



## Bugg's Boilerplate

Should the judiciary be pro-actively involved in addressing perceived social imbalances and injustices? If so, to what extent should a court be entitled to "punish" without such sanctions first being set out by the legislature in statute?

These are interesting constitutional, jurisprudential and philosophical issues that reflect the conflict not only between common (case) law and statute law but also between the role of the legislature and the courts.

It is an issue that, at least in relation to punitive (exemplary) damages, has found two solutions in two jurisdictions. But that is perhaps a reflection on the social philosophies and systems in the respective countries.

Enjoy your coffee!

Stuart Bugg

Nürnberg  
June 2014

## A Tale of Two Systems, Part I

### - U.S. Punitive Damages

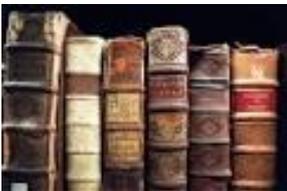
In the United States jurisdictions punitive damages have taken on almost folkloric qualities with numerous cases (both true and false) circulating in the internet and elsewhere on astronomically-high awards being made by juries that go beyond compensation and are intended to see the wrongdoer (tortfeasor) punished.

One of the most popular stories in this area involves a fast food chain and some very hot coffee. It is a true case from New Mexico. In *Liebeck v. McDonald's Restaurants (N.M. Dist. Ct. 1994)*, 79 year old Stella Liebeck spilled McDonald's coffee in her lap which resulted in her suffering second and third degree burns on her thighs, buttocks, groin and genitals. The burns were severe enough to require skin grafts. Liebeck initially proposed to settle the case for \$20,000 in pre-trial negotiations, an amount which covered her already-incurred medical expenses, and those she anticipated to incur for future treatment. McDonald's settlement offer however was a mere \$800. Liebeck therefore sued. During the pre-trial discovery procedures internal documents from McDonald's revealed that the company had received hundreds of similar complaints from customers claiming McDonald's coffee caused severe burns. The jury decided at the trial the company had been aware of the coffee being dangerous and that the company had done nothing to mitigate the situation. As a result, the jury decided on compensatory damages of \$160,000. However, the jury also awarded Liebeck \$2.7 million in punitive damages. A judge subsequently reduced the punitive damages to \$480,000.

However such reports should always be read with great care. Firstly, it should be remembered that (unlike the Liebeck case) many of these "reported" cases have no basis in fact or, at the least, are grossly exaggerated in the retelling. Secondly, even in those cases that did in fact take place there is usually a further opportunity for a judge (e.g. on appeal) to reduce the dramatic amounts of punitive damages imposed by U.S. juries in the hearing of first instance.

It should also be remembered that in the U.S. jurisdictions punitive damages are awarded under Torts (especially negligence) and not under Contract Law. Moreover, punitive damages are limited in many states to situations of gross negligence, wilful acts or negligence caused by economic reasons, or negligence motivated by fraud. Numerous states have also capped the amount of punitive damages by way of statute. In addition, the U.S. Supreme has moved to limit the impact of punitive damages whereby any awards should exceed compensatory damages by a single-figure ratio (9:1) (*State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003)*). Thus, for each dollar awarded as compensatory damages the court will allow only a maximum of 9 dollars as punitive damages.

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# A Tale of Two Systems, Part II

## - English Law Exemplary Damages

Punitive damages outside the U.S. jurisdictions are generally referred to in the common law systems as exemplary damages and they have a relative minor role to play in legal cases compared to the U.S. situation. The English position that damages should compensate rather than be awarded as a deterrence or punishment is reflected in case law. In *Rookes v Barnard (1964)* Lord Devlin proposed two very limited and exclusive categories in which exemplary damages could be awarded:

The first category related to “oppressive, arbitrary or unconstitutional action by the servants of the government” and the second category where “the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.” Following Lord Devlin's landmark judgment a bar of action was imposed on exemplary damage cases and this bar implemented by the case of *AB v South West Water Services (1993) CA 1993* which involved an action for public nuisance and negligence.

However, in the later case of *Kuddus v Chief Constable of Leicester (2001)* the strict limits of the categories of Lord Devlin were weakened. The court also heavily criticised Lord Devlin's formulation because whatever the position forty years ago, it respectfully inclined to doubt the soundness of the distinction between government officials and companies and individuals. In other words, the rise of a modern, globalised economy and massive individual wealth meant that large companies, organisations or even individuals could also be regarded as “oppressive and arbitrary” and therefore should be potentially subject to exemplary damages claims.

Nevertheless, it must be emphasised that generally exemplary damages in English law are rare in tort cases (see *Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29*) and almost certainly irrecoverable in contract cases (*Addis v Gramophone, Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd [2013] EWHC 1414 (Ch) at para 232*).

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## Nürnberg Seminar Workshops with Stuart Bugg for the remainder of 2014

Places (participants limited to 14 per seminar) are still available in the following seminars:

1. **Introduction to Working with Contracts in English**  
26-27 September 2014  
exact venue in Nürnberg to be announced
2. **Update 2014: Masterclass on Developments in English Contract Law**  
5-6 December 2014  
Hotel Victoria Nürnberg

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