Punitive Damages
The Civil Remedy in American Law, Lessons and Caveats for Continental Europe

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Cyprus v. Turkey


- Turkish invasion of Cyprus (July 1974)

- Victims:
  1. Missing persons
  2. Enclaved residents of the Karpass peninsula
Just Satisfaction

• 2012: Cyprus files definite claim for just satisfaction ex art. 41 ECHR

• ECtHR 12 May 2014, Cyprus v. Turkey, no. 25781/94 (just satisfaction):
  1. EUR 30,000,000 to relatives of missing persons
  2. EUR 60,000,000 to enclaved residents
Judge Pinto de Albuquerque

Concurring opinion at § 13:

“The punitive nature of this compensation is flagrant. [...] When the Court awards compensation in an amount higher than the alleged damage or even independently of any allegation of damage, the nature of the just satisfaction is no longer compensatory but punitive. [...] The fundamental purpose of that remedy is hence to punish the wrongdoing State and prevent a repetition of the same pattern of wrongful action or omission by the respondent State and other Contracting Parties to the Convention.”
Judge Pinto de Albuquerque

Concurring opinion at § 13 and 14:

“There is nothing new about this procedure. In fact, the practice of the Court shows that punitive damages have been applied in seven types of cases. [...] Thus, the existence of punitive or exemplary damages under the Convention is a fact in the Court’s practice.”
Problem Statement

Does the punitive damages remedy have a future in continental Europe?

Increase understanding:

• Good amount of American punitive damages law and practice

• Americans have much experience with punitive damages
A Definition (1/2)

§ 908 Restatement (Second) of Torts 1979

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
A Definition (2/2)

§ 908 Restatement (Second) of Torts 1979

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.
To Sum Up

- A Civil sanction
- Monetary damages awarded to plaintiff in civil lawsuit *apart from and in addition to* compensatory damages
- Functions
Research Questions

1. What are the main characteristics of American punitive damages law, such as the functions of and conditions for awarding punitive damages?

2. What are the underlying reasons for the non-existence of punitive damages in continental European legal systems?

3. Which developments illustrate the increased European interest in punitive damages, and how can these developments be explained?

4. What is the status quo of the rejection of punitive damages in Europe? Are there signs of a more liberal approach to the civil remedy?

5. Which existing civil sanctions, especially sanctions that bear a resemblance to the punitive damages remedy, can be distinguished in four European legal systems, i.e. the Netherlands, Germany, France and England?
European Punitive Damages Debate

There is resistance to, but also interest in, punitive damages in Continental Europe
Resistance: Obstacles

- Obstacles intrinsic to civil law tradition:
  - Traditional functions of tort law
  - Public-private divide
  - Role of government
Resistance: Incorrect Perception

• Misperception of American reality of punitive damages
  - Powerful civil sanction in a civil justice system
  - The truth about excessiveness
  - Punitive damages generally awarded with great caution
  - Insurability of punitive damages
Resistance: Incorrect Perception
Punitive Damages “Run Wild”?

Incidence and size of punitive damages awards ≠ Excessive

• Bureau of Justice Statistics of the U.S. Department of Justice (Report from 2011 concerning 2005):
  - Sought: 12% of approximately 25,000 tort and contract cases
  - Awarded: 5% of cases won by plaintiff (14,359), median award in these cases $ 64,000
Resistance: Incorrect Perception

Which Cases Then?

• Commonly thought, rarely awarded:
  – medical malpractice
  – products liability
  – personal injury resulting from negligence and accidents

• Mostly awarded:
  – Intentional torts (e.g. battery and assault)
  – Defamation (libel and slander)
  – “Financial torts” (e.g. fraud, bad faith insurance, employment discrimination)
Resistance: Incorrect Perception
Caution! (1/2)

• Minimal requirements to claim punitive damages:
  
  – Invasion legally protected interest
  
  – Element of major *aggravation*: defendant injured plaintiff maliciously, intentionally, or with a conscious, reckless, wilful, wanton or oppressive disregard of the rights or interests of the plaintiff (Owen 2005, p. 1121)
  
  – Plaintiff suffered actual damage resulting in nominal or compensatory damages
**Resistance: Incorrect Perception**  
*Caution! (2/2)*

- Punitive damages should not go beyond what is *necessary to achieve its goals*:
  - Character of defendant’s act
  - Nature and extent of the harm
  - Profits that defendant gained due to unlawful act
  - Financial condition defendant
  - Compensatory damages award

- Several legislative and judicial control mechanisms
Interest

- Punitive damages on agenda of academics and policymakers
  - Example: *Cyprus v. Turkey* (2014)

- Two main causes for increased interest:
  - Private enforcement
    - E.g. competition, intellectual property, environment, human rights, consumers, anti-discrimination, personality rights.
  - Calls for powerful civil sanctions
    - Intentional, calculative and grave misconduct
Conclusion (1/2)

• At this point in time introduction of punitive damages does not seem a workable proposal:

  – It is possible to put each objective into perspective
  – But it is currently unlikely that opponents will accept these qualifications
  – Thus the objectives are still seen as prohibitive objectives
Conclusion (2/2)

- The civil sanction continues to rouse curiosity throughout Europe
- The European debate should be continued properly
- Resistance felt due to incorrect perception of American law should be removed
(Distant) Future?

- Gaze into a crystal ball

- The decision to introduce punitive damages is a choice of policy

- Policy reason is twofold
  - Private enforcement
  - Powerful civil sanctions

- Careful judgment needed: O’Connor and Koziol
Judge Pinto de Albuquerque

Concurring opinion at § 19:

“[...] punitive damages are an appropriate and necessary instrument for fulfilling the Court’s mission to uphold human rights in Europe and ensuring the observance of the engagements undertaken by the Contracting Parties in the Convention and the Protocols thereto.”
Thank you for your attention!