is doubtful. Perhaps the more plausible explanation is that, by Michaelmas Term 1763, the term 'exemplary damages' was already part of the English common law lawyer's working vocabulary when talking about the large damages juries gave in select cases. It just so happened that Pratt CJ employed the term in his denial of the defendant's motion to set aside such the *Huckle* jury's allegedly excessive verdict, and that Wilson chose to make note of it in his report.

There might be more, however, to Blackstone's failure to mention the *North Briton* cases as two leading examples of exemplary damages being given in response to 'private

Abstract of the Following Interesting Articles . . . (P Boyle 1794) 110, where a 'gentleman of the Inner Temple' observed that 'on a second [nuisance] action generally, a jury will give large damages, and on a third, very exemplary damages'.

[74] George Wilson, Serjeant-at-Law, *Reports of Cases Argued and Adjudged in the King's Courts at Westminster: In Two Parts* (His Majesty's Law Printers 1770).

[75] I have found no evidence suggesting that Blackstone had access to Serjeant Wilson's notebook before he published it in 1768.

[76] *Wilkes* (n 2) 490. The term 'exemplary damages' was used again by Pratt CJ in banc before Book III was published in *Grey v Sir Alexander Grant* (1764) 2 Wils KB 252, 95 ER 794, which will be explored below.

wrongs'. After his inaugural election to Oxford University's Vinerian Chair in 1758, Blackstone went on to serve as a member of parliament for the Wiltshire borough of Hindon for the Tories from 1761 until 1768.[77] It was in parliament that Blackstone made his political opposition against John Wilkes – and his ardent Whig supporter base – most apparent. In a speech to the House of Commons in 1769, Blackstone renewed his advocacy of parliament's legitimate power to expel Wilkes.[78] Moreover, Lemmings has noted that in the fifth (1775) edition of Book I ('Of the Rights of Persons'), Blackstone 'added yet more text qualifying MP's privileges from arrest in legal proceedings, a question which had been aired in the original clash between Wilkes and the government in 1763'.[79] Given Blackstone's open opposition to Wilkes, Blackstone may have resented the delight that Pratt CJ had seemed to take in seeing damages of an exemplary variety imposed against the crown. Perhaps most interestingly, even after Wilson's reports were in print from 1770, Blackstone never referred to Pratt CJ's decisions in any later editions of his *Commentaries*.[80]

(c) A wider usage after 1763

Although the term 'exemplary damages' may not have originated in the *North Briton* cases, it appears with greater frequency in the post-1763 sources. This may suggest that the *North Briton* litigation served as a catalyst for the term's wider use. Between Pratt CJ's 1763 speeches and the publication of Blackstone's *Commentaries* in 1768, the term appeared in an epistolary pamphlet that first appeared in 1764 under the pseudonym, 'Father of Candor'.[81] Its intended recipient was the political journalist and Whig partisan, John Almon (though it has been conjectured that Almon himself may have written it). Priced at 'one Shilling and Six-pence',[82] Schnapper notes that it 'was the longest and most widely

[77] See IG Doolittle, 'Sir William Blackstone and his 'Commentaries on the Laws of England' (1765–9): A Biographical Approach' (1983) 3 OJLS 99, 101.
[78] See Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (OUP 2008) 39–40.
[79] Sir William Blackstone, *Commentaries on the Laws of England: Book I: Of the Rights of Persons* (M Lemmings ed, OUP 2016) vii.
[80] ibid.
[81] Father of Candour, *A Doctrine Entitled an Enquiry into the Doctrine, Lately Propagated, Concerning Libels, Warrants, and the Seizure of Papers* (G Faulkner, P Wilson & J Exshaw 1764).
[82] The price appears on the title page of the fourth (1765) edition.

circulated publication arising out of the Wilkes controversy'.[83] By 1765, it had already run into multiple editions; five by 1765.

The letter took up the popular issue of the propriety of the government's general warrant regime: 'The mansion of every man being his castle', it proclaimed, 'no general search-warrant is good'.[84] It also had in mind the very large verdicts rendered in the *North Briton* cases. In a tone reminiscent of Pratt CJ's Michaelmas Term speech in *Huckle,* the Father of Candor asked with rhetorical flourish: 'Who, under such circumstances, would blame a Jury, should they at last have such a secretary brought before them, for giving extraordinary, exemplary damages, *in terrorem*!'.[85] Referring to the damages given by the *North Briton* juries, the Father of Candour added: 'If mankind is to be enrag'd, I really think this is the readiest way to effect it'.[86] Accordingly, although Wilson's report of Pratt CJ's *Huckle* speech was not published until 1770, the public profile of the *North Briton* proceedings, as well as the passionate public discussion they generated, suggests the term 'exemplary damages' may have acquired a wider currency after Michaelmas Term 1763. As the remainder of this chapter will show, this currency is not only attested in official legal texts, but in a wider discourse too.

iii. Pratt CJ's summing-up in *Wilkes*

Returning to the trial of Wilkes' claim, an important problem remains. This is the problem of whether, in using the term 'exemplary damages' in argument at nisi prius, both Serjeant Glynn and Solicitor-General Norton can be considered to have been making arguments about whether a doctrine of exemplary damages was applicable to the nature and circumstances of the undersecretary's *vi et armis* wrong. In examining this problem, more

[83] Eric Schnapper, 'Unreasonable Searches and Seizures of Papers' (1985) 71 Virg L Rev 869, 900.
[84] Father of Candour, *A Letter Concerning Libels, The Seizure of Papers and Sureties for the Peace and Behaviour, With a View to Some Late Proceedings and the Defence of them by the Majority* (first published 1764, 4th edn, G Faulkner, P Wilson & J Exshaw 1765) 58.
[85] ibid 63. The same remarks appear the following year in a text similarly celebratory of Wilkes' struggle, see Anon, *A Collection of the Most Valuable Tracts, Which Appeared During the years 1763, 1764, 1765, Upon the Subjects of General Warrants, Publication of Libels, Seizure of Papers and Other Constitutional Points Which Arose out of the Case of Mr. Wilkes* (1766) 157.
[86] ibid.

careful attention must be paid to what the trial judge, Pratt CJ, said by way of his summing-up of the evidence to the jurors in *Wilkes*.

Owing to the complexity of the case, what Pratt CJ said to the jury before submitting the case to them was reportedly quite substantial. It included commentary on evidence that had been specifically given for the purpose of increasing and decreasing damages. Pratt CJ first told the jury that if they were satisfied of the legality of the general warrant executed upon Wilkes, the law would require Wilkes' claim to be defeated, which in turn would compel the jury to find a verdict for the defendant.[87] However, if they were to judge the general warrant illegal, then not only would the law require a finding for Wilkes, but as the Chief Justice commented it 'must aggravate damages'[88] as well. Pratt CJ then identified for the *Wilkes* jury evidentiary matter that they might properly consider in mitigation of damages. He told them that if they were to judge the general warrant illegal, but might be persuaded that – despite their questionable constitutionality – such warrants had nonetheless been 'a constant practice of the [Secretary of State's] office',[89] this could properly be taken account of in 'mitigation of damages'.[90] On the basis of these comments in respect of damages, the jury returned a verdict in Wilkes' favour with damages in the substantial sum of £1000 – one-fifth of the sum he had originally laid in his pleadings.

(a) No reference to '*exemplary damages*'

It is significant that Pratt CJ did not use the specific formulation 'exemplary damages' in the course of his remarks on damages in *Wilkes*. If the effect of his use of it in his earlier *Huckle* opinion in had been to give formal effect to a new damages doctrine, then it is perhaps reasonable to expect that Pratt CJ, in ostensibly administering it in a later case,

[87] Some impartiality shines through in the way Pratt CJ described a verdict being rendered in the defendant's favour (and without damages), which was said would be 'of the most dangerous consequences', see *Wilkes* (n 2) 498.
[88] ibid.
[89] ibid 499. At trial, the defendant's counsel gave evidence of 'office precedents' in support of Wood's special justification of the government's general warrant regime, strongly contending it had been accepted executive practice since the 1688 Revolution, see ibid 498.
[90] ibid. Notably, Pratt CJ implicitly rejected Norton's submission that the severity of the libel was a matter that the jury might properly take account of in mitigation of damages.

would have used the same term. This would be especially so where the subsequent case was touched by the very same circumstance of aggravation.

Although Pratt CJ did not use the term 'exemplary damages' in his summing-up, he did speak to the broader notion that, in matters of tort, damages were not restricted to compensation for the loss or injury that a plaintiff suffered. After assuring the jury that the issue of an illegal general warrant would be a proper basis on which they might increase damages, Pratt CJ paused. Seeming to return to a contention made earlier in the course of argument, he went on to make the following remark:

> *Notwithstanding what the Solicitor-General has said*, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.[91]

Although Pratt CJ did not use the specific term 'exemplary damages' in his summing-up, he referred to three seemingly punitive extra-compensatory principles according to which damages might be assessed in aggravated tort cases: to punish the defendant for his guilt; to deter others from behaving similarly; as a means of a trial jury expressing its disapproval at what the defendant had done. This comment, in turn, has been widely interpreted as constituting a 'direction' – given by Pratt CJ to the *Wilkes* jurors – regarding the applicability of a new legal doctrine of civil remedies. According to this interpretation, *Wilkes* was the first tort case where the rule as to exemplary damages was applied by a jury on the direction of a judge in a common law tort action.[92] It is suggested that this interpretation is problematic. There are plausible grounds on which to conclude that, in settling their very substantial £1000 award, the *Wilkes* jury had applied no such doctrine, nor had Pratt CJ 'directed' them to do so.

[91] ibid 498–499. (Emphasis added). It is not entirely clear which former opinion Pratt CJ was referring back to. The only apparent candidates were his Easter and Michaelmas Term in banc speeches in *Leeman* and *Huckle* earlier that year.

[92] See McCormick (n 5) 137.

(b) Yet another defence of the jury

As discussed above, when denying the defendant's motion for a new trial in *Huckle*, Pratt CJ reminded the defendant's counsel that the 'books'[93] where the laws of England had been posited contained no 'law' laying down how damages in tort cases were to be fixed. In each case, the appropriate measure (or, indeed, measures) of damages were in the jury's province. Pratt CJ's recent remarks make it difficult to accept that what he said to the special *Wilkes* jurors about how damages were to be settled constituted a direction about what a new doctrine of the English law damages now permitted them to do. It is suggested that the best interpretation of Pratt CJ's reference to three extra-compensatory principles for fixing damages in tort depends on setting Pratt CJ's comment in its accurate context. In particular, it requires identifying who he was addressing when he made it.

Pratt CJ premised his comment with the following, often neglected, qualification: 'Notwithstanding what the Solicitor-General has said'.[94] Both in *Huckle*,[95] and in *Wilkes*,[96] it is apparent that Solicitor-General Norton persisted with the same trial strategy in respect of damages. The reports of both cases clearly attest to the firm pressure that Norton had exerted upon both *North Briton* juries with a view to restraining their awards. Despite Pratt CJ's disapproving comments in *Huckle*, Norton continued to press the *Wilkes* jury later in Michaelmas Term. '[D]amages', he once again instructed them at trial, 'should always be reckoned according to the injury received'.[97] In *Wilkes*, however, Norton's persistence seems to have raised Pratt CJ's ire. In argument at Guildhall, he went as far as to caution the *Wilkes* jury that, in fixing a tort award, a 'jury that ever acted on any other principles certainly foreswore themselves'.[98] Norton doubtless knew how strongly Pratt CJ would have disagreed with such a contention. It appears that such unrelenting nisi prius advocacy had not been uncharacteristic of the Solicitor-General. According to Norton's biographers, by the *North Briton* cases, Norton had already earned notoriety – not only for being 'coarse

[93] *Huckle* (n 1) 768.
[94] *Wilkes* (n 2) 498. Notably, in *Rookes* (n 47) 1222, Lord Devlin omitted this qualification from what he quoted from Pratt CJ's trial 'direction' on damages in *Wilkes*.
[95] *Huckle* (n 1) 769.
[96] ibid 768.
[97] *Wilkes* (n 2) 494.
[98] ibid.

and brutal, but afraid of nobody'[99] – but for his strong 'zeal to the King, and attachment to his administration'.[100]

In *Wilkes,* however, his efforts to elicit a modest award may have gone too far. In effect, Norton's caution to the *Wilkes* jurors was that they risked perjuring themselves were they to reach a wrong decision on damages. It is rather tempting to read Norton's cautionary comment as carrying more than a subtle reference to the late-medieval threat of attaint.[101] By the mid-eighteenth-century, however, the suggestion that an English jury could be attainted on account of damages was fanciful. Indeed in 1757, in *Bright v Eynon,*[102] Lord Mansfield (and Norton's personal benefactor at Westminster) had already emphatically dismissed the attaint remedy as a 'mere sound'.[103] At the very least, Norton's comment is suggestive of the indignance, even desperation, of those tasked with defending against the *vi et armis* claims for very large damages arising from the *North Briton No. 45.* As Hickman importantly notes, not only was George III's administration indemnifying the tort victims that its general warrant regime had targeted, it was also 'shocked by the level of the awards'.[104] In *Wilkes*, however, Norton's persistent strategy aimed at dulling the jury's remedial response appears to have provoked Pratt CJ. Indeed, it is entirely consistent with Pratt CJ's strong advocacy of the jury's adjudicative competence that he would have taken Norton's comment as showing contempt for the office of a juror, and therefore requiring an equally firm and unequivocal response from the trial bench.

It was in the neglected context of this long-running tension between Pratt CJ and lead counsel for the defendants in *Huckle* and *Wilkes,* that Pratt CJ referred to the various extra-compensatory principles according to which an English jury might settle damages in tort. On this basis, Pratt CJ's purported aim in *Wilkes* was not to give effect to a new doctrine

[99] Namier and Brooke (n 57) 214.
[100] Walpole (n 56) 192–193.
[101] See chapter 3 C i (a).
[102] (1757) 1 Burr 390, 97 ER 365.
[103] ibid 366, with Lord Mansfield adding 'it does not pretend to be a remedy'. The attaint remedy was finally abrogated by the Juries Act 1825 (6 Geo 4 c 50): 'it shall not be lawful either for the King, or any One on His Behalf, or for any Party or Parties, in any Case whatsoever, to commence or prosecute any Writ of Attaint against any Jury or Jurors, for the Verdict by them given, or against the Party or Parties who shall have Judgment upon such Verdict'.
[104] See Hickman (n 14) 64.

of civil damages, and which the jury might choose to apply to facts of an aggravated *vi et armis* interference. Rather it was to defend the jury's adjudicative prerogative to decide the defendant's ultimate financial fate in the face of a relentless strategy to undermine it. Indeed, as Pratt CJ emphatically remarked, awarding Wilkes 'damages for more than the injury received' was a remedial response that the jury had 'in *their power*'.[105] Perhaps resigned to the likely outcome that a motion to lay aside the *Wilkes* jury's £1000 verdict would produce in Pratt CJ's Common Pleas in banc, counsel for undersecretary Wood advisedly chose not to challenge it.

C. Exemplary Damages After 1763

Whether Pratt CJ's intervention in the *North Briton* cases led to a rule of law of exemplary damages calls for a closer examination of the sources from the period that followed it. Beginning with the famous case of *Beardmore v Carrington and others*[106] in 1764, I will suggest that well beyond *Huckle* and *Wilkes*, decisions to subject aggravated tortfeasors to punishment, including exemplary punishments, continued to be seen as within the jury's adjudicative province. In fact, the ultimate effect of Pratt CJ's intervention in the *North Briton* cases was to strengthen this province, not weaken it.

i. Arthur Beardmore and the *Monitor* newspaper

The English lawyer, Arthur Beardmore, together with his collaborator, John Entick, were regular contributors to another controversial newspaper of the day − the *Monitor*. Like the Whig-leaning *North Briton*, it too ran weekly anti-government issues. In 1762, Beardmore had attracted royal ire for a satirical piece on the Tory Prime Minister, Lord Bute's rumoured liaison with George III's widowed mother, the Dowager Princess of Wales.[107] Four royal messengers – Nathan Carrington, James Watson, Thomas Ardran and Robert Blackmore – attended Beardmore's residence under a warrant of search and arrest, again issued by Lord Halifax. Suspicious that Beardmore had authored a seditious libel, they

[105] *Wilkes* (n 2) 498. (Emphasis added).
[106] See (n 20).
[107] John Sainsbury, *John Wilkes: The Lives of a Libertine* (Ashgate 2006) 63–64.

were instructed 'to bring him with his books and papers in safe custody'.[108] Beardmore obtained a *vi et armis* writ, alleging unlawful entry and false imprisonment. Unlike his colleague Wilkes, however, he alleged that the wrongful interferences were jointly committed by all four messengers. He also declared that the defendants had 'seized, took, and carried away 500 printed charts, and a great many other papers, printed and written'.[109] In his declaration, Beardmore laid enormous damages of £10,000.

Significantly, unlike the general warrants issued in the *North Briton* cases, the warrant executed on this occasion upon Beardmore was not 'general' in nature. It had been duly particularized: in His Majesty's name, it called for the 'strict and diligent search for the said Arthur Beardmore, mentioned in the said warrant to be the author'.[110] Upon a trial of the facts in the Common Pleas (again before Pratt CJ), the *Beardmore* jury found against all four messengers, awarding the plaintiff £1000 damages, one-tenth of the sum declared in his pleadings. The king's serjeants moved for new trial on account of the excessiveness of the jury's verdict. Their argument was familiar to the reviewing court: 'little or no injury had been done either to the plaintiff's person, house or goods'.[111]

(a) Pratt CJ's silence on '*exemplary damages*'

In Easter Term 1764, Pratt CJ denied the defendants' motion. Unlike in his *Huckle* opinion, however, he did not use the term 'exemplary damages' in his post-trial defence of the jury's verdict. The fact that, in this case, Beardmore's home had been raided under a duly particularized warrant appears to have been significant. In *Huckle*, Pratt CJ had seemed to accept that the execution of a general warrant upon the plaintiff was the decisive circumstance of aggravation. But because the defendants in *Beardmore* had not executed a general warrant on the plaintiff, Pratt CJ does not appear to have considered the present case quite as severely circumstanced.[112] This difference perhaps explains why, despite

[108] *Beardmore* (n 20) 790.
[109] ibid. The plaintiff also laid, but did not specify, 'expences in his maintenance during his imprisonment'.
[110] ibid.
[111] ibid 791.
[112] ibid 793. The fact that '[t]he nature of the trespass in the present case is joint and several', may have caused Pratt CJ to doubt whether the £1000 damages the jury awarded against the four messengers was as 'exemplary' as against one.

denying the defendants' motion, Pratt CJ was on this occasion not moved to do what he had done in *Huckle* – namely, to publicly commend the *Beardmore* jury for giving damages of an exemplary character.

This is not to suggest, however, that the circumstances of aggravation touching the defendants' trespass were irrelevant in *Beardmore*. Although not a general warrant case, Pratt CJ was evidently still of the view that it concerned, as he put it, 'the liberty of every one of the King's subjects?'.[113] Thus, although the circumstances in *Beardmore* appear to have generated less constitutional outrage, for the purposes of damages there was still no quantum of loss, or degree of injury, that could be 'certainly seen'.[114] Once again, Pratt CJ apparently felt obliged to discredit contrary submissions made by the defendants' counsel at trial.

The report of the in banc hearing in *Beardmore* clearly shows that the government had persisted with the same strategy regarding damages. As counsel for the defendants had insisted at trial, 'the jury were to measure the damages by what the [plaintiff] had suffered by this trespass and six days and a half of imprisonment'.[115] As he had done the previous year, Pratt CJ inveighed against counsel's attempts to control, even coerce, the *Beardmore* jury's decision on damages. In another, seemingly tense, exchange of words with the king's serjeants at nisi prius, he had reportedly dismissed it as 'a gross absurdity'.[116] In banc, Pratt CJ then recalled what he had told the *Beardmore* jurors regarding damages. Consistent with his approach to the question in *Huckle* and *Wilkes* the year before, he merely said: 'assess damages for the plaintiff according to the evidence'.[117]

Turning to address the defendants' motion to set aside the jury's verdict, Pratt CJ reiterated what had become his court's well-established position. The present action, he said, was one where 'the damages are a matter of opinion, speculation, ideal'.[118] In an apparent nod to his earlier 1763 opinion in *Leeman*, before interfering, a reviewing court would need to

[113] ibid 794.
[114] ibid 792.
[115] ibid 793.
[116] ibid.
[117] ibid 792.
[118] ibid.

be satisfied that a jury's award was as he now even more forcefully articulated it, 'monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush'.[119] Whatever measure (or measures) the *Beardmore* jury had applied in determining the messengers' £1000 liability, Pratt CJ held that post-trial judicial interference would be improper.

The Chief Justice's failure to use the specific formulation 'exemplary damages' or mention any extra-compensatory, distinctly punitive, principles according to which the *Beardmore* jury might in their discretion have chosen to assess damages, is significant. It would be misguided, however, to suppose that the reason for Pratt CJ not having done so was because he drew a 'conclusion of law' that the aggravated nature of, and circumstances surrounding, the king's messengers conduct against Beardmore did not warrant applying any doctrine of exemplary damages to them. The correct interpretation rather is that by the middle of 1764 no such 'doctrine' had yet been given effect to, much less that it was being administered by trial judges. As was essentially the case before the *North Briton* cases, a jury's response to the peculiarity of the circumstances in a matter of tort remained, solely, a matter for them to decide.

(b) Pratt CJ's second use of the phrase in banc

The second instance of the term 'exemplary damages' being used by a common law judge occurred in 1764 in *Grey v Sir Alexander Grant*,[120] an action for assault and battery finally determined in Pratt CJ's Common Pleas in Trinity Term 1764. Captain Samuel Holland, a colonial surveyor, had brought back a turtle from the Caribbean islands, which he intended as a gift for the plaintiff. Yet, by mistake, the turtle was delivered to the defendant, Sir Alexander Grant, a member of parliament and holder of Britain's lowest hereditary title, that of baronet. When Grey, the turtle's intended recipient, asked Grant to hand it over to

[119] ibid 793. Pratt CJ's formulation of the proper threshold test for centralized interference with jury-assessed tort damages was adopted seven years later in the common law's first ever textbook on damages, see Joseph Sayer, *The Law of Damages* (W Strahan & M Woodfall 1770) 236, and was maintained in the second and final (1792) edition, see Joseph Sayer, *The Law of Damages* (first published 1770, 2nd edn, J Moore 1792) 242.
[120] See (n 76).

him, he was reportedly rebuffed in a 'very ungenteel'[121] manner. An exchange of insults then ensured, which led ultimately to Grant shoving Grey and then striking a blow to his face.[122]

Upon the trial of Grey's *vi et armis* claim at the Common Pleas' nisi prius sittings at Guildhall, a special jury found a large £200 verdict for the plaintiff, but against which the defendant moved on the ground of excess. It was in the course of denying Grant a new trial that Pratt CJ used the term 'exemplary damages' for a second time. He said as follows:

> This was a quarrel between two gentlemen, and has been properly tried by a special jury of merchants of London, who are the proper judges of the damages; when a blow is given by one gentleman to another, a challenge and death may ensue, and therefore the jury have done right in giving exemplary damages.[123]

Notably, in *Grey*, Pratt CJ's comment has the same laudatory tone previously attested to in *Huckle*: 'the jury have done right in giving exemplary damages'.[124] *Grant* and *Huckle*, of course, were circumstanced in very different ways. The motivation for Pratt CJ's approving description of the *Grant* jury's award as, in some part, designed to make an example of the defendant, becomes clearer when probing the peculiar circumstances of the parties' 'quarrel'. Pratt CJ's reference to a 'challenge and death' is significant. It suggests that Grey may have justifiably sought his satisfaction in a way other than by taking his writ – namely, by challenging Grey to a duel. By the eighteenth-century, duels were designed to restore gentlemanly honour, with the contemporary evidence suggesting that the end to which the practice was directed was not the infliction a fatal blow upon one's opponent.[125] As Banks argues, duels played out as 'a polite exchange of bullets'.[126] According to Pratt CJ, the jury's £200 award suggests that they thought it necessary to make an example of

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[121] ibid 795.

[122] ibid. The report suggests that in response to Grant's obstinance Grant had called him a 'scoundrel', see ibid.

[123] ibid.

[124] *Huckle* (n 1) 769.

[125] In November 1763, and one month before his *vi et armis* claim against Wood came to trial before Pratt CJ, Wilkes participated in a duel in Hyde Park with the Cornish member of parliament, Samuel Martin, after Martin called him a 'cowardly scoundrel'. Wilkes' was struck by Martin's bullet, but not fatally, see Frank McClynn, *Crime and Punishment in Eighteenth Century England* (Routledge 2013) 143.

[126] Stephen Banks, *A Polite Exchange of Bullets: The Duel and the English Gentleman, 1750–1850* (Boydell & Brewer 2010) 63–94.

Grant, who, on the evidence given at trial, the jury had little difficulty accepting had been, in Blackstone's phrase, the 'original aggressor'.[127]

Importantly, the report also suggests that when Grey asked Grant to relinquish the turtle he refused by insisting upon his privileges as a member of parliament. 'In such a trifling business as this,' Grant is reported to have remarked, 'I will not waive my privilege'.[128] It is noteworthy that during the period under examination parliamentarians enjoyed a wide range of privileges, which included immunities from civil and criminal actions unrelated to parliamentary processes. These, importantly, were privileges that Pratt CJ himself had enjoyed: from 1757 to 1761, he had sat in the House of Commons as a member of the borough of Downton in Wiltshire.[129] According to Wittke, although the doctrine of parliamentary privilege had been celebrated as 'the bulwark of English liberty',[130] during the period in question it risked abuse as a 'tool of oppression in the hands of a corrupt, mercenary, time-serving oligarchy of politicians desirous of perpetuating their power'.[131] Indeed, in refusing to lay his hands on the jury's £200 verdict, Pratt CJ characterized the present controversy in the following terms: 'the plaintiff has been used unlike a gentleman by the defendant in striking him, withholding his property, and insisting upon his privilege, all of them tending to provoke him to seek his revenge in another way than by law'.[132] The ultimate decision to respond in damages to evidence of those aggravating circumstances by making an example of Grant had been properly undertaken by 'a special jury of London's mercantile class'.[133]

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[127] 4 Bl Comm 199: 'penalties of the law will never be entirely effectual to eradicate this unhappy custom'. Also see *Merest v Harvey* (1814) 5 Taunt 442, 444; 128 ER 761, 761 (Heath J): 'It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages'.

[128] *Grey* (n 76) 795; the evidence suggests that, in the course of the parties' quarrel, Grant had insisted on his privilege a second time: 'the defendant . . . asked the defendant if he would waive his privilege of Parliament, but the defendant refused to do it' (795).

[129] Peter DG Thomas, 'Pratt, Charles, first Earl Camden (1714–1794)' *Oxford Dictionary of National Biography* (OUP 2004, online edn Jan 2008) <www.oxforddnb.com/view/article/22699> accessed 3 October 2019. The report refers to the lack of credibility of the defendant's key eyewitness: 'One Falconer was called as a witness to prove he was present at this dispute, and could not remember that any blow was struck by the defendant; he had forgot every thing which made in favour of the plaintiff, but remembered every thing which made for the defendant', see ibid.

[130] Carl Wittke, *The History of English Parliamentary Privilege* (Da Capo 1970) 206.

[131] ibid.

[132] ibid.

[133] ibid.

ii. After Pratt's Chief Justiceship

Pratt CJ remained Chief Justice of the Common Pleas until July 1766. He was lured out of Westminster Hall by the leading Whig statesman of the day, William Pitt the elder, who appointed him Lord Chancellor on the 30th of July 1766.[134] Pratt CJ was customarily raised to the peerage as the first Earl of Camden and was succeeded on the Common Pleas bench by Sir John Eardley Wilmot after having served for almost a decade as a puisne judge in Lord Mansfield's King's Bench.

(a) Continuity in Wilmot CJ's Common Pleas

Wilmot CJ is not reported as having used the term 'exemplary damages' during his five years as Chief Justice of the Common Pleas. His first apparent opportunity to do so came in Easter Term 1769, in the *vi et armis* action of *Redshaw v Brook and others*.[135] In a search for prohibited goods, a group of custom officers unlawfully entered the plaintiff's house, but after a very intrusive and disruptive search, departed with nothing.[136] Upon a trial of the plaintiff's claim at nisi prius, the jury found a verdict a large £200 verdict for the plaintiff, against which the defendants' counsel, Serjeant Davy, moved for a new trial on the ground of excess, contending that the defendants 'did very little damage and behaved well enough'.[137] It was even suggested that if the jury had confined their consideration regarding damages to the plaintiff's actual loss, 10s probably would have been given.[138]

In refusing to lay his hands upon the jury's verdict, Wilmot CJ stated:

> Although I myself may think 200*l* too large damages, yet how can we draw the line to fix the measure of damages in this case? I cannot say the jury have done wrong; and perhaps if I had been one of the jury, some of them might have convinced me that 200*l* damages are little enough. I am not dissatisfied with the verdict.[139]

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[134] See John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (CUP 1981) 69.
[135] (1769) 2 Wils KB 405, 95 ER 887.
[136] ibid 887.
[137] ibid.
[138] ibid.
[139] ibid 888.

The Chief Justice's reasons harmonize closely with those provided by his predecessor, Pratt CJ. He implicitly suggested that the 'measure of damages' had never been fixed by judicial decision, nor would it properly be for the judges to do so. Although Wilmot CJ admitted that he would have personally favoured a smaller award, as a judge he could not say that in deciding to weigh more heavily upon the defendants the *Redshaw* jury had, as he put it, 'done wrong'.[140]

(b) A fluid vocabulary of aggravated recovery

Another significant case that was ultimately determined in Wilmot CJ's Common Pleas was *Tullidge v Wade*[141] in 1769, an action on the case for seduction. The essential ground of the plaintiff's claim against his daughter's seducer was that he had 'lost the benefit of her service for a certain space of time, and was put to great charge and expence in her time of lying-in'.[142] In his pleadings he had laid pecuniary loss in the sum of 20s. Upon a trial of his claim at nisi prius, the jury found in his favour with very substantial damages of £50. In banc, Wilmot CJ once again refused to upset the jury's award, despite acknowledging that 'the plaintiff's loss . . . may not really amount to the value of twenty shillings'.[143] Wilmot CJ's implicit suggestion, it seems, was that the plaintiff's loss was also thought to have included some substantial non-pecuniary component.[144] But the very large discrepancy between the jury's award and the actual pecuniary loss representing the plaintiff's 'charge and expense' did not, in Wilmot CJ's view, entitle the defendant to try

[140] In another case involving an unlawful entry by custom officers, *Bruce v Rawlins and others* (1770) 3 Wils KB 61, 95 ER 934, 935, Wilmot CJ made a similar point in dismissing the defendant's motion: 'I cannot conceive what these Custom-House officers mean, by acting in this unjustifiable manner, after this matter has been so often tried in Westminster Hall; they know the risk they run by such conduct, and must take the consequence that may fall upon them by the verdict of a jury'; on the relevance of the circumstances to damages, Gould J said: 'The entering the plaintiff's house under colour of legal authority, aggravates the trespass committed by the defendants', (935). For his part, Yates J suggested that it was because the defendants had acted under the pretence of legal authority, the reviewing court had no 'line or measure to go by' regarding damages, (935).

[141] (1769) 3 Wils KB 18, 95 ER 909.

[142] ibid 909.

[143] ibid.

[144] See chapter 3 D i (a).

a second jury. In a show of solidarity with the *Tullidge* jury, Wilmot CJ asserted that they had 'done right in giving liberal damages'.[145]

At least the first part of his statement is notably similar to that used by his predecessor on the bench, Pratt CJ, first in *Huckle* and then in *Grey*: 'the jury have done right . . .'.[146] Unlike Pratt CJ, however, Wilmot CJ did not prefix the word 'damages' with the adjective 'exemplary', opting instead for the more neutral adjective 'liberal'. By using it, Wilmot CJ apparently chose not to speculate over the principles according to which Wade's full financial liability may have been determined by the nisi prius jury, exemplary or otherwise. This suggests that the adjectives used by the central judges to describe allegedly excessive tort verdicts – and seemingly out of proportion to a plaintiff's material loss or injury – were far from fixed. More significantly, they seem to have been entirely devoid of any technical-doctrinal meaning.

Although Wilmot CJ did not use the specific formulation 'exemplary damages', the principle of punishment is clearly alluded to in the *Tullidge* report. In stating his reasons against interference, he informed the plaintiff that extra damages could be recovered in a separate action based on evidence suggesting that the defendant had also broken a promise he had made to marry his daughter. Adopting a decidedly less neutral stance, the reason Wilmot CJ encouraged the plaintiff to bring a second damages claim was because he too believed that the defendant 'ought to be punished twice'.[147] The strong implication, in turn, is that in giving seduction damages of £50, the reviewing court had supposed that the *Tullidge* jurors had, at least in part, intended their award to punish Wade as much as compensate Tullidge (for the full extent of his suffering). It is also likely that this had probably been an 'exemplary' punishment. In denying the defendant's motion, Wilmot CJ specifically observed that '[a]ctions of this sort are brought for example's sake'.[148] The Chief Justice's observation suggests that the impulse to punish an aggravated wrongdoer did not always originate with the trial jury, but with the plaintiff who first obtained his

[145] *Tullidge* (n 141) 909.
[146] *Huckle* (n 1) 769; *Grey* (n 76) 795.
[147] *Tullidge* (n 141) 909.
[148] ibid.

writ.[149] In some tort cases, there is a compelling basis on which to conclude that – in giving 'large and exemplary damages' – jurors used remedial judgment to meet the expectations of justice implied in the characteristically large sums that tort plaintiffs laid in their pleadings.

iii. Beyond Blackstone

In determining the effect of the *North Briton* cases on the putative creation of an exemplary damages 'doctrine', the contemporary legal literature also repays closer examination. By the end of the 1760s, the subject of damages appears to have attracted closer attention by at least some who were 'engaged in the profession of law'.[150] In 1770, shortly after the publication of Serjeant Wilson's notebook, the Serjeant-at-Law, Joseph Sayer, published his important work, *The Law of Damages*, the first law book in the English common law tradition to take the subject of damages in civil actions as its singular theme.

(a) Sayer's '*Law of Damages*'

The term 'exemplary damages' appears in chapter 32 of Sayer's book, entitled 'Of Granting a new Trial on Account of the Excessiveness of the Damages'.[151] Unlike Blackstone's previous references to 'exemplary damages' in Book III of his *Commentaries*, Sayer's discussion was entirely based on Wilson's reports of recently decided actions in the common law courts. Among them, were the *North Briton* cases where the term 'exemplary damages' had been used with repetition but not mentioned by Blackstone. Other than focussing on different materials than Blackstone, Sayer's own discussion of exemplary damages also seems to have differed in terms of its substance.

[149] See *Smith v Milles* (1786) 1 TR 474, 481; 99 ER 1205, 1209, where Ashurst J supposed in banc that the reason the plaintiff sued out of a *vi et armis* writ of trespass *de bonis asportatis* (rather than writ of trover) had been to 'harass' the defendant: 'the officer shall not be harassed by this species of action [trespass], in which the jury might give vindictive damages'.
[150] Sayer (n 119) iv.
[151] ibid.

According to Lobban, Blackstone's principal aim in Book III was to illuminate the legal and practical workings of 'the remedial common law system'.[152] Blackstone had simply flagged 'large and exemplary damages' as remedial outcomes that the system had in its capacity to produce. But Sayer's project was somewhat different. The term 'exemplary damages' appears in chapter 32 of his book, specifically in the context of a lengthy reproduction of Wilson's report of Pratt CJ's Michaelmas Term speech in *Huckle*. Interspersed within the text of Pratt CJ's judgment were Sayer's own comments. His approach reflects the avowed aim of his book. As he said in its preface: 'Remarks and Observations are inserted, as were in the Author's Judgment necessary or proper to be made'.[153]

Commenting on *Huckle,* Sayer observed that the defendant had acted 'under the Colour of Authority'[154] and that the *vi et armis* interferences committed against the journeyman printer were part of a profounder 'Attack upon publick Liberty'.[155] Agreeing with Pratt CJ, Sayer's view was that *Huckle* was 'a proper Case for the Jury to Assess exemplary Damages in'.[156] But in his commentary, Sayer went further. He extrapolated from the facts in *Huckle,* supposing that damages might properly be increased for example's sake where a defendant acts in abuse of his legal powers. He gave the specific, seemingly hypothetical, example of where 'a Master of a Ship abuses the Power by Law vested in him over Sailors under his command'.[157] Notably, Sayer's 1770 treatise is not the first source to attest to the jury's tendency to increase damages according to an exemplary principle in aggravated tort cases involving abuses of powers conferred by law. An example can be found in a 1768 pamphlet entitled *A Mirror for Courts-Martial*, written by the so-called 'Irish Wilkes'[158] – the physician and reform-minded member of parliament for Dublin City, Dr Charles Lucas.[159] In it, Lucas referred to the tendency of the common law courts in their civil jurisdiction to respond to the cruel corporal penalties meted out by court martials in

[152] Michael Lobban, *The Common Law and English Jurisprudence 1760–1850* (OUP 1991) 38.
[153] Sayer (n 119) v.
[154] ibid 210.
[155] ibid.
[156] ibid 220.
[157] ibid 221.
[158] *London Chronicle*, November 18 1771, 482.
[159] Charles Lucas, *A Mirror for Courts-Martial: In which the Complaints, Trial, Sentence and Punishment of David Blakeney are Represented and Examined with Candor* (T Ewing 1768).

their disciplining of members of the country's armed forces.[160] In a striking passage, Lucas wrote:

> If I were to recount the instances, where the courts of law have interposed, censured and corrected Courts-Martial, or given their victims costs and exemplary damages against them, I know not where I should end. I should mention one or two examples more, which may suffice.[161]

A specific 1740s controversy was recalled in which a certain lieutenant Fry had been imprisoned for fourteen months in Jamaica upon an accusation of mutiny after allegedly disobeying the orders of one his commanders. Lieutenant Fry's eventual return to England is said to have given 'an opportunity to bring his tyrants before a *British* civil tribunal'.[162] Upon the trial of his *vi et armis* claim in Willes CJ's Common Pleas, an English jury imposed very large (and seemingly exemplary) damages of £1000 against the president of the court martial and high-ranking British admiral, Sir Chaloner Ogle.[163]

It is, nonetheless, unreasonable to assume that Sayer was thinking in terms of a new damages doctrine which he regarded Pratt CJ's Common Pleas as having first formally recognized in the *North Briton* cases as a matter of positive common law. The more plausible interpretation is that Sayer had simply purported to derive general propositions about the practice of aggravated tortious recovery from recently decided cases. The timely publication of Wilson's report of the defendant's motion in banc in *Huckle* enabled Sayer to say that damages of an exemplary nature would be 'proper' where the peculiar

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[160] Also see *Benson v Frederick* (1766) 3 Burr 1845, 146; 97 ER 1130, 1130, the plaintiff was ordered to be stripped and subjected to twenty lashes from two drummers of the Middlesex militia. See chapter 2 C ii (d).

[161] Lucas (n 159) 9. The probability of exemplary damages in a later *vi et armis* action was often considered in military proceedings before court martials; for an example later in the century, see Anon, *The Trial of John Browne Esq. Major of His Majesty's 67th, or South Hampshire Regiment of Foot* (J Bell 1788) 57, where in advising a Major John Browne in a military action, WM Gilbert, wrote a letter that enclosed the following advice: 'If military punishment be ordered for you, my advice is, after your complying with the rules of the army, by suffering it, to bring an action at law; where there is no doubt exemplary damages in your favour will instruct future Courts Martial'.

[162] ibid 11. (Original emphasis).

[163] ibid. Clearly belonging to this category of tort case is the 1766 decision in *Benson* (n 160) 1130, in which Lord Mansfield King's Bench unanimously refused to upset a large £150 award given upon writ of inquiry against a colonel of the Middlesex militia, with Wilmot J stating: 'the Court might look upon these damages to be too high, in a common and ordinary case, and had power to set aside the verdict and award a new writ of inquiry; yet, as in this case, the defendant had acted very arbitrarily, and was well able to pay for it, he did not think the Court were obliged to set aside the verdict that the jury had found'.

circumstances of a tort case involved an abuse of authority by a stronger party against a weaker one.

Such a 'peculiarly circumstanced' tort action came to trial shortly after Sayer's treatise was published, in 1773 in the *vi et armis* action of *Fabrigas v Mostyn*.[164] The plaintiff was a native of the island of Minorca who brought a civil action in England after he was assaulted and then falsely imprisoned by the British Army officer and local Governor, General John Mostyn.[165] After elaborating upon the 'cruel and afflicting injury'[166] that the governor had caused, counsel for Fabrigas (and John Wilkes' lead counsel), Serjeant Glynn, implored the jury to use their verdict to 'correct' what, on this later occasion, he characterized as the defendant's 'very intoxication and drunkenness of power'.[167] In concluding the plaintiff's case at trial, he asked them with some force: 'Are you not called upon then by every consideration that is dear to you to give great and exemplary damages in this cause? If ever example required it, it does in this'.[168] Yet, like Pratt CJ in *Wilkes*, the presiding puisne Common Pleas judge, Gould J, did not engage counsel's fervent pleas to the jury in his summing-up of the evidence at Guildhall. In respect of damages, his comment to the *Fabrigas* jury was as evasive as it was short. 'As for the damages', he remarked, 'I shall not say a word upon that matter, because it is your province to consider it upon all the circumstances'.[169] Within this province, the jury returned a staggeringly large £3000 verdict for the plaintiff. Thus, even in the category of tort case in which Sayer had regarded exemplary damages as most likely and proper, well into the 1770s it remains difficult to discern a trial judge quite 'employing' anything like a formal legal doctrine of exemplary damages.

[164] (1773) 11 St Tr 162.
[165] ibid.
[166] ibid 180.
[167] ibid.
[168] ibid.
[169] ibid 183, and finally adding: 'It is your province, gentleman, to consider all the circumstances, and to give in your verdict accordingly' (Gould J).

(b) Buller's nisi prius practice-book

The question of damages was also of passing interest to the proponents of another contemporary genre of legal commentary, namely, the nisi prius practice-book. Nisi prius practice-books had their origins in the middle of the seventeenth-century: as jurors increasingly based their verdicts on evidence presented to them in open court as much as their local knowledge, there emerged a body of rules regulating the presentation of evidence at trial.[170] The practical purpose of nisi prius practice-books, in turn, was to gather precedents regarding questions of evidence, pleading and practice. In their pages, remarked Holdsworth, 'practitioners could find . . . the law on most of the topics that arose in trials at nisi prius'.[171]

Among its leading contemporary examples was Francis Buller's 1772 book, *An Introduction to the Law Relative to Trials at Nisi Prius*.[172] The first edition of Buller's manual did not have a preface. In a later edition, however, he described the aim of his book as 'to collect rules and points, and not to report cases'.[173] He conceived it as 'a *vade mecum* on the circuits'[174] – an essential guide for trial advocates. The first edition of Buller's practice-book entered print two years after the publication of both Wilson's notebook and Sayer's treatise. It is revealing for what it also suggests about the existence (or lack thereof) of a new damages doctrine that judges had been employing, whether in London or on circuit, after the *North Briton* cases were decided. Significantly, Buller did not use the term 'exemplary damages', nor did he allude to extra-compensatory, distinctly punitive, principles for the fixing of tort damages in aggravated cases. Buller's 1772 text was substantially based on an early 1768 work written by his uncle, Henry Bathurst, who had been a puisne Common Pleas judge from 1754 to 1770. More significantly, in *Huckle*, he had sat with Pratt CJ in Michaelmas Term 1763 to hear Serjeant Whitacre's arguments for

[170] See Sir Geoffrey Gilbert, *The Law of Evidence* (H Lyntot 1754) (a posthumous publication; Gilbert died in 1726). Also see, generally, Henry Horwitz, 'The Nisi Prius Trial Notes of Lord Chancellor Hardwicke' (2003) 23 JLeg Hist 154–156.

[171] William S Holdsworth, *A History of English Law,* vol 13 (Methuen 1966) 460.

[172] Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (W Strahan & M Woodfall 1772).

[173] Buller made these comments in an advertisement to the sixth (1793) edition of his text, see James Oldham, 'Law-making at Nisi Prius in the Early 1800s' (2005) 25 JLeg Hist 221, 240.

[174] ibid.

why appellate relief on the ground of excessive damages should be granted. As noted above, Bathurst J had emphatically agreed with Pratt CJ's reasons for denying it.[175] Despite a personal connection to the *North Briton* litigation, Buller failed to 'collect' any rule, or point of law, from those ostensibly 'law-making' cases where the term 'exemplary damages' had been used. This may strengthen the proposition that although the *North Briton* cases had caused a commotion at Westminster, they were not perceived as productive of a new rule of damages administered by the king's common law judges 'from that point on'.

Buller's discussion of the motion for a new trial for excessive damages suggests that the recent case law was contemporaneously taken to stand for an altogether different proposition. In a short section of his manual entitled 'Of New Trials', Buller proclaimed that 'In Actions founded upon Torts, the Jury are the sole Judges of the Damages'.[176] The phrase, of course, was not Buller's. Rather it seems to have been popularly used by trial advocates. Serjeant Burland, for one, had used it in argument before Pratt CJ and Bathurst J in Michaelmas Term 1763.[177] By 1772, the designation of the jury as the 'sole' adjudicative body for settling damages in matters of tort appears to have influenced the working common lawyer's perspective. So much so, that Buller's account of the law regarding to motions for new trials in tort cases was as follows: 'the Court[s] will not grant a new Trial on Account of the Damages being trifling or excessive'.[178] Of course, the reported cases show that the judges had never gone quite so far.[179] It is quite clear, nonetheless, that Buller was seeking to protect the adjudicative province of the jury in which he regarded the question of tortious recovery as properly belonging.

[175] See (n 37).

[176] Buller (n 172) 321. The same phrase appeared in the Bathurst J's 1768 text, see A Learned Judge, *An Introduction to the Law Relative Trials at* Nisi Prius (Watts 1768) 456.

[177] For its earliest use, see *Lord Townsend v Hughes* (1676) 1 Mod 232, 233; 86 ER 850, 850 (North CJ).

[178] Buller (n 172) 321.

[179] See, for example, *Beardmore* (n 20) 793 (Pratt CJ): 'We desire to be understood that this Court does not . . . lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial'.

D. A 'Constitutional' Province of Adjudication

A closer examination of the contemporary sources shows that characterizations of the jury as the 'sole judges' of damages was also cast in more explicitly constitutional terms. The first clear example in the reports is found in Pratt CJ's denial of the defendants' new trial motion in *Beardmore* in Easter Term 1764.[180] Discussing the central courts' power to lay aside verdicts for excessive damages, Pratt CJ reflected upon a long 'disused' practice that (in at least some matters of tort) had seen the judges 'abridge or increase'[181] damages given by juries as they saw fit. According to Pratt CJ, the reasons that those earlier practices were discarded was because they came to be 'looked upon as unconstitutional'.[182] Similarly, Pratt CJ passionately described the courts' granting multiple new trials where successive juries gave excessive damages in terms of the 'digging up the constitution by the roots'.[183]

i. Post-1763 allusions to the 'constitution'

After *Beardmore* was decided, 'constitutional' references appear in the case law with greater frequency. Most often, they were made by counsel for plaintiffs seeking to prevent the overthrow of large jury verdicts. The 1768 tort case of *Perkin v Proctor and Green*[184] is particularly illustrative. In that case, assignees under a commission of bankruptcy had entered a local publican's house. The plaintiff publican brought an action *vi et armis* alleging that the defendants had entered his house unlawfully.[185] Wilmot CJ, who presided at the trial of the plaintiff's claim, accepted that an action did lie, though at the same time thought it was a 'very hard case, and did recommend it to the jury to find small damages'.[186] The jury, however, appear to have ignored his recommendation to weigh

[180] ibid. I have found a single pre-1763 description of the jury's function of settling damages that used constitutional language, see *Turner v Rose* (1756) 1 Keny 394, 395; 96 ER 1032, 1033, where in seeking to uphold the large damages assessed by arbitrators in Lord Mansfield's King's Bench, counsel for the defendant stated: 'the Court would set aside awards, (as well as verdicts by juries, who are constitutional judges of damages) for the excessive sums awarded'.
[181] ibid.
[182] ibid 792.
[183] ibid.
[184] (1768) 2 Wils KB 382, 95 ER 874.
[185] ibid 874.
[186] ibid 875.

lightly on the defendants in damages, instead giving the plaintiff allegedly excessive damages in the sum of £40. Upon the defendant's motion to have the *Perkin* jury's verdict set aside, the Chief Justice confessed that he:

> wished they [the damages] had been 40s instead of 40*l*; that he thought there was a foundation for the jury to have lessened them, but they thought otherwise, and they are the constitutional judges as to damages; and there must be some very extraordinary conduct in a jury to induce the Court to meddle with damages . . .[187]

The same sentiment was expressed at the end of chapter 32 of Sayer's 1770 treatise on damages. Wilson's report of the defendants' motion in *Perkin* enabled Sayer to make a further statement about the contemporary common law practice of civil recovery in tort: 'the Jury . . . are in all Cases the Constitutional Judges of Damages'.[188]

(a) The 1790s climax

Later eighteenth-century characterizations of the question of tortious redress as belonging to a constitutional province of jury adjudication do not just appear in reports of motions in banc. At the trial of a plaintiff's claim for breach of a promise to marry in 1790, Lord Kenyon reportedly used the designation before leaving the plaintiff's case to the jury.[189] Although hinting at the burden that large damages would cause the defendant (a young attorney[190]) the Chief Justice emphatically remarked:

> The consequences of large damages will not be productive of much benefit to the plaintiff; at the same time, they may crush the defendant. You are the sole and only constitutional judges of what the damages shall be. You will attend to the situation of the parties, and, I am sure, will do substantial justice.[191]

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[187] ibid 877.

[188] Sayer (n 119) 231–232. Although in a less direct way, see *Fabrigas v Mostyn* (1775) 2 Black W 929, 929; 96 ER 549, 549, where De Grey CJ, in banc, dismissed the defendant's in banc motion to set aside the jury's £3000 verdict by emphasizing that '[i]n the present case, the jury (not the Court) are to estimate the adequate satisfaction'. The constitutional dictum appears in passing in an in banc motion reported in the Irish Reports, see *Lockwood v Cox* (1787) 1 IR 77, 80, (Hamilton B), where upon a motion in banc, counsel for the plaintiff remarked: 'The constitution has wisely placed the scales for weighing damages in the hands of the jury, and we cannot take them out'.

[189] Anon, *Trial for Breach of Promise of Marriage. Miss Elizabeth Chapman against William Shaw Esq.; Attorney at Law* (G Riebau 1790).

[190] ibid 10.

[191] ibid 31. The *Chapman* jurors seem to have acquiesced, finding a mere £20 in damages.

The same designation was employed in Lord Kenyon's King's Bench two years later in *Duberley v Gunning*,[192] an action for criminal conversation. In seeking to uphold the jury's large £5000 verdict, counsel for the plaintiff went as far to characterize the defendant's motion as 'an appeal from the proper jurisdiction to another, which has no cognizance of such a question'.[193] It was even contended that the judges were, in virtue of their judicial office, incompetent to adjudicate the question of 'excess' without 'taking upon them the characters of jurors as well as Judges'.[194]

One puisne judge of the King's Bench was persuaded by the submissions made on the plaintiff's behalf. Ashurst J's chief reason for denying the defendant's motion was because – as judges – they possessed 'no right . . . to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages'.[195] Kenyon CJ was also inclined to deny the defendant's motion, but was more circumspect than Ashurst J. In the tenor of his predecessor, Lord Mansfield, he made the following remark:

> This is by no means encroaching upon the jurisdiction of the jury, nor drawing the question to the examination of a different tribunal from that to which the constitution has referred it; for it is not substituting a different judgment in the place of that which has been pronounced, but requiring the same jurisdiction to reconsider that opinion which appears to be erroneous.[196]

The King's Bench delivered its judgment in *Duberley* in early May during Easter Term 1792. Significantly, earlier in the spring Charles James Fox, the Whig leader in the House of Commons, had tabled legislation 'designed to reduce the power of the judiciary to determine whether an impugned publication was criminally libellous, and by the same token to increase the power of juries in criminal libel cases to reach that general

[192] (1792) 4 TR 651, 100 ER 1226.
[193] ibid 1227.
[194] ibid 1226. Also see *Gilbert v Berkinshaw* (1774) Lofft 771, 774; 98 ER 911, 913 (Lord Mansfield): 'The Court will not judge by a measuring cast, where matters, properly for all parties, have been left to the sound discretion of a jury, in a subject of which they are competent and proper judges'.
[195] ibid 1228.
[196] ibid 1227. See *Bright* (n 102) 366: 'a general verdict can only be set right by a new trial: which is no more than having the cause more deliberately considered by another jury'.

conclusion'.[197] Well into May, Fox's Bill was before the House of Lords under unremitting Tory scrutiny.[198] But it was not all one-sided. In the Lords' debate on the Bill's second reading, Lord Camden (now upwards of seventy years of age) revived his decades-long struggle for the jury to play a larger role in determining press freedom.[199] He deplored the fact that in seditious libel cases trial by jury had been little more than 'a nominal trial, a mere form; for, in fact, the judge, and not the jury, would try the man'.[200]

The Whigs' reiteration of the jury's 'undoubted right to form their verdict themselves according to their consciences'[201] appears to have been widely supported among contemporary judges. The best example was Ashurst J. Before his appointment as a puisne judge of the King's Bench, he had previously served in a Whig ministry led, among others, by Fox.[202] The constitutional tone of his protection of the jury's unimpeachable right to fix damages in matters of tort in *Duberley* is, therefore, particularly striking. Although Fox's Bill had only aimed 'to remove doubts respecting the functions of juries in cases of libels',[203] supportive Whig judges may have been looking to show their support for other rights of juries – like the right to decide damages.[204]

(b) Blackstone and adjudicative integrity

Despite intermittent references to the 'constitution' in argument during trial term, the later eighteenth-century reports do not elaborate the constitutional sources that, over time, had vested the question of damages in the jury's sole adjudicative competence. That particular subject, it seems, had been addressed by Blackstone in chapter 23 of Book III of his *Commentaries*, entitled 'Of The Trial by Jury'. There, Blackstone spoke of trial '*by the*

[197] Libel Act 1792 (32 Geo 3 c 60).
[198] See Robert R Rea, '"The Liberty of the Press" as an Issue in English Politics, 1792–1793' (1961) 24 Hist 26, 26–88.
[199] See chapter 3 C ii (c).
[200] William Cobbett, *Parliamentary History of England: From the Norman Conquest in 1066 to the Year 1803* (TC Hansard 1817) 1536.
[201] ibid.
[202] See George W Cooke, *The History of Party: From the Rise of the Whig and Tory Factions, in the Reign of Charles II to the Passing of the Reform Bill 1714–1762*, vol 2 (Macrone 1837) 320.
[203] Libel Act 1792 (32 Geo 3 c 60).
[204] Fox's statute was proclaimed five weeks later, on the 15th of June 1792.

country'[205] as having been 'used time out of mind in this nation'.[206] It was to Magna Carta, chapter 29, that Blackstone traced the earliest acknowledgement of trial by jury as the 'principal bulwark of our liberties'.[207]

Blackstone's historical view of the 'constitution' was wide-ranging, comprising almost every statute concerning the practice of trial by jury that parliament had ever enacted.[208] Like Sir Matthew Hale a century before,[209] Blackstone's avowed aim in chapter 23 was to show 'how admirably this constitution is adapted and framed for the investigation of truth'.[210] In his view, the English jury's constitutional status as the common law's designated investigative body was concerned with the 'impartial administration of justice'.[211] According to Blackstone, the end to which 'impartial' justice was aimed was the security of 'both our persons and our properties', which he described as 'the great end of civil society'.[212] For Blackstone, however, an unchecked judiciary was to be avoided. He feared that if the security of persons and their properties:

> be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many.[213]

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[205] 3 Bl Comm 231. (Original emphasis).

[206] ibid.

[207] ibid; Magna Carta 1215 (16 Joh c 29).

[208] Examples include: Westm 2 (13 Edw 1 c 30), on the insertion of the clause 'nisi prius' into the writ of *venire facias*; statute 1369 (42 Edw 3 c 11), requiring no inquest to be taken until after jurors' names had been returned by the sheriff to the court; the statutes 1330 (4 Edw 3 c 2), 1375 (8 Ric 2 c 2) and 1522 (33 Hen 8 c 24), requiring no judge to hold pleas in any county where he was born or inhabits; the statute 1526 (35 Hen 8 c 6), restoring the number of jurors required to be summoned from the vicinity to six; the statute 1560 (27 Eliz c 6), lowering that number to two; statute 1730 (3 Geo 2 c 25), allowing parties to elect to be tried by a 'special jury'.

[209] 3 Bl Comm 234. See Sir Matthew Hale, *The History of the Common Law of England and an Analysis of the Civil Part of the Law* (first printed 1739, Hard Press 2019) 336: 'The trial by a jury of twelve men . . . seems to be the best trial in the world'.

[210] ibid.

[211] ibid.

[212] ibid.

[213] ibid. He added, 'if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts' (234).

For Blackstone, in turn, trial by jury was an ancient safeguard that helped ensure that those judgments entered by royal judges in actions at common law would have a basic adjudicative virtue – namely, 'integrity'.[214]

(c) The payment of damages as property transfer

Significantly, Blackstone seemed to think that the integrity of the outcomes reached within the royal jurisdiction was most at risk when it came to 'settling and adjusting a question of fact'.[215] Among such questions was that of damages. Blackstone appears to have fundamentally conceived the payment of monetary damages from defendant to plaintiff in civil actions as a royally enforced method by which a plaintiff would receive part of the defendant's proprietary holdings. Leaving the determination of the question of how much of the defendant's holdings to be transferred to the plaintiff to jurors enjoyed 'so great an advantage' over other methods of 'regulating civil property'.[216] It was a determination that, in many in common law actions, could not securely be 'entrusted to the magistracy'. As Blackstone explained:

> when entrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.[217]

[214] On the crown's attempts to influence the ranks of judges during the period, see David Lemmings, 'The Independence of the Judiciary in Eighteenth Century England' in P Birks (ed), *The Life of the Law: Proceedings of the 10th British Legal History Conference* (Hambledon Press 1993) 125–149.
[215] 3 Bl Comm 234.
[216] ibid. Blackstone's reference to 'civil property' suggests a Lockean influence; in particular, the problem of the redistribution of property held within civil society as opposed to in a state of nature, see John Locke, *Second Treatise on Government and a Letter Concerning Toleration* (first published 1689, M Goldie ed, OUP 2016) 14–27. Lord Mansfield had previously used the term in *Bright* (n 102) 366, when discussing reviewable errors of law and fact: 'If unjust verdicts . . . were to be conclusive forever, the determination of civil property . . . would be very precarious and unsatisfactory'. On Locke's influence on Lord Mansfield, see Norman S Poser, 'Lord Mansfield, The Reasonableness of Religion' in M Hill and RH Helmholz (eds), *Great Christian Jurists in English History* (CUP 2017) 197.
[217] ibid.

Especially in tort, it had long been accepted that the question of damages would be especially sensitive to the peculiar circumstances in which tortious mischief occurred. Indeed, in a social world where class delineations were firm, among the circumstances considered relevant to the question of damages were the respective stations and ranks of the disputing parties.[218] In spite of the king's judges 'natural integrity',[219] Blackstone's apparent view was that, in peculiarly circumstanced cases especially, fulfilling the ends of 'public justice' through the medium of damages depended on each jury collectively responding to the evidence given to it. Ultimately, it is in light of Blackstone's exposition of jury trial in chapter 23 that contemporary judicial concerns about being seen to act contrary the 'constitution' make sense.

In banc, in *Duberley*, for example, Kenyon CJ admitted that he did not have the judicial 'courage . . . to make the first precedent of granting new trials under such circumstances as the present'.[220] Ashurst J's reluctance to upset the jury's £5000 verdict was not only stronger but expressed more portentously:

> Where damages depend in any wise, upon calculation, the Court have some medium to direct them, by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it would be very dangerous for us to interfere.[221]

Ultimately, Grose J's short in banc remarks provide some insight into the decisive aggravating circumstance that appeared to induce the *Duberley* jurors to weigh as heavily as they did on the defendant. He emphasized that the present adulterous controversy

[218] *Huckle* (n 1) 768. Also see Blackstone's wider discussion of damages in criminal conversation: 'But these [large and exemplary damages] are properly increased or diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connexion between them', see ibid 94.
[219] 3 Bl Comm 231.
[220] *Duberley* (n 192) 1228.
[221] ibid. In *Huckle*, Pratt CJ had earlier spoken in similar terms: 'it is very dangerous for the Judges to intermeddle in damages for torts', see *Huckle* (n 1) 769. In *Leith v Pope* (1779) 2 Black W 1327, 1329; 96 ER 777, 778, the judges declined to disturb a £10,000 malicious prosecution verdict, *inter alia*, on the basis that it was not for the king's judges to 'enter into stories of private scandal, which have been liberally propagated on both sides'.

involved a married man who 'has taken away his friend's wife'.[222] In settling the damages, the jury chose to make of that circumstance what they did.

ii. Judges as informal shapers of 'public justice'

As cases from the period under examination in this chapter show, the trial judges were not always averse to expressing their personal views about how heavily a jury should weigh on a defendant in damages. How directly they were prepared to do so, however, appears to have varied. For example, in his comments upon the evidence at the trial of Wilkes' claim at Guildhall, Pratt CJ expressly told the jury that this was an occasion where 'they had a very material affair to determine upon'.[223] After identifying evidentiary matter that might properly be considered in aggravation and mitigation of damages, he is reported to have merely cautioned them to be 'careful to do justice, according to the evidence'.[224]

(a) 'Exemplary damages' and the admonishing of juries

The sources suggest that other trial judges were occasionally inclined to press particular remedial principles upon juries. In 1779, the *London Chronicle* published a report of a tort action tried in the King's Bench brought by a black man who had been traded on the false belief that he was a slave. At nisi prius, Lord Mansfield is reported to have 'summed up the evidence' coupled with what the reporter described as 'suitable remarks on the good policy and humanity of such actions'.[225] Before submitting the case to them, he is reported to have 'recommended to the Jury to give exemplary damages'.[226] The jury found against the Liverpool trader with large damages of £300. Another example is the 1788 criminal conversation case of *Sheridan v Newman*.[227] In the course of submitting the case to the

[222] *Duberley* (n 192) 1230.
[223] *Wilkes* (n 2) 499.
[224] ibid.
[225] James Oldham, 'New Light on Mansfield and Slavery' (1988) 27 J BritStud 45, 65.
[226] ibid.
[227] The Times, 28 June 1788, 3. For further discussion of the case, see James Oldham, 'Lord Kenyon, Preaching from the Bench' in M Hill and RH Helmholz (eds), *Great Christian Jurists in English History* (CUP 2017) 244.

jury, Kenyon CJ is reported, this time in *The Times* newspaper, to have told them the following:

> To you, juries the guardianship and protection of families is committed; – it is your duty to teach men who thus transgress the laws of God and of society, that it is their interest as well as their duty, to restrain their passions, and regulate them according to the rules of morality and decency; and that if they will break into the domestic peace of families, they shall not do so with impunity.[228]

The following year, Kenyon CJ admonished another criminal conversation jury, even suggesting to them that they 'would fall short of that justice which they owed to the country if large damages were not given'.[229] Before submitting the case to the jury, he said that 'very large and exemplary damages were proper in this case'.[230]

(b) Continued informal judicial use

Oldham recently notes Kenyon CJ's tendency to exploit 'his judicial office as a bully pulpit'.[231] Lord Mansfield's tendency to elicit verdicts aligning with his own personal sentiments is equally well-known.[232] Oldham has also properly cautioned against construing recommendations that tortfeasors be punished as 'technical or legalistic'[233] jury directions. Indeed, as the above examples show, the term was not spoken to trial juries in

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[228] ibid.

[229] *Parslow v Sykes* The Times, 10 December 1789, 3. Also see Anon, *The Trial of Mr. Cooke, Malt Distiller, of Stratford, for the Crime of Adultery with Mrs. Walford, Wife of Mr. Walford, of the Same Place, Before Lord Kenyon, and a Special Jury, Who Gave a Verdict for the Plaintiff Three Thousand Five Hundred Pounds* (M Lewis & M Symonds 1789) 50, where Lord Kenyon rather suggestively remarked: 'Small damages, therefore, in such a case as this, would be reading a very improper lesson to the public'.

[230] ibid. Also see Anon, *Adultery and Seduction, The Trial at Large of Robert Gordon Esquire for Adultery with Mrs. Biscoe* (J Ridgeway 1794) 52, where in respect of damages, Lord Kenyon emphatically remarked to the jury: 'Between these extremes there is no medium. You must give large and exemplary damages, or none at all'.

[231] Oldham, 'Preaching from the Bench' (n 227) 244. In 1798, *The Times*, a daily London-based newspaper launched in 1785, featured a letter from a criminal conversation juror in which he confessed that he trusted more in 'the unimpeached integrity of your Lordship [Kenyon CJ] . . . than the imbecility of my own judgment', and it was for this reason that the juror agreed to, as he put it, make a 'deserved inroad on the Defendant's fortune' (247).

[232] On Lord Mansfield's privately expressed confidence that juries regularly followed what he told them, see James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, vol 1 (UNCP 1992) 206.

[233] Oldham, 'Preaching from the Bench' (n 227) 244.

the familiar context of a statement of law – formulated in terms of general principle – and which, in settling a plaintiff's recovery, juries might in their discretion choose to apply to proven facts about the aggravated nature and circumstances of a defendant's tortious wrong. In turn, where the phrase 'exemplary damages' was employed in post-1763 tort trials, it is difficult to say that its employment was grounded in the impartial judicial administration of legal damages doctrines.[234] The cases in which judges used the term in their summing-up remarks to juries appear to have been limited to those cases where the presiding trial judge himself wanted the defendant subjected to particularly harsh treatment.[235]

Kenyon CJ's puritanical approach to sexual behaviour is known to have influenced his interactions with juries, particularly in criminal conversation cases.[236] Lord Mansfield's indignation towards acts of injustice against slaves (indeed, his opposition to the practice of slavery itself) must have induced his own summing-up remarks to select juries as well.[237] Indeed, the sources plausibly suggest that Lord Mansfield carefully discerned the aggravated tort cases in which he would call for a defendant's punishment from the bench. One example is a 1770 action on the case for libel between George Onslow and the Vicar of Brentford, John Horne, tried on circuit before Lord Mansfield in Guildford, Surrey.[238] Serjeant Leigh pressed the fact that the defendant's libel was a 'gross and unjust attack on the plaintiff', who he duly reminded the jury was a 'Privy Counsellor, a lord of the treasury, and representative of the country'.[239] To this end, plaintiff's counsel declared: 'we do not

[234] The same may be said of the one instance I have found of a Chief Justice (Jeffreys CJ) admonishing a writ of inquiry jury to give damages that would make a public example of the defendant before Michaelmas Term 1763, see chapter 3 D iii (a).

[235] Also see Douglas Hay, 'Kenyon, Lloyd, first Baron Kenyon (1732–1802)', *Oxford Dictionary of National Biography* (OUP 2004, online edn Jan 2008) <www.oxforddnb.com/view/article/15431> accessed 10 October 2019.

[236] Oldham, 'Preaching from the Bench' (n 227) 244: 'Lord Kenyon's speeches . . . were often studded with admonitory pleas to the jurors to help preserve some degree of moral decency and respect for religion'.

[237] Oldham, 'Mansfield and Slavery' (n 225) 65. Also see *Somerset v Stewart* (1772) Lofft 1, 19; 99 ER 499, 510 (Lord Mansfield): 'The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law'.

[238] The two libels appeared in the *Public Advertiser* in mid-July 1769, see Anon, *The Genuine Trial Between the Rt. Hon. Geo. Onslow Esq; And the Rev. Mr. John Horne Tried at Guilford the 1st of August 1770* (J Williams & J Godwin 1770) 1–2.

[239] ibid 16.

doubt that you will give Mr Onslow ample and exemplary damages, such as which in your breasts you think he deserves, from the character and situation he bears in life'.[240] Yet, in his summing-up of the evidence, Lord Mansfield did not recommend it to the jury that the plaintiff's damages be calculated to make a public example of the defendant. In a more neutral and decidedly less 'directive' comment, he simply said:

> you are to give what damages you think right; I shall not by any means direct you, only you will consider the whole matter, the situation of the plaintiff, and every other circumstance, you have heard relating thereto, and give damages accordingly.[241]

Exercising their collective – undirected – remedial judgment, the jury returned a verdict for the plaintiff with £400 in damages. Accordingly, it is suggested that the sporadic late eighteenth-century appearances of the term 'exemplary damages' in the nisi prius trial reports are best understood, not in terms of the application by juries of a legal damages doctrine that the common law judges administered, but in terms of select judges striving to impose upon the constitutional judges of damages their personal sense of what, in select tortious controversies, 'public justice' seemed to require.[242]

E. Conclusion

This chapter has set out to challenge histories of modern exemplary damages that trace their doctrinal origins to the *North Briton* cases in later 1763. It has contended that Pratt CJ's decisions, both in *Huckle* and *Wilkes*, did not make it 'the law' that damages beyond compensation may be awarded in tort. Rather than breaking with the common law practice of aggravated tortious recovery before Michaelmas Term 1763, this chapter has attempted to show that the common law's post-1763 practice was essentially continuous with it. In 'peculiarly circumstanced' tortious controversies, deciding whether to increase an

[240] ibid.

[241] ibid 40. (Emphasis added).

[242] Apart from its appearance in 3 Bl Comm 234, the term 'public justice' appears in summing-up remarks Lord Kenyon reportedly made to a 1789 special criminal conversation jury at a trial at bar, see *The Historical Magazine; Or Classical Library of Public Events*, vol 2 (Brewman 1789) 350: 'Lord Kenyon was of the opinion that this case was marked by many circumstances of aggravation; and that public justice, and the preservation of the morals of society, independent of the injury to the plaintiff, called for very exemplary damages'. For a similar point having been made by the counsel's plaintiff in argument, see Anon, *The Trial of Mr. Cooke, Malt Distiller* (n 229) 47.

aggravated wrongdoer's full financial liability, including according to principles other than compensation, were seen as belonging fundamentally in the jury's adjudicative province. By simply using the increasingly familiar phrase 'exemplary damages' in banc in Michaelmas Term 1763, Pratt CJ did not, it has been argued, alter this reality.

This chapter went on to suggest that the proper significance of Pratt CJ's famous tort judgments whilst Common Pleas Chief Justice was to strengthen this adjudicative province of the jury. This included further recognizing the jury as the 'constitutional' judges of damages in matters of tort. By doing so, Pratt CJ appears to have been concerned with ensuring each jury's exercise of this constitutional role would be free of judicially imposed legal strictures. As the final part of this chapter showed, where later eighteenth-century judges happened to employ the phrase 'exemplary damages' before leaving aggravated tort cases to juries, its employment cannot plausibly be said to have comprised anything resembling a formal legal doctrine of exemplary damages like that administered in modern civil courts. For the emergence of the modern doctrine, the historian of the common law must look to the nineteenth-century.

CHAPTER 5

Towards the Modern Legal Doctrine of Exemplary Damages, 1800–1861

A. Introduction

The previous chapter showed that, although it caused a commotion in the Court of Common Pleas, Pratt CJ's *North Briton* decisions in fact did not give effect to the modern legal doctrine of exemplary damages. Indeed, the proper significance and effect of those decisions was to strengthen the constitutional proposition that the question of a tortfeasor's full financial liability lay in the jury's adjudicative province. This chapter continues this thesis' critical exploration of the pre-*Rookes v Barnard* dimension of the common law practice of extra-compensatory, distinctly punitive, recovery. It sets out to show that English common lawyers did not start to conceive of exemplary damages in terms of a legal doctrine of civil remedies until quite some time after the *North Briton* cases.[1]

The central claim of this chapter is that this distinct evolutionary period in the growth of the award of exemplary damages in tort actions can be explained by the parallel operation of two causes. The first of these causes was procedural in nature. By the middle of the nineteenth-century, unsuccessful tort defendants were increasingly able to avail themselves of more options for post-trial appellate relief. Where a tort defendant objected to the size of a jury's award, his means of challenging it were no longer limited to a motion for a new trial on the ground of the award's excessiveness. He acquired the further right to ask a court in banc to reconsider what the judge at trial had specifically said to the jury in

[1] Goudkamp and Katsampouka recently propose that the first period of the 'English law of punitive damages' comprised the period from 1763 to 1963, arguing that it was generally characterized by a 'substantive approach to punitive damages' as opposed to a more formalistic one, see James Goudkamp and Eleni Katsampouka, 'Form and Substance in the Law of Punitive Damages' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Bloomsbury Publishing 2019) 333.

respect of damages before the plaintiff's case was left to their decision and assessment. This, in turn, gradually led to the recognition of a further ground upon which a jury's aggravated award of tort damages could be reviewed – judicial misdirection. As a result of this recognition, the English common law made its earliest attempt at treating the question of the availability of 'exemplary damages' (and, in turn, 'vindictive damages') as a matter of trial judge's answer to a reviewable question of law.

Yet, the formal doctrinal recognition of extra-compensatory punitive tortious recovery cannot only be attributed to the recent possibility of trial judges misdirecting juries about exemplary damages being available. This chapter suggests that the second operative cause upon the English common law's earliest elaboration of the doctrinal basis of punitive tort liability was the nineteenth-century legal treatise. AWB Simpson asserted that this new tradition of legal literature was, in the positivist spirit of the age, distinguished by its devotion to the exposition of law as a 'principled science'.[2] Beginning in the late 1840s, Anglo-American treatise writers subjected the deserted subject of civil recovery to distinctly scientific treatment. Motivated by 'rule of law' concerns about arbitrary remedial decision-making, these writers played an important role in tentatively setting forth the rules thought to comprise the English common 'law' of damages. Among them, it will be suggested, was the rule of common law that permitted the punishment of a defendant in an aggravated tort action.

The last part of this chapter suggests that these two parallel developments can be seen coming together in two aggravated tort cases decided in the third quarter of the nineteenth-century: *Emblen v Myers* in 1860,[3] and *Bell v Midland Railway Co* in 1861.[4] The significance of these two successive tort judgments in historical accounts of the growth of the modern common law doctrine of exemplary damages has been understated. Decided almost a century after Pratt CJ's *North Briton* decisions, *Emblen* and *Bell* show two appellate benches attempting to explicate the juridical basis of the award of exemplary damages. In turn, they are to be regarded as important early catalysts in the emergence of

[2] AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 UChi L Rev 632, 658. For a historical summary, see Richard A Danner, 'Oh, The Treatise!' (2013) 111 Mich L Rev 821, 824–828.
[3] (1860) 6 H & N 54, 158 ER 23.
[4] (1861) 10 C B (N S) 287, 142 ER 462.

the modern familiar positivist practice of remedial tort law adjudication in which modern exemplary damages are administered. As part of this practice, awards of tort damages beyond compensation and for the purpose of punishment are predicated – not on a jury's essentially arbitrary judgment – but rather on a judge's prior statement of the legal rule of damages applicable to proven facts about the aggravated tort that the defendant committed.

B. Judicial Misdirection on Aggravated Tort Awards

In his 1832 work, *The Province of Jurisprudence Determined*, the English legal theorist, John Austin, advocated a sharper division between 'positive law' and 'positive morality'.[5] As Austin wrote, positive morality, unlike positive law, referred to the 'opinions and sentiments held or felt by men in regard to human conduct'.[6] Austin's main contention was that common attitudes about right and wrong, justice and injustice, were often related to 'positive law'.[7] But this relation, Austin argued, was only 'by a remote or slender analogy'.[8] In Austin's view, the difficulty with principles of positive morality was that they had not been posited (or 'laid down') by a 'monarch, or sovereign number, to a person or persons in a state of subjection to its author'.[9] This included principles that a sovereign's subordinate inferiors might posit; for example, the king's judges.[10]

Austin did not refer to any particular instance of common law adjudication where principles of 'positive morality' (as opposed to 'positive law') played a role in shaping the outcomes of legal controversies. But he might well have used the example of the determination of damages in matters of tort. As the previous chapter showed, Pratt CJ's Common Pleas had not posited any legal rules for the determination of damages in

[5] John Austin, *The Province of Jurisprudence Determined* (first published 1832, WE Rumble ed, CUP 1995) 164.
[6] ibid.
[7] ibid.
[8] ibid.
[9] ibid 165. Lobban doubts whether Austin's true conception of the judge-made common law was as crude as later positivists suggested, see Michael Lobban, *The Common Law and English Jurisprudence 1760–1850* (Clarendon Press 1991) chapter 8.
[10] For Austin's recognition of the common law judges' capacity to 'posit' law, see Wilfrid E Rumble, 'John Austin, Judicial Legislation and Legal Positivism' (1977) 13 UWA L Rev 77, 77–78.

aggravated tort cases.[11] In such cases, a tortfeasor's full financial liability was fundamentally fixed by the jury acting within their proper and constitutional province of adjudication.

i. The jury's adjudicative province of aggravated recovery

The historically non-positivist adjudicative practice in which juries gave damages of a punitive, and more specifically exemplary, character was significant in one key respect. It made it very difficult for unsuccessful tort defendants to complain about what a trial judge said to a jury about damages before he left the plaintiff's case to them. Even in those select cases where the phrase 'exemplary damages' happened to be used by trial judges in their concluding comments, its use was not regarded as consequential in any legal sense. As such, the only recourse available to defendants aggrieved by the size of damages remained what it had been for nearly two centuries: to persuade a central common law court that the damages settled within the jury's province were such that 'all mankind must be ready to exclaim against at first blush'.[12] Indeed, well into the nineteenth-century, the threshold level of centralized interference with excessive tort verdicts, particularly in circumstanced cases, remained exceedingly high.[13] To interfere too readily, remarked a puisne judge of the early Victorian Common Pleas, would be to 'take away from the jury a prerogative that the constitution has invested them with'.[14]

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[11] *Huckle v Money* (1763) 2 Wils KB 205, 206; 95 ER 768, 768.

[12] *Beardmore v Carrington and others* (1764) 2 Wils KB 244, 250; 95 ER 790, 793 (Pratt CJ).

[13] William Tidd, *The Practice of the Courts of King's Bench and Common Pleas in Personal Actions*, vol 1 (first published 1791, 8th edn, J Butterworth & Son 1821) 916; *Blower v Hollis* (1833) 1 C & M 393, 399; 149 ER 452, 454: 'the Court will not . . . interfere . . . unless the damages were manifestly, and at the first blush, outrageous and excessive, and clearly evinced passion or partiality'; David Graham, *An Essay on New Trials* (Halsted & Voorhies 1834) 410: 'In *personal torts* and actions, generally sounding in damages, it being within the strict province of the jury to estimate the injury, unless there be a manifest, the court will not interfere'. (Original emphasis).

[14] *Williams v Currie* (1845) 1 CB 841, 847; 135 ER 774, 776 (Coltman J). For continued nineteenth-century reference to the jury's constitutional prerogative to assess damages, see *Foy v The London, Brighton and South Coast Railways Company* (1865) 18 C B (N S) 225, 228; 144 ER 429, 430, an action for negligence the jury gave the plaintiff large £500 damages and in which Willes J in banc refused to upset the jury's verdict, stating: 'The only question was, whether under the circumstances it was a reasonable thing for the lady to get out of the carriage in the way she did. The finding of the jury disposes of that. And they are the constitutional judges of the amount of damages, and we only interfere in cases of misconduct or evident mistake'.

Significantly, however, as a form of review the motion for a new trial on the ground of excess had never been concerned with what a trial judge may have chosen to say to a jury about damages. Well beyond the eighteenth-century, its special concern remained with what might be described as the substantial justice of the jury's award. And establishing the injustice of an award often saw defendants attack the particular jury that had settled it. *Merest v Harvey*,[15] an aggravated 1841 *vi et armis* action for trespass to land, provides a clear illustration. The plaintiff alleged that the defendant (a local magistrate) had entered his field in a drunken rage with 'dogs and guns and beating for game there'.[16] Upon a trial of the plaintiff's claim at the Norfolk Assizes, a special jury found for the plaintiff with £500 damages, being the whole sum laid in his declaration.[17] The defendant sought a new trial on the ground of excess. Before Gibbs CJ's Common Pleas, Serjeant Blosset for the defendant advanced the following criticism of the jury's award:

> the jury seemed to have considered, not what they ought to give as a compensation for the injury sustained, but what they, as lords of manors in a sporting county, where the jealousy of preserving the game was carried to an excess, should like to receive in similar circumstances.[18]

In turn, the defendant's principal complaint against the *Merest* jury's allegedly excessive award was that it had been improperly motivated by parochial concerns about recreational hunting. The court in banc, however, expressed their characteristic unwillingness to interfere, and the jury's verdict stood.[19]

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[15] (1814) 5 Taunt 442, 128 ER 761.

[16] ibid 761. In evidence to the jury, the plaintiff showed that the defendant had used 'very intemperate language' and had discharged his firearm 'several times', see 761.

[17] There is no suggestion in the report that the trial judge directed the jury in respect of damages, and if so, exactly what was said.

[18] *Merest* (n 15) 761.

[19] The court did not speculate over what motivations may have actuated the jury in giving their award. The Chief Justice merely said: 'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?'. In his short concurring opinion, Heath J simply said: 'I remember a case where a jury gave 500*l* damages for merely knocking a man's hat off; and the Court refused a new trial', see ibid.

(a) The obscure origins of misdirection in respect of damages

The origins of judges misdirecting juries in respect of damages in civil actions are obscure.[20] Examining contract actions, Simpson could find no 'suggestion before 1768 that a retrial might be granted on the ground of judicial misdirection regarding the assessment of damages'.[21] The 1768 case of *Smee v Huddlestone*[22] is seen as an important development. In that case, what Wilmot CJ told a jury regarding damages in an assumpsit action formed the basis of a review in banc. The issue was whether the Chief Justice had erred in directing the jury to assess the plaintiff's damages according to the value of the expectancy created by the defendant's promise.[23] In banc, it was determined that Wilmot CJ had not misdirected the jury as to the proper measure of damages to be applied. According to Swain, the emerging procedure of appeal on misdirection regarding damages in matters of contract meant that, 'by the late eighteenth-century, the expectation measure had become a rule of law enforceable through a new trial'.[24]

By the nineteenth-century, however, new trials had yet to be granted on the ground that the judge at trial had misdirected the jury regarding the assessment of damages in tort.[25] Unlike in contract actions, judges had altogether avoided laying down the correct measure to be applied in determining a tort plaintiff's recovery. This was especially so where trial judges submitted aggravated cases to juries. In this important subset of tort actions, the persistent judicial practice was to treat the problem of aggravated tortious recovery 'as an

[20] See AWB Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 UChi L Rev 533, 550.
[21] ibid. In the case of judicial misdirection, the magnitude of the jury's award was never at issue in banc, see *Allum v Boultbee* (1854) 9 Ex 738, 740; 156 ER 316, 317: 'in case of misdirection the amount of the verdict is not considered'.
[22] Unreported, though noted in Joseph Sayer, *The Law of Damages* (first published 1770, 2nd edn, J Moore 1792) 49–52.
[23] ibid.
[24] Warren Swain, *The Law of Contract 1670–1870* (CUP 2015) 105. Also see George T Washington, 'Damages in Contract at Common Law II' (1932) 48 LQR 90, 92, contending that the premium placed on certainty in late eighteenth-century commerce ensured 'that rules of damages in contract would develop more quickly than in tort'.
[25] By 1828, direction to juries regarding damages was still given little attention by the authors of the nisi prius practice-books, see William Tidd, *The Practice of the Courts of King's Bench and Common Pleas in Personal Actions*, vol 1 (first published 1791, 9th edn, J Butterworth & Son 1828) 867: 'The evidence being gone through, and summed up by the judge, the jury, if they think proper, may withdraw from the bar, to deliberate on their verdict'.

unregulated jury matter'.[26] This is amply reflected in the reports of nisi prius tort trials in the early nineteenth-century.

(b) Substantially un-directed aggravated awards

Even in those tort actions where counsel urged juries to give 'exemplary damages',[27] nineteenth-century trial judges appear to have avoided being too 'directive' in respect of damages in their summing-up, often choosing not to use the phrase 'exemplary damages' (or other cognates) at all. Examples abound. In an aggravated 1802 *vi et armis* action for breaking and entering the plaintiff's close, the early nisi prius reporter, Thomas Peake, noted Lawrence J's attitude to the question, whose admitted inclination was to leave it 'only to the jury'.[28] The same inclination is attested to in *Bromley v Wallace*,[29] an action for criminal conversation decided the same year. Before leaving the plaintiff's aggravated case to the jury, Alvanley CJ is reported to have remarked, tersely: 'With regard to the measure of damages in this case, it must depend entirely on the Jury viewing the evidence on both sides'.[30] The 1835 aggravated slander case of *Swinborne v Druke*[31] is also illustrative. According to *The Times* report, counsel for the plaintiff at trial told the jury that he hoped to see 'heavy and exemplary damages [given] at their hands'.[32] But in his summing-up of the evidence, Williams J merely said: 'as to the amount of damages . . . it was for them [the jury] to say what, under the circumstances, they considered the plaintiff entitled to'.[33]

In those early nineteenth-century tort cases where judges were inclined to say more, they often appear to have simply affirmed particular aggravated matter that the plaintiff had permissibly given in evidence, and therefore that the jury might properly consider in

[26] Simpson, 'The Horwitz Thesis' (n 20) 220.
[27] See *Wyatt v Gore* The Times, 13 July 1816, 3; *Gilchrist v Mottley and others* The Times, 19 January 1818, 3; *Wood v Wainwright* The Times, 4 July 1823, 3: 'Mr C. Phillips introduced this as a very aggravated assault, calling for exemplary damages'; *Cotton v James* The Times, 5 November 1829, 3.
[28] *Bevans v Reynolds* (1802) Peake Add Cas 217, 170 ER 250.
[29] The Times, 7 December 1802, 3.
[30] ibid.
[31] The Times, 20 June 1835, 6.
[32] ibid.
[33] ibid.

settling the damages. *Fox v Oakley*[34] provides a neat illustration. A pauper had been offered free accommodation by officers of the Parish of Stapleton in Shrewsbury, but after informing him of the need to relocate him to another cottage, the pauper refused to vacate. Armed with weapons, the parish officers entered the pauper's cottage by force. They then tied his arms and legs with cords. After the pauper's daughter cut the cords, 'great violence'[35] ensued, resulting in the pauper again being tied up and then detained. The pauper sued out a *vi et armis* writ for trespass to land, assault and false imprisonment. Upon the trial of his claim at nisi prius, Le Blanc J held his ejectment to have been lawful,[36] but the assault and imprisonment unjustified. In respect of damages, he said:

> The jury must therefore, in all events, give damages for the injury to the person; and if they thought that more trespass had been committed than was absolutely necessary, that also should from a part of their consideration.[37]

Although seemingly invited to account for the circumstances that surrounded the assault and false imprisonment, the jury found a verdict for the pauper with very modest damages of 40s (though reportedly still 'declaring that they thought the trespass excessive'[38]). In cases, therefore, where trial judges perhaps anticipated juries increasing their awards, and perhaps according to extra-compensatory principles of punishment, judges generally appear to have either the left the question of damages entirely to the jury, or offered some assistance by either affirming or disaffirming matters that the plaintiff had purposely given in evidence to aggravate the damages.[39]

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[34] (1802) Peake Add Cas 217, 170 ER 249.

[35] ibid 250.

[36] ibid: 'when parish officers put a pauper into possession of a room or cottage, he gains no interest in it; he is not even tenant at will, but the parish officers still have the legal possession, and whether he continues for a month or twenty years, they may turn him out whenever they please'.

[37] ibid.

[38] ibid.

[39] Also see Bayley J's summing-up in the aggravated assault and false imprisonment case of *Forde v Skinner* (1830) 4 Car & P 239, 340; 172 ER 687, 687: 'You will therefore decide on the motives which actuated the defendants, and according to that decision you will estimate the amount of damages'. The judges sometimes urged restraint, see *Sears v Lyons* (1818) 2 Stark 317, 318–319; 171 ER 658, 658, where Abbott J bade a jury in an action for an aggravated trespass to land 'to guard their feelings against the impression likely to have been made by the defendant's conduct'.

ii. Regulating the reach of extra-compensatory principles

There is, in turn, little evidence from the first half of the nineteenth-century of trial judges showing any inclination to accurately explain to juries the principles of measurement applicable in determining a particular tort plaintiff's aggravated recovery. That being said, some nineteenth-century judges appear to have used in banc hearings to express their own views about the jury's proper task of assessing damages in particular types of tort cases, including whether principles of punishment had any application in determining particular types of tort damages awards. An instructive case is *Doe v Filliter*,[40] ultimately determined by Pollock CB's Court of Exchequer Chamber in Trinity Term 1844.

The case arose out of a land dispute in which the plaintiff brought two successive actions of trespass. The first action was for ejectment, in which the plaintiff sought to recover possession of the land; the second was for *mesne profits*, in which the he subsequently sought to recover profits earned by the tenant in wrongful possession. The plaintiff succeeded in the first ejectment action. But in addition to recovering possession, he had also had his costs taxed by the court. His costs comprised an 'indemnity'[41] for the expenses reasonably incurred in recovering possession, and which the defendant paid into court.[42] In the second action for *mesne profits*, however, the plaintiff sought an indemnity of 'full costs',[43] including further costs he had incurred as between himself and his attorney.[44] At the trial of the plaintiff's subsequent claim for *mesne profits* in the Exchequer of Pleas, Wightman J is reported to have 'directed a verdict for the plaintiff,' telling the jury to factor into their indemnity 'the excess above the sum [that the defendant had already paid] into court'.[45] The defendant then brought a motion in the Exchequer Chamber. His contention was that the jury's verdict was unsatisfactory by reason of what the trial judge had said to them about how to determine the plaintiff's full recovery. The issue was whether the plaintiff's additional attorney-client costs were recoverable in the second action, despite there having been a full taxation of costs upon the judge's order in the former ejectment

[40] (1844) 13 M & W 47, 153 ER 20.
[41] ibid 21 (Alderson B).
[42] ibid.
[43] ibid 20.
[44] ibid.
[45] ibid.

action. The court unanimously held that they could not. As Rolfe B stated: 'Here a taxation has taken place in the usual way, and by that the plaintiff is bound'.[46]

(a) The scope of a plaintiff's '*indemnity*'

One of the notable parts of the Exchequer Chamber's decision is its engagement with the question of the nature of redress in actions of ejectment and *mesne profits*. In a short concurring judgment, Rolfe B observed that where 'there has been *no* taxation [by the court], then, *ex necessitate*, the jury must say what is to be an indemnity'.[47] In judging this question, however, the opinions of the Exchequer Chamber demonstrate quite a clear intention to lay down broad remedial principles. Addressing the proper question of 'what is to be an indemnity' in actions for ejectment and *mesne profits*, Alderson B stated:

> The plaintiff in ejectment is to recover such damages as he has sustained; and as the defendant's misconduct consisted in turning him out of possession, the defendant must pay back all the profits of the estate during the time he has so kept him out. The taxed costs are intended to be a full indemnity to the plaintiff for his expenses in getting back the land. That is the principle; whether it be fully carried out in practice is another matter.[48]

Pollock CB agreed with Alderson B as to a principle of 'full indemnity'[49] (or compensation) underpinning recovery in actions for ejectment and *mesne profits.* Yet, the Chief Baron appears to have used his *Filliter* judgment to dispel further doubt surrounding the question of a plaintiff's proper remedial entitlement:

> It has been said, that a plaintiff in ejectment is entitled to a full indemnity; but he is not entitled to be in a better situation than any other plaintiff. In actions for malicious injuries, juries have been allowed to give what are called vindictive damages, and to take all the circumstances into their consideration; but that is not the case in ejectment.[50]

[46] ibid 21.
[47] ibid. (Emphasis added).
[48] ibid.
[49] ibid.
[50] ibid. (Emphasis added).

Like Alderson B, therefore, Pollock CB also sought to definitively align ejectment recovery with a principle of full indemnity. In his view, this required stating that the peculiar circumstances of land disputes – including whether the defendant's misconduct was aggravated by malice towards the plaintiff – could not be properly accounted for by juries in settling the damages. In turn, for a future trial judge to otherwise direct a jury would be to abandon the proper measure of damages that the Exchequer Chamber had taken tentative steps to 'canonize'[51] in *Filliter*.

(b) The phrase 'vindictive damages'

The appearance of the specific formulation 'vindictive damages' in Pollock CB's *Filliter* judgment also repays close scrutiny. The Chief Baron seemed to recognize that in many tort actions juries readily used the medium of damages in response to evidence showing that the defendant had maliciously inflicted tortious injury.[52] Specifically, however, juries did so, not in the form of 'exemplary damages', but in the form of damages of a 'vindictive' character.

The phrase 'vindictive damages' appears with some frequency in the very late eighteenth and early nineteenth-century sources. Yet, the extent of its alignment with an *extra*-compensatory – distinctly punitive – principle of tortious recovery is indeterminate. In some reported tort cases, the phrase is employed, typically by counsel, in a way that suggests it was in fact more closely aligned with a principle of *restitutio in integrum* (or full compensation). A contemporary example is *Bedford v M'Kowl*,[53] an action on the case for seduction in which, in addition to the pecuniary loss of service that the defendant's seduction of the plaintiff's daughter had caused, the plaintiff also led evidence that she had

[51] Simpson, 'The Horwitz Thesis' (n 20) 220.

[52] On 'vindictive damages' being the award juries tended to give specifically in response to circumstances of malice, see the libel case of *Robertson v Wylde* (1838) 2 M & Rob 101, 101; 174 ER 228, 228 (Mr Erle QC): 'the defendant, the bookseller, was only liable for the actual damages resulting from the libel, and could not be charged with vindictive damages on account of the malice of the supposed writer'.

[53] Anon, *The Counsellor's Magazine; Or a Complete Law Library for Barristers . . . and Others who Would Wish to Acquire a Competent Knowledge of the Law* (W & Stratford 1796) 246, compiled by 'a society of gentlemen of the middle temple'.

'every symptom of a broken heart'.[54] Attempting 'to procure a mitigation of damages', Serjeant Shepard, for the defendant, forcefully put it to the jury that in such a case '[a] civil Court was only to consider the pecuniary loss which the party had sustained', even suggesting that 'the idea of vindictive damages was absurd'.[55] Serjeant Shepard's employment of the phrase suggests that, in some cases, the purpose of vindictive damages awards was to provide full compensatory redress for the intangible injured feelings that the nature and circumstances of the defendant's sexual mischief had further caused the plaintiff to suffer.[56]

Yet, other appearances of the phrase in the reported cases equally suggest that 'vindictive damages' were also seen to be aligned with an extra-compensatory, distinctly punitive, principle. In *Compton v Winkworth*,[57] the plaintiff brought an action for breach of a promise to marry in the King's Bench in which he won the court's judgment by default. At the execution of the writ of inquiry of damages, counsel for the plaintiff told the sheriff's jury that their proper task was 'to determine what damages a young and virtuous woman was to receive [for] . . . constant, warm and frequently renewed promises, in expectation of matrimony'.[58] According to the report, counsel specifically 'appealed to the jury as fathers, as brothers, whether this was a case that should be allowed to pass unvisited, he would not say by vindictive, but at least by exemplary damages'.[59] It is counsel's final comment that is perhaps most revealing. A possible interpretation is that the plaintiff's counsel considered that a vindictive award would have the effect of subjecting the defendant to especially harsh treatment, and that if the jury were inclined to punish him they would be more likely to do so for example's sake. Apparently in response to counsel's recommendation in respect of damages, before submitting the case to the jury, the under-

[54] ibid 247. By the nineteenth-century, the action on the case for seduction could be brought by a parent or guardian of the seduced, not just the father, see generally, Samuel B Harrison and Frederic Edwards, *Practical Abridgement of the Law of Nisi Prius Together with the General Principles of Law*, vol 2 (Hodges & Smith 1838) 976–979.

[55] ibid 248. Lord Eldon's direction to the jury was terse in respect of damages, but the jury seemed to ignore Serjeant Shepard's recommendation, giving the plaintiff very large damages of £400.

[56] As for the mother's intangible injuries, evidence was given showing that Mrs Bedford 'had watched over her daughters with the most anxious care, and had ever strove to keep their minds pure, and their behaviour correct', see ibid 246.

[57] The Times, 27 December 1819, 3.

[58] ibid.

[59] ibid.

sheriff told them: 'only estimate the damages . . . for the very serious injury which she had received'.[60]

(c) Blurring compensation and punishment

In other instances, vindictive damages appear to have straddled the line between compensation and punishment. This is particularly evident in *Stanley v Chorley and Bulmer*,[61] an action on the case for negligence tried before Tindal CJ in the Common Pleas in 1830. In his declaration, the plaintiff had charged the defendants (two surgeons from Leeds) with so negligently treating his dislocated shoulder that they caused him to entirely lose his use of it. The plaintiff's case was opened at nisi prius by Frederick Pollock, the later Chief Baron of the Exchequer. Before the calling the plaintiff's first witness, Pollock told the special jury that, ultimately, they would need to 'come to the question, what damages the plaintiff is entitled to'.[62] He reminded them that the plaintiff was a 'person comparatively in a humble station in life', but that his surgeons were 'in affluent circumstances'.[63] As to how the plaintiff's damages were to be settled, Pollock continued:

> You will say what is a fair and reasonable compensation to the plaintiff, whose prospects are interrupted and who has to pass the rest of his life in a state of uselessness, and must remain crippled in his endeavours to maintain his family.[64]

Pollock's comment suggests various elements were seen to mingle in 'fair and reasonable' negligence awards, including essentially intangible elements of injury, such as the distress and humiliation that the defendants' negligent act had (and would seemingly continue) to cause the plaintiff to suffer. On the question of damages, however, Pollock appears to have gone on to assure the jury that '[h]e [the plaintiff] don't ask for vindictive damages, the question is how is he to be compensated for the injury he has sustained'.[65] The fact that the plaintiff's claim for damages was grounded, not in a malicious injury,[66] but a negligent

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[60] ibid.

[61] Anon, *An Account of the Trial Between Jonathan Stancliffe, Plaintiff, and Thomas Chorley and George Bulmer, Defendants, For Neglect and Inattention as to the Dislocation of an Arm* (F Hobson 1830).

[62] ibid 4.

[63] ibid 11.

[64] ibid 11–12.

[65] ibid.

[66] *Filliter* (n 40).

one, may suggest that Pollock conceived 'vindictive damages' as encompassing the various, essentially reparable, injuries that comprised the full extent of the plaintiff's suffering. By the same token, however, his assertion that the plaintiff was *not* seeking vindictive damages may equally suggest that, in the instant case, vindictive damages were conceived as an award designed to subject the negligent medical men to a particular type of punishment.

(d) Bentham and '*vindictive satisfaction*'

The notion of vindictive damages as coaligned with principles both of compensation and punishment is further supported, albeit in a more philosophical context, by the English moral philosopher, Jeremy Bentham. In his 1789 treatise, *An Introduction to the Principles of Morals and Legislation*, Bentham had propounded his famous analysis of the principle of utility.[67] In chapter 13, entitled 'Cases Unmeet for Punishment', he opened with the following proposition:

> The general object which all laws have, or ought to have, in common is to augment the total happiness of the community; and, therefore, in the first place, to exclude, as far as may be, everything that tends to subtract from that happiness: in other words, to exclude mischief.[68]

Yet, as Bentham conceived it, the imposition of punishment was itself a kind of state-sponsored mischief. Under a principle of utility, it followed that if punishment 'ought to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil'.[69] Under Bentham's analysis, in order for punishment to fulfil its utilitarian end, its primary goal needed to be to 'controul action . . . in which case', he added, 'it is said to operate in the way of example'.[70]

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[67] Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* (first printed 1870, T Payne & Son 1879) i. The first introductory chapter famously commenced with the proposition: 'Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*'. (Original emphasis).

[68] ibid 166.

[69] ibid.

[70] ibid. Bentham similarly punctuated: 'Example is the most important end of all', see ibid 167.

However, Bentham equally observed that punishment often had what he described as a 'collateral end, which it has a natural tendency to answer'.[71] As he described it, the natural tendency is 'that of affording a pleasure of satisfaction to the party injured',[72] although, under his utilitarian framework, 'no punishment ought to be allotted *merely* to this purpose'.[73] Yet, Bentham's elaboration of this 'collateral end' of punishment may help illuminate the principled content of 'vindictive' damages awards given to injured victims in civil tort actions. In his view, this collateral end of punishment 'may be stiled a vindictive satisfaction or compensation'.[74] A victim's vindictive or retributive desire for satisfaction was invariably induced by the 'ill-will . . . excited by the offence'.[75] What is curious about Bentham's discussion in chapter 13 is its treatment of an injured person's desire to be satisfied as an independent, albeit inferior, goal of punishment. With the aid of Bentham's analysis, the 'vindictive damages' awarded in tort actions may be conceived as damages designed to give injured victims of punishable wrongs (like, as Pollock CB supposed in *Filliter*, malicious torts[76]) a certain 'stock of pleasure'.[77]

Bentham's use of the term 'compensation' is noteworthy. It suggests that an important purpose of vindictive (punitive) awards was to ensure that, as Bentham elsewhere put it, 'the whole of the [wrongdoer's] mischief may be cured by compensation'.[78] As the uses

[71] ibid.
[72] ibid.
[73] ibid 167. (Emphasis added).
[74] ibid.
[75] ibid 166–167. In later philosophical writings, Bentham emphasized the social pervasiveness of personal vindictiveness or retribution as a motivator for the seeking out of justice: 'It is the vindictive satisfaction which often unties the tongue of the witnesses; . . . which generally animates the breast of the accuser; and engages him in the service of justice', see Jeremy Bentham, 'Principles of Penal Law', in J Bowring (ed), *The Works of Jeremy Bentham* (W Tait 1843) 83.
[76] See *Filliter* (n 40). Indeed, in many of the contemporary tort cases in which the term appears the tortfeasor's *mens rea* was specifically at issue; see for example, *Jones v Perry* (1803) 2 Esp 482, 483; 170 ER 427, 428 (Lord Kenyon), where the Chief Justice urged a jury not to give the victim of a negligent act vindictive damages apparently because the defendant's level of fault was not intentional or malicious: 'I have no doubt there is evidence to go to the jury that the dog was a fierce and unruly dog, and not properly secured: but not that the defendant knew him to be mad or used to bite, and therefore this is not a case for vindictive damages'. Also see *Brewer v Dew* (1843) 11 M & W 625, 629; 152 ER 955, 957 (Lord Abinger CB); *Crouch v Great Northern Railway Co* (1856) 11 Ex 742, 759; 156 ER 1031, 1038 (Martin B).
[77] Bentham, *Principles of Morals and Legislation* (n 67) 166.
[78] ibid 302. Notably, the phrase vindictive damages also contemporaneously appears in the famous (and peculiarly circumstanced) contract case, *Lumley v Wagner* (1852) 1 De G M & G 604, 619–620; 42 ER 687, 693 (Lord St Leonards LC), where the Chancery further justified the giving of injunctive relief

of the term 'vindictive damages' in contemporary aggravated tort cases suggest, the awards appears to have been simultaneously concerned with the defendant's punishment *and* the plaintiff's reparation (albeit reparation for intangible injuries that the aggravated nature and circumstances of the tortfeasor's mischief further caused him to suffer).

Returning to Pollock CB's *Filliter* judgment, he disavowed all ejectment awards other than those merely designed to give the plaintiff a 'full indemnity'. These included vindictive damages, even if in part intended to compensate the plaintiff for the full extent of his suffering, tangible or otherwise. Yet, despite Pollock CB's 1844 appellate intervention in *Filliter*, what his Exchequer Chamber did not do was say when tort plaintiffs might generally be entitled to damages whose purpose would be an aggravated tortfeasor's punishment. Significantly, however, the contemporary judicial ability to lay down general remedial principles in aggravated tort cases was limited in two main ways.

First, it depended on trial judges actually telling juries that damages of an 'exemplary' (or 'vindictive') nature could be given. Secondly, it required an unsuccessful tort defendant to get a court in banc to state 'in what way ought the jury to have been directed'.[79] As this chapter has already suggested, the contemporary nisi prius reports show that, in their interactions with juries, judges remained by and large neutral as to the measures according to which a plaintiff's recovery was to be determined in aggravated cases. The important effect of this trial practice was to ensure that the principles for determining a tortfeasor's full financial liability would remain unclear and uncertain. This essentially prevented defendants against whom large damages were awarded from arguing that the trial judge was at fault because of the manner of his direction to the jury regarding damages. By

because it would avoid a potentially more potent remedy at common law: 'The effect, too, of the injunction in restraining Johanna Wagner from singing elsewhere may, in the event of an [common law damages] action [for breach of contract] being brought against her by the Plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre'. There is some evidence of judges often explicitly urging juries not to award such damages in contract cases, see *Startup v Cortazzi* (1835) 2 CM & R 162, 168–169; 150 ER 71, 71 (Lord Abinger CB): 'I did not, however, prescribe any line to the jury . . . upon which they ought to proceed; but I told them they ought not to give speculative or vindictive damages'.

[79] These were the terms of the argument advanced on the defendant's behalf in the Exchequer Chamber in *Hadley v Baxendale* (1854) 9 Ex 341, 350; 156 ER 145, 149, which famously produced the applicable rule of recovery to determine consequential damages from a breach of contract.

preferring to say little, for a long time English judges were able to avoid any accusation that the awards settled within the jury's adjudicative province reflected errors on their part.

C. The Nineteenth-Century Legal Treatise on Damages

At least initially, it was not the central common law judges who first stated the proper measures of damages to be applied in aggravated tort cases in the Austinian sense – that is, in terms of legal 'rules' of recovery 'properly so-called'.[80] By the middle of the nineteenth-century, however, the subject of damages had been taken up by legal treatise writers. They set out to put order to the mass of common law statements about the recovery of damages in civil actions generally, including the specific question of exemplary damages in tort actions. The first Anglo-American writer to do so was Theodore Sedgwick in 1847.

i. From Sayer to Sedgwick

In that year, Sedgwick published his pioneering book, *A Treatise on the Measure of Damages*.[81] Educated at New York's Columbia College, his book was seemingly inspired by the disheartening realization that, as he put it, 'our libraries contain no sufficient work on the subject of the Rule or Measure of Damages'.[82] 'Indeed, the only which we have', Sedgwick lamented, 'is that by Sayer, published nearly three quarters of a century ago'.[83] Unlike Sayer, Sedgwick conceived his project as making what he described as 'a proper and scientific division of the subject'.[84] He set out to instil what Horwitz describes as 'faith in the possibilities of logical consistency of legal doctrine';[85] indeed, to do so in a field in which it was manifestly lacking. Sedgwick's faith in his project, however, was not absolute. He acknowledged that the lawyerly instinct to reduce 'the rules of damages to principle'[86] was a recent one. He was also aware of various institutional facts that lawyers

[80] Austin (n 5) xv.
[81] Theodore Sedgwick, *A Treatise on the Measure of Damages* (JS Voorhies 1847).
[82] ibid 1.
[83] ibid.
[84] ibid.
[85] Morton J Horwitz, 'Treatise Literature' (1976) 69 LawLibrJ 460, 460.
[86] Sedgwick, *Treatise on the Measure of Damages* (n 81) 2.

sceptical about his scientific endeavour might raise by way of criticism. Sedgwick referred to one 'chief embarrassment'.[87] He attributed it to:

> The whole arrangement of our Anglo-American jurisprudence; the primary distinction between law and equity; and the subordinate division of the forms of action at law are so purely arbitrary and technical, that it is almost impossible to prepare a treatise on the subject as extensive as that of the measure of damages, which shall be at once useful and logically arranged.[88]

Sedgwick was not deterred. Despite familiar difficulties he strove, as he put it, to 'extract some general and reasonable rule, from cases often conflicting and discrepant'.[89]

(a) Sedgwick's general compensatory 'rule' of civil recovery

As a general proposition, Sedgwick declared that a civil plaintiff's 'relief depends upon the amount of injury',[90] which he designated the 'rule of compensation'.[91] In his view, the history of Anglo-American common law disclosed six 'items'[92] that could be properly 'taken into account in any effort to make complete *compensation*'.[93] Among these six categories of civil injury individually 'curable' by compensation was what Sedgwick described as '[t]he sense of wrong, or insult, in the sufferer's breast'.[94]

Sedgwick's motivation for extracting a compensatory rule of damages of general application bears particular note. Fundamentally, he appears to have been concerned with arbitrary decisions on damages in civil actions. It must have been a problem Sedgwick had experienced first-hand as a civil litigator in the city of New York from 1835.[95] By

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[87] ibid.
[88] ibid 2–3.
[89] ibid 4.
[90] ibid 33.
[91] ibid 34.
[92] ibid 35.
[93] ibid. (Original emphasis).
[94] ibid. Sedgwick implied that, in assessing this particular non-pecuniary item of compensation, a jury would need to examine the defendant's conduct *per se* because the plaintiff's 'sense of wrong or insult' resulted 'from an act dictated by a spirit of wilful injustice' (35).
[95] James H Lamb, *Lamb's Biographical Dictionary of the United States*, vol 7 (JH Brown, Federal Book Co 1903) 4.

endorsing a 'principle of compensation'[96] as the proper measure of damages across civil actions generally, Sedgwick's apparent view was that the question of a plaintiff's proper remedial entitlement would be less vulnerable to the 'fluctuating discretion of either judge or jury'.[97] By judges directing juries to conform their awards to a compensatory principle, Sedgwick hoped that the question of damages in individual cases would evolve into 'a question of law not governed by any arbitrary amount'.[98]

(b) A subsidiary rule of punishment

At the same time, Sedgwick recognized that the historical experience of the common law did not bear out a principle of full compensation alone. In his view, the previously decided cases suggested that, where any of four elements mingled in civil wrongdoing, a plaintiff's damages might properly be determined according to a distinctly punitive extra-compensatory principle. These elements were: fraud, malice, gross negligence, or oppression.[99] 'Where either of these elements mingle in the controversy', Sedgwick asserted, '*the law*, instead of adhering to the system or even the language of compensation, adopts a wholly different rule'.[100] By judges administering this extra-compensatory – punitive – rule in the appropriate cases, his view was the law would 'permit[] the jury to give . . . punitory, vindictive or exemplary damages'.[101] In support of this subsidiary rule of civil recovery, Sedgwick drew mostly on English case law. He cited three in banc judgments of the English common law courts in support of it: Pratt CJ's 1763 speech in *Huckle v Money*,[102] Wilmot CJ's 1769 speech in *Tullidge v Wade*,[103] and, more curiously, Pollock CB's 1844 speech in *Filliter*.[104] On the basis of these decisions, Sedgwick opined that 'this rule seems settled in England'.[105]

[96] Sedgwick, *Treatise on the Measure of Damages* (n 81) 28.
[97] ibid 34.
[98] ibid 28.
[99] ibid 34
[100] ibid. (Emphasis added).
[101] ibid 39.
[102] See (n 11).
[103] 3 Wils KB 18, 95 ER 909.
[104] *Filliter* (n 40); Sedgwick, *Treatise on the Measure of Damages* (n 81) 39.
[105] ibid.

Of course, when English juries gave large damages in aggravated tort cases (including in the first two cases Sedgwick cited), they did so within a non-rule-based adjudicative province. By the time Sedgwick embarked on his project, this important aspect of the practice of tort law adjudication had not yet itself, to use Simpson's phrase, 'hardened into law'.[106] Sedgwick's scientific project, therefore, was an important attempt at using rules of law to discipline a remedial tort practice that, by the middle of the nineteenth-century, appeared vulnerable to arbitrary remedial decision-making.

(c) Sedgwick's immediate influence in England

The success of Sedgwick's scientific project can in some part be gauged by how soon his book was cited in English civil courts. His ideas were referred to on four occasions in the landmark 1854 contract law case – *Hadley v Baxendale*.[107] Counsel for the defendant did so in support of the proper rule of remoteness of damages applicable in contract actions – that a 'defendant shall be held liable for those damages only which both parties may fairly be supposed to have at the time contemplated'.[108] Danzig shows that the common law's formal recognition of the 'rule laid down in *Hadley* v. *Baxendale*'[109] by Pollock CB's Exchequer Chamber was the result of the 'quiet absorption'[110] of ideas propounded in the new legal treatise literature on damages.

Sedgwick was also cited in *Smith v Woodfine* in 1857,[111] a case regarding the proper legal measure of damages in actions for the breach of a promise to marry. In his speech in banc, the recently appointed puisne judge of the Common Pleas, Willes J, quoted directly from the second (1852) edition of Sedgwick's treatise,[112] agreeing that the applicable

[106] AWB Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press 1987) 220.
[107] See (n 81) 147, 148, 149.
[108] ibid 147.
[109] For the contemporary use of the phrase, see *Williams v Reynolds* (1865) 6 B & S 495, 494; 122 ER 1278, 1282 (Shee J).
[110] Richard Danzig, 'Hadley *v.* Baxendale: *A Study in the Industrialization of the Law*' (1975) 4 LStud 249, 257.
[111] (1857) 1 CB (NS) 660, 140 ER 272.
[112] Willes J's citation of Sedgwick's treatise may have been personally motivated; when he was made a judge of the Common Pleas in the mid-1850s, Willes himself was threatened with a law-suit for breach of promise on the basis of a youthful attachment to a young woman in Cork, see Thomas Dixon, 'The Tears

(compensatory) rule of damages that the American treatise writer had 'extracted' from the case law had been the correct one:

> "The clear and irresistible result of the authorities is, that the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induce the violation of the agreement."[113]

ii. Mayne's English intervention

Sedgwick did not remain Sayer's successor for long. Within two years of being called to the English bar, the young Irish lawyer, John Dawson Mayne, embarked on a similar project. Eighty-six years after the publication of the first edition Sayer's book on damages, Mayne declared it 'obsolete'.[114] In 1856 he delivered its first English replacement – *A Treatise on the Law of Damages.* By way of preface, Mayne discerned that 'our own courts . . . have been remarkably prolific in decisions upon this branch of the law'.[115] Significantly, Mayne did not present his book as having solely replaced Sayer's. Noting the scarce literature on the English subject of damages, Mayne acknowledged: 'The American treatise, by Theodore Sedgwick has gone far to supply this want'.[116] Yet, despite the rapid influence of Sedgwick's ideas on English law, his treatise was not bespoke to the English common law system of civil justice. For Mayne, this showed that 'there was still room for an English work upon the same subject'.[117]

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of Mr Justice Willes' (2012) 17 J VicCult 1, 19. See Theodore Sedgwick, *A Treatise on the Measure of Damages* (2nd edn, JS Voorhies 1852) 208.

[113] *Smith* (n 111) 275. Sedgwick (and Mayne's treatises) were constantly cited by counsel in banc, see *Loder v Kekule* (1856) 3 CB (NS) 128, 135; 140 ER 687, 690, an action for breach of contract where it was contended: 'The correct rule, as the result of all the cases, is thus stated in Sedgwick on Damages, 2nd edit. p. 218'; *Bramley v Chesterton* (1857) 2 CB (NS) 592, 603; 140 ER 548, 553, where on the question of the recovery of consequential damage, counsel argued: 'The rule is laid down in Sedgwick on Damages, pp. 66 et seq. and pp. 210 et seq., in terms similar to those in Maine, and several authorities cited, the general result of which is, that "the damage to be recovered must always be the natural and proximate consequence of the act complained of".'

[114] John D Mayne, *A Treatise on the Law of Damages* (T & JW Johnson 1856) vii.

[115] ibid. It is clear which case Mayne had in mind: 'the law on the subject of damages where there has been a breach of contract, has been much considered lately, and laid down with great fulness by the Court of Exchequer [*Hadley*]', see ibid 8–9.

[116] ibid vii.

[117] ibid.

(a) Mayne's distinctively English treatment of the subject

There is a sense that Mayne may have been conscious about how truly scientific a contribution his own treatise might be seen as making to the subject of damages in its English context. In the preface of his treatise, for instance, he professed that 'in many cases of torts no measure of damages can be stated at all'.[118] For Mayne, the best an English lawyer could do, he thought, was merely 'approximate'[119] one. Unlike Sedgwick, Mayne had been versed in a genre of English legal literature that had traditionally covered the subject of damages in a particular way – the nisi prius practice-book tradition.[120]

For the proponents of nisi prius practice-books, the question of damages had been fundamentally viewed as an evidentiary problem.[121] In aggravated tort cases, in particular, the question of damages was a matter of ascertaining the evidence that a plaintiff, suing out of a particular writ, might permissibly give at trial in aggravation of damages. A clear example is the English barrister Henry Roscoe's 1827 practice-book, *A Digest of the Law of Evidence on the Trial of Actions at Nisi Prius*.[122] Discussing *vi et armis* writs of trespass *quare clausum fregit*, Roscoe included a sub-section under the heading: 'Evidence under *alia enormia*, and in aggravation of damages'.[123] Referring to previously decided cases, he gave a sense of the range of evidence that plaintiffs suing out o a writ for land trespass could reasonably expect to give in aggravation of damages. Citing one of Ellenborough CJ's early nineteenth-century judgments in the King's Bench,[124] Roscoe said:

> where the plaintiff declared against the defendant for breaking and entering her house, and under a false charge the plaintiff had stolen property . . . it was held that the

[118] ibid viii.
[119] ibid vii.
[120] See chapter 4 C iii (b).
[121] Mayne, *A Treatise on the Law of Damages* (n 114*)* vii.
[122] Henry Roscoe, *A Digest of the Law of Evidence on the Trial of Actions at Nisi Prius* (J Butterworth & Son 1827) 300.
[123] ibid.
[124] *Bracegirdle v Orford* (1813) 2 M & S 77, 105 ER 311.

> declaration was good, and that the jury might give damages for the trespass as aggravated by the false charge.[125]

Another example is the English barrister William Selwyn's practice-book, *An Abridgement of the Law of Nisi Prius.* Discussing the action on the case for seduction, he alluded to the wide-ranging matters of aggravation that previous judges had accepted juries might respond to in giving 'liberal damages'.[126] In a more questioning tone, Selwyn added:

> although it was difficult to conceive upon what legal principles the damages could be extended *ultra* the injury arising from the loss of service . . . the practice was now inveterate and could not be shaken.[127]

The 'practice' Selwyn apparently had in mind was that under which the principles according to which a seducer's full financial liability would be determined were seen to be properly in the jury's adjudicative province. Significantly, it was this decidedly practice-oriented treatment of the English subject of damages that Mayne was most familiar with, and from which, in coming to write his treatise in 1856, appeared reluctant to depart from. Indeed, by way of preface, he further acknowledged that 'many parts of the present work resemble a treatise on the law of Nisi Prius, rather than one exclusively appropriated to Damages'.[128]

Mayne began his substantive discussion of aggravated tortious recovery by noting how widely evidence of ill-motive was, not only given by tort plaintiffs, but expressly permitted by judges to be considered by juries in settling the plaintiff's damages. The purpose of

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[125] Roscoe (n 122) 310. Discussing actions for assault and battery, Roscoe similarly stated more generally: 'evidence may be given of circumstances that accompany and give a character to a trespass, in order to enhance the damages. *Bracegirdle v. Orford* 2 M. and S. 79', see ibid 300. Discussing criminal conversation actions, Roscoe stated: '*Evidence in aggravation*. Conversations between the husband and wife are evidence to shew their demeanour and conduct. *Trelawney* v. *Coleman* 1 B. and A. 91. So letters from the wife to the husband before suspicion of criminal intercourse', see ibid 291. Also see Espinasse's discussion of 'evidence on the part of the plaintiff' in the context of slander actions in Isaac Espinasse, *A Digest of the Law of Actions and Trials at Nisi Prius*, vol 2 (4th edn, A Strahan 1812) 22–23; Thomas Starkie, *A Treatise of the Law of Slander and Libel*, vol 1 (2nd edn, J & WT Clarke 1830) 339–440, whose discussion of slander damages is very thin and almost entirely focussed on pleading proprieties.

[126] William Selwyn, *An Abridgement of the Law of Nisi Prius*, vol 2 (first published 1806, 2nd edn, EF Backus 1823) 846.

[127] ibid 847.

[128] Mayne, *A Treatise on the Law of Damages* (n 114) vii.

giving such evidence, Mayne supposed, was to 'render a wrongful act more wrongful'.[129] For Mayne, however, the principles according to which juries used the medium of damages to respond to such aggravating matter was entirely unclear. For this reason, he was unable to conclusively say whether in tort 'damages are a compensation or a punishment'.[130] That being said, Mayne appears to have regarded extra-compensatory punitive principles as central to the aggravated recovery practised in England's nisi prius courts. As he stated:

> where the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, *or the like*, they [the damages] operate as a punishment, for the benefit of the community, and as a restraint to the transgressor.[131]

Unlike Sedgwick, therefore, Mayne did not read the English cases as supporting the application of a distinctly punitive 'rule' of damages where discrete aggravating elements mingled in the defendant's wrong.[132] For Mayne, civil punishment seems to have had a rather wider scope of application. Indeed, Sedgwick's more fundamental concern about arbitrary remedial decision-making in civil actions, and the need for a more rigorously 'rule-based' practice to counteract it, is notably absent from Mayne's treatise.

D. A Judicial Response in the Common Law Courts

What Sedgwick and, in turn, Mayne had specifically said about extra-compensatory punitive damages was bound to attract judicial interest. In the final section of this chapter, I shall closely examine two mid-nineteenth-century tort cases decided in the wake of both Sedgwick and Mayne's treatises on damages. The first, *Emblen*, was an action on the case for negligence finally determined in banc in Pollock CB's Exchequer Chamber in 1860. The second, *Bell*, was an action for breach of statutory duty finally determined in banc in Erle CJ's Common Pleas the following year. Both decisions reflect the earliest judicial

[129] ibid 25; for the same general idea, see *Fox* (n 34) 250.
[130] ibid.
[131] Mayne, *A Treatise on the Law of Damages* (n 114*)* 25. (Original emphasis).
[132] See Sedgwick, *Treatise on the Measure of Damages* (n 81) 34: 'fraud, malice, gross negligence, or oppression'.

attempts to explicate the legal-doctrinal bases of damages given seemingly beyond compensation and for the purpose of punishing civil defendants in tort actions.

i. *Emblen* and judicial misdirection regarding exemplary damages

The facts of *Emblen* arose out of a landowner's attempt to pull down a dilapidated building in East London in the late 1850s. Suing out a writ of case, the plaintiff formally alleged that as a result of the defendant's 'negligence, carelessness, and unskilfulness'[133] in pulling down the building, the stable located on his adjoining property had been damaged.[134] In his declaration, he also alleged that as a further consequence of the damage to his property that the defendant had negligently inflicted, he had lost profits that otherwise would have yielded from his trade as an iron master. Emblen's tortious claim against Myers came to trial in 1859 at the Exchequer of Pleas' nisi prius sittings in London before Wilde B.

(a) The specific aggravating matter and the question of damages

Curiously, at the trial of his claim Emblen gave evidence which had the seemingly intended effect of showing that Myers had acted 'with a view to caus[ing] the plaintiff to give up the stable'.[135] As it stood, however, Emblen had not originally alleged in his pleadings that the defendant had actually intended to do the plaintiff any harm. When stating his grievance by way of preamble, Emblen's pleader had merely laid that Myers had 'wrongfully and injuriously' pulled down a particular building.[136] Perhaps the most obvious adverbial forms that could have been used – 'intentionally', 'wilfully' or 'maliciously' – had not been.[137] In turn, this made it arguable that, on the framing of Emblen's declaration, the aggravating matter of the defendant's 'malicious motives'[138] had not been made affirmatively part of the case for negligence that had been pleaded.

[133] *Emblen* (n 3) 23.
[134] ibid.
[135] ibid 24.
[136] ibid 23.
[137] See chapter 3 B i (b).
[138] *Emblen* (n 3) 24.

Nevertheless, Wilde B not only admitted testimonial evidence of the defendant's ill-motives at nisi prius, but further invited the jury to account for it in determining the full extent of the plaintiff's recovery.[139] Before ultimately leaving Emblen's case to them, he is reported to have directed them to:

> take into consideration all the circumstances, both the conduct of the defendant and the expressions he used, and that if they were of opinion that the destruction of the stable was caused by the negligence of the defendant in pulling down the houses, they should give such damages as they thought a reasonable compensation for the injury the plaintiff had sustained; but if they were of opinion that what was done by the defendant was done wilfully, with a high hand, for the purpose of trampling on the plaintiff and driving him out of possession of the stable, they might find exemplary damages.[140]

The *Emblen* jury found a verdict for the plaintiff with damages in the not inconsiderable sum of £75. Dissatisfied with their verdict, Mr Robert Collier QC and Mr Henry James QC brought a motion for a new trial in the Exchequer Chamber on behalf of the defendant on two grounds. First, on the familiar ground that the trial jury's award was excessive; secondly, on the ground that Wilde B had misdirected them regarding the proper measures to be applied in settling the damages.[141] In respect of the second ground, the defendant's contention on appeal was that Wilde B had inaccurately explained to the jury that 'in awarding damages they should consider the motive of the defendant, and give a different measure of damages if the injuries were committed maliciously'.[142] Citing Mayne's treatise on damages, the defendant's counsel accepted that evidence of ill-motive was admissible in most matters of tort,[143] but nonetheless contended it was 'very improbable that the question of motive should arise in an action for diligence'.[144]

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[139] The aggravating evidence specifically attested to various 'expressions' the defendant had used when pulling down his building, and that he perhaps knew that the plaintiff's wife was in the stable at the time the defendant's timber fell on it, see ibid.

[140] ibid.

[141] ibid.

[142] ibid.

[143] Mayne, *A Treatise on the Law of Damages* (n 114) 13. For other contemporary references to Mayne's treatise, see *Jones v Williams* (1859) 4 H & N 706, 707; 157 ER 1019, 1020, where both Sedgwick and Mayne were used to resolve whether 'a plaintiff has been held entitled to recover damages in trover beyond the value of the goods'; *Hawkins v Coulthurst* (1864) 5 B & S 343, 346; 122 ER 859, 860; *Ronneberg v Falkland Islands Co* (1864) 17 C B (N S) 1, 11; 144 ER 1, 5.

[144] *Emblen* (n 3) 24. In defence of their client's declaration, counsel for Emblen noted that Sedgwick had specifically enumerated 'gross negligence' (alongside fraud, malice, and oppression) as a legal basis for

(b) The defendant's '*wilful negligence*'

Responding to counsel's submission, the reviewing Exchequer Chamber carefully scrutinized the language with which the plaintiff had originally framed his declaration. Seemingly sympathetic to the contentions made on the defendant's behalf, Channell B remarked:

> At first I thought that the declaration might be treated as charging an act of trespass as well as negligence; but, on looking more closely into it, I think it must be read as charging the defendant with wilful negligence.[145]

He then stated: 'If in actions of trespass the plaintiff may recover damages beyond the amount of the actual injury, I see no reason why the same rule should not extend to wilful negligence'.[146] Channell B's use of the term 'wilful negligence' is rather curious. He seems to have regarded one of the adverbial forms that the plaintiff had used in his pleadings ('wrongfully') as so open-ended in its meaning as to encompass the more specific fault-laden terms that the defendant's counsel contended ought to have been used ('wilfully' or 'maliciously'). It was, in turn, the careful laying of the adverb 'wrongfully' that had succeeded in charging the defendant with an aggravated wrong on the record, meaning evidence of the defendant's ill-motive was properly given and received at trial in aggravation of Emblen's award.

It is very likely that the plaintiff's failure to use the adverbs 'wilfully' or maliciously' had been a deliberate omission. Three decades earlier, Tindal CJ's Common Pleas had unanimously stated the following proposition in *Williams v Holland*:

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exemplary damages in his treatise on damages; they even quoted Church J's opinion in the United States Supreme Court case of *Tracy v Swartwout* 35 US 10 Pet 80 (1836) (a case which Sedgwick had specifically referred to). Although not argued in *Emblen*, later writers noted the conceptual difference between 'gross negligence' and 'wilful negligence', see Charles F Beach, *A Treatise on the Law of Contributory Negligence* (J Voorhies 1885) 67: 'By gross negligence is meant exceeding negligence, that which is mere inadvertence in the superlative degree . . . By wilful negligence is meant not strictly negligence at all . . . whenever there is an exercise of the will there is an end of inadvertence, but rather an intentional failure'.

[145] ibid 25.

[146] ibid.

> where the injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act.[147]

In that case, the plaintiff had sued out a writ of case solely alleging negligence after the defendant's horse-driven cart had struck the plaintiff's own cart which, at the time, was stationery on the sideroad.[148] By framing his declaration in case (and therefore avoiding any outright allegation of wilfulness), Emblen would have been unassailable on the record. As MJ Prichard suggested in a 1964 article published in the *Cambridge Law Journal*, a mid-nineteenth-century tort plaintiff in Emblen's position 'ran the danger of being nonsuited if it appeared at trial that the defendant had acted wilfully'.[149] In *Emblen*, of course, this did appear at trial. Nonetheless, as Prichard noted, in order to have nonsuited the plaintiff, the defendant would have needed 'the co-operation of the judge or jury', though supposing that, in many cases, neither 'were likely to be sympathetic to an argument by a defendant that the plaintiff's action should fail simply because he, the defendant, had acted wilfully rather than negligently'.[150]

As Bramwell B later noted in his in banc speech in *Emblen*, by originally declaring in negligence, but later giving evidence of wilfulness, the plaintiff had shown that the defendant's 'act was negligent as well as wilful'.[151] Indeed, as Wilde B's direction to the jury at trial shows, the appearance of Myers' wilfulness in the evidence made him quite sympathetic to the plaintiff's cause – so much so, that the effect of such evidence (albeit given upon a declaration of negligence) would be to broaden the proper measures of damages that the jury might apply in fixing the full extent of the plaintiff's recovery. More specifically, it would permit his damages to be assessed, not simply to reasonably

[147] (1833) 10 Bing 112, 117–118; 131 ER 848, 850. (Emphasis added). For a historical overview of the doctrinal trouble, particularly in 'running-down' cases, to which *Williams* ultimately responded, see MJ Prichard, 'Trespass, Case and the Rules in *Williams* v. *Holland*' (1964) CLJ 234, especially 244–251.
[148] ibid 848. As Tindal CJ stated: 'The declaration, in this case, states the ground of action to be an injury occasioned by the carelessness and negligence of the Defendant in driving his own gig; and that such carelessness and negligence is, strictly and properly in itself, the subject of an action on the case, would appear', see ibid 849.
[149] Prichard (n 147) 251. In *Williams*, the defendant had sought to set aside the verdict and enter a nonsuit 'upon the ground that the injury having been occasioned by the immediate act of the Defendant himself, the action ought to have been trespass, and that the case was not maintainable', see ibid 849.
[150] ibid 251–252.
[151] *Emblen* (n 3) 25.

compensate the plaintiff for his injuries, but seemingly to punish the defendant for a wilful, and therefore aggravated wrong. And it was Wilde B's direction to the *Emblen* jury to give 'exemplary damages' upon a finding of wilfulness that Myers' counsel argued had misdirected them.

(c) Wilde B's direction in respect of damages

What Wilde B reportedly told the *Emblen* jury in respect of damages is significant for a further reason. Importantly, its significance did not lay in him merely using the specific formulation 'exemplary damages'; more significant was the way in which Wilde B used it. In contrast to reported instances of earlier judges exhorting trial juries to give 'exemplary damages' in select cases,[152] Wilde B's direction to the *Emblen* jury may be seen as couched in decidedly legalistic terms. Awarding damages of a seemingly extra-compensatory character would be conditional on the jury being satisfied that the defendant had acted, according to Wilde B's formulation, 'wilfully, with a high hand, for the purpose of trampling upon the plaintiff'.

At the trial of Emblen's claim, therefore, the term 'exemplary damages' quite strikingly appears as part of a considered judicial attempt to specify when – in terms of general principle – a jury might, in their discretion, apply a doctrine of exemplary damages to proven facts about aggravated tortious wrongdoing. By stating what exactly a jury would, first, need to be satisfied of before awarding such damages, the exemplary principle can be seen as being treated in a decidedly 'legal' way; that is to say, as a damages doctrine capable of being predicated in advance and – after being so predicated – awaiting proof of particular facts necessary for its application. It was the distinctively rule-based manner in which Wilde B used the phrase 'exemplary damages' at nisi prius that, at least in part, enabled the defendant to ask the Exchequer Chamber to consider in what way the jury ought to have been directed in respect of exemplary damages. *Emblen*, it is suggested, is the earliest evidence of an English trial judge appearing to treat a seemingly extra-compensatory punitive measure as a legal rule of damages enforceable through a motion for a new trial.

[152] See chapter 4 D ii (a) and (b).

(c) The Exchequer Chamber's '*rule-based*' *deliberation*

Ultimately, all four reviewing Exchequer barons dismissed the defendant's motion for a new trial on the ground of juridical misdirection. Significantly, however, on appeal there was interesting divergence of opinion about what Wilde B had said, or ought to have said, to the jury about damages. According to Pollock CB:

> the direction of the learned Judge was substantially this: "In measuring these damages, you may take into consideration expressions used by the defendant shewing a contempt of the plaintiff's rights and convenience."[153]

Under Pollock CB's formulation, any increase of the plaintiff's damages would have been predicated on the jury being satisfied that the evidence of aggravation proved that the defendant had been contemptuous of his rights. Notably, however, the Chief Baron would not have laid down any particular measure of damages (compensatory or punitive) for the jury to apply in effecting an increase.

Channell B had a slightly different take. In his view, what Wilde B had 'in substance'[154] told the jury was the following:

> "You may take into consideration all the circumstances, and see whether there is anything to satisfy you that the defendant behaved in an improper and unjustifiable manner; and if so, you need not give damages strictly, as in the case of mere negligence, but you may give them with a liberal hand."[155]

Like Pollock CB, Channell B also would seemingly not have told the *Emblen* jury that the facts warranted damages of a particular nature being given. What both of their judgments suggest, in turn, is that not all judges were as inclined to specify particular remedial principles that juries might apply in aggravating their awards. Unlike Pollock CB, however, Channell B would have told the jury to give damages liberally, as long as the evidence satisfied them that the defendant's wrong had been 'improper and unjustifiable'.

[153] *Emblen* (n 3) 25.
[154] ibid.
[155] ibid.

Bramwell B shared the plurality's view that 'the direction of the learned Judge was perfectly correct'.[156] Unlike Pollock CB and Channell B, however, he did not seem to think that, by using the term 'exemplary damages', Wilde B had been thinking solely in terms of an extra-compensatory, distinctly punitive, award. Referring to actions for nuisance, he said: 'Suppose a person caused a nuisance in front of another man's house, damages might be given for the insult as well as the actual injury'.[157] He also gave another example (though it is not clear whether he had in mind an action for trespass or case): 'If a plaintiff, in his particulars, claimed 500*l* because the defendant walked over his lawn, the jury might award that amount if they thought it was done for the purpose of annoyance and insult'.[158] In both hypothetical scenarios, Bramwell B's apparent view was that an exemplary measure of damages would be applied, not necessarily to subject the defendant to an exemplary punishment, but to compensate for the insult and annoyance that the nature and circumstances of the defendant's wrong had further caused the plaintiff to suffer. In this sense, Bramwell B appears to have been thinking more in terms of further compensatory damages given (perhaps as a 'vindictive satisfaction') to the plaintiff, rather than *extra*-compensatory (punitive) damages given to punish the defendant.

Upon closer examination, in turn, the Exchequer Chamber in *Emblen* fell short of laying down a single 'canonical' formulation of the situation where a tort plaintiff would be legally entitled to damages assessed according to some punitive measure of redress. Indeed, Wilde B, for his part, expressed relief that his appellate colleagues agreed with him that the present case was one where it would be, as he put it, 'competent for the jury to give exemplary damages'.[159] Nonetheless, it was Wilde B's technical and legalistic direction to them respecting exemplary damages that, in large part, created the opportunity for the Exchequer Chamber to entertain the question – 'in what way ought the jury to have been directed?' The decidedly rule-based deliberation that that question had provoked was engaged in again the following year in *Bell*.

[156] ibid 25.
[157] ibid.
[158] ibid. It is tempting to assume Bramwell B had in mind the facts of the 1841 trespass to land case of *Merest* (n 16). In that case, however, Heath J had said that the purpose of 'exemplary damages' would be 'to *punish* insult', see (n 15) 761. (Emphasis added).
[159] ibid.

ii. *Bell* and the continued quest for principle

The plaintiff in *Bell* was the proprietor of a seemingly lucrative wharf that principally loaded and unloaded coal. For some time, the wharf had been serviced by rail via a track that branched off the main network line belonging to the Midland Railway Company. In his pleadings, the plaintiff stated that, upon a request under chapter 20 of the Railway Clauses Consolidation Act 1845, the former Midland Counties Railway Company had facilitated the construction of the branch railway.[160] For many years, the plaintiff and his tenants freely used it for the purposes of 'receiving, landing, wharfing, and keeping and selling . . . coals and other goods'.[161] In his declaration, the plaintiff formally alleged that the railway company obstructed the connection of the branch railway to the main line by erecting a barricade of 'poles, posts, wooden balks, railway carriages, wagons, trucks, heavy chattels, and other obstructions'.[162] Relying on the statute under which the branch railway had been created, the plaintiff brought a common law action for damages against the Midland Railway Company for a wrongful obstruction of the communication between its wharf and branch railway, and Midland's main line.

(a) The specific aggravating matter and the question of damages

The plaintiff's claim was an action for breach of statutory duty. Under chapter 20, the legislative purpose of a railway company's construction of a branch railway was to give 'effect' to 'communication'.[163] Notably, there is no suggestion in the *Bell* report that the plaintiff pleaded or argued (or was required to plead or argue) that parliament intended to create an entitlement to damages at common law for the breach of a duty imposed by the relevant statute. During the period in question 'the courts were prepared to grant a remedy

[160] Railways Clauses Consolidation Act 1845 (8 & 9 Vict c 20).
[161] *Bell* (n 4) 462.
[162] ibid 463.
[163] Railways Clauses Consolidation Act 1845 (8 & 9 Vict c 20), with s 76 relevantly providing: 'the (railway) company shall, if required, at the expense of such owners an occupiers and other persons . . . make openings in the rails, and such additional lines of rail *as may be necessary for effecting such communication*, in places where communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon'. (Emphasis added).

for breach of statutory duty fairly freely'.[164] On the record, Bell's claim was substantially grounded in an averment of special damage; principally, loss of profits by way of royalty payments on coals at the wharf, as well as the permanent transfer of the business of the plaintiff's wharf to another wharf owned by Midland. He laid damages of £5000.

His claim came to trial in 1860 at the Common Pleas' nisi prius sittings in London after Michaelmas Term before Erle CJ. In support of the plaintiff's substantial claim, the plaintiff led evidence of what had led to the 'quarrel between the parties'.[165] As Willes J later recounted in his judgment in banc, the plaintiff's evidence showed that free communication along the line had only ended after Midland had 'constructed a wharf of their own'.[166] For Erle CJ, as well as the trial jury, the evidence presented in support of the plaintiff's claim supported a reasonable inference of ill-motive on the defendant's part. As Willes J put it, that Midland's directors 'were desirous of with-drawing the business from the plaintiff's wharf and diverting it to their own'.[167]

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[164] Margaret Fordham, 'Breach of Statutory Duty – A Diminishing Tort' (1996) Sing JLStud 362, 364. This 'free' approach is perhaps most clearly evident in *Couch v Steel* (1854) 3 E&B 402, 415; 118 ER 1193, 1198 (Lord Campbell CJ), where the Queen's Bench recognized that a party who suffers special damage because of a breach of statutory duty has a common law action for damages, even where the statute does not 'contemplate' compensation and where the statutory response is to punish the party in breach: 'There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable'. It was not until the 1870s (in cases such as *Atkinson v Newcastle Waterworks Co* (1877) 2 ExD 441) that the need for parliament to have actually intended a damages remedy to be available was recognized. See, generally, Colin S Phegan, 'Breach of Statutory Duty as a Remedy Against Public Authorities' (1974) 8 UnQu LJ 158, 167–169. Cane suggests that Bell's action for breach of statutory duty 'may properly be regarded as a case of nuisance', see Peter Cane, 'The Scope and Justification for Exemplary Damages: The Camelford Case' (1993) 5 J EnvL 149, 155.

[165] *Bell* (n 4) 469.

[166] ibid 469.

[167] ibid 466. In banc, Erle CJ reflected at length on the nature of the aggravated, primarily testimonial evidence, of the defendant's ill-motive. In addition to the fact that the obstruction was only 'removed upon the interference of the court of Chancery', the Chief Justice recounted: 'The language of Mr. Ellis, the chairman [of Midland], was also evidence to shew that it was intended to be a permanent obstruction. The conduct of the traffic manager, who was acting under instructions from the company, showed the same intention, and that he had orders to prevent the communication. The way in which the remonstrance of the plaintiff's attorney was met leads to the same conclusion. There was abundant evidence that the company intended to prevent the plaintiff from using the communication between their railway and his wharf: and the jury upon this evidence have found, and rightly found, that the obstruction was intentional', see ibid.

(b) Erle CJ's direction in respect of damages

Before submitting the plaintiff's case to the jury at nisi prius, the presiding Chief Justice addressed the question of damages. His remarks suggest that he had been satisfied that the aggravating circumstances of malice were a proper basis on which the jury might increase their award. Yet, in an appreciably less 'directed' way than Wilde B in *Emblen*, he is reported to have merely 'asked them to say whether the defendants did by an intentional obstruction stop up the communication between their railway and the plaintiff's wharf, and prevent him and his tenants from using the same'.[168] The *Bell* jury 'found that the defendants did prevent the plaintiff's access to the wharf, by intentionally placing an obstruction across the siding',[169] inducing them to find for the plaintiff with substantial damages in the sum of £1000. Mr Fitzroy Kelly QC, who appeared for Midland, sought a new trial. In respect of damages, he did not take issue with the Erle CJ's apparent invitation that the jury consider the circumstances of the defendant's wrong. His main contention rather was that Erle CJ had erred in failing to expressly direct them to exclude from their calculation all losses incurred by the plaintiff's tenants at the wharf.[170]

(c) Willes J's adverting to general legal principle

The court in banc unanimously rejected the defendant's argument that Erle CJ had erroneously directed the jury in respect of damages. Yet, the opinion of the youngest of the three reviewing Common Pleas judges, Willes J, bears particular note. He addressed the specific question of the availability of damages seemingly in excess of compensation in a case such as the present. At the end of his speech, Willes J remarked: 'There remains now only one-question, viz. as to the amount of damages'.[171] Although Erle CJ is not reported to have used the term 'exemplary damages' (or, indeed, 'vindictive damages') in his summing-up to the *Bell* jury, Willes J used his appellate judgment to state: 'if ever there

[168] ibid.

[169] ibid 467.

[170] According to the report, Erle CJ merely cautioned the jury 'not to give the plaintiff any damages which Nutt [only one of multiple tenants at the wharf] would have a right to recover', see ibid 466.

[171] ibid 470.

was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case'.[172]

That it was Willes J who so gratuitously adverted to the question of when exemplary damages might be 'warranted' is perhaps unsurprising. His familiarity with, and willingness to consult, the contemporary treatise literature on damages (particularly Sedgwick's treatise) is well attested to.[173] In Willes J's view, the reason that exemplary damages were warranted in the instant case was because the plaintiff's evidence of ill-motive had shown that, in his own formulation, Midland had committed 'a grievous wrong with a high hand'.[174] Significantly, Willes J made it quite clear that, in stating this position, he saw himself as supporting what he welcomed as the Exchequer Chamber's various efforts to explicate the legal-doctrinal basis of the award of exemplary damages. 'If it were necessary to cite any authority for such a position', Willes J stated, 'it will be found in the case of *Emblen* v. *Myers*'.[175] Indeed, there is a similarity between Willes J's requirement that exemplary damages be predicated on a defendant perpetrating a 'grievous wrong with a high hand' and Wilde B's requirement that they be predicated on a wrong 'done wilfully, with a high hand, for the purpose of trampling on the plaintiff'.[176] In turn, what Willes J appears to have thought was, not only significant, but authoritative about *Emblen* was the unprecedented attempt it had made at formulating – in terms of general principle – when the award of exemplary damages might be 'warranted' in tort.

Willes J's own judicial interest in a principled exposition of an incipient 'law' of exemplary damages might be explained by his own contribution to English lawyerly

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[172] ibid.

[173] See (n 111).

[174] His statement continued: '. . . in plain violation of an act of parliament; and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves', see *Bell* (n 4) 470. It is for this reason that Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1226 (HL), substantially relied on the opinions of the Common Pleas' in *Bell* for the second category in which modern exemplary damages would be available. See chapter 2 C ii (e).

[175] *Bell* (n 4) 470.

[176] In Byles J's short concurring judgment, he agreed with Willes J's decidedly doctrinal explanation for why exemplary damages were available, but did not as emphatically advert to general principle: 'I agree also with my Brother Willes that, where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into their consideration, and giving retributory damages', see ibid 471. Like 'vindictive damages', the phrase 'retributory damages' suggests a comingling of both compensatory and punitive principles, see (n 74).

literature. In 1849 and 1856 he had assumed the co-editorship of the third and fourth editions of his close friend John W Smith's tome, *Leading Cases in Various Branches of the Law*, first published in 1837.[177] As Smith had put it in the preface of its second (1840) edition, its purpose had been to provide a:

> guide that would direct him to the leading cases, embodied in which he might discover those great principles of Law which it is necessary that he should render himself thorough master before he can trace with accuracy the numerous ramifications into which those principles are expanded in the surrounding multitude of decisions.[178]

Before his appointment to the Common Pleas, Willes J must have appreciated the principled direction that Smith's 'innovatory'[179] book had provided the mid-nineteenth-century English common lawyer. It is plausible, in turn, that Willes J's viewed the appellate occasion in *Bell* in 1861 as a further opportunity to contribute to the common law's recent contemplation of the question of the principled basis on which the award of exemplary damages rested. In this sense, his in banc speech might be seen as yet a further example of what Lobban describes as the 'clarity of his thought in searching for legal principles'.[180]

E. Conclusion

This chapter set out to show that the English common lawyer's conception of exemplary damages in terms of a legal doctrine of civil damages did not come about until a long while after Pratt CJ's *North Briton* decisions. It has suggested that the evolution of extra-compensatory, distinctly punitive, damages towards their modern 'rule of law' condition

[177] AWB Simpson, 'Willes, Sir James Shaw (1814–1872)', *Oxford Dictionary of National Biography* (OUP 2004; online edn September 2004) <https://www.oxforddnb.com/view/article /29442> accessed 1 July 2021.

[178] John William Smith, *A Selection of Leading Cases on Various Branches of the Law*, vol 1 (first published 1837, JS Willes and HS Keating eds, 3rd edn, W Maxwell 1856) viii, where the preface to the second (1842) edition is reproduced.

[179] ibid.

[180] Michael Lobban, 'The Politics of English Law in the Nineteenth Century' in P Brand and J Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (CUP 2012) 109; perhaps the two best examples of Willes J's search for principles are taken to be: *Indermaur v Dames* (1866) L R 1 C P 274, known for 'the rule in *Indermaur* v. *Dames*' (regarding an occupier's duty towards invitees); *Gautret v Egerton* (1867) L R 2 C P 371, regarding the duty of care owed to persons injured as a result of the existence of a natural feature or landscape.

did not begin until the nineteenth-century. As this chapter has shown, the origins of the submission of the jury's constitutional 'prerogative' to settle damages in aggravated tort cases to the legal-doctrinal authority of the common law judges must be understood as the combined consequence of two key historical causes. The procedural right of tort litigants to seek appellate review of what trial judges specifically said to juries in respect damages was significant. Despite the inclination of trial judges to leave aggravated questions of damages entirely in the jury's disposition, the emergent possibility of judicial misdirection did allow the central court judges to review the accuracy of how trial judges may have chosen to direct juries in respect of damages.

The legal treatise writers' decidedly scientific treatment of the subject of damages was also a substantive catalyst; one, indeed, that helped nineteenth-century common lawyers in their apprehension of a 'positive law' of civil recovery comprising legal rules of damages and that trial judges would increasingly administer in individual cases. In the early 1860s, these causes combined to provide the Exchequer Chamber in *Emblen* with the capacity to attempt some exposition of the legal-doctrinal basis of an award of exemplary or vindictive damages. It was this unprecedented undertaking that Willes J supported in *Bell*, and in characteristic fashion, contributed to in some measure as well.

CHAPTER 6

Doctrinal Elaboration and Principled Tensions, 1861–1964

A. Introduction

The previous chapter showed that the common law practice of aggravated recovery in tort did not begin to 'harden into law' until the middle of the nineteenth-century. As a result, deciding whether to subject an aggravated tortfeasor to punishment was no longer solely for English juries to decide within their proper province of remedial tort law adjudication. Doing so, rather, would increasingly depend on a trial judge's prior statement of the legal doctrine of exemplary damages, which the jury might apply to aggravated facts they found proved. This chapter continues this thesis' exploration of the evolution of the practice of aggravated recovery at common law. It focusses on the historical period immediately before the House of Lords' landmark decision in *Rookes v Barnard*[1] in 1964.

As part of his critique of the mid-twentieth-century doctrine of exemplary damages in *Rookes*, Lord Devlin set out to explore 'how far and in what sort of cases the exemplary principle has been recognised'.[2] As the second chapter of this thesis argued, in gauging the scope of an extra-compensatory, distinctly punitive, principle of recovery at English common law, Lord Devlin made it clear that earlier appearances of the term 'exemplary damages' (and other cognate terms) would not, in themselves, be definitive. Using the example of Lord Atkin's earlier use of the terms 'vindictive' and 'punitive' to describe aggravated defamation awards in *Ley v Hamilton*,[3] Lord Devlin showed that the English common law's affirmation of punitive responses over and above full compensation could

[1] AC 1129 (HL).
[2] ibid 1221.
[3] (1935) 153 LT 384.

not be safely inferred from the labels previous generations of judges had assigned to aggravated elements of tort awards. Indeed, a closer plausible reading of Lord Atkin's *Ley* speech suggests he understood 'vindictive or punitive damages'[4] to refer to further compensatory damages for 'the insult offered or the pain of a false accusation'.[5]

This chapter explores attempts to formulate a common 'law' of exemplary damages in the aftermath of the important decisions in *Emblen v Myers*[6] in 1860 and then *Bell v Midland Railway Company*[7] in 1861. It concentrates on those attempts undertaken by leading later nineteenth and twentieth-century writers of practitioner's texts and scholarly treatises broaching both the laws of damages and torts. It suggests that in respect of exemplary (or vindictive or punitive) damages awards, these writers were primarily interested in classifying – at a high level of generality – facts about aggravated tortious wrongdoing that would justify increasing a tortfeasor's full financial liability. As part of this process of subsuming facts going in aggravation of damages under a positive legal rule of civil recovery, it will be shown that ideas seemingly outside the common law's official sources were often evoked; most prominently, from the Roman law of delict. In key instances, the ideas about exemplary damages propounded by leading legal writers influenced judicial thinking: both in England and abroad they helped shape the common law doctrine of exemplary damages that judges increasingly managed, and that both juries and judges applied.

Significantly, this chapter will suggest that these writers were only secondarily concerned with definitively aligning the damages doctrine they were purporting to elaborate with a principle of full compensation on the one hand, or an *extra*-compensatory principle of punishment on the other. In turn, few writers in the century before Lord Devlin's *Rookes* judgment appear to have considered the combination of compensation and punishment in aggravated tort awards as raising serious theoretical problems.[8] As Lord Atkin's 1935 *Ley* judgment shows, in the prelude to *Rookes*, such problems were not acutely perceived, even

[4] ibid 386 (Lord Atkin).
[5] ibid. See *Rookes* (n 1) 1231. See chapter 2 C ii (b) and (c).
[6] (1860) 6 H & N 54, 158 ER 23.
[7] (1861) 10 C B (N S) 287, 142 ER 462.
[8] On the surprising modernity of the problem of the combination of punishment in the civil law, see Izhak Englard, 'Punitive Damages – A Modern Conundrum of Ancient Origin' (2012) 3 JETL 1, 4.

at the highest of judicial levels. Ultimately, this chapter suggests that the under-theorized state in which exemplary damages remained until *Rookes* was decided in 1964 was due to the very important adjudicative function that the English jury – even well into the twentieth-century – was seen to serve at the remedial stage of aggravated tort actions. In turn, only until a senior common law court conceived the combination of compensation and punishment as theoretically problematic would a re-alignment of principle be seen as necessary.

B. The Aftermath of *Emblen* and *Bell*

The second half of the nineteenth-century saw further important contributions to the nineteenth-century legal treatise tradition. The first English legal text taking its subject as the 'law of torts' was published contemporaneously with the in banc speeches of the Exchequer Chamber in *Emblen*. Somewhat belatedly, the second edition of Mayne's 1856 treatise on damages was delivered in the early 1870s. And with the forms of actions 'buried',[9] in FW Maitland's famous turn of phrase, the first decidedly analytical approach to the English law of tort entered print in the late 1880s. Across this wide-ranging literature, focussed on different legal spheres and often pursuing different intellectual aims, the question of extra-compensatory, seemingly punitive, recovery was addressed in a way that it had not been previously.

i. Addison and England's first book on torts

The first text dedicated to the English 'law of torts' as a standalone subject was published by the barrister, Charles G Addison, in 1860 under the title, '*Wrongs and their Remedies, Being a Treatise on the Law of Torts*.[10] Addison's discussion of damages seemingly beyond compensation was located in chapter 21 of his treatise – 'Of the Damages and Costs Recoverable in Actions Ex Delicto'.[11] It appeared under the heading '*exemplary and*

[9] Frederic W Maitland, *The Forms of Action at Common Law: A Course of Lectures* (AH Chaytor and WJ Whittaker eds, CUP 1936) i.
[10] Charles G Addison, *Wrongs and their Remedies: Being a Treatise on the Law of Torts* (V & R Stevens Sons 1860).
[11] ibid 772.

vindictive damages'.[12] It began, similar to Mayne's treatise on damages four years earlier, with a prompt acknowledgement 'that in actions of tort the damages are very much left to the discretion and judgment of the jury'.[13] Significantly, Addison treated exemplary damages and vindictive damages separately. In respect of exemplary damages, he stated that 'juries are told give, and are allowed to give' them in three seemingly loose categories of tort action: 'malicious injuries', 'trespasses accompanied by personal insult, 'or oppressive or cruel conduct'.[14] Vindictive damages, by contrast, appear to have enjoyed a wider scope of application. Unlike exemplary damages, they were not confined to particular categories of tort action. '[W]herever the wrong or injury is accompanied by circumstances of great aggravation', Addison similarly stated that 'the jury are authorized in giving, and may be told to give vindictive damages'.[15]

(a) Abiding ties to the nisi prius practice-book

What is notable about Addison's separate treatment is its reluctance to state, in terms of general principle, when awards of exemplary or vindictive damages may be justified. As the small number of cases which he cited indicate, Addison's primary aim was to arrange in a neater, more accessible, way what Friedman refers to as 'old bricks from the common law brickyard'.[16] *Huckle v Money*,[17] *Merest v Harvey*[18] and *Tullidge v Wade*[19] all struck Addison as cases more illustrative of exemplary damages;[20] whereas *Benson v Frederick*[21]

[12] ibid 786.
[13] ibid.
[14] ibid.
[15] ibid. For this very general proposition, Addison only cited the recent case of *Thomas v Harris (*1858) 1 F & F 67, 68; 175 ER 629, 629–630, the nisi prius report of an aggravated action for trover and trespass where, in leaving the case to the jury, Bramwell B told the jury that they could give damages 'not only for the value of the stock and goods, and for the seizure of the crops, which it was not only unlawful but wilfully wrongful to sell, and compensation for the injury sustained through his being thus treated, and for the sale by auction on his premises, but damages for the wrong, taking all the circumstances into consideration'. The term 'vindictive damages' does not appear in the report.
[16] Lawrence M Friedman, *A History of American Law* (OUP 2019) 443.
[17] (1763) 2 Wils KB 205, 95 ER 768.
[18] (1814) 5 Taunt 442, 128 ER 761.
[19] (1769) 3 Wils KB 18, 95 ER 909.
[20] Addison, *Treatise on the Law of Torts* (n 10) 787.
[21] (1766) 3 Burr 1845, 97 ER 1130.

and *Doe v Filliter*[22] more illustrative of vindictive damages.[23] In this sense, Addison's treatment of the subject may be seen as bearing the hallmarks of the nisi prius practice-book tradition in which he (along with his contemporary Mayne) were versed.[24] Indeed, immediately following his short discussion of exemplary and vindictive damages was an equally short section under the familiar heading '*Evidence in aggravation of damages*'.[25] In the approach of the nisi prius authors, Addison showed that his conception of damages in aggravated cases strongly reflected the common lawyer's practical temperament, being tied to the problem of what aggravating evidence a tort plaintiff might permissibly adduce at the trial of his claim given the species of writ out of which he originally sued.[26] Coupled with his acknowledgment that the question of damages in aggravated tort cases was still 'very much left to the discretion and judgment of the jury', Addison appears to have been scarcely concerned with aligning exemplary or vindictive damages with an underlying principle of compensation or punishment.

(b) Emblen *and* Bell *in the second edition*

The differences between the first and second editions of Addison's text are noteworthy. The 'considerably enlarged'[27] second edition was published in 1864. In its preface, Addison assured his readers that 'many hundreds of new cases, qualifying and explaining, or overruling previous decisions, or authoritatively establishing certain principles of law, for which no decided case previously existed, have been examined'.[28] Following the first edition's publication, Addison clearly recognized the Exchequer Chamber's decision in *Emblen* and that of the Common Pleas in *Bell* as tort judgments that – if not having 'authoritatively establish[ed] certain principles' – had helpfully expounded them.

[22] (1844) 13 M & W 47, 153 ER 20.
[23] Addison, *Treatise on the Law of Torts* (n 10) 788.
[24] See chapter 5 C ii (a).
[25] Addison, *Treatise on the Law of Torts* (n 10) 788. (Original emphasis).
[26] See chapter 5 C ii (a).
[27] Charles G Addison, *Wrongs and their Remedies: Being a Treatise on the Law of Torts* (2nd edn, V & R Stevens Sons & Haynes 1864).
[28] ibid i.

Addison preserved his separate treatment of exemplary and vindictive damages. Although what he had said about exemplary damages had remained the same, his previously, conspicuously general, statement regarding vindictive damages had been amended. It now read as follows:

> wherever the wrong or injury is of a *grievous* nature, done with a *high hand*, or is accomplished with a deliberate intention to injure, or with words of contumely and abuse, and by circumstances of aggravation, the jury are authorised in giving, and may be told to give, vindictive damages (A).[29]

Both *Emblen* and *Bell* were included in footnote '(A)'. And it was Willes J's judgment in *Bell* that Addison chose to pinpoint. As the previous chapter showed, and in terms similar to Wilde B's direction to the *Emblen* jury at trial in 1859,[30] in his *Bell* speech, Willes J had predicated awards of 'exemplary damages' (as he styled them), not on unspecified circumstances of 'great aggravation',[31] but more specifically on a tort of a 'grievous' and 'high-handed' character.[32] In the second edition of his torts text, Addison clearly regarded Willes J's recent decision in *Bell* as significant enough to merit a reformulation of when vindictive damages might be given. It had supplied a 'new brick' with which a 'new law'[33] might be articulated.

The revised formulation that both the Exchequer Chamber and the Common Pleas had seemingly prompted Addison to make remained a stable fixture across subsequent editions of his text.[34] Indeed, although its location in the overall text's structure shifted, his 1864 account of exemplary or vindictive recovery was hardly changed by later editors.[35] By the fifth (1879) edition, which had since come under the editorship of Lewis W Cave QC,

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[29] Addison, *Treatise on the Law of Torts* (n 27) 906. (Emphasis added).

[30] *Emblen* (n 6) 24 (Wilde B): 'if . . . what was done by the defendant was done wilfully, with a high hand, for the purpose of trampling on the plaintiff and driving him out of possession of the stable, they [the jury] might find exemplary damages'.

[31] See (n 12).

[32] *Bell* (n 7) 470. The middle part of Addison's general statement is clearly drawn from Byles J's short concurring judgment in *Bell*, see 471.

[33] Friedman (n 16) 443.

[34] Addison died in 1866, two years after the publication of the second (1864) edition.

[35] For a concise summary of Lewis W Cave's significant reworking of the text, see Robert Stevens, 'Professor Sir Frederick Pollock (1845–1937): Jurist as Mayfly' in J Goudkamp and D Nolan (eds), *Scholars of Tort Law* (Hart Publishing 2019) 98–99.

Emblen and *Bell* were evidently still perceived as the latest appellate considerations of the matter.[36]

(c) Emblen *and* Bell *in the second edition of Mayne*

This perception is further reflected in the second edition of Mayne's treatise on damages, which was not published until 1872, and by this time under the editorship of Lumley Smith QC.[37] Unlike Addison's treatment, Mayne's only considered discussion of extra-compensatory (seemingly punitive) damages formed part of a more reflective, less practically oriented, discussion of 'general principles'[38] in tort. Indeed, in the body of this discussion, Smith did not use the specific terms 'exemplary' or 'vindictive' damages,[39] simply preferring (in the original manner of Mayne[40]) to emphasize the 'looser principles'[41] governing civil recovery in tort. Moreover, Smith also maintained Mayne's basic position that in torts touched by 'aggravating circumstances', it could not be definitively said 'whether damages are a compensation or a punishment'.[42]

Smith's only addition to Mayne's discussion was 'placed within brackets'[43] in footnote '(K)'. In that footnote, Mayne had cited Wilmot CJ's 1769 in banc observation that seduction actions were often brought 'for example's sake'[44] as an illustration of tort law's

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[36] See Lewis W Cave, *Addison's Law of Torts* (5th edn, Stevens & Sons 1879) 71–72, especially 72. This was despite the Inner Temple barrister Francis S Pipe-Wolferstan's intervening editorship, who had edited the third (1869) and fourth (1873) editions following Addison's death.

[37] Lumley Smith, *Mayne's Treatise on the Law of Damages* (2nd edn, Stevens & Hayes 1872). The preface suggests Smith brought an independence of mind to the second edition, in which he wrote: 'the Editor has been anxious to retain as far as possible the original form of the work, and to enable the reader to distinguish which parts of it have Mr. Mayne's authority', see v.

[38] ibid ix.

[39] By contrast, Addison had placed his discussion under a heading comprised of these specific terms ('*Exemplary or vindictive damages*'), see (n 10).

[40] John D Mayne, *A Treatise on the Law of Damages* (T & JW Johnson 1856) 23.

[41] Smith, *Mayne's Treatise on the Law of Damages* (n 37) 23. Smith preserved Mayne's originally rhetorical question in the side-note to the main text: 'Inquiry whether damages in cases of tort are a compensation or a penalty?', see ibid 25.

[42] Smith also retained Mayne's original general statement: 'where the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, they [the damages] operate as a punishment, for the benefit of the community, and as a restraint to the transgressor', see ibid 25.

[43] ibid v.

[44] *Tullidge* (n 19) 909. *Tullidge* was the only case that was included.

decidedly 'looser' remedial principles. Yet, in the brackets Smith opened, two further citations were added – *Bell* and *Emblen*.[45] He described *Bell* as a case '[w]here a railway company had obstructed a siding belonging to an adjoining landowner with a high hand'.[46] Smith then noted 'Willes, J., and Byles, J., [who] were of opinion that exemplary damages might justly be given'.[47] However, unlike in the second edition of Addison's torts treatise, Smith did not draw on the judgments in *Emblen* and *Bell* in an effort to classify the type of aggravated wrongdoing that might warrant an exemplary or vindictive award. Unlike Addison, of course, who had tended to his own text in the second edition, Smith was the first to take responsibility over another's text, namely Mayne's. Perhaps more significantly, the treatise Smith had inherited – being 'appropriated to damages'[48] generally – had not been thinking specifically about torts as a distinct 'branch of law'.[49] This may have reduced the need for Smith to attempt to formulate a doctrine of exemplary or vindictive damages in line with previously decided cases.

ii. Pollock and a more resounding call to principle

In 1887, in the same year as the publication of the sixth edition of Addison's treatise,[50] Professor Frederick Pollock published his treatise on tort. Whereas Addison's text on torts had been in the nature of a 'detailed practitioner's text',[51] Pollock's set out to produce what Mitchell describes as a 'rational, morally coherent exposition'[52] of the principles underlying liability in tort. His book opened with a prefatory letter to his close friend, the

[45] Smith, *Mayne's Treatise on the Law of Damages* (n 37) 26.
[46] ibid.
[47] ibid. Regarding *Emblen*, Smith wrote: 'liberal damages were allowed to be given against one who negligently and recklessly pilled down buildings on his own land, so as to injure his neighbour, with a view to making him give up possession', see ibid.
[48] Mayne, *A Treatise on the Law of Damages* (n 40) vii.
[49] Addison, *Treatise on the Law of Torts* (n 10) v.
[50] Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens & Sons 1887).
[51] Stevens, 'Professor Sir Frederick Pollock' (n 35) 98.
[52] Paul Mitchell, *A History of Tort Law 1900–1950* (CUP 2018) 18. Pollock's analytical treatment is reflected in its length, being roughly half the size of Addison's text.

American judge, Oliver Wendell Holmes Jr. After alluding to the modernity of tort as a distinct subject of English law,[53] Pollock asserted:

> The really scientific treatment of principles begins only with the decisions of the last fifty years; their development belongs to that classical period of our jurisprudence in England which came between the Common Law Procedure Act and the Judicature Act.[54]

Among the 'living masters'[55] of this classical period, Pollock specifically mentioned Lord Blackburn and Lord Bramwell. But the master for whom 'posterity'[56] had been achieved was Willes J, who Pollock warmly described as 'a consummate lawyer, too early cut off, who did not live to see the full fruit of his labour'.[57] Willes J had died in 1872 at the age of 58.[58] It was to his memory that Pollock dedicated his decidedly scholarly treatment of liability in English tort.

(a) All damages as a '*conclusion of law*'

There is a sense in which Pollock's distinctive intellectual aims influenced his discussion of the 'most frequent and familiar' form of 'judicial redress' in actions of tort – 'the awarding of damages'.[59] A particularly striking feature of Pollock's treatment of the damages remedy is its concern with a procedural point that Addison's discussion of

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[53] Interestingly, the only other English torts text Pollock cared to mention was what he described as the 'meagre and unthinking digest': Anon, *The Law of Actions on the Case for Torts and Wrongs* (E Nutt R Gosling 1720). Curiously, Addison's textbook was not mentioned, seemingly because it had not purported anything in the nature of a 'complete theory of Torts', see Pollock, *The Law of Torts* (n 50) vi.

[54] ibid vi–v. In respect of damages, the Common Law Procedure Act 1854 (17 & 18 Vic c 125) must have been thought particularly significant: where the parties to an action 'gave consent in writing, signed by them or their attorneys, as the case may be', it made provision for damages to be 'assessed where necessary, in open Court, either in Term or Vacation, by any Judge who might otherwise have presided at the Trial thereof by Jury'. See, generally, Michael Lobban 'The Strange Life of the English Civil Jury, 1837–1914' in JW Cairns and G McLeod (eds), '*The Dearest Birth Right of the People of England*' *The Jury in the History of the Common Law* (Hart Publishing 2002) 179–181.

[55] ibid v.

[56] ibid.

[57] ibid.

[58] See, generally, AWB Simpson, 'Willes, Sir James Shaw (1814–1872)', *Oxford Dictionary of National Biography* (OUP 2004; online edn September 2004) <https://www.oxforddnb.com/view/article/29442> accessed 1 July 2021.

[59] Pollock, *The Law of Torts* (n 50) 120.

damages had alluded to, but not really developed. Addison had repeated the point that exemplary and vindictive damages were awards that 'the jury are authorised in giving, and may be told to give'.[60] Addison's apparent point was that trial judges did not always direct juries in respect of the measures of damages to apply, including any exemplary or vindictive measures. That being said, a jury's application of such measures was 'authorized' in the sense that judges had historically upheld allegedly excessive tort verdicts on a supposition that trial juries had applied such measures.

Pollock accepted that, as he put it, '[w]henever an actionable wrong has been done, the party wronged is entitled to recover damages'.[61] Keen to qualify a plaintiff's right to damages, Pollock asserted: 'though, as we shall immediately see, this right is not necessarily a valuable one'.[62] 'Valuable' was an interesting adjective to use here. It suggests that a tort plaintiff's ability to recover the value of his claim was limited. As Pollock then asserted, it was limited, not by the extent to which a particular jury might to be inclined to award a plaintiff more or less liberally, but by settled legal forms. Referring to the plaintiff in an English tort action, Pollock firmly pressed the following point:

> His title to recover is a conclusion of law from the facts determined in the cause. How much he shall recover is a matter of judicial discretion exercised, if a jury tries the cause, by the jury under the direction of the judge . . . the rule as to 'measure of damages' is laid down by the Court and applied by the jury, whose application of it is, to a certain extent, subject to review.[63]

This emphatically procedural point with which Pollock prefaced his account of tort damages strikes as a very deliberate 'show of legality'. It expresses the view that a tort plaintiff's remedial entitlement should not be solely determined by a jury acting within its province of tort law adjudication. Rather a jury's ultimate award should follow a judge's prior decision regarding a reviewable question of law.[64] Even in aggravated tort cases, Pollock's apparent view was that trial judges needed to consistently 'lay down' the

[60] See, for example, Addison, *Treatise on the Law of Torts* (n 27) 906.
[61] Pollock, *The Law of Torts* (n 50) 120.
[62] ibid.
[63] ibid 121.
[64] On this point, it may be significant that four years before Pollock's treatise, the Rules of the Supreme Court 1883, Ord 36, required trial by jury to specifically requested in all civil claims other than in actions of 'libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise of marriage'.

measure (or measures) of damages required by law,[65] and which, in their sole discretion, juries might choose to apply to proven aggravating facts.

Contemporary scholarly influences may help explain Pollock's insistence that the jury's wide remedial discretion in tort cases submit to the common law courts' legal-doctrinal authority. At the time his treatise was published, Pollock had been Corpus Professor of Jurisprudence at Oxford for four years. During the late nineteenth-century, among the main pursuits of English scholarly lawyers was what Stapleton describes as the 'tying [of] Englishness to law'.[66] Centrally involved in this pursuit was Pollock's Oxford colleague, AV Dicey. In his important 1885 work, *Introduction to the Study of Law of the Constitution*, Dicey had advanced his famous conception of the 'rule of law'. Among the three principles upon which it rested was that establishing that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'.[67] Following Dicey, it is tempting to presume that Pollock deliberately rendered his account of (judicial) tortious redress so as to assert the consistent application of law to facts as the legitimate adjudicative method by which English courts reach decisions about damages in tort actions.

(b) Pollock's legal measure of exemplary damages

After making his preliminary procedural point, Pollock came to his substantive discussion of 'exemplary damages'.[68] He began as follows:

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[65] As the reports of late nineteenth-century tort trials show, in aggravated cases in particular, judges were scarcely 'directing' juries, much less laying down the proper legal measure of damages for them to apply, see for example, *Anderson v Cook* The Times, 5 May 1894, 19, where Lord Coleridge concluded his summing-up by saying that 'nothing remained for the jury but the amount of damages, and that is a question emphatically for you, and which I leave to you'. The foreman of the jury is reported to have then asked Lord Coleridge whether they could give 'give exemplary damages indicating their feelings as to the wrongs done to Dr. Anderson'.

[66] Julia Stapleton, *Englishness and the Study of Politics: The Social and Political Thought of Ernest Barker* (CUP 2006) 53. For Pollock's own contribution to this pursuit, see Sir Frederick Pollock, 'The History of English Law as a Branch of Politics' in AL Goodhart (ed), *Jurisprudence and Legal Essays* (St Martin's Press 1961) 185–211. Pollock had delivered it as a lecture in 1882.

[67] See AV Dicey, *The Law of the Constitution* (first published 1885, JWF Allison ed, OUP 2013) xxxi.

[68] Pollock, *The Law of Torts* (n 50) 125.

> Where there is great injury without the possibility of measuring compensation by any numerical value . . . juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called exemplary or vindictive.[69]

It is, of course, not entirely clear whether the 'principle' Pollock regarded as underpinning exemplary or vindictive awards was aligned solely with a principle of full compensation or extra-compensatory punishment. His introductory statement suggests a mingling of both. As Pollock's ensuing discussion makes clear, his primary concern was to formulate a legal measure of exemplary-vindictive damages. Indeed, this discussion provides a further illustration of Pollock 'invok[ing] sources and values from outside English law'.[70] As to the type of tortious wrongdoing that would an exemplary or vindictive measure available, Pollock had in mind those:

> which, besides the violation of a right or the actual damage, import insult or outrage, and so are not merely injuries but *iniuriae* in the strictest Roman sense of the term. The Greek *ὕβρις* ['hubris'] perhaps denotes with still greater exactness the quality of the acts which are thus treated.[71]

Pollock was clearly thinking in terms of what Birks designated as the 'specialized meaning'[72] of '*iniuria*', and which Justinian's compilers had introduced into the *Institutes*.[73] According to that meaning, *iniuria* meant '*contumelia*'. As Birks explained, like the idea of 'hubris' in ancient Greek legal thought, the general principle of *contumelia* in the Roman law of delict denoted 'arrogance or pride, an over-confident exaltation of the self, manifested in violence or other misbehaviour towards others'.[74] It expressed 'both the attitude of mind and the conduct emanating from it'.[75] Descheemaeker and Scott suggest '[t]he closest English analogue is contempt'.[76]

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[69] ibid.
[70] ibid.
[71] ibid.
[72] Peter Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1999) 32 IJur 1, 9.
[73] ibid.
[74] ibid.
[75] ibid.
[76] Eric Descheemaeker and Helen Scott, '*Iniuria* and the Common Law' in E Descheemaeker and H Scott (eds), Iniuria *and the Common Law* (Hart Publishing 2013) 9.

(c) Aggravated recovery and the 'iniuria' *notion*

In aggravated tort cases, it was the notion of *iniuria* that Pollock propounded as a principle capable of unifying much of the aggravating matter that had historically induced juries to increase damages. Immediately following his broad statement of principle, Pollock mentioned a few historical tort cases whose different aggravating characters the notion of *iniuria* seemingly captured. Perhaps unsurprisingly, the first Pollock mentioned was *Huckle* – 'an assault and false imprisonment under colour of a pretended right in breach of the general law, and against the liberty of the subject'.[77] Pollock's following references are perhaps more interesting. After *Huckle*, he listed *Merest* in 1814. Perhaps more than *Huckle*, *Merest* was a case where the notion of *iniuria* may have already appeared in English law, albeit in a shadowy form. In refusing to upset the *Merest* jury's allegedly excessive £500 award, Gibbs CJ remarked:

> Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, "here is a halfpenny for you, which is the full extent of all the mischief I have done?" Would that be a compensation? I cannot say that it would be.[78]

Mitchell compellingly suggests that Gibbs CJ's example 'is suspiciously similar to the problem discussed in the Roman texts of a man, knowing that the damages for *iniuria* were fixed, going around slapping people's faces and then instructing his slave to hand over the fixed amount'.[79] Mitchell also refers to *Tullidge* as an example of another common law judge 'borrowing' more explicitly from Roman law in order to justify an exemplary award.[80] Incidentally, *Tullidge* was Pollock's next reference after *Merest.* It is probable

[77] Pollock, *The Law of Torts* (n 50) 125.
[78] *Merest* (n 18) 761. See chapter 5 B i.
[79] Paul Mitchell, *The Making of the Modern Law of Defamation* (Bloomsbury Publishing 2004) 66.
[80] In *Tullidge*, Bathurst J supposed that peculiar circumstances of place would justify an increase of damages: 'it is a greater insult to be beaten up upon the Royal Exchange, than in a private room', see *Tullidge* (n 19) 910. Mitchell draws a comparison with Justinian's *Institutes*, where it was said that the particular place where an affront occurs is significant, for example, 'in the theatre or in the market place', see ibid 66–67.

that Pollock himself had detected the Roman influence in the common law's own official sources regarding exemplary damages.[81]

Like Addison, as well as subsequent editors of Mayne's treatise on damages, Pollock also noted the decisions in *Emblen* and *Bell*. For Pollock, *Emblen* was a decision which held 'that a judge might properly authorize a jury to take into account the words and conduct of the defendant "showing a contempt of the plaintiff's rights and convenience".'[82] Pollock's emphasis on a jury being 'authorized' to give exemplary damages is significant given the procedural point that had prefaced his discussion on damages. It was perhaps expected that of the opinions of the reviewing barons in that case, he would ascribe authority to that of his grandfather, Pollock CB. Feelings of patronymic loyalty aside, it is arguable that out of the Exchequer's attempted formulations of a legal measure of exemplary damages in *Emblen*, Pollock CB's most clearly bears the stamp of Roman legal thought.[83] His explicit reference to tortious wrongdoing manifesting 'contempt' for the plaintiff's right is quite suggestive of *contumelia*. Given Pollock's dedication of his book to Willes J, it is similarly unsurprising that his *Bell* judgment was also referred to. He credited Willes J for specifically citing *Emblen* as 'authority that a jury might give exemplary damages'.[84]

Whether, and to what extent, Pollock's placing of exemplary-vindictive awards on the principled footing of *iniuria* influenced judicial thinking around such awards is difficult to tell. There is certainly no direct evidence of influence. Significantly, Pollock ended his discussion of exemplary damages by referring to the contractual action of breach of a promise to marry, which he noted was 'not within the scope of this work'.[85] In respect of damages, however, Pollock drew an analogy: 'it has curious points of affinity with actions of tort in its treatment', he underlined, 'one which of which is that a very large discretion

[81] It has been shown that Pollock's interest in Roman law had been aroused well before he wrote his torts treatise, John W Cairns, 'English Torts and Roman Delicts: The Correspondence of James Muirhead and Frederick Pollock' (2013) 87 Tul L Rev 867, 878–883.
[82] Pollock, *The Law of Torts* (n 50) 126; *Emblen* (n 6) 25 (Pollock CB).
[83] Wilde B at trial in *Emblen*, and Willes J in banc in *Bell* had both referred, suggestively, to 'high handed' wrongdoing, see *Emblen* (n 6) 24 and *Bell* (n 7) 470, but Pollock did not specifically mention them in his discussion.
[84] Pollock, *The Law of Torts* (n 50) 127.
[85] ibid.

is given to the jury as to damages'.[86] The year after Pollock's treatise was published, the English Court of Appeal finally decided *Finlay v Chirney*.[87] In his judgment, Lord Esher MR enquired as to whether principle justified giving damages 'in an exemplary manner'[88] in what had formally been a contractual action.[89] In using the label 'exemplary', it is not clear whether Lord Esher MR had in mind all non-pecuniary damages other than those strictly designed to put the plaintiff in the position she would have been in had the marriage promise been honoured, or those narrowly designed to punish the contract-breaker.[90] He said:

> An action for breach of promise to marry is strictly personal, and . . . although in form it is an action for breach of contract, it is really an action for breach arising from the personal conduct of the defendant and thus affecting the *personality* of the plaintiff.[91]

Lord Esher MR's support of exemplary damages being available in the action on the case for the breach of a promise to marry was because in such actions, the contract-breaking conduct involved a rejection of the promisee as a person. Influence from the Roman *actio iniuriarum*, and its special protection of 'personality or personhood',[92] is not easy to dismiss. Yet, whether Lord Esher MR's point in *Finlay* came from, or was inspired by, Pollock's recent discussion of exemplary damages is difficult to prove.

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[86] ibid.

[87] (1888) 20 QBD 494.

[88] ibid 498.

[89] Pollock, *The Law of Torts* (n 50) 127.

[90] Elsewhere in his treatise Pollock had referred to the '*penal nature* of the action for breach of promise of marriage', Pollock, *The Law of Torts* (n 50) 465. (Emphasis added). There is a sense in which contract-breakers were punished where their motives for breaching the marriage promise were particularly objectionable, see James Schouler, *A Treatise on the Law of Husband and Wife* (Little Brown & Co 1882) 82: 'damages are heavily aggravated in case she appears to have been seduced upon faith of the engagement; and here the defendant becomes assessed in fact chiefly by way of exemplary damages'.

[91] *Finlay* (n 87) 498.

[92] Birks, 'Harassment and Hubris' (n 166) 8. On '*iniuria*' and the protection of violations of 'personality rights', see Jonathan Burchell, 'Retraction, Apology and Reply as Responses to *Iniuriae*' in E Descheemaeker and H Scott (eds), Iniuria *and the Common Law* (Hart Publishing 2013) 197–214.

C. Principled Tensions into the Twentieth-Century

The decidedly analytical treatment of tort Pollock presented in his treatise was not the final consideration of exemplary or vindictive damages in the final quarter of the nineteenth-century. It was followed by further treatments soon after the publication of his treatise, as well as in the first decade of the twentieth-century. These further considerations in the literature were marked by a rather more questioning attitude about the true alignment of exemplary or vindictive damages with a principle of punishment as opposed to full compensation. Evidence of these later nineteenth-century and early twentieth-century accounts influencing judicial thinking about exemplary damages, both in England and abroad, is stronger.

i. Clerk and Lindsell and the remedial '*solatium*' notion

Two years after Pollock's torts treatise was published, the English barristers John F Clerk, of the Middle Temple, and William HB Lindsell, of Lincoln's Inn, published their textbook on torts, *The Law of Torts*.[93] Their discussion of aggravated recovery appeared in chapter vi, entitled 'Damage'.[94] Their discussion was prefaced with the following statement of general principle:

> In actions of tort compensation is the principle of redress and the measure of damages is in the absence of matters of aggravation the exact amount of the injury which the plaintiff has suffered in his person, property or reputation.[95]

In a more emphatic way than Pollock (and indeed Addison or Mayne previously), Clerk and Lindsell then stated:

> But when the tort is accompanied by a malicious intent on the part of the defendant, the jury are allowed to take such malice into consideration in assessing the damages, and to award the plaintiff a sum *more than sufficient to compensate* him for any injury received by him of the kinds mentioned above.[96]

[93] John F Clerk and William HB Lindsell, *The Law of Torts* (Sweet & Maxwell 1889).
[94] ibid 89.
[95] ibid 92.
[96] ibid.

The above-mentioned injuries were the (more or less) ascertainable injury to person, property or reputation. For Clerk and Lindsell, the clearest example in the extant tort cases was *Merest*, 'where the defendant insisted on joining the plaintiff's shooting party, and fired at his birds, at the same time using intemperate language'.[97] Despite Gibbs CJ's Common Pleas using the phrase 'exemplary damages',[98] mingling in the *Merest* jury's £500 damages award were components 'more than sufficient to compensate' the plaintiff for the defendant's mere invasion of his property, and included further compensation for an essentially intangible injury, like the plaintiff's insult. For Clerk and Lindsell (and despite Wilde B's use of the term 'exemplary damages' in his summing to the jury[99]), *Emblen* was a case evincing the same principle of full compensation. Interestingly, they cited the central Common Pleas' 1861 decision in *Bell* simply for having dispelled any notion that 'the propriety of giving extra damages', as they styled them, 'for matter of aggravation was confined to trespass'.[100]

(a) Consolation (or solace) rather than punishment

By reference to the most recent fourth edition of Mayne's treatise on damages, Clerk and Lindsell conceded that these 'extra damages are generally spoken of as exemplary, as though the object of allowing them were punitive, and to deter others in like cases from offending'.[101] Published in 1884 (and still under Lumley Smith's editorship), the fourth edition of Mayne's treatise continued to maintain the view that in most tort actions touched by 'circumstances of aggravation', damages generally operate 'as a punishment, for the benefit of the community, and as restraint to the transgressor'.[102] Clerk and Lindsell did not share Mayne's ambivalence about whether damages in aggravated tort cases 'are a compensation or a punishment'.[103] In their view, compensation was the guiding principle

[97] ibid 93.
[98] *Emblen* (n 6) 761 (Heath J).
[99] Clerk and Lindsell, *The Law of Torts* (n 93) 93.
[100] ibid, stating that the *Bell* jury 'were held entitled to give damages in excess of the pecuniary injury to the reversion'. Clerk and Lindsell also clearly regarded the 'extra damages' give in actions on the case for seduction as 'strictly in accordance with [a compensatory] principle', see ibid.
[101] ibid 94.
[102] Sir Lumley Smith, *Mayne's Treatise on the Law of Damages* (4th edn, Stevens & Hayes 1884) 43.
[103] ibid.

of tortious redress. This is included in most aggravated cases. The role of punishment risked overstatement. As they went on to state:

> It is doubtful whether the better view is not that they are consolatory rather than penal, resting upon the principle that where there is malice, the plaintiff suffers from a sense of wrong and is entitled to a *solatium* for that mental pain.[104]

Clerk and Lindsell's evocation of the notion of '*solatium*' is noteworthy. It bears note that the specific term seldom appears in the nineteenth-century printed case law.[105] Where it does appear, it does so in quite a narrow context, almost exclusively in the reports of a spate of mid-nineteenth-century statutory actions brought by the surviving relatives of those who had been fatally killed in railway accidents.[106] Against leading Victorian railway firms, plaintiffs typically laid very large damages. The essential gist of their claim was the loss of the pecuniary benefit that they would have received had death not been caused. As the cases show, plaintiffs were also given extra damages; specifically, for the grief and anguish the defendant's tort had further inflicted upon them.[107] Against the tide of previous cases, in 1852 in *Blake v Midland Railway Co*,[108] Coleridge J had questioned the proper measure of damages endorsed by the statute. In his view, its purpose was to provide pecuniary compensation to the families of killed victims rather than 'solac[e] their wounded feelings'.[109] In his judgment, Coleridge J drew a distinction between 'injuries of which a pecuniary estimate may be made' and those where 'a *solatium*' may additionally be given for 'mental sufferings'.[110] Clerk and Lindsell did not cite these cases. Yet, their

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[104] Clerk and Lindsell, *The Law of Torts* (n 93) 94.

[105] I have found one libel action where the idea of *solatium* and exemplary punishment were curiously combined, see *Maskelyne v Bishop* The Times, 16 January 1885, 12, where counsel for the plaintiff reportedly 'claimed at their [the jury's] hands a substantial and exemplary *solatium* for their [the defendants'] very gross and unwarranted attack'.

[106] Relatives sued upon the Fatal Accidents Act 1846 (9 & 10 Vic c 93), allowing husbands, parents, or children of the deceased to claim 'such damages ... proportioned to the injury resulting from such death'. The case of the families of railway accident victims had been taken up by the liberal politician, Lord Campbell, who steered the bill through the House of Commons.

[107] Examples include *Franklin v South Eastern Railway* (1858) 3 H & N 211, 214; 157 ER 448, 450; *Pym v Great Northern Railway* (1863) 4 B & S 396, 401, 404; 122 ER 508, 511, 512; *Duckworth v Johnson* (1859) 4 H & N 653, 658; 157 ER 997, 1001.

[108] (1852) 18 QBD 93, 118 ER 35.

[109] ibid 41.

[110] ibid. The idea was extensively discussed, with suggestions of a Scottish civilian influence, and with counsel for the defendant even citing: John Erskine, *An Institute of the Law of Scotland* (first published 1773, 4th edn, J Gillon 1805) 13: '*Solatium* for wounded feelings is allowed in cases of breach of promise

specific identification of *solatium* with non-physical suffering of the mind makes it possible that they may have had these statutory actions in mind in setting forth their emphatically compensatory model of aggravated tortious redress.

Clerk and Lindsell's rather unprecedented alignment of aggravated tortious recovery with a more capacious principle of compensation remained a staple feature of their torts text. By the fourth edition, published in 1906 under the editorship of the Inner Temple barrister, Wyatt Paine, Clerk and Lindsell's 'better view' that (even in aggravated cases) non-pecuniary damages are generally 'consolatory rather than penal'[111] remain undisturbed.

ii. Salmond and the refinement of *solatium*

It was after the publication of the fourth edition that John W Salmond first published his torts treatise in 1907 following scholarly writings of a more jurisprudential nature.[112] As Salmond stated in the preface of his treatise, his specific aim was to account for 'the principles of the law of torts with as much precision, coherence and system as the subject admits of'.[113] Like Clerk and Lindsell, Salmond was also concerned with promoting principled coherence in the law of tort damages. In respect of aggravated, seemingly punitive, damages one of the key contributions of Salmond's treatise was its scholarly reinforcement and refinement of the view originally propounded by Clerk and Lindsell in 1889.

(a) A further evocation of Roman delictual principles

One of the distinguishing features of Salmond's call to principle was his explicit use of the term 'vindictive damages'. In his view, 'vindictive damages' were 'otherwise called

of marriage'; George J Bell, *Principles of the Law of Scotland* (first published 1829, 4th edn, P Shaw 1839) 749. The *solatium* idea had been earlier mentioned by Lord Kames in the 'Preliminary Discourse' in *Principles of Equity*, see chapter 3 D i.

[111] Wyatt Paine, *Clerk and Lindsell on Torts* (4th edn, Sweet & Maxwell 1906) 138.

[112] John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens & Haynes 1907) v.

[113] ibid v.

exemplary'.[114] But as his ensuing discussion showed, his preference for the former designation was perhaps not without purpose. Like Pollock in 1887, Salmond was also concerned with formulating a doctrine of vindictive or exemplary damages of general application in aggravated tort cases. But whereas Pollock had not really addressed the principle of redress underlying aggravated tortious recovery, Salmond did so with purpose. In a similar vein to Clerk and Lindsell, he generally described vindictive tort awards as 'a sum of money awarded in excess of any material loss actually suffered by the plaintiff, but by way of *solatium* for any insult or other outrage that is involved in the injury complained of'.[115] Although not citing any specific cases, for Salmond, the essential principle to be derived from them was that 'vindictive damages . . . are given only in cases of conscious wrongdoing in contumelious disregard of another's right'.[116]

Salmond's use of the adjective 'contumelious' suggests that, like Pollock, he too was thinking in terms of Roman legal ideas in formulating a statement of legal principle. Although he did not cite the case for the specific proposition, Salmond's formulation bears a striking resemblance to Pollock CB's formulation in *Emblen*, where he referred to tortious conduct 'showing a contempt of the plaintiff's rights'.[117] Salmond's use of the adjective 'contumelious' arguably evoked the Roman idea underlying the *actio iniuriarum* – '*contumelia*' – more vividly. Yet, whereas Pollock had referred to the notion of *iniuria* in his account of exemplary damages, Salmond appears to have been more concerned with extracting the proper remedial principle underlying it. In a similar way to Clerk and Lindsell, he went on state:

> It is often said that such [vindictive] damages are awarded not by way of compensation, but by way of punishment for the defendant. It seems more accurate, however, to regard them as *solatium* for wounded dignity and feelings: as a remedy for *injuria* in which the Roman lawyers used that term. Wilful wrongdoing not amounting to injuria in this sense . . . is no ground for vindictive damages.[118]

[114] ibid 102.
[115] ibid.
[116] ibid.
[117] ibid.
[118] ibid.

Thus, although Pollock and Salmond both evoked the Roman law notion of *iniuria*, Salmond's account of exemplary damages enquired more deeply into the proper remedial rationale of the *actio iniuriarum* itself. Adopting the term that Clerk and Lindsell had used in their discussion, Salmond found the rationale, not to be punishment, but compensation in the wider sense of *solatium*.[119] For Salmond, in turn, the essential purpose of an award of vindictive damages would be to compensate plaintiffs for the wounded dignity and feelings that the defendant's 'contumelious disregard' of their rights had further caused them to suffer. For Salmond, therefore, it had been aggravating facts establishing a 'contumelious disregard' of a tort plaintiff's right that had induced English juries to increase their awards beyond the 'material loss actually suffered'. The oldest examples were *Huckle* and *Tullidge*; the most recent, *Emblen* and *Bell*.[120]

(b) The Australian High Court's rejection of solatium

Salmond's articulation of the kind of tortious wrongdoing that would justify an aggravated damages award was influential. Thirteen years after he first articulated it, it was adopted by the Cambridge educated lawyer and ultimately Australia's second Chief Justice, Sir Adrian Knox, in the 1920 defamation case of *Whitfield v De Lauret & Co Ltd*.[121] Discussing when 'exemplary damages' would be available, Knox CJ laid down that they 'are only given in cases of conscious wrongdoing in contumelious disregard of another's rights'.[122] Yet, a closer scrutiny of Knox CJ's *Whitfield* judgment suggests that the Australian High Court had not been willing to endorse Salmond's call to principle in full.

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[119] It has been argued that 'the word '*solatium*' has been used by English judges with different shades of meaning around the same broad idea of comfort or consolation conveyed by the Latin term . . . The link with *iniuria* is evident here: we are dealing with the protection of personality', see Eric Descheemaeker, '*Solatium* and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in E Descheemaeker and H Scott (eds), Iniuria *and the Common Law* (Hart Publishing 2013) 77.

[120] Salmond, *The Law of Torts* (n 112) 103.

[121] (1920) 29 CLR 71.

[122] ibid 77. For the same connection, see Mitchell, *Modern Law of Defamation* (n 79) 67. In Australia, this formulation of the doctrine of exemplary damages was later affirmed in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 118 (Windeyer J), and it continues to constitute the doctrinal 'test' applied in Australian tort actions, see, most recently, Felicity Maher, 'An Empirical Study of Exemplary Damages in Australia' (2019) 43 MULR 694, 700: 'In Australia, a claim for exemplary damages need not fall within a *Rookes* category. Provided the test first stated in *Whitfeld* is satisfied, exemplary damages may be available in answer to any cause of action'.

Specifically, it did not embrace the *solatium* idea that (following Clerk and Lindsell) Salmond had suggested more accurately explained those aggravated awards to which judges had historically assigned the labels 'vindictive' and 'exemplary'. Knox CJ stated that such damages 'apply only where the conduct of the defendant merits punishment'.[123] He then added that the common law would permit punishment where a defendant's 'conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like'.[124] The Chief Justice's additional reference to specific categories of aggravated tortious misconduct suggests an influence from elsewhere. Indeed, what Knox CJ appeared to do was essentially re-order the open-ended categories of punishable wrongdoing that Mayne had originally set forth in his treatise three quarters of a century earlier.[125]

That the High Court had also consulted Mayne's treatise is made clear in Isaacs J's judgment, who directly referred to the ninth (1920) edition[126] (by then under the editorship of the English academic lawyer, Professor Coleman Phillipson, who at the time was a member of the law faculty at the University of Adelaide, in South Australia). In the manner of his editorial predecessors, and despite Mayne's death in 1917, Phillipson had maintained Mayne's originally robust link between aggravating matter and the general operation of tort damages 'as a punishment, for the benefit of this community, and as restraint to the transgressor'.[127] Knox CJ's covert borrowing from Salmond for the essential facts triggering exemplary damages, but overtly from Mayne for their remedial purpose, is noteworthy. As Isaac J's *Whitfield* judgment shows, a notable feature of the Australian High Court's deliberation of the question of exemplary damages involved noting the number of times 'very eminent'[128] English judges had put labels seemingly connoting various extra-compensatory, seemingly punitive, responses in front of the word 'damages'.[129] According to Isaacs J:

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[123] *Whitfield* (n 121) 77. (Emphasis added).
[124] ibid.
[125] See (n 40) 25.
[126] *Whitfield* (n 121) 81, referring to the 'the opinion of one learned writer'.
[127] Coleman Phillipson, *Mayne's Treatise on Damages* (9th edn, Sweet & Maxwell 1920) 44.
[128] *Whitfield* (n 121) 81.
[129] Outside aggravated recovery, Isaacs J had no qualm endorsing a principle of *restitutio in integrum*: 'Damages are, in their fundamental character, compensatory. Whether the matter complained of be a breach of contract or a tort, the primary theoretical notion is to place the plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred (see per Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (1))', see ibid 80.

> From a very early period exemplary damages have been considered by very eminent Judges to be punitive for reprehensible conduct and as a deterrent. In *Emblen v. Myers* in 1860 *Pollock* C.B. used the expression "vindictive damages"; in 1861 *Byles* J., in *Bell v. Midland Railway Co.*, termed them "retributory damages"; in 1889 *Kay* J., in *Dreyfus v. Peruvian Guano Co.*, called them "vindictive"; in 1891 Lord *Hobhouse*, for the Privy Council in *McArthur & Co. v. Cornwall*, called them "penal"; in *The Mediana*, Lord *Halsbury* L.C. called them "punitive damages"; in 1908, in *Anderson v. Calvert*, Lord *Cozens Hardy*, and Lord *Wrenbury* (then in the Court of Appeal), used the word "punitive"; in 1913, in *Smith v. Streatfeild*, *Bankes* J. called them "vindictive" damages'.[130]

For Isaacs J, therefore, if English judges meant the words they had used, then the juridical basis of aggravated recovery in tort was closer to that set out by Mayne than that by Clerk and Lindsell, and later, Salmond.

(c) McCardie J's tacit adoption of solatium

There is a plausible basis on which to suppose that Salmond's distinctive account of vindictive damages had influenced McCardie J's judgment in the 1920 English divorce case of *Butterworth v Butterworth and Englefield*.[131] As Lunney recently shows, McCardie J's familiarity with Salmond's torts jurisprudence is evident as early as 1917.[132] In that year, soon after his appointment to the King's Bench Division of the High Court, McCardie J had first cited Salmond treatise in his judgment in *Maclenan v Segar*,[133] a case involving the liability of innkeepers for the safety of their premises.

Butterworth concerned a husband seeking to divorce his wife on grounds of adultery. The man with whom his wife had committed adultery (Englefield) was named as a co-respondent in the divorce action, and from whom the husband sought substantial damages. On the question of the damages recoverable from the co-respondent, McCardie J

[130] ibid 81. (Original emphasis).
[131] (1920) P 126.
[132] Mark Lunney, 'Professor Sir John Salmond (1862–1924): An Englishman Abroad' in J Goudkamp and D Nolan (eds), *Scholars of Tort Law* (Hart Publishing 2019) 120: 'There is no doubt that *Law of Torts* was an influential text in the courts from soon after its publication'. Lunney notes that McCardie J's references to Salmond's text increased during the 1920s.
[133] (1917) 2 KB 325.

recognized that '[c]laims for damages in divorce are . . . to be tried on the same principles and in the same manner as actions for criminal conversation . . . were tried at common law'.[134] The critical issue, however, was whether recovery for criminal conversation had been designed to inflict punishment upon the defendant as much as compensate the aggrieved husband for the full extent of his suffering. After surveying the standard printed reports, McCardie J found a very tenuous link between criminal conversation damages and a principle of punishment. This was because he had found 'no case [in] which the judge told the jury that they might give exemplary or punitive damages in a case for criminal conversation'.[135] McCardie J's conclusion was questionable: as the totality of the historical evidence shows that previous judges had told, even admonished, criminal conversation juries to give 'exemplary damages' *eo nomine*.[136] In its consideration of the longer past, however, McCardie J's *Butterworth* judgment is problematic for a further reason: it equates the presence of extra-compensatory, distinctly punitive (and exemplary) elements in historical criminal conversation awards with judges 'telling' juries to include them. Being in its nature a tort award depending 'entirely upon circumstances',[137] in tort law's longer past, the question of an adulterer's full financial liability had been entirely determined by juries acting within their proper province of adjudication.

Recent cases, however, did show a level of judicial dissatisfaction with the presence of distinctly punitive elements in criminal conversations awards.[138] In *Butterworth*, McCardie J strove to definitively align the nature of awards in contemporary divorce claims with a principle of full compensation. According to this principle, (former) criminal conversation awards properly comprised two elements; the former pecuniary, the latter non-pecuniary. First, the husband could recover for what McCardie J described as 'the actual value of the wife to the husband'.[139] Rather curiously, however, this first element was to be

[134] *Butterworth* (n 131) 126. The action on the case for criminal conversation was abolished by the Matrimonial Causes Act 1857 (20 & 21 Vic s 33).
[135] ibid 138.
[136] See, especially, chapter 4 D ii (a) and (b).
[137] *Wilford v Berkeley* 1758) 1 Burr 609, 97 ER 472, 472 (Lord Mansfield).
[138] See, most definitively, *Keyse v Keyse and Maxwell* (1886) 7 C & P 198, 202 (Hannen J): 'You are not here to punish at all. Any observations directed to that end are improperly addressed to you [by counsel]. All that the law permits a jury to give is compensation for the loss which the husband has sustained'. (Emphasis added).
[139] *Butterworth* (n 131) 138.

substantially measured against the co-respondent's wealth.[140] The apparent rationale was that if the wife only had an affair with the co-respondent because he was wealthy, this demonstrated her value to her husband. Conversely, if she had committed adultery with a poor man, this would have shown the wife to be of less value to her husband.

For McCardie J, the second important element for which a husband could receive compensation was 'for the injury to his feelings, the blow and the serious hurt to his matrimonial and family life'.[141] As he explained: 'any feature of treachery, any grossness of betrayal, any wantonness of insult and the like circumstances may add deeply to the husband's sense of injury and wrong and therefore call for a larger measure of compensation'.[142] There is, admittedly, no firm evidence that Salmond's endorsement of *solatium* actually inspired McCardie J's extensive discussion of damages in *Butterworth*. Yet, by the fifth (1920) edition of Salmond's *Law of Torts*, which he worked on in the prelude to his appointment to the Supreme Court of New Zealand, Salmond appears to have further refined his *solatium* idea. For Salmond, compensatory damages were ordinarily given 'as compensation for, and are measured by, the material loss suffered by the plaintiff'.[143] Beyond these damages were exemplary damages, though 'also known as vindictive or punitive'.[144] For Salmond, such damages were not properly *extra*-compensatory. Rather they only represented 'a sum of money *in excess of any material loss* and by way of *solatium* for any injury or insult or other outrage to the plaintiff's feelings that is involved in the injury complained of'.[145] Given McCardie J's apparent affinity for Salmond's torts treatise, it is reasonable to conclude that it had some influence upon his principled discussion of the question of damages in *Butterworth.*[146]

[140] ibid 127, 148.
[141] ibid 142.
[142] ibid 144–5.
[143] Sir John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (6th edn, Sweet & Maxwell 1920) 129. In his *Whitfield* judgment, Knox CJ had directly quoted from Salmond for this more recent general proposition, but again with no citation, see *Whitfield* (n 121) 77.
[144] ibid.
[145] ibid. (Emphasis added).
[146] For McCardie J's reform-mindedness as a judge, see Anthony Lentin, *Mr Justice McCardie (1869–1933) – Rebel, Reformer, and Rogue Judge* (CSP 2017) chapter 2.

Albeit a first-instance judgment, McCardie J's in *Butterworth* evidently came to be seen as consequential. Observing English developments from across the Atlantic, the American damages scholar, Charles T McCormick, considered it a watershed decision in the English law of civil recovery. In a 1930 review article entitled, 'Some Phases of the Doctrine of Exemplary Damages', McCormick credited McCardie J's strong judicial support for a principle of full compensation for adjusting the English perception of the doctrine:

> In England where exemplary damages had their origin it is still not entirely clear whether the accepted theory is that they are a distinct and strictly punitive element of the recovery, or that they are merely a swollen or "aggravated" allowance of compensatory damages.[147]

Clearly, in the wake of Clerk and Lindsell's textbook in 1889 attempts had been made to propound the latter of these theories, both in the torts treatise literature, and in at least one High Court opinion.

i. Winfield and tort's separation from crime

Soon after the publication of McCormick's article, the Rouse Ball Professor of English Law at Cambridge, Percy H Winfield, published his first monograph on torts, *The Province of the Law of Tort*.[148] In a favourable review that appeared in the *Harvard Law Review* in 1931, the American legal scholar, WA Seavey remarked of it:

> This is another of the delightful little books which every now and then come out of England and make us think. It is a series of lectures delivered by the author as Tagore Professor in the University of Calcutta, in an attempt to "trace the liaison between tortious obligation and other regions of the law."[149]

One of the central aims of Winfield's *Province* was, as he put it, 'to separate liability in tort as sharply as possible from liability arising from crime'.[150] As part of what Mitchell

[147] Charles T McCormick, 'Some Phases of the Doctrine of Exemplary Damages' (1930) 8 NC L Rev 129, 132.
[148] Percy H Winfield, *The Province of the Law of Tort* (CUP 1931).
[149] WA Seavey (1931) 45 Harv L Rev 197, 309. For more critical reactions to Winfield's theoretical project, including from his mentor, Pollock, see Donal Nolan, 'Professor Sir Percy Winfield (1878–1953)' in J Goudkamp and D Nolan (eds), *Scholars of Tort Law* (Hart Publishing 2019) 176–179.
[150] Winfield, *The Province of the Law of Tort* (n 148) 2.

describes as a 'more self-consciously theoretical investigation of tort liability',[151] one might perhaps have expected Winfield to defend some version of the (now familiar) thesis that the presence of punitive principles in tort remedies confuses the functions of the civil and criminal law.

(a) Distinguishing between civil and criminal punishment

Winfield's approach in chapter viii was more nuanced. He recognized that '[t]ort can be distinguished from crime in that the sanction for crime is punishment, while the sanction for tort is an action for damages'.[152] Winfield also left his reader in no doubt that, in civil tort actions, damages of an extra-compensatory, distinctly punitive, nature were available, and often given. Speaking of awards of damages in civil tort actions, Winfield accepted that they 'may be exemplary or punitive, but they are not', he asserted, 'within the definition of punishment which has just be[en] developed'.[153]

For Winfield, therefore, the punishment imposed by exemplary or punitive tort damages was a different type of punishment to that imposed in criminal prosecutions. Winfield's definition of criminal as distinct from civil punishment was quite nuanced. He developed his definition earlier in his chapter viii discussion. 'A crime always involves *punishment*',[154] Winfield stated. 'If an exact meaning can be attached to that term', he then suggested, 'then we can mark off crimes from civil injuries'.[155] For Winfield, therefore, the principal differentiating feature of criminal punishment is that the commission of a criminal wrong, as opposed to a civil wrong, is that the former is unavoidably sanctioned by punishment. As he stated:

> A crime may . . . be defined as *a wrong the sanction of which involves punishment*; and punishment signifies death, penal servitude, whipping, fine, imprisonment . . . or some other evil which, when once liability to it has been decreed, is not avoidable by any act of the party offending.[156]

[151] Paul Mitchell, 'The Modern History of Tort Remedies in England and Wales' in Halson R and Campbell D (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar 2019) 36.
[152] Winfield, *The Province of the Law of Tort* (n 148) 201.
[153] ibid. (Emphasis added).
[154] ibid 196.
[155] ibid.
[156] ibid 200. (Original emphasis).

'Contrast this', Winfield said, 'with a civil case'.[157] 'There, if he [the defendant] is . . . cast in damages . . . he can always compromise or get rid of his liability with the assent of the injured party'.[158] For Winfield, in turn, civil and criminal punishment were distinguishable on the basis that the punishable civil wrongdoer is personally liable to a private actor. In turn, even once tortious liability – including any distinctly punitive component of it – is 'decreed', the consequences sounding in damages were not inevitable.

For Winfield, therefore, a sharp (enough) separation of tortious from criminal liability was not seen to require removing from tort liability all extra-compensatory punitive or exemplary principles. Indeed, a theoretically sound separation of the two liability spheres could be achieved without disrupting established remedial principles in tort. Nor was it seen to require definitively aligning aggravated tortious recovery with an overriding compensatory principle. In turn, when Winfield published his treatise on tort in 1937, the proposition that in the case of 'exemplary damages it [the court] can punish the defendant for misbehaviour'[159] was not seen as theoretically problematic, much less intolerable. Such damages, Winfield asserted, 'represent the jury's indignation at an especially outrageous attack on the plaintiff's security, or at wanton misconduct on the defendant's part'.[160]

D. Damages as a 'Jury Question' and the Prelude to *Rookes*

Well into the twentieth-century, attempts to elaborate a common 'law' of exemplary damages did not seek to eradicate all extra-compensatory punitive elements from the practice of aggravated tortious recovery. Despite applying to civil actions, the doctrine of exemplary damages continued to be widely perceived as encompassing a 'distinct and strictly punitive element'. Yet, as demonstrated above, some academic writers and judges had been keen to emphasize the distinctly *compensatory* elements that the established labels 'exemplary' or 'vindictive' often obscured. But it was not until the early 1960s that

[157] ibid.
[158] ibid.
[159] Percy H Winfield, *A Text-Book on the Law of Tort* (Sweet & Maxwell 1937) 153. (Emphasis added).
[160] ibid.

the 'anomaly inherent'[161] in a punitive doctrine of civil remedies was subjected to intense theoretical investigation in English academic law. The disinclination to do so may be explained by the extent to which the matter of an aggravated tort defendant's full financial liability to the plaintiff continued to be apprehended as one for each jury to resolve.

i. Exemplary damages: an enduring 'jury question'

Despite short-lived restrictions imposed by statute towards the end of the First World War,[162] rights to trial by jury in English civil litigation remained stable from the period of the judicature legislation in the mid-1870s to the early 1930s. Before the enactment of the Administration of Justice Act 1933, English tort litigants had to specifically request for the plaintiff's claim to be tried by jury, except in actions of libel, slander, malicious prosecution, false imprisonment, seduction, breach of a promise marry, and fraud. In these actions, the plaintiff's claim could still not be tried by judge alone.[163] The effect of the 1933 statutory amendments was considerable. It left the granting of a jury to the discretion of the judge in all tort actions,[164] except in actions of libel, slander, malicious prosecution, false imprisonment, seduction, breach of a promise to marry and fraud. In these actions, jury trial was automatically granted at the request of either litigant. [165] When tort claims were tried by jury, the damages question continued to be perceived as one very much for them to decide. Despite Pollock's late nineteenth-century imperative that the proper measure of damages be consistently 'laid down by the Court and applied by the jury', the

[161] *Rookes* (n 1) 1227 (Lord Devlin).

[162] The Juries Act 1918 required tort trials to be before a judge without a jury *unless* the High Court saw fit to order a jury, except in cases alleging libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and fraud. These restrictions were introduced as a result of the shortage of man-power caused by Britain's involvement in the war, see RM Jackson, 'The Incidence of Jury Trial During the Past Century' (1937) 1 MLR 132, 144. The war-time restrictions were repealed by the Administration of Justice Act 1925.

[163] The first set of *post*-judicature rules (arguably) restrictive on civil jury trial was the Rules of the Supreme Court 1883, ord 36, r 2, which required either litigant to specifically request for the plaintiff's claim to be tried by jury in tort cases except those where jury trial was the unalterable mode of trial.

[164] For the unfettered nature of this discretion, see *Hope v Great Western Railway Co* [1937] 2 KB 130 (CA) 139 (Lord Wright MR): '[Section 6] leaves the matter completely in the discretion of the Court or a judge'.

[165] Administration of Justice Act 1933, s 6. Complaints of the cost and delays in proceedings at common law led to the reintroduction of this more restrictive legislation, see Jackson (n 162) 141.

courts' imposition of their legal-doctrinal authority over the inquiry of damages was, in practice, not always firm.

(a) Lord Sumner's observation

A powerful observation to this effect appears in the judgment of a senior Law Lord in the 1926 tort case of *Admiralty Commissioners v SS Chekiang*.[166] The owners of the steamship SS Chekiang accepted liability after their vessel collided and caused damage to the HMS Cairo, one of the Royal Navy's light cruisers. The key issue on appeal concerned the proper method of measuring damages for the deprivation of the navy's use of the ship despite it not using it to make a profit.[167] In the House of Lords, Lord Sumner began his speech by encouraging his fellow Law Lords to devote 'some short time to the rules applicable to the measure of damages in collision actions'.[168] As he rather charily put it, he thought they might do so 'without any sacrifice of dignity'.[169] Addressing the general question of tortious recovery, Lord Sumner continued:

> After all, little as this question has engaged the attention of the Courts, parties take more interest in it than in any other issues in litigation, and they are not alone in thinking that it is one in which platitudes and rules of thumb are no good. Damages may be a "jury question," that is a question of fact for the jury, if there is one, but they must be measured under a proper direction, as to what the law requires. To say, as judges have come as near to saying as decorum permits, that juries must find a figure as best they can and escape criticism by being anonymous and dumb and accordingly proof against everything but "perversity," is a poor position in which to leave the matter.[170]

Notably, the Royal Navy's damages in the present action had initially not been assessed by a jury, but by the Registrar of the (juryless) Admiralty Court.[171] For Lord Sumner, nonetheless, a general account of the prevailing jury practice of damages in tort actions

[166] [1926] AC 637 (HL).

[167] The method of measurement employed by the registrar was to calculate the interest upon the capital value of the damaged chattel at the time of the damage, this value being ascertained by taking the original cost and deducting depreciation, see ibid 637.

[168] ibid 643.

[169] ibid.

[170] ibid.

[171] For the Registrar's historical adjudicative role, see John A Kimbell, 'The Admiralty Registrar: Past, Present and Future' (2018) LMCLQ 413–427.

was in order. As he implied, the measures according to which tort plaintiffs' remedial entitlements were determined were often not 'laid down' to juries with adequate legal-doctrinal authority. Lord Sumner did not specifically refer to the proper measures of damages to be applied in aggravated tort actions. But the general problem to which he drew attention was acute in that particular sphere of tort liability.

(b) The special case of aggravated tort awards

Shortly after *The Chekiang* was decided, the defendant in the libel action of *Tolley v JS Fry and Sons Ltd*[172] moved for a new trial, *inter alia*, on the ground of the excessiveness of the trial jury's global award of £1000.[173] In the Court of Appeal, Scrutton LJ underscored how 'very slow' an appellate English court must be before 'interfer[ing] with the verdict of a jury on the question of . . . the amount of damages'.[174] Yet, as for how damages were to be measured in a libel action, Scrutton LJ's view was that they:

> need not be limited to damage actually proved but may express the disapproval of the jury of the conduct of the defendant. But there are some limits to the power of a jury, and the damages must have some reasonable relation to the facts of the case, some reasonable relation between the wrong done and the *solatium* applied.[175]

Scrutton LJ's statement tacitly suggests that the damages going beyond an attempt to 'track the scandal'[176] would essentially serve to express the jury's disapproval of the wrongful conduct. Yet, the need that an award in addition to ordinary defamation damages bear a relation between the defendant's wrong and the damages given as a '*solatium*' suggests that the extra damages were not to punish, but to 'solace' for other essentially intangible

[172] [1930] 1 KB 467 (CA). The defendant chocolate company advertised one of their products with a caricature of the plaintiff, an amateur golfer, who claimed that the image made him look like someone willing to prostitute his reputation for advertising purposes.
[173] The first ground of the defendants' appeal was that the trial judge should not have left a case to the jury at all, because the caricature was not defamatory, see ibid 467. Acton J's particular direction to the *Tolley* jury in respect of damages was not impugned, though it appears to have been rather brief: 'Acton J. ruled that the advertisement capable of a defamatory meaning and left the case to the jury, who found for the plaintiff, assessing the damages at 1000*l*', (468).
[174] ibid 476.
[175] ibid.
[176] *Ley* (n 3) 386 (Lord Atkin).

injuries that the plaintiff had suffered.[177] Indeed, at the time Scrutton LJ gave his judgment in *Tolley*, the *solatium* notion had remained a stable feature of contemporary editions of both Clerk and Lindsell and Salmond's texts on torts.[178] In this sense, Scrutton LJ's remarks in *Tolley* may be seen as another example of what Lunney describes as 'the opprobrium of the proscribed conduct . . . being used as a surrogate to value the non-pecuniary loss of the plaintiff'.[179]

Still, in Scrutton LJ's remarks it is difficult to find any conclusive statement of what 'the law' would require for an award of exemplary damages. And the same may also be made of the House of Lords' ultimate decision in *Tolley.* In his judgment, Lord Blanesburgh sharply criticized the *Tolley* jury's verdict on the ground that he saw 'no evidence on the case presented, properly to instruct any damages *at all*'.[180] Yet, had the plaintiff made and proved his case, Lord Blanesburgh's view was that the particular allegation 'would have amounted to a serious imputation on the honour of the appellant, and, not being justified, might well have instructed exemplary damages'.[181] Like Lord Atkin four years later in *Ley*,[182] beyond using the phrase 'exemplary damages', Lord Blanesburgh did not clearly articulate the juridical basis of such an award. It is, therefore, unclear whether he had in

[177] Scrutton LJ's phrase was later adopted by Goddard LJ in *Knuppfer v London Express Newspapers Ltd* [1943] KB 80 (CA) 91: 'There must be some reasonable relation between the wrong done and the *solatium* applied'.

[178] Sir John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (6th edn, Sweet & Maxwell 1924) 129; WA MacFarlane and GW Wrangham, *Clerk and Lindsell on Torts* (8th edn, Sweet & Maxwell 1929) 119. After Salmond's death in 1926, the editorship of his torts text was inherited by the barrister and Oxford fellow, William TS Stallybrass. Although by the eighth (1934) edition, Stallybrass 'felt free to depart not only from the text of his author but to abandon fundamental principles from which analytical development proceed' (Fowler V Harper (1936) 1 UTLJ 395, 395), Salmond's *solatium* principle remained undisturbed, see WTS Stallybrass, *Salmond on the Law of Torts* (8th edn, Sweet & Maxwell 1934) 120.

[179] Mark Lunney, 'Uren v John Fairfax & Sons Pty Ltd (1966)' in D Rolph (ed), *Landmark Cases in Defamation Law* (Hart Publishing 2019) 158. The point is further evidenced in Mackinnon LJ's judgment in *Knupffer*: 'It is true that damages for defamation may be punitive, and need not be limited to any actual pecuniary loss that a victim can prove he has suffered', see *Knuppfer* (n 177) 85.

[180] *Tolley v JS Fry and Sons Ltd* [1931] AC 333 (HL) 348. (Emphasis added).

[181] ibid. For a discussion of the central liability question in *Tolley* through the prism of *iniuria,* see David Ibbetson, '*Iniuria*, Roman and English' in E Descheemaeker and H Scott (eds), Iniuria *and the Common Law* (Hart Publishing 2013) 37.

[182] Who had used the phrase 'vindictive or punitive damages', but seemingly linked them to (compensation) for the 'the insult offered or the pain of a false accusation', see *Ley* (n 3) 386.

mind the same (largely compensatory) award as Scrutton LJ, or a properly extra-compensatory award comprising 'a distinct and strictly punitive element'.

Importantly, the ostensibly 'poor position' in which twentieth-century English judges appear to have kept the award of exemplary damages can be explained by the extent to which it was, although no longer treated as an 'unregulated jury matter',[183] certainly still perceived as ideally suited to a jury. Reflecting 'on the whole region of the inquiry' in his speech in *The Mediana*, Lord Halsbury LC spoke of the two judicial entities to which the question of damages was 'remitted' – namely, 'the jury, or those who stand in place of the jury'.[184] In non-jury cases where judges remitted the question to themselves, there is a strong sense that they attempted to answer it by taking on the character of a jury. For example, in a 1942 action for trespass to land tried without a jury, Atkinson J justified his decision to further award the plaintiff what he described as 'aggravated damages' upon a supposition that 'a jury might give very high damages'.[185]

It is also significant that, as in *Tolley*, the damages ultimately fixed in aggravated tort cases were invariably 'global'. This meant that regardless of how properly judges might have directed juries about what the law required of them, the particular principles informing their awards remained ambiguous.[186] This may have contributed to the way in which English judges – both at first-instance and on appeal – generally apprehended damages inquiries.[187] Indeed, in 1925 in *Admiralty Commissioners v SS Susquehanna*, Atkin LJ (as he then was) professed that he generally found damages 'a branch of the law less guided

[183] See AWB Simpson, 'The Horwitz Thesis and the History of Contracts' (1979) 46 UChi L Rev 533, 550.
[184] [1904] AC 113 (HL) 116.
[185] *Lavender v Betts* [1942] 2 All ER 72, 74.
[186] Lord Denning MR made the observation in *Broome v Cassell & Company Ltd* [1971] 2 QB 354 (CA) 379: 'the [trial] Judge drew a distinction between compensatory and exemplary damages . . . and asked the jury to assess those two heads separately: whereas, before *Rookes v. Barnard* they would have been taken together as one total sum'.
[187] In aggravated cases tried without juries, how properly judges directed themselves in respect of damages was called into question, see *Cruise v Terrell* [1922] 1 KB 664 (CA) 670 (Lord Sterndale MR): 'The learned judge . . . found that . . . "there was no high-handed outrage perpetrated – not in the least." . . . The learned judge then proceeded to assess the damages at 60*l.* I am sorry to say he gives no reason to show how he arrived at that sum . . . It is not usually desirable to interfere with the judgment of a Court on a question of damages, but when it is found that there is no evidence of aggravation vindictive damages ought not to be given'.

by authority laying down definite principles than on almost any other'.[188] His comment was not meant as criticism. Indeed, when the shipping dispute ultimately occupied the Law Lords, Lord Sumner seemed to think that some of the House's 'dignity' risked being lost were the question of damages to be explored too searchingly. In a recent reflection upon Lord Sumner's remark in *The Chekiang*, Moore-Bick LJ supposes it was simply much easier for earlier century judges to 'hide behind the fact that the assessment of general damages [wa]s a matter of fact for the jury'.[189] In turn, within an adjudicative practice in which each jury's discretion over the question of damages remained widely respected, any definitive clarification of the juridical basis of exemplary damages awards appears not to have been seen as a particularly pressing appellate imperative.[190]

ii. A persistent 'Janus-like' attitude

Until *Rookes*, the common law of England had not come around to definitively accept either the compensatory or punitive theories of aggravated tortious recovery. This unresolved tension was encapsulated with classical metaphor by Harvey McGregor QC shortly before Lord Devlin's judgment. In the twelfth (1961) edition of Mayne's treatise on damages, McGregor described the English law pertaining to damages in aggravated cases as displaying a 'Janus-like attitude'.[191] Like the Roman god whose two faces looked in opposite directions, it remained unclear whether juries (or judges) increased their awards with a view to fully compensate, or to punish. Of course, being a book suited to 'the lawyer who is looking for the English law of Damages',[192] McGregor's aim had not been to correct this attitude. As Jolowicz noted in 1963, for that correction the English lawyer had to very shortly wait for the 'useful discussion of the principles which Professor Street claims to exist for the assessment of the non-pecuniary elements of damage'.[193] As the final part of

[188] *Admiralty Commissioners v SS Susquehanna* (1926) P 196 (CA) 210 (Atkin LJ), and going on: 'I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book upon the subject'.

[189] *West Midlands Travel Ltd v Aviva Insurance UK Ltd* [2013] EWCA Civ 887 at [18].

[190] This enduring respect was expressed in Havers J's judgment on the eve of *Rookes* in *Lewis v Daily Telegraph* [1963] 1 QB 340 (CA) 409: 'subject to a proper direction by the Judge, damages in an action for libel are at large and the assessment does not depend on any definite legal rule. The amount of damages is peculiarly the province of the Jury'.

[191] Harvey McGregor, *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961) 214.

[192] JA Jolowicz (1963) 21 CLJ 144, 145.

[193] ibid. See chapter 2 B i (a).

this chapter shows, the 'Janus-like attitude' to which McGregor referred is amply attested to in the sources, judicial and academic, up until the early 1960s.

(a) The two faces of aggravated tortious recovery

Twenty years before Lord Devlin's speech, the English Court of Appeal finally determined *Dumbell v Roberts and others*,[194] a false imprisonment action brought against three constables of the Liverpool City Police Force. Although the only issue on appeal was whether the constables had any justification for arresting the plaintiff,[195] Scott LJ adverted to the question of damages in tort actions involving disregard for the 'British principle of personal freedom'.[196] As he remarked:

> By the common law there was no fixed measure of damages for such an interference when unjustifiable because the damages are at large, and in so far as they represent the disapproval of the law – historically of a jury – for improper interference with personal freedom they may be "punitive" or "exemplary," given by way of punishment of the defendant or as a deterrent example, and then are not limited to compensation for the plaintiff's loss. The more high-handed and less reasonable the detention is, the larger may be the damages; and, conversely, the more nearly reasonable the defendant may have acted and the nearer he may have got to justification on reasonable grounds for the suspicion on which he arrested, the smaller will be the proper assessment.[197]

Unlike Scrutton LJ in *Tolley*, the *solatium* notion appears rather more suppressed in Scott LJ's judgment in *Dumbell.* Indeed, Scott LJ drew a stronger connection between "punitive" damages and a punitive response, and "exemplary" with a deterrent one. This is probably explained by the fact that the particular defendants in *Dumbell* (and being an action for false imprisonment) were police constables, therefore making false imprisonment liability one that might be readily put in the service of the demands of public policy that certain defendants be punished as a deterrent.[198] Especially curious, however, was Scott LJ's point

[194] [1944] 1 All ER 326.

[195] The plaintiff was arrested without a warrant and without making any inquiries as to his name or address for carrying a bag containing fourteen pounds of soap flakes which were rationed goods at the time, see ibid 326.

[196] ibid 329.

[197] ibid 329–330.

[198] Notably, Scott LJ added: 'just as it is of importance that no one should be arrested by the police except on grounds which in the particular circumstances of the arrest really justify the entertainment of a

that, 'in so far' as aggravated false imprisonment awards purported to fulfil distinctly punitive and deterrent ends, the expressed disapproval was to be understood as that of '*the* law', not of '*a* jury'. It strongly echoes Lord Sumner's point – although very much a "jury question", any disapproval expressed through an award of exemplary damages must be the result of a 'proper direction, as to what the law requires'.

(b) Devlin J's pre-Rookes exemplary damages direction

Exactly what 'the law' was seen to require before trial juries could apply an extra-compensatory punitive, or deterrent measure of damages also remained ambiguous. Perhaps the best pre-1964 example of this ambiguity manifesting in England's trial courts occurs in an absorbing direction Devlin J (as he then was) gave to a jury in the 1953 case, *Loudon v Ryder*.[199] Armed with a 'steel or iron instrument',[200] the defendant entered the plaintiff's property after climbing a ladder and breaking a pane of glass, which ultimately led to an altercation in which the plaintiff was assaulted.[201] On the evidence, the jury found both the trespass and assault proved, and were directed by Devlin J to assess damages separately for each of those torts. In his summing-up to the *Loudon* jury, Devlin J concluded: 'It seems to me to be on the agreed facts of the case quite plainly a case which calls for exemplary damages'.[202] But the statement of the law of exemplary damages that he proceeded to lay down to the jury reveals the principled tension that his own appellate judgment in *Rookes* strove to resolve a decade later. Regarding the damages for the assault, Devlin J said to them:

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reasonable suspicion, so also it is in the public interest that sufficient damages should follow in such a case in order to give reality to the protection afforded by the law', see ibid 329. In other cases, the *solatium* idea, although not always specifically mentioned, came out more strongly, see, for example, *Constantine v Imperial Hotels Ltd* [1944] KB 693, 708, where the plaintiff's counsel, Sir Patrick Hastings QC, asked Birkett J in an action brought under the common law principle that innkeepers must not refuse accommodation to guests without just cause to award the plaintiff 'exemplary or substantial damages, because of the circumstances in which the denial of the right took place when Mr. Constantine suffered, as I find that he did suffer, much unjustifiable humiliation and distress'.

[199] [1953] 2 QB 202 (CA).

[200] ibid 203.

[201] Singleton LJ narrated the facts extensively, noting that the defendant 'does not appear to have done any material physical damage to her, but it must have been upsetting for a young woman to be attacked like that by a man who came through the window', see ibid.

[202] ibid.

> If the assault is conducted in such a way as to insult the dignity of the person who is assaulted, if it is conducted in such a way as to invade the rights of the property that a person is granted by the law of this country the liberty to hold inviolate, in those circumstances the law permits a Jury or a Judge, if he happens to be doing it, to go outside the measure of compensation and assess damages, which are sometimes called exemplary, sometimes called punitive, sometimes indignant damages.[203]

The most obvious principled tension was Devlin J's association of damages given for the defendant insulting the plaintiff's 'dignity' with a measure of damages 'outside' compensation. Yet, what exactly he understood to be the nature of any (seemingly) extra-compensatory measure of damages is difficult to tell. Referring to what damages might be given 'by way of compensation' for the assault, Devlin J went on to remark:

> Under the head of assault itself you can properly consider the circumstances of the assault and you will decide upon a sum which you think is appropriate by way of compensation to the Plaintiff for the treatment she received, not only for the physical treatment, but for the way in which she was treated.[204]

On one plausible reading, Devlin J's direction regarding exemplary damages may be said to have suffered from the same interpretive ambiguity as Lord Atkin's remarks in the House of Lords in *Ley* two decades earlier. Despite presenting insult to dignity as punishable by 'exemplary' (or 'punitive' or 'indignant') damages, Devlin J also seems to have conceived it in terms of a further intangible injury that the defendant's assault had imported. Significantly, in his *Rookes* judgment in 1964, Lord Devlin asserted that the specific non-pecuniary elements of 'insult' and 'dignity' were to be properly conceived as 'matters which the jury can take into account in assessing the appropriate compensation'[205] – as he later emphatically put it, 'matters for compensation and *not* for punishment'.[206] Yet, at the time of submitting the plaintiff's case to the *Loudon* jury, Devlin J's direction regarding damages was very much consistent with prevailing accounts of the English common law of exemplary damages. For example, in the fifteenth (1951) edition of Pollock's torts treatise, the Oxford law don, Philip A Landon, said the following about when exemplary damages might be given:

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[203] ibid.

[204] ibid.

[205] *Rookes* (n 1) 1221.

[206] ibid 1231. (Emphasis added).

> The kind of wrongs to which [exemplary damages] are applicable are those which, besides the violation of a right or the actual damage, import insult or outrage, and so are not merely injuries but *iniuriae* in the strictest Roman sense of the term. The Greek hubris perhaps denotes with still greater exactness the quality of the acts.[207]

Clearly, the Roman delictual footing upon which Pollock had first situated the award of exemplary damages some sixty years earlier had remained essentially undisturbed.[208] It continued to conceive the elements of 'insult' and 'outrage' suffered by plaintiffs in aggravated cases as warranting the award.[209] Indeed, according to Ibbetson, Devlin J's explicit reference to both elements in his *Loudon* summing-up is 'quite unmistakeably redolent of the Roman law'.[210]

At the same time, however, it appears that Devlin J regarded punishment as the primary remedial principle upon which the doctrine of exemplary damages was based. Coincidentally, in the early 1950s the criminal law scholar and Quain Professor of Jurisprudence at University College London, Glanville Williams, published his article – 'The Aims of the Law of Tort'.[211] In it, he contended that vindictive, punitive and exemplary damages could be individually 'supported by reference to each of the three non-compensatory theories of the law of tort; the satisfaction of vengeance, ethical retribution, and deterrence'.[212] Clearly, Devlin J never subscribed to any of the general punitive tort theories to which Williams had referred. But he clearly accepted that such damages properly encapsulated a subordinate, though distinctly punitive, element of tortious liability. This was strongly expressed by Devlin J in his closing remark to the *Loudon* jury:

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[207] Philip A Landon, *Pollock's Law of Torts* (15th edn, Sweet & Maxwell 1951) 141–142.

[208] See (n 71).

[209] The preservation of Pollock's statement was indicative of a deliberate 'policy adopted in the fourteenth edition and maintained in the present one, which was "to preserve Pollock's language verbatim, so far as it is not actually misleading to the student",' see CF Parker, (1953) 16 MLR 114, 114.

[210] Ibbetson (n 181) 46. In further remarks to the *Loudon* jury as to how assault damages were to be assessed, Devlin J added: 'whether they [exemplary damages] are large or small is entirely a matter for you, but damages that are far more than nominal, in order to mark the *outrage*, because I do not think there is any doubt that it was an *outrage* that was committed against the Plaintiff', see *Loudon* (n 199) 203. (Emphasis added).

[211] Glanville Williams, 'The Aims of the Law of Tort' (1951) 4 CLP 137, 148.

[212] ibid. Williams added: 'The first two objects are probably dominant, but instances are not wanting in the reports of an avowed deterrent theory'.

> The punitive damages are rather like imposing a fine as if you were a bench of Magistrates and you wanted to impose a fine which made it quite clear what view you took of a wanton and wilful disregard of the law, or for somebody else's rights, and wished to make it quite plain that you marked the seriousness of the offence, if it was a serious offence, and so to show the Defendant that he cannot do that sort of thing with impunity.[213]

On appeal, the defendant's counsel 'submitted it was wrong to direct the jury'[214] that exemplary damages function like a criminal fine. Despite Devlin J's unequivocal invocation of the criminal jurisdiction, the Court of Appeal (consisting of Singleton, Denning and Hodson LJJ) 'saw no fault in the direction given'.[215] Despite its length, his summing-up ensured that the jury's ultimate award would be, in Lord Sumner's phrase, 'measured under a proper direction, as to what the law requires'.[216] In firm defence of Devlin J's direction, Singleton LJ commented: 'the Judge was entitled to direct the jury that they could give damages of an exemplary or punitive kind'.[217]

(c) Tensions immediately before Rookes

Devlin J's direction to the *Loudon* jury was not the final appearance of the principled tensions underlying the English practice of aggravated tortious recovery before *Rookes*. It appeared again in 1960, in the decision of the Court of Appeal in *Williams v Settle*.[218] The case involved a breach of copyright of a photograph. In view of the circumstances, the first-instance judge, Blagden J (sitting without a jury) concluded that damages were prone to aggravation because of the defendant's ill-motive: the defendant, who had been hired to

[213] *Loudon* (n 199) 203. The *Loudon* jury ultimately gave a differentiated award consisting of: £1500 damages for trespass, and £1000 for assault; and £3000 exemplary damages [for the assault] (203).
[214] ibid (Mr Breyfus QC).
[215] ibid.
[216] Significantly, Singleton LJ added that a 'Court does not lightly interfere with the verdict of a jury if there is a proper direction', of which Devlin J's undoubtedly was, see ibid.
[217] ibid. By later explicitly recognizing 'aggravated (compensatory) damages' in his *Rookes* judgment, Lord Devlin's was resigned to the consequences of doing so for the Court of Appeal's earlier defence of his own direction in *Loudon*: '*Loudon* v. *Ryder* ought, I think, to be completely overruled. The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case and I can see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such', see *Rookes* (n 1) 1146.
[218] [1960] 1 WLR 1072 (CA).

photograph the plaintiff's wedding, later sold some of the photographs to the press, which subsequently appeared in two prominent tabloid newspapers. Blagden J found on the evidence that the defendant 'must have known the use which would be made of the photographs which he supplied'.[219] 'I regard this as a shocking case',[220] he stated, before declaring it his (legal) 'duty to award damages that are really vindictive'.[221] The plaintiff's damages were assessed at £1000. As in *Loudon*, the defendant's counsel sought a new trial, *inter alia*, on the ground of misdirection; only this time the contention was that 'in awarding vindictive damages'[222] the trial judge had misdirected himself rather than a jury.

The Court of Appeal saw no fault in Blagden J's direction. For present purposes, Sellers LJ's defence of Blagden J's direction is the most interesting. In his view, the essential purpose of the additional 'vindictive' award was to 'hold the defendant up as an example to the community'.[223] Justified on this basis, he stated that such an award 'may act as a deterrent to others who are willing to supply to the press information which they know is going to be used in a manner which will be so hurtful and distressing to the people involved.[224] Yet, the more Seller LJ's amplified his reasons for the propriety of Blagden J's direction, the more Janus' second face began to show:

> It is sufficient to say that it [the defendant's conduct] was a flagrant infringement of the right of the plaintiff, and it was scandalous conduct and in total disregard not only of the legal rights of the plaintiff regarding copyright but of his feelings and his sense of family dignity and pride. It was an intrusion into his life, deeper and graver than an intrusion into a man's property.[225]

Clearly, Sellers LJ conceived of vindictive damages as based on conflicting remedial principles: at once, they purported to impose an exemplary punishment on the defendant and compensate the plaintiff for the further intangible injuries that the aggravated nature of the defendant's wrong had caused him to suffer. The Court of Appeal's recent judgment in *Williams* evidently bore heavily on Lord Devlin's judgment in *Rookes* three years later.

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[219] ibid 1077.
[220] ibid.
[221] ibid.
[222] ibid.
[223] ibid 1081.
[224] ibid.
[225] ibid.

The principled conflict latent in Sellers LJ's reasons encouraged Lord Devlin in his view that the case could be, as he put it, 'justified in the result as . . . [one] of aggravated damage'.[226] Whatever aggravated elements had mingled in Blagden J's global £1000 sum, it could 'to my mind', Lord Devlin stated, 'more easily be justified on that ground than on the ground that they were exemplary'.[227] By the 1960s, no attempt in England had been made to slough-off aggravated damages from exemplary damages; and, in doing so, to definitively align the former, as Street went on to align it, with an overriding principle of *restitutio in integrum*.

(d) Street and the origins of the aggravated-exemplary distinction

Before foraying into the law of damages in 1962, in 1955 Street had published his avowedly student-friendly text on torts – the first living English university teacher to produce a new text on the subject, and the first 'who has graduated in the law since the first World War'.[228] Its discussion of exemplary damages shows that he was already, not only acutely aware, but less than satisfied with the Janus-like attitude afflicting the English practice of aggravated recovery.[229] Upon closer examination, the essence of the principled solution he went on to advocate in his 1962 book on damages had already been tentatively set forth in 1955. It is strongly alluded to by the title of his discussion: 'Aggravated and Exemplary Damages Distinguished'.[230] His discussion began with a frank admission that 'distinguishing aggravated and exemplary damages is not always easy'.[231] But he accepted the challenge. As he stated:

> In order to ascertain the nature and the extent of the injury done to the plaintiff, it is often material to examine the circumstances surrounding the commission of the act. In other words, the general damages capable of being inferred depend on the

[226] *Rookes* (n 1) 1146.
[227] ibid.
[228] Harry Street, *The Law of Torts* (Butterworth & Co 1955) v. On the attraction of Street's torts book as a teaching text, see Glanville Williams (1956) 14 CLJ 251, 254.
[229] Very soon after Street, John G Fleming seems to have been equally aware, but rather less inclined to offer a solution, see John G Fleming, *The Law of Torts* (Law Book Co of Australasia 1957) 2: 'where the defendant's wrongdoing was deliberate, juries are frequently permitted to demonstrate their disapproval by awarding 'punitive' or 'exemplary' damages, and in such instances the tort remedy fulfils the *dual function* of both repairing the plaintiff's loss and penalizing the aggressor'. (Emphasis added).
[230] Street, *The Law of Torts* (n 228) 460.
[231] ibid.

> circumstances. Where the general damages are accordingly increased they are then often called aggravated damages.[232]

For Street, the labels 'exemplary', 'vindictive' and 'punitive' failed to 'adequately describe'[233] the emphatically compensatory purpose of tort awards given in the above situation. It is difficult to tell how influential Street's attempt at a separation of 'aggravated damages' from other, distinctly punitive, damages was. Six years later, in the thirteenth (1961) edition of Salmond's *Law of Torts*, Robert VF Heuston's view was that exemplary damages 'are also known as vindictive, aggravated, retributive, penal and punitive'.[234] It is tempting to assume that Heuston was aware of Street's recent attempt to corral non-pecuniary, essentially intangible, elements of damage under the unifying label 'aggravated' damages. For Heuston, however, it seems to have remained an academic point. 'No distinction', as he saw it, 'has been taken *in the authorities* between "aggravated" and "exemplary" damages'.[235] Of course, it was a distinction that Street not only revisited the following year, but critically cast as one of the largest problems afflicting the English law of damages. In *Rookes*, Lord Devlin not only saw the merits of Street's principled distinction, but set out to forge it – authoritatively – into law.

E. Conclusion

This chapter has presented an account of the development of the common law of exemplary damages from the breakthrough decisions in *Emblen* and *Bell* in the 1860s, to that of the House of Lords in *Rookes* one hundred years later. It explored key attempts of proponents of treatises and textbooks systematizing both the laws of damages and torts made to elaborating a nascent legal doctrine of exemplary damages. In articulating when the award of exemplary damages would be permitted by the common law, these writers were engaged in a process of classifying aggravating facts through recourse to general principles. The evocation of the Roman delictual notions of *iniuria* and *solatium* saw them try to bring out

[232] ibid. Street only cited the assault case of *Dean v Hogg and Lewis* (1833) 6 Car & P 54, 58; 172 ER 1143, 1145 (Alderson J) as an early example of the situation in which 'aggravated damages' were awarded (although Alderson J did not use that term). See chapter 2 C i (c).
[233] ibid.
[234] RVF Heuston, *Salmond on the Law of Torts* (13th edn, Sweet & Maxwell 1961) 739.
[235] ibid. (Emphasis added).

ideas that they often saw as latent in the historical tort cases. Judicial decisions showed that these academic attempts gave important shape and content to the exemplary damages doctrine that common law judges increasingly administered.

As this chapter further showed, the elaborated common law of exemplary damages was not concerned with definitively aligning the award of exemplary damages with a compensatory or punitive principle. As key pre-*Rookes* decisions in the High Court, Court of Appeal and House of Lords have shown, English judicial thought on exemplary damages revealed an abiding tension between principles of compensation and punishment. Well into the twentieth-century, this tension was not widely perceived as raising serious methodological or conceptual problems. It has been suggested that, although the jury was no longer the only mode of tort trial in England's common law courts, the inquiry of damages in aggravated cases was widely perceived as better suited to their remedial judgment. In turn, a trial judge could acceptably direct a jury (and, in some cases, himself) as to what 'the law' required without identifying that part of their award given, either as punishment of the defendant, or as full compensation to the plaintiff. The point was lucidly made by Lord Wilberforce in his 1972 judgment in *Cassell & Co Ltd v Broome.*[236] Sceptical of Lord Devlin's view that, as Lord Denning MR had put it, 'exemplary damages had no place in the civil code',[237] Lord Wilberforce reflected:

> English law does not work in an analytical fashion; it has simply entrusted the fixing of damages to juries upon the basis of sensible, untheoretical directions by the judge with the residual check of appeals in the case of exorbitant verdicts.[238]

As this chapter has shown, despite conscious attempts to elaborate a common 'law' of exemplary damages from the third quarter of the nineteenth-century, the common law practice of aggravated tortious recovery remained 'untheoretical' in the sense that it was not definitively aligned with any overriding principle of compensation or punishment. What Lord Devlin grudgingly called 'the respect . . . traditionally paid to an assessment of damages by a jury'[239] had for a long time helped preserve this decidedly 'under-

[236] [1972] AC 1027.
[237] *Broome* (n 186) 381.
[238] *Cassell* (n 236) 1114.
[239] *Rookes* (n 1) 1228.

theorized'[240] *status quo*. Indeed, reflecting on the conflicting tort theories of compensation and punishment, Lord Wilberforce added in his *Cassell* judgment: 'As a matter of practice, English law has not committed itself to any of these theories: it may have been wiser than it knew'.[241] The abiding wisdom of the historical common law was a deeply practical one – trial by jury.

[240] Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 1.
[241] *Broome* (n 236) 1114.

CHAPTER 7

Conclusion

A. The Critical Historical Perspective on Exemplary Damages

This thesis has set out to critically explore the history of the practice of extra-compensatory, distinctly punitive, recovery in English tort actions. It has examined the period from the beginning of the seventeenth-century, to the House of Lords' most recent restatement of the exemplary damages doctrine in 1964. It has sought to open a new critical perspective on this past by re-examining it through the prism of that peculiarly English mode of adjudication in which, for many centuries, tortious injustices were rectified at common law – trial by jury. In doing so, this thesis has shown that the adjudicative practice in which tortious controversies were historically resolved at common law operated in ways not fully considered or appreciated by modern scholars of tort law, tort theorists in particular. By critically exploring the jury's place within that adjudicative practice, this thesis has sought to challenge the positivist assumptions that continue to guide, even control, modern understandings of the common law practice of exemplary damages. Its intended effect has been to upset settled historical accounts of the emergence and growth of the exemplary damages award at common law, as well as complicate modern theoretical criticisms of the legal doctrine that continues to allow for it.

i. 'Legal centralism' and its historical inadequacies

In contemporary practice, the imposition of tort damages beyond compensation is grounded in a ruling judicial authority's determination of the legal damages doctrine applicable to an aggravated tortfeasor's wrong. In this sense, their imposition in modern tort law adjudication reflects and reinforces the modern state's role as 'the monopolist of legitimate coercion'.[1] '[L]egitimate', Gordon explains, 'because coercion is regularly and

[1] Robert W Gordon, 'Without the Law II' (1986) 24 OHLJ 421, 422.

rationally imposed through the forms of law'.[2] The contemporary practice of exemplary damages might, in turn, be said to represent what Galanter and Luban characterize as a 'theoretical bias toward legal centralism'.[3] According to Gordon, legal centralism is 'otherwise known, in the classic formulation of AV Dicey, as the Rule of Law'.[4] It captures the late nineteenth-century vision of law as a normative practice marked by the 'primacy of formal state law applied through the ordinary courts'.[5]

(a) The decentralized verdict on damages in earlier tort practice

Among the implications of this modern positivist vision of law is its rejection of all rival sovereigns. According to Gordon, as part of this vision there can be no '"Alsatia where the King's writ does not run," no coordinate or superior sources of normative direction or coercive enforcement'.[6] Across its long institutional evolution, the English common law jury was not a rival jurisdiction. Upon the trial of a tort plaintiff's claim, the centralized apparatus of royal justice comprised the enforcement arm of the jury's verdict. Nor was it an 'extra-legal' institution. As chapter 3 of this thesis showed, even during the early modern period of its evolution from an essentially testimonial to an adjudicative body, the common law jury remained centrally accountable for the verdicts they returned. This included accountability for the size of the damages awards they fixed. By the middle of the seventeenth-century accountability assumed the form of a defendant's right to request a new trial.

Yet, for most of tort history the judgments juries formed about a tort defendant's full financial liability to the plaintiff had scarcely a claim on the attention of English common lawyers. This is because each jury's collective remedial judgment operated outside a positivist system of judicially administered legal rules of tortious recovery. As chapters 3 and 4 of this thesis combined to show, in 'peculiarly circumstanced'[7] matters of tort, the

[2] ibid.
[3] Marc Galanter and David Luban, 'Poetic Justice: Punitive Damages and Legal Pluralism' (1993) 42 AmU L Rev 1393, 1401.
[4] Gordon, 'Without the Law II' (n 1) 436.
[5] ibid 422.
[6] ibid 421.
[7] *Sharpe v Brice* (1774) 2 Black M 942, 943; 96 ER 557, 557 (De Grey CJ).

inquiry of damages was not answered by the king's judges drawing a conclusion about a doctrine of civil remedies applicable to an aggravated tortfeasor's wrong. As the English jury continued its institutional evolution into a judge of evidence during the seventeenth and eighteenth-centuries, it came to play an increasingly vital role as a coordinate – even superior – source of normative direction at the remedial stage of common law tort actions. Indeed, before the putative legal landmarks of *Huckle v Money*[8] and *Wilkes v Wood*[9] were decided in the third quarter of the eighteenth-century, the extent of the norm-setting authority exercised by juries in respect of damages was emphatically recognized by the central common law courts. As chapter 5 demonstrated, it was in those two high-profile cases that the Chief Justice of the Court of Common Pleas championed the jury's adjudicative competence over the question of tortious recovery. After *Huckle* and *Wilkes* were decided, the proper remedial principles to be applied in sealing an aggravated tortfeasor's ultimate financial fate were explicitly recognized as lying outside the province of a royally administered body of positive remedial law. In each case, they lay in what was increasingly designated as the jury's 'constitutional' province of adjudication. In cases touched by aggravating matters, it was within this province that jurors applied principles – not exclusively designed to compensate for the full extent of tortiously suffered injury – but to punish tortious wrongdoing independent of its contribution, however intangible to the plaintiff's suffering.

Yet, the historical jury's norm-setting power should not be thought of as entirely detached from positive law either. As the later medieval jury shed its testimonial function, the common law judges became increasingly responsible for maintaining and administering evidentiary matters. Through the influential device of judicial comment on the evidence, trial judges told jurors when aggravating evidence about the nature and circumstances of the defendant's conduct could be permissibly considered in settling the plaintiff's full recovery. In turn, a trial judge's decision about whether a tort plaintiff's case was to be properly treated as 'aggravated' strongly influenced jurors in determining how heavily to weigh on a defendant in damages. A re-examination of the historical sources, however, shows that trial judges were far from consistently concerned about the remedial principles

[8] (1763) 2 Wils KB 205, 95 ER 768.
[9] (1763) Lofft 1, 98 ER 489.

that may have undergirded the damages awards settled by juries. This is not to say that they were never concerned with remedial outcomes in individual cases. Rather the evidence strongly suggests that the normative problem of rebalancing the relationship between tort plaintiff and tort defendant was fundamentally conceived as a local concern. This meant its resolution, in each case, lay with the jury. It was shown that this localized normative practice of quelling tortious controversies continued for a very long time after the *North Briton* cases were decided in 1763.

(b) Towards the centralization of an aggravated tortfeasor's punishment

Significantly, this thesis went on to show that for much of the nineteenth-century the legal historian is still at a loss to identify a positive legal rule of exemplary damages. The practice of giving damages in aggravated tort cases – whether for the distinctly *compensatory* purpose of 'solacing' non-pecuniary, essentially intangible, injuries that aggravated tortious mischief may have additionally inflicted, or for the distinctly and strictly *extra*-compensatory purpose of inflicting some form of punishment on the aggravated wrongdoer – continued to essentially operate as a localized judgment, albeit within the centralized adjudicative structure of English civil justice. As chapter 6 showed, it was not until the second half of the nineteenth-century when this formerly localized normative practice of aggravated tortious recovery started, in earnest, to evolve into its modern – 'rule of law' – condition. Private law historians, however, have paid less attention to this period. It was marked by a gradual calling into question of the normative legitimacy of the jury's collective judgment about a tort defendant's full financial liability. It also reflected a commitment to a positivist conception of legitimate judgment that associated the proper resolution of tortious controversies with the consistent administration and application of legal rules. This commitment saw at least some trial judges increasingly predicate awards of exemplary damages on a reviewable direction regarding the legal damages measure applicable to facts about a defendant's tortious wrong. Through gradual steps, exemplary damages became positively part of 'common-lawyers' law'.[10]

[10] Gordon, 'Without the Law II' (n 1) 427.

Yet, despite these important late nineteenth-century developments, this thesis has shown that the common law's deep anti-formal tendencies persisted. Even into the twentieth-century, common law judges continued to guard the jury's special adjudicative role in determining the nature of a tort plaintiff's recovery. As chapter 6 showed, it meant that treatise writers, broaching the subjects of damages or torts, as well as senior common law judges, were not primarily concerned with aligning aggravated tortious recovery either with a compensatory, non-punitive, principle, or an extra-compensatory, distinctly punitive, one. Across this wide-ranging literature, principled tensions between compensation and punishment were apparent. Significantly, however, they never led to any overt conflict in an English appellate judicial decision. As the first chapter of this thesis showed, it was not until 1962 that Professor Street proclaimed the English law of damages applicable to the resolution of aggravated tortious wrongdoing 'under-theorized'.[11] As part of a forceful mid-century push for the 'total acceptance of the principle of compensation over the whole range of the law of damages',[12] Lord Devlin went on to restate the English common law pertaining to aggravated recovery in tort in his 1964 judgment in *Rookes v Barnard.*[13] The effect of doing so was to drastically restrict a punitive doctrine of exemplary damages.

B. Upsetting Historical Accounts of Exemplary Damages

By critically exploring the common law practice of extra-compensatory punitive recovery through the historical prism of trial by jury, this thesis has offered a revised account of how exemplary damages became 'ensconced' in positive law. According to the received interpretation, 'punitive damages appear late in the common law'[14] – as late, in fact, as 1763 in two trespass actions that arose from the publication of the controversial *North Briton No. 45.* Importantly, however, this received interpretation has not only been advanced by legal historians. Theoretically inclined scholars have also utilized it, and for their distinctive purposes have reinforced it as well.

[11] Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 1.
[12] Harvey McGregor, 'Compensation Versus Punishment in Damages Awards' (1965) 28 MLR 629, 653.
[13] [1964] AC 1129 (HL) 1226–27.
[14] Bailey Kuklin, 'Punishment: The Civil Perspective of Punitive Damages' (1989) 37 ClevSt L Rev 1, 3.

Essentially, it has enabled modern tort theorists to present the *North Briton* cases as having ended the formative period of the English common law; one in which the practice of civil recovery had been fundamentally dissociated from all extra-compensatory principles. By formally installing the principle of punishment into the law of civil remedies in Michaelmas Term 1763, Pratt CJ, the narrative goes, wrought incoherence upon it. This incoherence was, in turn, exported to new jurisdictions where the English common law took root. Only in England, however, has a superior common law court since attempted to correct the common law's original, later eighteenth-century error.

i. Challenging the traditional positivist narrative

By entering the long pre-*Rookes v Barnard* dimension of extra-compensatory punitive recovery in tort, this thesis has demonstrated that the tendency to reduce the origins and growth of its distinctively common law practice to neat legal-doctrinal explanation has distorted and narrowed the historical perspective.

(a) The proper significance of Pratt CJ and the North Briton

The tracing of the modern doctrine of exemplary damages to events that transpired in the latter months of 1763 is problematic in two key respects. First, it overstates the importance of the first appearance of the term 'exemplary damages' in the report of the defendant's in banc motion for a new trial on the ground of excessive damages in *Huckle*. Secondly, it questionably interprets Pratt CJ's summing-up remarks at the trial of John Wilkes' claim as a direction to the *Wilkes* jury about how the common law now permitted them to assess his damages.

Ultimately, this thesis suggests that the positivist search for a doctrinal *fons et origo* of exemplary damages at English common law is fruitless. Those that have been attempted have tended to distort historical accounts of exemplary damages in the common law tradition. Chapter 3 set out to challenge the claim that 'English juries first awarded modern exemplary damages as a remedy for civil wrongdoing in the companion cases of *Wilkes* v.

Wood and *Huckle* v. *Money*'.[15] On the basis of a systematic account of the place of aggravation in the pre-1763 litigation and adjudication of tort disputes, it contended that the *North Briton* cases were likely not the first instances of tort law adjudication where English juries responded by way of damages to matters of aggravation in a way that did not conform to the principle *restitutio in integrum*. As chapter 3 showed, within their proper adjudicative province, and in certain select cases well before Michaelmas Term 1763, extra-compensatory principles of punishment (and example) appear to have shaped remedial outcomes in tort. Chapter 4 went on to critically examine whether Pratt CJ's intervention in the *North Briton* cases really did have the disruptive effect of making it, as Street contended, '*the law* that damages going beyond mere compensation may be awarded in tort'.[16] The evidence in support of Street's contention was scant. A careful re-examination of the post-1763 sources plausibly showed that the common law practice of exemplary damages spanning the period before and after 1763 was marked by a high level of continuity; a continuity that doctrinal legal historians have not appreciated.

(b) A much later doctrinal emergence

The proper significance of Pratt CJ's role in the *North Briton* litigation has also tended to elude historians. Its significance lay in his resounding endorsement of the jury as the constitutional judges of damages. The elevation of the jury's assessment of damages function to constitutional status should not be understated. It seems to have aroused greater hesitancy about the exercise of the central courts' superintending power over the size of tort verdicts on the explicit basis that to do so would improperly impinge on a prerogative assigned to the jury by the constitution. As noted above, this is not to suggest that trial judges did not occasionally call on jurors to give very large and often exemplary damages, but rather that these occasional exhortations should not be misconstrued as technical 'directions' about the proper legal measure of damages to be applied. Despite the sporadic appearance of the term 'exemplary damages', as well as other cognate terms like 'vindictive damages' in the late eighteenth and early nineteenth-century trial reports, the earliest indication of an English trial judge directing a jury that 'the law' warranted them

[15] Nathan S Chapman, 'Punishment by the People: Rethinking the Jury's Political Role in Assigning Punitive Damages' (2007) 56 Duke LJ 1119, 1125.
[16] Street (n 11) 29. (Emphasis added).

to give exemplary damages does not appear until the second half of the nineteenth-century. This period saw the common law judges gradually corral the formerly localized practice of aggravated tortious recovery within a positivist framework of legal damages rules. Into the twentieth-century, legal writers – systematizing the laws of damages, and later, torts – continued to elaborate a common 'law' of aggravated tortious recovery. This literature contributed to ensuring that extra-compensatory punitive liability be imposed, not at the arbitrary whim of a jury, but within a judicially administered system of positive remedial law.

C. Complicating Theoretical Accounts of Exemplary Damages

The historical account that this thesis has offered has not merely set out to shed new light on how the exemplary damages doctrine came to be at common law. It has also sought to generate critical insights about the modern controversy surrounding it, including distinctly theoretical attempts to finally solve it. It has purported to do so by exploring the practice of extra-compensatory punitive recovery through the critical historical prism of trial by jury. When viewed through this prism, it is apparent that tort practice has changed in quite important ways across time, including in ways modern tort theorists have not fully recognized.

i. An unrecognized instance of change

The question of how 'tort' has changed across time has occupied certain quarters of modern justice-based tort theory. On the question of tort's temporal change, the leading modern tort theorist, John CP Goldberg, remarks as follows:

> What counts as a tort, who can sue for a tort, what processes are deployed to resolve such suits, the relief a successful tort claimant can expect to recover – all of these have changed over the course of Anglo-American legal history. But these changes have involved alterations of a continuously existing body of law.[17]

[17] John CP Goldberg, 'History, Theory and Tort: Four Theses' (2018) 11 JTortLaw 17, 23.

In turn, although Goldberg accepts that tort has changed over many centuries, his view is that none of its changes properly 'support a claim of radical discontinuity'.[18] Indeed, such has been tort law's continuity, he suggests, that '[i]f you sat that down for a chat with Matthew Hale, John Locke, or William Blackstone, you could have a perfectly cogent conversation about torts'.[19]

(a) An evolving normative practice of adjudicating tort disputes

Reflecting on how the common law evolves across time, SFC Milsom stated that '[f]undamental change happens slowly and by stages'.[20] At any point in time, change will appear 'so small that nobody at the time could see them as in any way important, let alone as steps toward an unimaginable future'.[21] Milsom thought that the only way for historians of the common law to apprehend its largest developments is to resist 'project[ing] essentially still and close up pictures, assembling all the evidence for narrow subjects in short periods'.[22]

Explored through the critical historical prism of trial by jury over a period of some four centuries, this thesis has purported to show how the practice of adjudicating tort disputes at historical common law has importantly changed. In doing so, it has resisted the temptation to view much of tort's historical practice as, in all fundamental respects, 'existing on a timeless horizontal plane with the present'.[23] Instead it has set out to identify its 'otherness' – historical aspects that the present practice of adjudicating tort disputes has, to use Gordon's phrase, 'defined itself in opposition to, or alternatively has claimed to have safely buried in its discarded past'.[24]

The historical aspect of tort practice that this thesis has attempted to illuminate was the extent of the normative authority that English juries exercised at the remedial stage of

[18] ibid.
[19] ibid.
[20] SFC Milsom, *A Natural History of the Common Law* (CUP 2003) 75–76.
[21] ibid.
[22] ibid.
[23] Robert W Gordon, 'Foreword: The Arrival of Critical Historicism' (1997) 49 Yale LJ 1023, 1023.
[24] ibid.

common law tort actions. For centuries, the determination of a tort defendant's full financial liability was an inquiry undertaken by local jurymen exercising a collective judgment, not judges administering positive legal rules. By Blackstone's time, these adjudicative arrangements had come to reflect the common law courts' basic constitutional commitments when administering tort trials. Conversing with a modern Anglo-American tort lawyer, an eighteenth-century jurist (like Blackstone) might be expected to rationalize these commitments as 'deeply rooted in Anglo-Saxon distrust of magisterial authority'.[25] It is not, therefore, only tort's positive legal content that has changed across time. As Wells states, '[t]he adjudication of tort disputes is a normative practice that has evolved slowly over a period of centuries'.[26] Albeit 'slowly and by stages', this practice has evolved across time, and in a way that might plausibly support a claim to at least significant discontinuity between past and present.

ii. Tort theory's limited concern with tort as an adjudicative practice

Of course, not all modern justice-based theories of tort in the common law tradition are concerned with it as a 'practice'. The dominant theoretical view does not think about tort 'as a collection of adjudicatory practices that are employed to resolve private disputes'.[27] Instead tort is primarily thought about as an independent body of positive private legal doctrine, and which recent generations of 'judges have increasingly lost their feel for how to reason about it'.[28]

(a) Practice-based and rule-based theoretical approaches

That being said, some quarters of modern justice-based theory claim to be more 'practice-based'[29] in their outlook than others. One example is Goldberg and Zipursky's theorization of tort. In shedding light on the concept of tort law, Zipursky argues that the normative

[25] Henry L Walker, 'Judicial Comment on the Evidence in Jury Trials' (1929) 15 AmBarAssocJ 647, 647.
[26] Catharine P Wells, 'Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication' (1990) 88 Mich L Rev 2348, 2362.
[27] ibid 2353.
[28] John CP Goldberg, 'Benjamin Cardozo and the Death of the Common Law' (2018) 34 Touro L Rev 147, 147.
[29] Benjamin C Zipursky, 'Pragmatic Conceptualism' (2001) 6 LT 457, 485.

coherence of tort law's positive legal content cannot be the theorist's only concern. He contends that a truly pragmatic tort theory requires 'human practices to take center stage'.[30] The 'human' aspect of tort practice is, perhaps, most clearly visible in the different groups of people that are still involved in the quelling of tort controversies. One such group is the civil jury. Indeed, Goldberg suggests that the jury's role in rectifying tortious injustices is a theoretically relevant feature of contemporary tort practice. This is especially so in the case of modern American tort practice. 'A central distinguishing feature of American as opposed to commonwealth tort practice', he suggests, 'is the civil jury'.[31] By adopting a practice-based perspective, theorists like Goldberg and Zipursky aspire to a level of normative coherence that is commensurate with the fact that tort law is, as it has been put, a 'human institution'.[32] Moreover, because exemplary damages awards in American tort practice are closely linked to trial by jury, Goldberg and Zipursky have set out to produce a justice-based theory of tort that accommodates rather than abrogates them. Their civil recourse – or 'wrongs-and-redress' – theory claims to do so.[33]

Yet, perhaps the more dominant outlook in modern tort theorizing is what Wells describes as 'rule-based'.[34] It is definitely the outlook preferred by normative corrective justice theorists. Among its leading proponents have been Weinrib and Beever. Their primary goal is to show how the positive content of tort law can be rendered an 'intelligible normative phenomenon'.[35] According to Beever, the aim is 'to provide the most conceptually satisfying account of the norms found in that law'.[36] And he states that '[t]his may mean deciding that certain elements of the positive law are defective'.[37] Unlike practice-based approaches, rule-based approaches are not as accommodating of particular institutional

[30] ibid 470.

[31] John CP Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 Geo LJ 513, 576–577; he then asks: 'Does corrective justice theory regard itself as obligated to account for that important feature of American practice?'.

[32] Zipursky, 'Pragmatic Conceptualism' (n 29) 468.

[33] Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 Geo LJ 695, 695–756; Benjamin C Zipursky, 'A Theory of Punitive Damages' (2005) 84 Tex L Rev 105, 151: 'our system recognizes in one who has been wronged an entitlement to an avenue of civil recourse against the wrongdoer'. On the tort victim's part, this includes a 'right to be punitive' against their wrongdoer (151).

[34] Wells, 'Tort Law as Corrective Justice' (n 26) 2353.

[35] Ernest J Weinrib, 'The Monsanto Lectures: Understanding Tort Law' (1989) 23 ValU L Rev 485, 497.

[36] Allan Beever, *A Theory of Tort Liability* (Hart Publishing 2016) 5.

[37] ibid.

features of the contemporary practice of adjudicating tort actions. As Weinrib states, the aim of normative corrective justice tort theories is 'to present at a high level of abstraction what it means for private law to be fair and coherent on its own terms'.[38] The fact that trial by jury remains centrally part of the modern practice of American tort law adjudication, including its practice of giving punitive tort damages, is theoretically irrelevant. It does not prevent extra-compensatory punitive damages from being seen as a conceptually 'defective' element of tort '*qua* normative phenomenon'.[39] From the rule-based perspective, tort law's normative coherence as a body of positive law requires abolishing exemplary damages.

iii. Modern positivist assumptions of adjudicative tort practice

Evidently, practice-based and rule-based theories of tort law afford different levels of 'respect for existing practices'.[40] These include the different normative-adjudicative practices used to resolve common law tort disputes. Practice-based and rule-based theories of tort share an important similarity: *both* engage the modern exemplary damages controversy from within a positivist structure of tort law adjudication. A tortfeasor's full financial liability is unproblematically determined by judges administering a body of positive legal doctrines.[41] Among them is the norm which allows a tort plaintiff to collect damages beyond the fullest extent of their suffering, and for the essential purpose of punishing the defendant who has done them wrong.

(a) The a-historical '*Aristotelian judge*'

Under tort law's modern positivist adjudicative practice, tort theorists strive to show modern judges what is 'required to determine corrective justice in all cases'.[42] Their aim

[38] Ernest J Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 FlaStU L Rev 273, 291.
[39] Beever, *A Theory of Tort Liability* (n 36) 5.
[40] Wells, 'Tort Law as Corrective Justice' (n 26) 2362.
[41] Zipursky assumes that the practice of exemplary damages has always been 'rule-based' in the sense that juries have always acted under a trial judge's legal 'instructions', see Zipursky, 'A Theory of Punitive Damages' (n 33) 152: 'the jury has been told, historically, that the purpose of the award is to punish and to set an example'.
[42] Mark C Modak-Truran, 'Corrective Justice and the Revival of Judicial Virtue' (2000) 12 YaleJL&Human 249, 254.

is to create the model tort law adjudicator – the 'ideal Aristotelian judge'.[43] In order to do so, they critique the body of positive tort law that modern judges administer in order to detect unfair and incoherent doctrine. By ceasing to administer unfair or incoherent tort doctrine, modern tort judges can finally fulfil the adjudicative function that a normatively coherent grasp of tort law's positive legal content makes possible. The aim of this familiar positivist adjudicative function is to put the parties to a tort action 'back into equilibrium with one another'.[44] Yet, by administering a (defective) damages doctrine – like exemplary damages – whose 'normative force'[45] applies only to the defendant in a tort action, corrective justice cannot be done.

Discussing the place of punishment in the common law of tort, Beever notices that common law judges have tended to find the role of punishment in tort law 'quite intuitive'.[46] He thinks this intuition can be partly explained by the fact that common law jurists (unlike their continental counterparts[47]) did not benefit 'from centuries of legal theory based on corrective justice'.[48] Had earlier generations of common law judges benefitted from it, he argues, they would have realized a lot earlier that a doctrine of exemplary damages based – not on corrective justice – but retributive justice fitted 'very poorly with substantive law'.[49]

Of course, corrective justice theorists would be correct to point out that a constant feature of tort law across time has been its correlative structure. Like the present, the 'world' of historical tort was similarly, to use Cane's phrase, 'organize[d] . . . in terms of bilateral

[43] ibid. See Ernest J Weinrib, 'The Special Morality of Tort Law' (1989) 34 McGill LJ 403, 409: 'The court's task is to decipher and to specify what is required by the normative dimension of this ['victim-injurer'] relationship in the context of a particular dispute'.
[44] Patrick R Goold, 'Corrective Justice and Copyright Infringement' (2014) 16 VandJEnt&TechL 251, 267. By accommodating exemplary damages, the Goldberg-Zipursky theory of civil recourse accepts that 'tort law frequently does many other things besides make whole', see Zipursky, 'Civil Recourse, Not Corrective Justice' (n 33) 752.
[45] Ernest J Weinrib, *Corrective Justice* (OUP 2012) 11.
[46] Allan Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in CEF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing 2008) 297.
[47] ibid: 'For the civil lawyer, at least traditionally, private law was concerned with corrective justice and so allowed no room for punishment'.
[48] ibid.
[49] ibid.

relationships between individuals'.[50] As in the present, the correlativity of historical tort also found expression, both in the 'bipolar nature' of tort law litigation, as well as in doctrines 'linking the tort plaintiff's claim to the tort defendant's wrong'.[51] As set out in the introduction to this thesis, from the corrective justice standpoint, tort law's 'correlativity' determines the legitimate ways in which tortious wrongs may be remedied.[52] It would be mistaken, however, to suppose that the normative implications for tort remedies that modern corrective justice theorists say follow from tort law's correlative structure should have been equally perceived by earlier generations of common law judges. This is because, despite the temporal constancy of tort law's correlative structure, other features of tort law have not remained constant; for example, the practice of adjudicating tort actions. In earlier stages of tort law's evolution, determining the normative force of a tort damages award was not an adjudicative function that judges performed as part of their administration of 'substantive' tort doctrine, including a positive legal doctrine of exemplary damages. Rather it was an emphatically non-rule-based adjudicative function performed by jurors. It included determining that the normative force of a tort damages award should apply solely to a defendant rather than encompass the correlative standing of the plaintiff.

This illuminates one of the distinctly historical difficulties with the modern corrective justice critique of exemplary damages. It assumes that historical common law judges had the equal adjudicative capacity to do corrective justice as their modern counterparts. By illuminating the normative authority juries exercised in tort law's longer past, this thesis has suggested that this adjudicative capacity was rather limited. In doing so, it has cast doubt over the full extent to which Aristotelian corrective justice was capable of being fully 'actualized'[53] or 'exemplified'[54] at the remedial stage of historical, albeit bilateral, tort actions. For centuries, the remedial stage of tort actions were, fundamentally, sites of popular norm elaboration; sites not of Aristotelian corrective justice but of localized justice, in all the diversity that such an open-ended form of justice entailed.

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[50] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471, 471.

[51] ibid.

[52] For modern corrective justice theory's approval of tort remedies that conform to tort law's 'correlative structure', see chapter 1 A i (c).

[53] Ernest J Weinrib, *The Idea of Private Law* (2nd edn, OUP 2012) 75.

[54] Allan Beever, *Rediscovering the Law of Negligence* (Bloomsbury Publishing 2007) 47.

(b) Temporally situating the exemplary damages controversy

As this thesis has further shown, exemplary damages entered the positive content of tort law much later than tort theorists seem to assume. They also became part of it in a way that theorists have not properly understood. The exemplary damages doctrine was not first laid down by a norm-positing authority – like Pratt CJ's Common Pleas – with the aim of giving effect to a particular 'kind of justice relevant to tort law'.[55] Rather it emerged by common law judges haphazardly situating on a positive legal basis those extra-compensatory principles of recovery that, in prior times, local lay jurors administered.

It was not until the second half of the nineteenth-century that it became possible for a distinctly punitive principle of recovery to be apprehended as a positive 'element' of substantive tort law. Among its important consequences, however, was the exposure of awards of exemplary damages to doctrinal criticism. Incidentally, it was during this critical stage of the development of the award of exemplary damages that it manifestly attracted controversy. In 1872, Foster J famously described the legal doctrine allowing for it as 'deforming the symmetry of the body of the law'.[56] For Bauer, writing in 1919, the exemplary damages doctrine was a 'distinct anomaly'.[57] McCormick's 1930 description was even more striking: 'a discordant strain disturbing the harmonious symphony of the law'.[58] By 1972, Ghiardi hoped the doctrine would be 'remembered as a rule of damage law that lived too long'.[59] Modern corrective justice theorists follow in this vein. The doctrine's very existence, says Beever, 'does violence to the coherence of private law'.[60]

The realization that exemplary damages have only been 'encased'[61] in theoretical controversy from the late nineteenth-century is not to challenge modern substantive attempts to solve it. The fundamental critical insight is at a higher level. It shows that the

[55] Allan Beever, 'Justice and Punishment in Tort' (n 46) 297.
[56] *Fay v Parker*, 53 NH 342, 16 Am Rep 270 (1872), 270.
[57] Ralph S Bauer, *Essentials of the Law of Damages* (Callaghan & Co 1919) 117.
[58] Charles T McCormick, 'Some Phases of the Doctrine of Exemplary Damages' (1930) 8 NC L Rev 129, 130.
[59] James D Ghiardi, 'The Case Against Punitive Damages' (1972) 8 Forum 411, 424.
[60] Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 106.
[61] Weinrib, *Corrective Justice* (n 45) 171. Also see Note, 'Exemplary Damages in the Law of Torts' (1957) 70 Harv L Rev 517, 517: 'For well over a century controversy has surrounded exemplary damages'.

controversy, as well as attempts to solve it, are themselves inherently temporally situated: they capture a distinct stage in the evolution of the long-standing practice of extra-compensatory punitive recovery at common law. Within this evolutionary stage, it is taken universally for granted that tortious injustices are rectified within a positivist normative practice of tort law adjudication – 'justice' being the upshot of an exercise in judges fashioning and administering as normatively coherent a body of tort 'law' as possible.

However, compared to how long tortious controversies have been quelled at English common law, it is important to see that this normative-adjudicative practice is of rather recent emergence. Indeed, problems attend the projection of modern presumptions about the normative-adjudicative conditions under which justice is done in contemporary tort actions onto the past. Claims about the defectiveness of the modern exemplary damages doctrine, and the call for its abolition, would be out of place in the normative practice of adjudicating tort disputes with which Hale, Locke, and Blackstone were familiar. This less proximate and familiar stage of tort law's evolution was undergirded by very different presumptions about doing justice in tort cases. Most significantly, it was informed by unfamiliar – and since discarded – ideas about which human participants were most competent to do it in each case.

(c) Critical implications for rule-based and practice-based tort theorizing

In its critical dimension, therefore, this thesis has not ultimately undermined the substantive conclusions that rule-based tort theorists, like normative corrective justice theorists, have reasoned to in respect of the legal defectiveness of exemplary damages. It has instead sought to complicate such 'rule-based' perspectives by exposing the tacit – though essentially unrecognized – assumptions about present-day tort law adjudication in which they are grounded. Within these assumptions, modern corrective justice tort theorists might be entirely theoretically correct about the unfairness and incoherence of the legal doctrine that allows for the modern award of exemplary damages. But the real critical point is that the further one enters tort practice's temporal dimension, the more these assumptions about present-day tort law adjudication become less well-founded, even untenable.

As indicated above, practice-based tort theorists have recognized the theoretical relevance of the civil jury's role in resolving tort disputes. The best example is Goldberg and Zipursky's 'wrongs-and-redress' theory of tort practice.[62] As this thesis has shown, however, the jury's role in the adjudication of tort disputes has not been static across time. For centuries, it has been, as Postema puts it, 'in flux'.[63] To the extent that their 'wrongs-and-redress' theory purports to accurately describe the historical practice of Anglo-American tort law, its limited temporal reach must also be recognized. Witt has given a historically inclined critique of Goldberg and Zipursky's 'wrongs-and-redress' theoretical account of tort practice. As part of it, he doubts whether a 'model of redress damages' can be said to have been 'indwelling in the common law'.[64] 'It is substantially more likely', he argues, 'that the broad authority of the common law jury allowed damages questions to go undertheorized for centuries'.[65]

This thesis has found historical support for Witt's hypothesis: the normative authority that jurors have been found to have exercised at the remedial stage of historical tort actions serves to further complicate the notion that the practice of tortious recovery in the longer past relied implicitly on a particular theoretical model. Further, the jury's non-rule-based remedial authority challenges the historical extent to which such a model can be treated as having been essentially part of 'a continuously existing body of law'. It is not until the second half of the nineteenth-century that one can sensibly talk of a positivist model of tortious recovery, including the legitimacy of a doctrine of exemplary damages within it.

iv. A tort doctrine drifting from its historical roots

By critically exploring the practice of extra-compensatory punitive recovery through the historical prism of trial by jury, this thesis has ultimately allowed the controversial award of exemplary damages in modern tort actions to be seen in a different light. It is to be best understood as a relic from a period in the history of common law tort adjudication where

[62] See (n 33).
[63] Gerald J Postema, 'Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) 103 Yale LJ 861, 873.
[64] John F Witt, 'Contingency, Immanence, and Inevitability in the Law of Accidents' (2007) 1 JTortLaw 1, 32.
[65] ibid.

the lay local element was far more powerful. Despite the House of Lords' intervention in *Rookes*, exemplary damages awards are still made in twenty-first-century English tort actions. The nature of the English jury's participation in making them, however, has changed.

(a) Towards an '*unimaginable future*'

Jurors occasionally do still participate in the punishment of tortfeasors by applying the law of exemplary damages as given to them by English trial judges. In recent years, however, questions have been raised about whether exemplary damages should be properly considered a question for the modern English jury at all. These doubts were expressed in 1997 by the Law Commission of England and Wales in its report 'Aggravated, Exemplary and Restitutionary Damages'. One of its recommendations was as follows:

> the availability and assessment of punitive damages should always be decided by the trial judge and never by a jury. Where trial is otherwise by jury, and punitive damages have been pleaded, the jury will continue to determine liability and to assess compensatory damages . . . However, the judge would then decide whether punitive damages are available, and would assess the quantum of those damages.[66]

This particular recommendation was not accepted.[67] It does, nonetheless, have important sociological value. It attests to a radical shift in official English attitudes about to whom the matter of a tortfeasor's full financial liability is to be entrusted. It is hoped that this thesis has allowed the extent of this shift to be more fully appreciated. Should the Commission's recommendation ever be accepted, it would it be highly significant, perhaps even more so than those who made it realized.

Importantly, it would not merely take away the English tort jury's surprisingly modern role of merely applying the doctrine of exemplary damages. Its effect would be far more consequential. It would remove the last vestige of a lay element in the resolution of tort disputes and where a response beyond compensation, and for the purpose of punishment,

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[66] Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, (Law Com No 247 1997), para 1.81.

[67] See Andrew Tettenborn, 'Punitive Damages – A View from England' (2004) 41 SanDieg L Rev 1568–70.

might be seen as called for. In such cases, the ends of English civil justice would no longer depend on interposing a body of decision-makers – with all their locally grounded moral values and intuitions. Even where trial is by jury, the question of exemplary damages would be for a judge – alone – to answer. To common law jurists of previous centuries, this is a future that could not have been imagined. It is, nonetheless, likely to be the next stage in the evolving practice of extra-compensatory, distinctly punitive, recovery at English common law.

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