

Louisiana Law Review

Volume 68 | Number 3
Spring 2008

Punitive Damages - A European Perspective

Helmut Koziol

Repository Citation

Helmut Koziol, *Punitive Damages - A European Perspective*, 68 La. L. Rev. (2008)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol68/iss3/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Punitive Damages—A European Perspective

*Helmut Koziol**

I. INTRODUCTION

As an introduction, I think it is useful to point out that the legal systems of the United States show a number of peculiarities that cause continental Europeans to shake their heads, and which may be of some influence on the discussion of the topic touched of this article. As the first anomaly, I have to mention the institution of juries,¹ which have to decide complicated legal questions and yet are not legal experts. By analogy, continental Europeans tend to pose the question whether Americans, in the case of a heart attack, prefer to be operated on by a lawyer instead of a surgeon. Second, Europeans are astonished that the winning party has to bear his own costs and that the American legal system allows, on one hand, claimants with spurious petitions to blackmail entrepreneurs with the threat of a suit, and on the other hand, accept that victims receive incomplete compensation because they have to pay enormous sums to their lawyers and the court. Furthermore, the extremes of class actions send shivers down the spine of European lawyers. Last, though certainly not least, punitive damages stir up memories of very ancient times when legal systems did not make a strict difference between penalty and compensation. With that, we finally have arrived at the centre of the topic.

Copyright 2008, by LOUISIANA LAW REVIEW.

* Prof. i.R. Dr. h.c. Helmut Koziol is a retired law professor of the University of Vienna. He is the Director of the Research Unit for European Tort Law under the Austrian Academy of Sciences, Managing Director of the European Centre of Tort and Insurance Law and a member of the European Group on Tort Law. Other fields of interest include Banking Law and Insolvency Law.

This article is the extended version of the John H. Tucker Jr. Lecture, held at the Paul M. Hebert Law Center of the Louisiana State University on March 22, 2007. I would like to thank Ms. Vanessa Wilcox, LL.M. (Cantab) for her valuable and varied assistance in drafting this article.

1. Informative for Europeans is the article of Michael D. Green, *The Impact of the Jury on American Tort Law*, in EUROPEAN TORT LAW 2005, at 55 (Helmut Koziol & Barbara Steininger eds., 2006).

I wish to begin by mentioning two cases, one from the United States and the other from Germany. Every American lawyer is familiar with *BMW of North America, Inc v. Gore*, where Dr. Gore discovered that the new BMW he purchased had been repainted after being scratched during transportation.² He brought an action for fraud and recovered \$4,000 compensation for the difference in value between the repainted and the brand new car, as well as four million dollars in punitive damages.³ The jury calculated the punitive damages by taking regard of the total harm, thus multiplying the approximate number of repainted vehicles sold by BMW—about 1,000—by the depreciation of each car.⁴

In contrast, a German case. In 1992 the German Supreme Court (BGH) had to decide on the enforceability of an American decision. In the case of *John Doe*, an American court decided that a juvenile was to be awarded \$750,260 for being sexually abused; \$400,000 of which was punitive damages.⁵ The German Supreme Court was of the opinion that the punitive damages award could not be enforced in Germany. Such an award would be against *ordre public*, because under the German legal system punishment and deterrence are the responsibility of criminal courts.

Looking solely at these two decisions, it would be reasonable to believe that American law and German—or even European—law are totally contradictory. But this is true only to some extent. As usual, the legal systems are not so diametrically opposed as to face each other from opposing black and white sides, but rather they occupy two grey sides where only the shade of grey differs.⁶ This will be demonstrated below by a closer look at the aforementioned German decision.

As for the state legal systems of the U.S., it is true that the Restatement (Second) of Torts sees punitive damages as aiming to punish the defendant for his outrageous conduct and to deter him

2. 517 U.S. 559 (1996).

3. *Id.* at 565.

4. *Id.* at 564.

5. Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 312 (F.R.G.).

6. In the same sense, see Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI-KENT L. REV. 105, 148–52 (2003).

and others like him from similar conduct in the future. Comment (b) to section 2, titled "Recklessness," of the Restatement (Third) points out that in certain tort cases even a plaintiff who receives full compensatory damages may be able to recover punitive damages as well. In such cases, however, the standard for awarding punitive damages commonly refers not to mere negligence, but to the defendant's reckless conduct, reckless indifference to risk, or reckless disregard for risk.

Nevertheless, six of the American states do not accept punitive damages. When I stress that Louisiana fortunately is one of these states, I give away at the outset the secret of my own firm conviction. Further, I have to mention that in the *BMW* case, the Supreme Court of Alabama⁷ disagreed with the jury and reduced the punitive damages to \$2 million. The U.S. Supreme Court was of the opinion that even this amount was disproportionate, as punitive damages have to be in well-balanced proportion to compensatory damages.⁸ As a result, the Supreme Court of Alabama, in the end, reduced the punitive damages to \$50,000.⁹

Finally, I have to point out that some scholars raise objections to punitive damages,¹⁰ stressing the unfairness of awarding "total harm" punitive damages and thus feel it incumbent upon themselves to expose the modern theoretical misconceptions of the role of such damages. I refer in particular to Dan B. Dobbs,¹¹ and more recently to Thomas B. Colby,¹² Richard W. Wright,¹³ and Anthony J.

7. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994), *rev'd*, 517 U.S. 559 (1996).

8. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–83 (1996).

9. *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 515 (Ala. 1997).

10. DAN B. DOBBS, *LAW OF REMEDIES* 355–58 (2d ed. 1993); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 9–15 (5th ed. 1984); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 182 (2003) (quoting SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 240 (16th ed. 1899)).

11. Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1988).

12. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003).

Sebok¹⁴—and I think it necessary to deal rudimentarily with their ideas.

Dobbs points out the fact that “punitive damages are not, in the present system, subject to measurement and hence not subject to effective limits.”¹⁵ He further lists the main criticisms of the institution of punitive damages, in particular (1) that punitive damages are criminal punishments and are therefore illegitimate in civil cases, or at least should be administered under the protective rules applied in criminal cases; (2) that punitive damages are out of control; (3) that punitive damages may over- or under-deter bad conduct and might be grossly unfair; and (4) that punitive damages operate to create a high risk of unfair application.¹⁶ He proposes that extra-compensatory damages should be triggered when it is shown that deterrence is needed.¹⁷ The measure of such damages should be taken by assessing the amount necessary to deter—not the amount necessary to inflict justly deserved punishment.¹⁸ According to Dobb’s opinion, for torts committed in the course of a profit-motivated activity, the deterrence measure should usually be either the profit or gain derived by the defendant from the activity or the plaintiff’s reasonable litigation costs, including a reasonable attorneys’ fees.¹⁹ As a result, “punitive damages” would still be extra-compensatory, but no longer punitive.

Colby identifies what some perceive as the modern purpose of punitive damages—to punish defendants for their wrongdoing and the wrong committed upon society.²⁰ Thus, the prevailing modern conception of punitive damages is that they serve the very same

13. Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425 (2003).

14. Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007).

15. Dobbs, *supra* note 11, at 834.

16. *Id.* at 837–39.

17. *Id.* at 840–41. For a similar sense under German law see Gerhard Wagner, *Schadensersatz-Zwecke, Inhalte, Grenzen*, in KARLSRUHER FORUM 2006, at 18ff (E. Lorenz ed., 2006).

18. Dobbs, *supra* note 11, at 841.

19. *Id.* at 915.

20. Colby, *supra* note 12, at 589.

goals as criminal law.²¹ Based on this idea, it makes sense to calibrate them by reference to the total harm done to all of society.²² But Colby criticises the modern theoretical account of punitive damages as punishment for public wrongs as being deeply at odds with the actual doctrine: If punitive damages truly were punishment for public wrongs it should not be necessary for the plaintiff to prevail on an underlying civil cause of action in order to receive them.²³ Furthermore, if punitive damages were punishment for the full scope of the wrong to society rather than simply the wrong to the plaintiff, it would make no sense to require a reasonable relationship between the amount of punitive damages and the amount of the individual plaintiff's damages.²⁴ Nor does it make sense to allow the plaintiff to keep the punitive damages award.²⁵ Finally, if punitive damages serve the criminal law function of punishing wrongs to society, it is difficult to understand why the defendant is not permitted to avail himself of the various criminal procedural safeguards afforded by the Constitution to those accused of public wrongs.²⁶

Colby, therefore, prefers the historical conception of punitive damages, namely that they are intended as punishment for the wrong to the individual victim.²⁷ Since, under this conception, punitive damages are punishment for a purely private wrong and are designed to punish the defendant only for the wrong done to the individual victim, it makes sense to give them to the plaintiff rather than to the government or society at large.²⁸ Further, it makes sense, according to Colby, that a plaintiff must prevail on an underlying cause of action and establish an entitlement to actual damages, because if the plaintiff cannot establish the underlying tort, then there is no private legal wrong to be punished.²⁹

21. *Id.*

22. *Id.*

23. *Id.* at 590.

24. *Id.*

25. *Id.*

26. *Id.* at 591.

27. *Id.* at 590.

28. *Id.* at 637–38.

29. *Id.* at 638.

In a similar sense, Wright understands punitive damages as private retribution for a discrete private injury to dignity, which is distinct and separate from any criminal punishment that may be imposed for any non-discrete "public wrong."³⁰ But it seems that Wright attaches more importance to the idea of compensation when he says:

Properly understood and administered, punitive damages in tort law also compensate for discrete private injuries. When a person harms another through a deliberate disregard of the other's rights, then in addition to any non dignitary harm that was inflicted on the victim, the victim has also suffered a discrete dignitary injury, which can be rectified through the imposition of private retribution in the form of punitive damages in tort law.³¹

Wright thus reconciles punitive damages to some extent with aggravated damages under English law, which serve as additional compensation for mental suffering, wounded dignity, and injured feelings.³² It seems to be problematic when Colby describes this as the historical English idea of punitive damages,³³ because under English law compensation has been and still is the function of aggravated damages.³⁴ It also may be incorrect, as Sebok points out,³⁵ to say that punitive damages primarily served a

30. Wright, *supra* note 13, at 1431.

31. *Id.*

32. *Id.*

33. Colby, *supra* note 12, at 614-15.

34. See B.S. MARKESINIS & SIMON DEAKIN, TORT LAW 686 (3rd ed. 1994); W.V. Horton Rogers, *England: Non-Pecuniary Loss Under English Law, in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 54* (W.V. Horton Rogers ed., 2001).

35. Sebok, *supra* note 10, at 180. Sebok points out that punitive damages served a number of very different functions. *Id.* at 197. Not very convincing is his differentiation between emotional distress, which may be the basis of awarding damages to compensate the victim, and the injury of insult that wounds or dishonours, which is covered by punitive damages. *Id.* at 192-93. I think that in both cases non-pecuniary or immaterial harm is at stake and, therefore, no fundamental difference is apparent. I have to admit that under German law the idea of satisfaction meets with approval. See Behr, *supra* note 6, at 133. But on the one hand, according to this opinion, the function of satisfaction is inherent to all damages for immaterial harm, and on the other

compensatory function in the early years of American tort law, as the United States Supreme Court claimed in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*³⁶ Thus, Wright's idea would be an innovation under U.S. law.

Colby's main approach is criticised by Sebok because it simply transfers the structural relationship between wrong and sanction from public law to private law.³⁷ Sebok advances his own opinion on punitive damages. First, punitive damages are grounded on the violation of a certain private right—a private right distinguishable from the set of private rights whose violations are fully redressed by an award of compensatory damages.³⁸ Second, punitive damages are personal punishment.³⁹ He points out that punitive damages vindicate the “dignity” of the private citizen, and therefore, the private right whose violation grounds their award is the private right not to have one's dignity violated.⁴⁰ Sebok further stresses that in all the cases in which punitive damages have been awarded, the defendant had intentionally violated the plaintiff's private right,

that is to say, without any regard for the fact that the plaintiff was in possession of that right. So in each of these cases, the defendant violated at least two rights: the primary private right (to physical security, property, etc.) and the right to be treated as someone deserving to have those primary rights respected by others.⁴¹

He mentions that such a lack of respect for another's primary private rights can be called a form of insult.⁴² Therefore, Sebok

hand, this opinion no longer has general support. Cf. Gerhard Wagner in *Münchener Kommentar zum BGB V* (4th ed. 2004) Vor § 823 no. 36 ff.

36. 532 U.S. 424 (2001).

37. Sebok, *supra* note 14, at 1004–05.

38. *Id.* at 1007.

39. *Id.*

40. *Id.* at 1008.

41. *Id.* at 1014.

42. *Id.* at 1015–16.

thinks that retribution by punitive damages is actually a form of compensation to the victim for moral injury.⁴³

Regarding European law, it is true that, in principle, the continental civil law systems disapprove of punitive damages⁴⁴ (although one has to confess that there are some departures from this idea). Furthermore, one has to remember that England and Ireland are part of Europe and the European Union (although England sometimes gives the impression that it prefers to forget this). The English⁴⁵ and Irish⁴⁶ common law system is, of course, familiar with punitive damages, although not to the same extent as the U.S. This is important because it seems to influence, to some extent, EU law, which is inconsistent in reflecting the contrast between common law and continental civil law in Europe. On one hand, according to continental tradition, Article 24 of Rome II provides: "The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy."⁴⁷ On the other

43. *Id.*

44. See JULIANA MORSORF-SCHULTE, FUNKTION UND DOGMATIK US-AMERIKANISCHER PUNITIVE DAMAGES. ZUGLEICH EIN BEITRAG ZUR DISKUSSION UM DIE ZUSTELLUNG UND ANERKENNUNG IN DEUTSCHLAND (1999); Behr, *supra* note 6, at 105–08; Franz Bydliniski, *Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft*, 204 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 309, 343ff (2004); Coderch, *Punitive Damages and Continental Law*, ZEUP 604 (2001). But some scholars speak out in favor of punitive damages: INA EBERT, PÖNALE ELEMENTE IM DEUTSCHEN PRIVATRECHT: VON DER RENAISSANCE DER PRIVATSTRAFE IM DEUTSCHEN RECHT (2004); DOMINIK KOCHOLL, PUNITIVE DAMAGES IN ÖSTERREICH (2001) (for a criticism of this argument, see Barbara Steininger, *Austria Country Report*, in EUROPEAN TORT LAW 2001, *supra* note 1, at 82 (Helmut Koziol & Barbara Steininger eds., 2002)); PETER MÜLLER, PUNITIVE DAMAGES UND DEUTSCHES SCHADENSERSATZRECHT 360ff (2000); KLAUS SCHLOBACH, DAS PRÄVENTIONSPRINZIP IM RECHT DES SCHADENSERSATZES (2004); ESTHER SONNTAG, ENTWICKLUNGSTENDENZEN DER PRIVATSTRAFE (2005).

45. W.V. Horton Rogers, *Damages Under English Law*, in UNIFICATION OF TORT LAW: DAMAGES 53 (Ulrich Magnus ed., 2001).

46. Competition Act, 2002 (Act No 14/2002) (Ir.) §14 (4), (5)(b); Industrial Designs Act, 2001 (Act No. 39/2001) (Ir.) § 59; Copyright and Related Rights Act, 2000 (Act No. 28/2000) (Ir.) §§ 128(1), (3), 304(3); Hepatitis C Compensation Tribunal Act, 1997 (Act No. 34/1997) (Ir.) § 5(3).

47. Commission of the European Communities, *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-*

hand, an inclination towards punitive damages exists in some directives; for example, on consumer credit⁴⁸ and in the area of anti-discrimination in the workplace, particularly with regard to discrimination between men and women.⁴⁹ Furthermore, the European Court of Justice demands the effectiveness of sanctions imposed by national laws for the violation of obligations arising from Community law. In *Von Colson & Kamann v. Land Nordrhein-Westfalen*, the court pointed out:

The principle of the effective transposition of the directive requires that the sanctions must be of such a nature as to constitute appropriate compensation for the candidate discriminated against and for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on an expectation (“Vertrauensschaden”) is not sufficient to ensure compliance with that principle.⁵⁰

This tendency toward punitive damages manifests itself in the revised draft of Rome II,⁵¹ which provides that “the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be

Contractual Obligations (“Rome II”) COM (2003) 427 final (Nov. 22, 2003) [hereinafter “Rome II”].

48. See Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Credit for Consumers*, COM (2002) 443 final (Nov. 9, 2002).

49. See, e.g., Council Directive 75/117, 1975 O.J. (No. C 13) (EEC) (equal pay); Council Directive 76/207, 1976 (EEC) (access/working conditions etc.); Council Directive 86/378, 1986 (EEC) (occupational social security schemes); Council Directive 97/80, 1997 (EC) (on burden of proof in sex-discrimination cases); Council Directive 2000/43, 2000 O.J. (L 180/22) (EC) (equal treatment (race)); Council Directive 2000/78, 2000 O.J. (L 303/16) (EC) (equal treatment in employment and occupation); and Council Directive 2002/73, 2002 O.J. (L 269/15) (EC) (amending Directive 76/207 EEC).

50. Case 14/83, *Sabine von Colson & Elisabeth Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891. Cf. Behr, *supra* note 6, at 133.

51. Rome II, *supra* note 47, at 22.

excessive may be considered incompatible with the public policy of the forum.” Accordingly, only punitive damages of an excessive amount are capable of violating the *ordre public*. This is to some extent consistent with the aforementioned German decision as the German Supreme Court restricts its opinion that punitive damages are against *ordre public*: It accepts such damages as far as they aim at lump sum compensation of losses that are not otherwise taken into regard or that cannot be proven, or if the damages aim at siphoning off profits that the defendant gained through his wrongful behaviour.

Thus, it seems unsurprising that the drafts for future regulations in Europe also show divided opinions: On one hand, the Principles of European Tort Law stress in Article 10.101 that the aim of damages is to compensate and to prevent harm.⁵² The European Group on Tort Law wanted to make clear that the Principles do not allow punitive damages at all because they are apparently always out of proportion to the victim’s actual loss.⁵³ The Principles of the Study Group on a European Civil Code, the Swiss and the Austrian draft,⁵⁴ also do not accept punitive damages. On the other hand, the new draft in one prominent country (it is not astonishing that this is France) is going in the opposite direction from all the other continental legal systems in providing for punitive damages. Article 1371 reads:

One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the public treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages

52. See EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY 8 (2005).

53. *Id.* at 150–51.

54. See article 1292, section 1 of the Austrian draft on a new liability, and discussion of it in Helmut Koziol, *Grundgedanken, Grundnorm, Schaden und geschützte Interessen*, in ENTWURF EINES NEUEN ÖSTERREICHISCHEN SCHADENERSATZRECHTS 32 (Griss et al. eds., 2006).

awarded to the victim. Punitive damages may not be the subject of a contract of insurance.

In the following sections, I discuss first some of the main arguments against punitive damages (part II), second some broadly accepted exceptions to the rejection of punitive damages (part III), and third some differences between continental European legal systems and the legal systems of the U.S. that may provide evidence as to why punitive damages are accepted to such an extent in the U.S. but not in continental Europe (part IV).

II. MAIN ARGUMENTS AGAINST PUNITIVE DAMAGES

The idea of punishment is outside of the private law, as according to its purpose, the private law is not aimed at and also is not in a position to realize this idea. This is true even of tort law, although this certainly is the part of the private law for which the idea of sanction could most likely be relevant: The legal consequences of an act are attached to a violation of a duty and faulty behaviour. Thus it seems obvious to draw a parallel to criminal law, which is based undoubtedly on the idea of sanction. Nevertheless, under European continental civil law, punitive damages are—as mentioned before—rejected by the predominant literature, and courts are of the opinion that punitive damages contradict the *ordre public*.⁵⁵ For example, article 40, section 3 of the EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, Introductory Act to the Civil Code*) provides that claims substantially exceeding appropriate compensation cannot be enforced in Germany.⁵⁶

Speaking out against the ordering of punishment by the private law is, in the first place, the notion that penalties express public disapproval of a certain behaviour, but are imposed on an individual. One has to stress that punitive damages are then awarded to an individual who has neither suffered damage to that

55. BGH June 4, 1992, 118 BGHZ 312 (F.R.G.). Cf. Behr, *supra* note 6, at 155–60. See also Areios Pagos [AP] [Supreme Court] 17/1999, 461–64.

56. Vgl. MünchKomm/Junker, BGB, 4. Aufl. 2006, Art. 40 EGBGB Rn. 214; Carsten Schäfer, *Strafe und Prävention im Bürgerlichen Recht*, 202 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 429f (2002).

amount, nor has a claim for unjust enrichment against the defendant. Franz Bydlinski has convincingly explained that ordering such punishment is against the structural principle that, under the private law, legal consequences need mutual justification.⁵⁷ He points out that in the area of private law a rule always concerns the relationship between two or more legal subjects. Therefore, laying down a civil rule always has an effect on persons defined by the statute. Furthermore, every allocation of rights, benefits, or chances to certain persons means the imposition of obligations, burdens, or risks on other persons. According to his opinion, two justifications have to be met: (1) why one person is given a favourable position while another person is provided a disadvantageous legal consequence, and (2) why this is reasonable in the relationship between these two persons. In other words, why should one person obtain rights against just this particular person and, vice versa, why should this person be under an obligation just to the obligee? Therefore, under private law, the principle of mutual justification of legal consequences applies. One-sided arguments that only take account of one legal subject—even if very strong—are in no position to justify a rule of private law.

Applying this principle to our subject, we reach the following conclusion: Even if there are very strong arguments for imposing a sanction on the defendant, these arguments alone cannot justify awarding the plaintiff an advantage when he has suffered no corresponding damage and has no unjust enrichment claim against the defendant.⁵⁸ The same arguments speak out against accepting

57. FRANZ BYDLINSKI, SYSTEM UND PRINZIPIEN DES PRIVATRECHTS 92ff (1996); Bydlinski, *supra* note 44, at 341ff (2004). In the same sense, see Claus-Wilhelm Canaris, *Grundstrukturen des deutschen Deliktsrechts*, 56 VERSICHERUNGSRECHT: JURISTISCHE RUNDSCHAU FÜR DIE INDIVIDUALVERSICHERUNG 577, 579 (2005); Koziol, *supra* note 54, at 32; H.P. Walter, *Recht und Rechtfertigung. Zur Problematik einseitigen Privatrechts*, in GAUCHS WELT RECHT, VERTRAGSRECHT UND BAURECHT: FESTSCHRIFT FÜR PETER GAUCH ZUM 65 GEBURTSTAG 302ff (Peter Gauch & Pierre Tercier eds., 2004).

58. See MARKESINIS & DEAKIN, *supra* note 34, at 691; cf. Gounalakis, *Persönlichkeitsschutz und Geldersatz*, in ARCHIV FÜR PRESSERECHT: ZEITSCHRIFT FÜR MEDIEN- UND KOMMUNIKATIONSRECHT 17 (1998).

such claims because of the idea of prevention.⁵⁹ If there are only arguments for punishing or deterring one party, but not for a claim of the other party, then criminal law is appropriate,⁶⁰ or—if private law shall be applicable—the payment made by the wrongdoer has to flow into a fund serving a public or social purpose.

Even if criminal law protection may be insufficient at times—as is said to be the case especially in the area of intellectual property⁶¹—tort law must not be reshaped in a manner which contradicts fundamental principles of private law. Rather, criminal law should be improved to the extent that it is capable of complying with the demands of sanction and prevention. One step in this direction seems to be the innovation of punishing not only natural persons but also juridical persons. As a result of this development, some of the loopholes in criminal protection can be filled.⁶²

Apart from the fact that punitive damages are inconsistent with the fundamental principles of the private law, they also show some additional shortcomings. First, the goal of prevention can be reached only imperfectly if punitive damages—just as compensation—cannot be claimed before the damage has occurred. Achieving the purposes of prevention and sanction would necessitate tying the sanction to the wrongful conduct or acts preparatory to the commission of an offence or attempted misconduct—and not only to the occurrence of damage.⁶³ This means that a claim for punitive damages should also be possible—if the other requirements are met—in connection with an injunction or the claim to abatement, or even independently from such claims and only because of the defendant's wrongful

59. In favor of such an idea—although cautiously—THOMAS DREIER, *KOMPENSATION UND PRÄVENTION. RECHTSFOLGEN UNERLAUBTER HANDLUNG IM BÜRGERLICHEN, IMMATERIALGÜTER UND WETTBEWERBSRECHT* 500ff (2002).

60. See Walter, *supra* note 57, at 305. It has to be pointed out that Austrian law frequently provides administrative penalties and, therefore, public prosecutors and criminal courts are not involved.

61. See DREIER, *supra* note 59, at 523ff.

62. *Id.* at 527ff (admitting as such).

63. The Law Commission for England and Wales has taken regard of this. See Law Commission, *Aggravated, Exemplary and Restitutionary Damages* 58 (Law Com. No. 247, 1997).

behaviour. In addition, punitive damages, partly because of their lack of structure, may over-deter or under-deter bad conduct and may be grossly unfair in particular cases.⁶⁴

Furthermore, I have to point out that—according to the prevailing opinion—punitive damages cause unreasonable consequences when there is cases of more than one victim. For example, a claimant seeks compensation and punitive damages after being severely poisoned by a can of meat, the failure to detect its rotten contents attributed to the recklessness of the defendant company. The claimant is awarded punitive damages, with the amount calculated by the court taking account of the entrepreneur's outrageous conduct. Shortly thereafter another victim claims damages. If the defendant has been punished to an adequate extent by the punitive damages paid to the first claimant, it would be highly unreasonable to punish him again and again every time a new victim shows up. Colby calls these "total harm" punitive damages: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment.⁶⁵

However, it seems unjust if only the first victim, who physically recovered more quickly than the others and thus had the opportunity to lodge a claim earlier, would at the stroke of good luck receive some hundred thousand dollars in addition to compensation for his damage, and the other more seriously injured victims end up with nothing. If the first claimant receives a massive windfall, as was the case initially in *BMW of North America, Inc v. Gore*, this would encourage claimants to race to court. As the courts do not know how many victims will show up, they face a formidable hurdle in adjudicating the appropriate amount of punitive damages for each victim. Hence in the English case of *AB v. South West Water Services Ltd.*,⁶⁶ where potential

64. See also Dobbs, *supra* note 11, at 839–41.

65. See Colby, *supra* note 12.

66. [1993] Q.B. 507, 527 (in which Stuart-Smith L.J., states, "Unless all their claims are quantified by the court at the same time, how is the court to fix and apportion the punitive element of the damages? Should the court fix a global sum of £x and divide it by 180, equally among the plaintiffs? Or should it be divided according to the gravity of the personal injury suffered? Some

causes of action had not yet accrued, the Court of Appeals considered, *inter alia*, that the large number of plaintiffs was an aspect of the case that made exemplary damages inappropriate.⁶⁷

In his article, Sebok⁶⁸ summarizes the effect of the recent U.S. Supreme Court decision of *Philip Morris USA v. Williams*,⁶⁹ which addressed assessment and apportionment difficulties in multiple claimant scenarios. The Court held that the evidence of the harm done to other victims can be used to determine the reprehensibility of the defendant's conduct. However, the jury cannot take into account wrongful conduct that affected parties other than the claimant in assessing the amount of punitive damages. Put succinctly, in an individual action, the defendant can only be punished for his harm to that claimant even where other victims exist. As Sebok notes, while this was the majority's opinion, Justice Stevens, the author of *BMW of North America, Inc v. Gore*, dissented, and his opinion should not be overlooked. Justice Stevens took the view that in awarding punitive damages, juries could take into account wrongful conduct that affected parties other than the plaintiff. It remains to be seen whether the majority decision in *Philip Morris* will stand the test of time. Indeed, the objection to this approach is that the defendant's wrongfulness is weightier where more people have been affected by it, and a proportionate award of punitive damages may not punish the defendant to the full extent necessary where other claims are not pursued.

Last but not least, it has to be pointed out that awarding punitive damages under tort law is contrary to the separation of criminal law and private law, which is thought to be an achievement of modern

plaintiffs may have been affected by the alleged oppressive, arbitrary, arrogant and high handed behaviour, others not. If the assessment is made separately at different times for different plaintiffs, how is the court to know that the overall punishment is appropriate?").

67. Law Commission, *supra* note 63, at 69.

68. Anthony J. Sebok, *The Supreme Court's Decision to Overturn a \$79.5 Punitive Damages Verdict Against Philip Morris: A Big Win, But One with Implications That May Trouble Corporate America*, FINDLAW, Feb. 27, 2007, <http://writ.news.findlaw.com/sebok/20070227.html>.

69. 127 S. Ct. 1057 (2007).

legal culture. The relapse into the archaic practice of mixing punishment and compensation also violates fundamental principles of modern penalty law,⁷⁰ above all the principle that the punishment should be laid down in the law (*nulla poena sine lege*).⁷¹ This principle also applies with respect to the measure of sentence and criminal procedural safeguards. Therefore, the Law Commission for England and Wales in referring to the similar “rule of law” rightly points out:

The “rule of law” principle of legal certainty dictates that the criminalisation of conduct is in general properly only the function of the legislature in new cases; it further dictates that there is a moral duty on legislators to ensure that it is clear what conduct will give rise to sanctions and to the deprivation of liberty. Broadly-phrased judicial discretions to award exemplary damages ignore such considerations.⁷²

Of course, by accepting Colby’s theory the difficulties in cases of a multitude of victims can be avoided. But the main objection to punitive damages is not refuted by this theory. Even if there are strong arguments in favour of punishing the defendant for the private legal wrong, Colby does not give convincing reasons why punitive damages should be given to the victim. Even in the case of a criminal trial, the sanction is very often imposed not only because of a wrong committed upon society, but because of the defendant’s conduct in violating a private right and thus committing a private wrong. Nevertheless, up until now, no one

70. Cf. MARKESINIS & DEAKIN, *supra* note 34, at 690; Dobbs, *supra* note 11, at 837; Wagner, *supra* note 17, at 17.

71. This principle is enshrined in section I, article 7 of the European Convention on Human Rights, available at <http://www.hri.org/docs/ECHR50.html>, and in articles 23 and 24 of the Rome Statute of the International Criminal Court, available at <http://www.un.org/law/icc/statute/rome fra.htm>.

72. Law Commission, *supra* note 63, at 99. See also B.S. MARKESINIS & S.F. DEAKIN, *TORT LAW* 729 (4th ed. 1998) (“The true objections, therefore, must be sought elsewhere and Lord Reid’s judgment provides some good clues. For example, by allowing punitive awards we may be violating such sacred principles as the *nullum crimen sine lege* rule, especially since such punitive awards can be made for any kind of conduct which can be described as ‘high-handed,’ ‘oppressive,’ or ‘malicious’ . . .”).

has taken the initiative of proposing that the victim should receive part of the money that is to be paid by the criminal where such a sum has been imposed.

Of more significant help are the ideas of Wright and Sebok, as they point out the compensatory function of “punitive damages”: compensation for the damage caused by the insult. Thus they are no longer punitive but take over the function of aggravated damages in the English sense.⁷³ What is decisive is no longer whether the defendant’s behaviour is punishable but whether the claimant needs compensation. As far as compensation for a loss suffered by the victim is concerned, there exists a convincing reason for awarding punitive damages to the plaintiff. It is also reasonable that the defendant has to compensate such damage only in the case of intentional conduct: Causing harm negligently is not an insult, and, further, in the case of the weightiest sort of fault it seems justifiable to award compensation for harm that is disregarded in cases of negligence. Of course, this idea justifies punitive damages only as long as they serve as compensation. This means that there has to be relation to the compensation for immaterial loss in other cases; punitive damages have to fit into the whole system of compensation under tort law, which until recently was not the case in the U.S. because of the tremendous discretion given to juries.⁷⁴

In *State Farm Mutual Auto Insurance Co. v. Campbell*,⁷⁵ the U.S. Supreme Court was reluctant to identify concrete constitutional limits on the ratio between compensation and the punitive damages award. In practice, however, it was suggested that few awards exceeding a “single-digit” ratio will satisfy due process.⁷⁶ *State Farm Mutual Auto Insurance Co. v. Campbell* involved a financial tort, however, and the later decision of *Philip Morris* seems to indicate that the suggested ratio has no bearing in wrongful death cases. In *Philip Morris*, the proportion of punitive damages to compensation was nearly 100:1. Granted, the ratio was

73. See MARKESINIS & DEAKIN, *supra* note 72, at 726. See also JOHN MURPHY, *STREET ON TORTS* 579, 580 (11th ed. 2003).

74. See Sebok, *supra* note 10, at 163.

75. 538 U.S. 408 (2003).

76. For example, a ratio of 9:1 would not violate due process, but one of 10:1 may.

influenced by a misdirection and the verdict was overturned, but Sebok notes that if one reads Justice Stevens's dissent in *Philips Morris* literally, he voted to uphold the Oregon Supreme Court's decision not to apply the single-digit ratio to the punitive damages awarded to the plaintiff.⁷⁷ It remains to be seen how courts will deal with the *State Farm* ratio in future non-financial cases.

III. EXCEPTIONS TO THE REJECTION OF PUNITIVE DAMAGES?

In continental Europe, one often hears the argument that tort law, even in combination with the law of unjust enrichment, is not able to provide sufficient protection for legally accepted interests or develop the necessary deterrent effect.

This supposed insufficiency is especially clear in the area of intellectual property,⁷⁸ and the complaints have already had some success: the acceptance of a claim for double the amount of a licence fee as punitive damages for a violation of intellectual property rights, for example.⁷⁹ The argument is that the area of intellectual property presents a special situation, as such goods are not corporeal (and thus "omnipresent"); because of this, many people can take advantage of them at the same time while in different places. It is argued that this higher vulnerability causes special difficulties in assessing damages, as the use of the intellectual property by the owner is not prevented by the violation of the right, and the restriction of the liberty to make arrangements is very difficult to prove. A further argument is that siphoning off the profits netted by the violation of an intellectual property right does not display strong preventive effects, because the defendant only has to hand over the gained profit and thus does not suffer any disadvantage. On top of this, the offender takes a rather insignificant risk of being discovered.

77. See Sebok, *supra* note 68.

78. For further detail, see DREIER, *supra* note 59, at 60. See also PAUL FORT, STRAFELEMENTE IM DEUTSCHEN, AMERIKANISCHEN UND ÖSTERREICHISCHEN SCHADENSERSATZRECHT UNTER BESONDERER BERÜCKSICHTIGUNG DES GEWERBLICHEN RECHTSSCHUTZES UND URHEBERRECHTS (2001), who is in favor of punitive damages in the area of immaterial property.

79. See Behr, *supra* note 6, at 137. See also DREIER, *supra* note 59, at 547.

These references regarding the vulnerability of intellectual property rights as well as the difficulties in effecting prevention under tort law and the law of unjust enrichment are quite convincing. But one has to point out that a similar situation can also arise with corporeal goods. One only has to think of means of mass transportation, as they can be used at the same time by a great number of people. Furthermore, in the case of use without permission, there will be no provable damage to the owner. Finally, the owner's claim for reasonable remuneration, based on the law of unjust enrichment,⁸⁰ has no preventive effect. The fare-dodger has to pay only what he would have paid had he adhered to the rules initially. Furthermore, he has a great chance of not being discovered.

Therefore, the idea that the offender has to pay double the amount of a reasonable remuneration cannot be restricted convincingly to intellectual property rights. Rather, it has to be extended to all those cases of unauthorised use of other people's property where a higher vulnerability exists and where the belated payment of the adequate fee will not have a preventive effect.

Of course, all of the aforementioned arguments regarding punitive damages seem to speak against doubling the amount of the licence fee. But I feel it is worthwhile to reconsider whether all the objections against punitive damages apply to such claims. First, at stake is a strictly defined increase of damages and, therefore, one must not be afraid that the sanctions are uncertain and likely to get out of control.⁸¹ Second, I see the possibility of qualifying the doubling of the licence fees not as punitive damages, which are in contrast to the idea of compensation, but as a way to justify them by another idea. The difficulty of finding and pursuing the offender, as well as the enforcement of the claim, typically entails considerable expense, which would not arise in the case of a properly contracted licence for use. The victim regularly suffers a loss because of the disturbance of the market by the infringement. One must also stress that the victim meets great difficulties in proving his loss. Because of these difficulties and

80. As to claims under private law, see Stefula, ÖJZ 2002, 825ff with further details.

81. This is also pointed out in DREIER, *supra* note 59, at 547.

the lack of other clues, the amount of expenses and loss could be equated to the licence fee. The doubling of the licence fee could thus be brought into harmony with tort law's fundamental idea of compensation, and the identification with a punishment could be avoided.

IV. RELEVANT DIFFERENCES BETWEEN EUROPEAN AND U.S. LEGAL SYSTEMS

It is astonishing that continental European lawyers seem to feel much less of a need for punitive damages than their colleagues in the U.S. The reasons for this phenomenon may arise from differences between European civil law systems and the American legal systems, and I think it interesting to cast a quick glance at this speculation.

It seems possible that under U.S. criminal law, punishment is of less importance than in continental Europe;⁸² this may even be true to a higher degree in the area of administrative penalty law. Thus there may be a greater need for punitive damages in the U.S. than in Europe.

One of the main goals and functions of punitive damages under U.S. legal systems seems to be deterrence,⁸³ and as economic gain indicates, deterrence is required. Dobbs recommends that punitive damages be measured by the direct and indirect profits the defendant has earned or will earn from the misconduct.⁸⁴ Under most European legal systems, the law of unjust enrichment⁸⁵ would be sufficient to siphon off the gains; therefore, tort law is not required to reach this goal. To provide claims under the law of unjust enrichment is even more effective because fault is not a prerequisite.⁸⁶ But I have to admit that, as a rule, indirect economic gains would not be captured by such claims.

82. Cf. SONNTAG, *supra* note 44, at 348.

83. See Dobbs, *supra* note 11, at 844-46.

84. See *id.* at 863.

85. Cf. PETER SCHLECHTRIEM, *RESTITUTION UND BEREICHERUNGS AUSGLEICH IN EUROPA. EINE RECHTSVERGLEICHENDE DARSTELLUNG* (2000).

86. According to Austrian law, the defendant further has to pay the highest price in cases where he should have known that he was acting in violation of

Furthermore, according to the “American rule,” and contrary to continental European law, the plaintiff does not receive restitution of his legal costs even if he wins his case. On top of that, in many instances, he has to hand over a large portion to his attorney—up to 40% of what he wins in the lawsuit. Therefore, he needs some incentive to raise a claim and punitive damages are supposed to provide such an incentive.⁸⁷ Dobbs even proposes that punitive damages should no longer be punitive, but that their main goal should be to cover the victim’s litigation costs.⁸⁸

It seems that punitive damages are supposed to replace compensation for immaterial loss.⁸⁹ But it would be preferable to openly discuss the need for compensation of immaterial loss and its prerequisites. Further, the amounts of punitive damages should fit into the whole scheme of compensation for non-pecuniary loss. Last but not least, it seems questionable whether there really is a need to invoke punitive damages to compensate for emotional or immaterial loss.⁹⁰

V. CONCLUDING REMARKS

Tort law, which aims compensation, even in combination with the law of unjust enrichment and other parts of private law is said to be unable to sufficiently deter tortious conduct. I think that, first of all, one should try to further develop tort law and the law of unjust enrichment such that they meet the demands of reasonable compensation and, in this way, prevention. One possibility—which has been mentioned before—is to improve the compensation of emotional loss: Intentional violation of another person’s private rights shows a lack of respect for such rights and can be

another’s right. See Allgemeines bürgerliches Gesetzbuch [ABGB] [Civil Code] § 417 (Austria).

87. See Dobbs, *supra* note 11, at 846–47. See also Behr, *supra* note 6, at 122–23; SONNTAG, *supra* note 44, at 345.

88. See Dobbs, *supra* note 11, at 856, 888. To some extent, punitive damages have the function of filling the loopholes of social security law (e.g., in the asbestos cases). See SONNTAG, *supra* note 44, at 351.

89. Cf. SONNTAG, *supra* note 44, at 350.

90. Cf. Dobbs, *supra* note 11, at 853.

characterized as a form of insult.⁹¹ Therefore, compensation for the emotional harm caused by such behaviour should be awarded to the victim, but only in such amounts as fit into the whole system of non-pecuniary damages. Further, and only to a very limited extent, providing a claim for a lump sum in cases where the proof of damage is extremely difficult seems to be compatible with the principles of tort law as long as the sum roughly corresponds to the damage that may have occurred.

Even if such measures fail to cover all reasonable demands, one has to consider the fundamental ideas of private law and come to the conclusion that tort law is not the right area for inserting tools of punishment, such as punitive damages. Therefore, I think the only way out is to consider other possibilities for developing systems of legal protection that are able to provide sufficient preventive effects but do not violate fundamental principles of private law. In my opinion, one prerequisite of such tools for filling the loopholes of legal protection is indispensable: The claimant must not receive a windfall.

Of course, the best solution would be to develop criminal, administrative, and procedural laws in such a manner that the necessary prevention could be secured. This approach would include the advantage that all fundamental principles of criminal law would be observed, above all the principle that the punishment should be laid down in the law (*nulla poena sine lege*).

Against this approach is the objection that public prosecutors and criminal courts would be overloaded. I am no expert in this field, but I think that this problem could be reduced by a system of private prosecution. Granted, the suggested approach may lead to criminal courts being overburdened by a flood of cases, but the adjudication of criminal cases is the job of criminal courts, and a failure to do this would result in the civil courts being overloaded and civil rules being manipulated to accommodate the aims of criminal law.

91. Already in Roman Law, an interference with another's property could be held to affect that person's reputation and could present to him an *actio iniuriarum aestimatoria*. Cf. REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 1057 (1996).

But if there are insurmountable hurdles under this approach, there could be a way out that is to some extent compatible with the principles of private law. Some European legal systems permit certain associations to pursue applications for injunctions and compensation claims on the injured party's behalf.⁹² In developing this idea, it seems possible to give to associations the right to put forward claims for punitive damages and deliver the money to public authorities or social institutions. As a stimulus, one should consider granting these institutions a lump sum for preparing the claim and handling the investigations. Solving the problem in this manner would not violate the fundamental private law principle of mutual justification of legal consequences, and it also respects the principle that tort law has to avoid the victim's enrichment by compensation. On the other hand, such a solution would have a preventive effect without overburdening criminal courts.

But I think that careful examination is still required because such a system may lead to duplication of claims, and thus of efforts and expenses of the victim's claim for compensation and the association's claim for punitive damages; sometimes, even a criminal trial may be held. Furthermore, I am not so sure that civil procedural law is capable of managing all the problems that arise with regard to punitive damages. Differences may exist between criminal and civil law regarding procedural safeguards that can operate against awarding punitive damages under continental civil law. Differences may exist regarding the burden of proof and the required measure of proof under criminal and private law, the permission to accept prima facie proof, the objectification—at least under some legal systems—of fault under tort law, the burden of bearing procedural costs, and so on.

Because of these differences, it seems doubtful that private law really is suitable for settling punitive damages claims, or that criminal and administrative punishment law are that much more suitable. Further, one has to bear in mind that punishment under

92. Such claims are known in some European countries. Cf. Kühnberg, *Die Konsumentenschützende Verbandsklage*, ZfRV 2005, 106 (for an example of such a claim in France); Mikroulea, *Verbandsklage auf Schadensersatz im griechischen Verbraucherschutzgesetz*, in FS GEORGIADES 281ff (2005) (for an example of such a claim in Greece).

criminal law always requires the statutory definition of the crime as well as the measure of punishment. Both requirements are not known to the same extent in private law, and thus—as the example of the U.S. shows—the assessment of punitive damages tends to be an arbitrary act. Taking all these objections into consideration, I think that it would be preferable to develop private prosecution under criminal law, to design additional criminal law provisions, and to extend the law of administrative punishment. Only insofar as punitive damages correspond with immaterial loss, or to suspected but un-provable economic loss (which is substantively compensatory, not punitive), should they be awarded under private tort law.