

 SpringerWienNewYork

Tort and Insurance Law
Vol. 25

Edited by the

Institute for European Tort Law
of the Austrian Academy of Sciences

Helmut Koziol
Vanessa Wilcox (eds.)

Punitive Damages:
Common Law and Civil Law Perspectives

With Contributions by

Bjarte Askeland	Attila Menyhárd
Jean-Sébastien Borghetti	Johann Neethling
Henry Brooke	Pedro del Olmo
Ina Ebert	Lukas Rademacher
Marta Requejo Isidro	Alessandro P. Scaso
Nils Jansen	Anthony J. Sebok
Bernhard A. Koch	Louis T. Visscher
Helmut Koziol	Vanessa Wilcox

SpringerWienNewYork

Austrian Academy of Sciences
Institute for European Tort Law
Reichsratsstraße 17/2
1010 Vienna, Austria
Tel.: +43 1 4277 29651
Fax: +43 1 4277 29670
E-Mail: etl@oeaw.ac.at

This work is subject to copyright.
All rights are reserved, whether the whole or part of the material is concerned,
specifically those of translation, reprinting, re-use of illustrations, broadcasting,
reproduction by photocopying machines or similar means, and storage in data
banks.

Product Liability: The publisher can give no guarantee for all the information
contained in this book. This also refers to information about drug dosage
and application thereof. In every individual case the respective user must check
its accuracy by consulting other pharmaceutical literature.

© 2009 Springer-Verlag / Wien
Printed in Germany

Springer-Verlag Wien New York is part of
Springer Science + Business Media
springer.at

Typesetting: Composition & Design Services, Minsk, Belarus
Printing: Strauss GmbH, 69509 Mörlenbach, Germany

Printed on acid-free and chlorine-free bleached paper
SPIN: 12578559

Library of Congress Control Number: 2009928375

ISSN 1616-8623
ISBN 978-3-211-92210-1 SpringerWienNewYork

This book is dedicated to

Ulrich Magnus

on the occasion of his 65th birthday

Preface

Punitive damages remain one of the most controversial areas in the history of tort law. With the growing literature on the subject, the consensus is that it seems worthwhile and even necessary to discuss, thoroughly and on a comparative basis, the nature, role and suitability of such damages in tort law and private law in general. This is especially so in light of the attempts to reform and unify continental European legal systems and the recent seminal judgments and consultations in this field of law.

The Institute for European Tort Law thus decided to embark on a comprehensive study on punitive damages. The study, which began in 2007, covers jurisdictions that explicitly allow the award of punitive damages, in particular, England, South Africa and the United States as well as those jurisdictions which purport (sometimes emphatically) to deny their existence (although some of them covertly incorporate punitive damages into the framework of their tort systems). The position in France, Germany, Hungary, Italy, the Scandinavian countries, Spain as well as EU law is thus considered. This book also includes reports on punitive damages from an insurance, law and economics and private international law perspective. A report on aggravated damages precedes a comparative report and conclusions. This book follows a conference held in November 2008 that was chaired by Sir Henry Brooke, whose chairmanship of the Law Commission for England and Wales coincided with the start of the Commission's consultation on punitive damages, and Prof. Ken Oliphant, the newly appointed Director of the Institute for Tort and Insurance Law.

We would like to thank the Institute staff, in particular, Mag. Lisa Zeiler and Thomas Thiede LL.B, LL.M for their help in making the Conference a success. We would also like to thank Mag. Christian Jöllinger, Mag. Kathrin Karner-Strobach and JUDr. Petra Pipkova for their valuable and varied assistance in producing this publication.

Helmut Koziol and Vanessa Wilcox
Vienna/Strasbourg, April 2009

Table of Contents

A Brief Introduction: The Origins of Punitive Damages
(Sir Henry Brooke)..... 1

COUNTRY REPORTS..... 5

Punitive Damages in England
(Vanessa Wilcox)..... 7

- I. Introduction..... 7
- II. The Three Categories: The Categories Test..... 8
- III. The Cause of Action Test Abolished..... 19
- IV. Factors Relevant to an Assessment of Punitive Damages 25
- V. The Case against Punitive Damages 32
- VI. Alternative Remedies – Gain Based Damages 51
- VII. Other 53
- VIII. Conclusions..... 53

Punitive Damages in France
(Jean-Sébastien Borghetti)..... 55

- I. Introduction..... 55
- II. A Hidden Presence of Punitive Damages? 56
- III. Towards the Official Introduction of Punitive Damages? 67

Punitive Damages in Germany
(Nils Jansen and Lukas Rademacher)..... 75

- I. Introduction..... 75
- II. The Debate on Punitive Damages..... 76
- III. Conclusions..... 85

Punitive Damages in Hungary
(Attila Menyhárd)..... 87

- I. Introduction..... 87
- II. Definition of Punitive Damages 88
- III. Function and Rationality of Punitive Damages 89
- IV. Regulatory and Policy Context..... 89
- V. No Punitive Damages in Hungarian Tort Law..... 91
- VI. Punitive Elements in Hungarian Private Law..... 92
- VII. Policy Aspects of Punitive Damages in Hungarian Tort Law..... 98
- VIII. Conclusions..... 102

Punitive Damages in Italy

<i>(Alessandro P. Scarso)</i>	103
I. Introduction.....	103
II. Compensation for Damage in Personal Injury Cases	104
III. Punitive Damages under the Italian Legal System	106
IV. Statutory Provisions and the Punitive Purpose of Tort Law	109
V. Compensation for Damage and the Standard of the Wrongdoer's Conduct.....	111
VI. Conclusions.....	113

Punitive Damages in Scandinavia

<i>(Bjarte Askeland)</i>	115
I. Introduction.....	115
II. Elements of Punitive Damages under Norwegian Tort Law	116
III. Elements of Punitive Damages under Swedish Tort Law.....	120
IV. Elements of Punitive Damages under Danish Tort Law.....	121
V. Conclusions.....	122

Punitive Damages in South Africa

<i>(Johann Neethling)</i>	123
I. Introduction.....	123
II. Law of Delict	123
III. The Law of Contract.....	135
IV. Copyright Law	136

Punitive Damages in Spain

<i>(Pedro del Olmo)</i>	137
I. Introduction.....	137
II. Specific Legally Based Arguments.....	140
III. Other Arguments.....	151
IV. Difficulties and Plays on Words.....	152
V. Conclusions.....	153

Punitive Damages in the United States

<i>(Anthony J. Sebok)</i>	155
I. Introduction.....	155
II. The Three Eras of American Punitive Damages.....	159
III. The Purposes of Punitive Damages in American Tort Law	169
IV. Rules for Juries (Or Other Factfinders)	180
V. Constitutional Constraints	189

Punitive Damages in European Law

<i>(Bernhard A. Koch)</i>	197
I. Introduction.....	197
II. Conflicts of Concepts in Legislative Drafts.....	197
III. "Effective, Proportionate and Dissuasive"	200
IV. Equal Treatment of Damages Awards.....	202
V. Punitive Damages by Way of Import.....	205
VI. Competing for a New Standard	207
VII. Conclusions.....	208

SPECIAL REPORTS	211
Punitive Damages and Liability Insurance	
<i>(Ina Ebert)</i>	213
I. Introduction.....	213
II. The Insurability of Punitive Damages	214
III. Conclusions.....	217
Economic Analysis of Punitive Damages	
<i>(Louis T. Visscher)</i>	219
I. Introduction.....	219
II. Economic Reasons for Punitive Damages: Deterrence	222
III. Economic Reasons for Punitive Damages: Punishment.....	229
IV. Tension between the Goals of Deterrence and Punishment.....	232
V. Conclusions.....	236
Punitive Damages From a Private International Law Perspective	
<i>(Marta Requejo Isidro)</i>	237
I. Introduction.....	237
II. Service of Claim Seeking Punitive Damages	239
III. Recognition and Enforcement of Punitive Damages Awards	245
IV. Punitive Damages as Part of the Applicable Law.....	252
V. Conclusions.....	254
Aggravated Damages	
<i>(Anthony J. Sebok/Vanessa Wilcox)</i>	257
I. Introduction.....	257
II. Aggravated Damages under English Law	258
III. Aggravated Damages in Other Jurisdictions	266
IV. Aggravated Damages under American Law	269
Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation?	
Comparative Report and Conclusions	
<i>(Helmut Koziol)</i>	275
I. Introduction.....	275
II. The Common Law	276
III. Continental European Legal Systems	282
IV. The European Union.....	288
V. Shifting From Punitive to Preventative Damages	289
VI. Arguments in Favour of Punitive Damages and Counterarguments.....	293
VII. Further Arguments against Punitive Damages.....	296
VIII. Additional Observations	303
IX. Conclusions.....	305
ANNEX	309
Index	323
Publications	331