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A two-stage framework for addressing punitive damages in Chilean civil law. A comparative approach from English law

Un marco teórico de dos etapas para abordar los daños punitivos en el derecho civil chileno. Un enfoque comparado desde el derecho inglés

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Abstract

Punitive damages are a controversial legal figure which has been present in English common law for almost 200 years, with a presence in its statutes for practically 800 years. Although Chilean Civil Law has certain punitive notions, the so-called punitive damages have gained relevance in the last decade. Interestingly, Civil Law may offer a more systematic and coherent treatment of this type of damages than that coined in English common law. This paper explores this by answering, from a civilian perspective, when it would be reasonable to award punitive damages.

Keywords: *Punitive damages; civil law; common law; comparative law; compensation; deterrence; punishment.*

Resumen

Los daños punitivos son una figura legal controvertida que ha estado presente en el common law inglés por casi 200 años, y en sus estatutos por casi 800. Aunque en el derecho privado chileno es posible encontrar ciertas nociones punitivas, los llamados daños punitivos han tomado particular relevancia recién en la última década. Interesantemente, el derecho civil puede ofrecer un tratamiento más sistemático y coherente para este tipo de daños que el tradicionalmente ofrecido por el common law inglés. Así, este artículo explora lo anterior, analizando, desde el derecho civil, cuándo sería razonable otorgar daños punitivos.

Palabras claves: *Daños punitivos; derecho civil; common law; derecho comparado; compensación; prevención; castigo.*

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I. INTRODUCTION

In general terms, by punitive or exemplary damages, we refer to those sums of money awarded to the victims of a tort, to punish and deter the wrongdoer, especially in the face of wilful or malicious behaviours.[1] These damages are a successful tool that serves two relevant goals: retribution and deterrence.[2] Roughly speaking, retribution refers to the idea of punishing and condemning "unlawful violations of another person's rights", protecting not only them but society as a whole".[3] In turn, the deterrence goal means that punitive damages attempt to discourage the wrongdoer from repeating their wrongs (specific deterrence) and to dissuade other potential wrongdoers from the same illicit behaviour (general deterrence).[4] These are the most common rationales behind punitive damages. Although some authors indicate that deterrence is just a secondary goal[5] or that these objectives compete with each other,[6] such discussions are beyond the scope of this paper.

Punitive damages have posed essential challenges to the logic that explains private law, especially its compensation principle.[7] This principle means the primary goal of damages (compensatory damages)[8] is to try to get the victims at "*restitutio in integrum*",[9] that is to say, to bring them just to the position they would have been in if the wrong had never occurred, no more than that.[10]

This discrepancy in the aims pursued by this legal figure and by tort law or civil liability has led to viewing punitive damages with a certain mistrust, proposing procedural safeguards, caps or limits for their award,[11] confusing them with other related figures,[12] saying they defy the boundaries between private law and criminal law,[13] and arguing in favour of their abolition.[14] That is why it could be reasonable to say that their potential benefits do not outweigh the tensions they generate inside the legal system.

Despite the above, punitive damages are a reality in English and Chilean private law. In the *common law*, they have been present for almost 200 years[15] and have recently had a kind of rediscovery.[16] On the other hand, not many years ago, Chilean law underwent reforms that accepted these types of damages, and scholars have begun to open up to the possibility that private law also fulfils punitive functions.[17] Thus, English and Chilean legal systems provide an

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[1] GOTANDA (2003).

[2] AUSNESS (1985), pp. 120-121.

[3] VANLEENHOVE (2016), p. 24.

[4] SEBOK (2009), p. 179.

[5] MUNITA (2021), p. 97.

[6] BEEVER (2003), p. 101.

[7] POLLOCK (1892), p. 124.

[8] Ibid, p. 187.

[9] JONES (2020), p. 254.

[10] BROOKE (2009), p. 1.

[11] ENGLARD (1993), p. 1.

[12] BEEVER (2003), p. 88.

[13] SEBOK (2009), p. 161.

[14] BEEVER (2003), p. 88.

[15] GOTANDA (2003), pp. 6-8.

[16] GOUDKAMP and KATSAMPOUKA, (2018), p. 91.

[17] In recent years, the number of academic works in Chile referring to the punitive function of civil liability has increased. This trend can be seen in academic research, dissertations and presentations at various colloquia. For example, see: BANFI DEL RÍO (2017); FOSK AND TUNIC (2020); PEREIRA (2015).

interesting contrast between two worlds: one that has been familiar with this controversial tool for more than two centuries (or even more) and one that still hesitates whether or not to incorporate it more broadly into its legal system.

I. OBJECTIVE

This article presents a theoretical framework for the treatment of this *common law* figure in the Chilean civil law system. In this sense, it is essential to clarify that this work is not an attempt to encourage the use of punitive damages nor a criticism of them. Nor does it attempt to determine whether or not using this foreign figure is possible under the current Chilean Civil Code, and even less try to give a final answer for the tensions that its inclusion could generate between private law and criminal law.

In short, this work attempts to answer how to deal with more extensive use of this figure if Chilean private law accepted it beyond the cases specifically established in Chilean statutory law. The answer will try to deal with these damages consistently and coherently with the Chilean private law principles and central legal institutions. After all, punitive damages need not necessarily be arbitrary or unpredictable, or as has been said on occasion, like a *bolt of lightning*.[18]

II. METHODOLOGY

The experience of English law is precious since the roots of punitive damages are in English tort law.[19] In turn, this is a legal system known for using this tool moderately and conservatively, unlike, for example, the United States.[20] In this way, rather than a direct legal transplant,[21] the aim is to learn from this figure, consider its origin and the main rationales that explain it, highlight the usefulness of some civilian categories and finally create something new.[22] In this case, a theoretical framework to address these damages.

The proposed scheme must be coherent with the main principles and rules of Chilean private law, which includes respecting the reasonableness,[23] abstraction and systematisation that characterises it,[24] as well as the priority that this system gives to the protection of some interests over others. In this sense, not all the concerns and priorities of the English legal system are necessarily relevant to the Chilean legal reality.

Finally, although this work has focused on identifying the lessons English law can provide for constructing this normative framework, it is not the only relevant legal system for Chilean private law. Thus, it would be interesting to see future comparative works analysing the experience of the United States and France. In particular, the comparative value of how these damages have been studied in the United States is found in the abundant literature on the economic,[25] moral[26] and social[27] justifications surrounding this figure, as well as the challenges regarding the control of constitutionality and proportionality about the punitive awards.[28] Furthermore, the United States is a country in which (at least apparently) punitive damages have

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[18] ZIPURSKY (2014), p. 141.
[19] VANLEENHOVE (2016), p. 14.
[20] GOTANDA (2003), p. 53.
[21] LEGRAND (1997), p. 120.
[22] SACCO (1991), p. 5.
[23] SAN MARTÍN NEIRA (2018), p. 177.
[24] ALCALDE (2016), p. 115.
[25] POLINSKY and SHAVELL (1998), p. 869.
[26] ZIPURSKY (2005), p. 105.
[27] SHARKEY (2020).
[28] REDISH and MATHEWS (2004), p. 1.

received an intensive application.[29] In turn, the French experience is relevant given the Chilean civil liability system has been strongly influenced by French legal principles (especially full recovery), the historical relevance that the French law had for the genesis of the Chilean Civil Code[30] and given the modern discussions about the punitive function of civil liability that have taken place in French scholarship.[31] Likewise, France and Chile share similar challenges regarding the punitive function of *daño moral*.[32]

III. CHILEAN CIVIL LIABILITY AND ENGLISH TORT LAW: AN OVERVIEW

Chilean civil liability structures its system on a few articles in its Civil Code (Articles 2314 to 2334), which French Civil Law heavily influenced. This influence can be seen in the historical relationship between the two codes,[33] in the general approach presented by its civil liability rules[34] and in the fact that the concept of liability was built upon a moral (and somewhat subjective) reproach regarding the conduct of the wrongdoer.[35]

Article 2314 of the Chilean Civil Code is one of the most important among these rules because it is the starting point for every civil liability case. This article contains a general clause which states: "*Whoever has committed a delict or quasi-delict that has caused damage to another is obliged to pay compensation, without considering the sanctions imposed by law for that delict or quasi-delict*".[36]

According to this rule, for a civil liability claim to succeed, the plaintiff must prove that (i) the defendant acted voluntarily; (ii) the conduct was either intentional (malice/*dolo*) or negligent (the first situation is called a "delict" and the second a "quasi-delict"); (iii) the defendant's conduct caused the harm; and (iv) a causal connection between the harm and the defendant's behaviour. Based on this rule, the Chilean legal system has been described as "fault-based",[37] founded on the breach of the duty of care ("*neminem laedere*").[38]

Alongside Article 2314, another fundamental rule in Chilean civil liability is articulated in Article 2329 of the Civil Code. This provision stipulates that: "*As a general rule, any harm attributable to malice or negligence of another person must be compensated by the latter* (...)".[39] Consequently, in has been interpreted, the extent of the harm caused serves as both the foundation and limit for the *quantum* of the award. This doctrine is commonly referred to as the principle of "*reparación integral*" or "full recovery".[40] Traditionally, it is explained that this principle inherently conflicts with the mechanic of punitive damages.[41]

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[29] SEBOK (2009) p. 156.

[30] GUZMÁN (2004), p. 49.

[31] CABRILLAC (2021), p. 19.

[32] PARKER (2014), p. 418.

[33] BARRIENTOS (2009), pp. 351-353.

[34] ZELAYA (2004), p. 101.

[35] DOMÍNGUEZ (2005).

[36] Chilean Civil Code, Article 2314.

[37] BARROS (2020), p. 31.

[38] BANFI DEL RÍO *et al.* (2018), p. 200.

[39] Original text in Spanish: "*Artículo 2329. Por regla general todo daño que pueda imputarse a malicia o negligencia de otra persona, debe ser reparado por ésta. Son especialmente obligados a esta reparación* (...)".

[40] BARROS (2020), p. 267.

[41] PEREIRA (2015), p. 65.

On the other hand, England is a *common-law* country.[42] In this system, the courts create the law through precedent and distinguishing doctrines.[43] England does not have a Civil Code. In this legal system, the enacted law plays a secondary role, mainly in complementing or correcting the courts' decisions.[44]

The English tort law mainly consists of over 70 wrongs, some overlapping, each with its own name and requirements.[45] This is not innocuous. Indeed, one of the main characteristics attributed to the *common law*, and therefore, by extension, also present in English tort law, is its lack of systematisation and dispersion. As it has been said, "*logic in excess has never been the vice of English Law*".[46] In this sense, it is possible to find different "causes of action" or "torts", not necessarily systematically ordered or categorised.[47]

The most common torts in English law are the tort of negligence, trespass, battery, assault, and false imprisonment.[48] These torts are all specific, requiring the defendant to have committed a particular act to be liable. There has also been a substantial increase in the use and importance of the tort of negligence, which may be the most relevant today in English law.[49]

The structural differences between English tort law and Chilean civil liability are evident. English tort law is based on caselaw, while Chilean delict law is mainly based on a civil code; besides, the former tends to be specific and the latter general. However, there are also some similarities between the two systems. For example, both systems are mainly fault-based, meaning that the defendant must be at fault to be liable. As we will see, both legal systems have punitive elements, albeit with different intensities.

IV. BOTH PRIVATE LAW SYSTEMS HAVE SOME PUNITIVE ELEMENTS

The core of the Chilean civil liability system is the victim's compensation with *full recovery*.[50] However, in this legal system, not everything is *compensation*, as rules go beyond this objective and seek to punish and deter certain undesired behaviours. Among them, we can mention the following:

In matters of Succession Law, Article 1231 of the Chilean Civil Code[51] regulates those cases in which an heir has stolen things from the estate, obliging them to return double the amount of what was stolen. Thus, if it is required to deliver *double* the amount of what was stolen, we are no longer talking about mere restitution but something different. Similarly, in Family Law, Article 1768 of the Chilean Civil Code[52] refers to cases in which one of the spouses

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[42] VAN DAM (2013), p. 93.
[43] RIGONI (2014), p. 151.
[44] KÖTZ (1987), p. 5.
[45] NOLAN and DAVIES (2013), p. 929.
[46] MORGAN (2021), p. 187.
[47] WAGNER (2019), p. 999.
[48] VAN DAM (2013), p. 101.
[49] CANE and GOUDKAMP (2018)
[50] BARROS (2020), p. 43.
[51] Original text in Spanish: "*Art. 1231. El heredero que ha substraído efectos pertenecientes a una sucesión, pierde la facultad de repudiar la herencia, y no obstante su repudiación permanecerá heredero; pero no tendrá parte alguna en los objetos substraídos.*
El legatario que ha substraído objetos pertenecientes a una sucesión, pierde los derechos que como legatario pudiera tener sobre dichos objetos, y no teniendo el dominio de ellos será obligado a restituir el duplo.
Uno y otro quedarán, además, sujetos criminalmente a las penas que por el delito correspondan".
[52] Original text in Spanish: "*Art. 1768. Aquel de los cónyuges o sus herederos que dolosamente hubiere ocultado o distraído alguna cosa de la sociedad, perderá su porción en la misma cosa y se verá obligado a restituirla doblada*".

misappropriates assets belonging to the marital partnership. In such a case, the consequence is similar to the previous one: the spouse must return *double* the amount of the stolen property.

The effect produced by these rules could have *some* of its explanation in the *in rem verso* actions from the Law of unjust enrichment or even in the *rei vindicatio* action typical of the Law of Property. However, the most strike-forward explanation of that additional obligation that weighs on the spouse or heir is obtained through the civil liability system.[53]

Firstly, we are facing an action freely executed by a subject (generally referring to the misappropriation of assets); secondly, such conduct has patrimonial consequences on others (the spouse or other heirs suffer economic harm concerning the above); thirdly, between this action and the damage caused there is a clear connection of causality; and fifthly, we can see in the illegal heir or spouse's conduct a disvalue, which can be classified as wilful or malicious.

Therefore, the civil liability logic seems to explain these kinds of cases. This conclusion is not affected by the fact that the plaintiff does not have to prove the existence of negligence or malice, nor are these rules not located in the chapter that the Chilean Civil Code reserves for civil liability. Indeed, the first argument simply brings these cases closer to the strict liability regime, and the location of a rule within the Civil Code does not -necessarily- determine its legal nature but its content.

Regarding Chilean law of contracts, there are also punitive elements. For example, the Chilean Civil Code recognises the parties' power to liquidate damages arising from the eventual breach of contract of one of them, which is known as a "penalty clause" ("*cláusula penal*").[54] This contractual clause becomes "punitive" if the parties establish that in the event of non-performance, the oblige can request compensation for damages and "the private sanction" stipulated by the parties. In other words, it is not simply a matter of liquidating damages in advance since they can request such a sum in addition to the harm caused. Interestingly, although the Chilean Civil Code expressly accepts the above, it also limits such punitive consequences, establishing that the "clausula penal" cannot exceed twice the value of the principal obligation.[55]

Then, it is also possible to find similar cases outside the Chilean Civil Code, particularly in the areas of labour law and consumer law.[56] In both cases, there are situations related to the civil liability of the offender, and despite being contained in special statutory laws, the Chilean Civil Code is applied as a subsidiary set of rules.[57]

Regarding labour law,[58] article 168 of the Chilean Labour Code empowers judges to increase the award of damages by 30%, 50%, 80%, or even 100% in cases of unjustified dismissal of a worker when the employer has incorrectly invoked some of the grounds that would allow

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[53] HERNÁNDEZ and PONCE (2022), p. 82.

[54] PRADO (2019), p. 10.

[55] Original text in Spanish: "*Art. 1543. No podrá pedirse a la vez la pena y la indemnización de perjuicios, a menos de haberse estipulado así expresamente; pero siempre estará al arbitrio del acreedor pedir la indemnización o la pena*".

[56] "*El artículo 53 C (c) de la Ley N°21.081 incorpora en nuestro Derecho del consumo los denominados daños punitivos. La figura significa reconocer en el derecho de consumo la pertinencia de la función punitiva de la responsabilidad civil* (...)" See: MUNITA (2022), p. 607.

[57] Original text in Spanish "*Art. 4º. Las disposiciones contenidas en los Códigos de Comercio, de Minería, del Ejército y Armada, y demás especiales, se aplicarán con preferencia a las de este Código*".

[58] GAMONAL (2017), pp. 237-238. In addition to the cases presented here, it has also been argued that current legislation would allow for the awarding of punitive damages in cases of violations of trade union freedom.

them for terminating the employment relationship. Most of these cases refer to situations considered outrageous for the worker.[59]

In the area of Consumer Protection Law, a reform to class action procedures was approved in 2018,[60] allowing judges to increase compensations for consumers by up to 25% if the wrongdoer company: a) has been previously sanctioned for the same infringement within the last 24 months; b) has caused severe financial harm to consumers; c) has harmed the physical (body) or psychological integrity of consumers, or seriously harmed their dignity; or d) has endangered consumers' or community's safety, even if it has not caused them harm. The academic literature has recognized here a case of punitive damages.[61]

Interestingly, even though these five cases correspond to situations referring to different matters, they have elements in common. Firstly, in almost all these cases (except for contract law), it appears to be an additional element: it is not merely a negligent act, it is a particularly serious conduct, or it infringes off a specially protected legal right or interest. Secondly, in all these cases -including contract law- it is accepted that a person who has acted particularly objectionably may be ordered to pay or make restitution for a sum of money higher than the harm caused or the misappropriated funds. That is to say, the compensation principle is not enough. Thirdly, although all these cases provide a kind of punishment, that punishment is subject to a limitation established in proportion to the principal sum. In other words, although the Civil Code (as well as different rules of statutory law) considers the possibility of granting private penalties, it also considers subjecting them to certain limits.

Finally, it is interesting to point out that *daño moral* (non-pecuniary harm) also plays a punitive role in the Chilean legal system. Indeed, although these damages have an compensatory appearance, they perform a subtle punitive function in practice.[62] In fact, when facing outrageous conduct, judges tend to measure those awards based on the wrong's severity, the presence of *dolo* or even on the wrongdoer's economic capacity. All of these criteria are outside the strictly compensatory sphere. Some scholars have already mentioned the existence of this phenomenon,

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[59] More in detail: the compensation can be increased (i) by 30%, when the employer has not been able to prove the needs of the company that justified the worker's dismissal; (ii) by 50%, if the employer has not invoked any grounds, or has incorrectly invoked some of the grounds for terminating the employment relationship (e.g. mutual agreement, worker's death, expiry of the term of the employment contract, among others), (iii) by 80% if the employer has not been able to prove some serious misconduct, such as that the worker has held negotiations prohibited by the employer, unjustified absences of the workplace, or non-compliance with the employment contract, among others; and (iv) increased by 100%, if the employer has erroneously applied one of the serious grounds for dismissal, for example, referring to lack of probity, sexual harassment, etc.

[60] "Ley Nº 21.081" that modifies "Ley Nº 19.496" (Consumer Protection Act) Diario Oficial de la República de Chile, September 13th, 2018.

[61] MUNITA (2022), p. 607.

[62] HERNÁNDEZ and PONCE (2022), p. 83.

among them, PINO,[63] GAMONAL,[64] LARRAIN[65] and SEGURA.[66] The same problem has been pointed out in France[67] and Mexico. In the latter, the problem has become even more explicit, after the Supreme Court's recognition and awarding of punitive damages based on the interpretation of Article 1916 of the Mexican Federal Civil Code, which regulates *daño moral.*[68] Specifically, factors such as the severity of the conduct and the capacity of the defendant, among others not necessarily compensatory, were considered as criteria for measuring the award.[69]

Punitive damages are not novel for English law, as their roots can be traced back to medieval English statutes.[70] An example is the Statute of *Westminster* of 1272, which states: "Trespassers against religious persons shall yield *double damages*".[71]

Likewise, these damages have been present in English *common law* for more than 200 years.[72] *HUCKLE V. MONEY,* decided in 1763, is an example of this.[73] This was a false imprisonment case in which a jury decided to award damages of 300 pounds, although the actual damages were only 20 pounds.[74] Then, the Crown requested the verdict to be set aside because the damages seemed excessive, but the Court ultimately declined to intervene with the jury's decision.[75] Cases such as these have suggested that practice was ahead of theory and that the conceptualisation of these types of damages seems to have been born only to control something that already existed.[76]

Then, in 1964, one of the most important cases for understanding, developing and limiting these types of damages in the English *common law* was decided: *ROOKES V. BARNARD.*[77] In simple terms, Rookes was an employee of the British Overseas Airways Corporation (BOAC) and part of the Association of Engineering and Shipbuilding Draughtsman (AESD). Rookes disagreed with the union and withdrew from it. However, since the company and the union

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[63] "*Por otra parte, la distinción entre el objetivo punitivo (ii) y los efectos que una orden judicial (o norma) pueden producir en el demandado (iii) permite orientar de buena forma el debate. Concretamente, podemos pensar en la indemnización del daño moral, y aquella conocida función punitiva encubierta que suele adquirir en la jurisprudencia chilena. Para que estas indemnizaciones tengan propiamente una naturaleza punitiva, se requiere que sean decretados con el propósito de castigar al demandado. La atención de los tribunales en el grado de reprochabilidad de la conducta del demandado y sus capacidades económicas sugieren que efectivamente existe dicha función punitiva*". In: PINO (2022).

[64] GAMONAL (2017), p. 240. "*Los daños punitivos no son extraños a nuestro sistema* (...). *Quizás desde una perspectiva dogmática algunos prefieran la coherencia y que la responsabilidad civil sea solo correctiva. Pero como muchos civilistas han destacado, el código de Bello reconoce casos de sanciones civiles y la jurisprudencia de tribunales en materia de daño moral tiende a encubrir consideraciones de tipo punitivo*".

[65] LARRAÍN (2009), p. 709.

[66] "*Poca duda cabe que en nuestro sistema de responsabilidad civil no se ha contemplado la figura relativa a la sanción o agravación de la responsabilidad por especial gravedad de la culpa del autor. Sin embargo, la doctrina más reciente ha advertido que un estudio medianamente detenido de la jurisprudencia nacional en materia de reparación de daño moral demuestra, sin dudas, la existencia de evidentes razones de índole sancionatoria que determinan el monto de la indemnización fijada*". In: SEGURA (2005), pp. 101–102.

[67] PARKER (2013), p. 418.

[68] Supreme Court of Mexico, Amparo 30/2013 (2014).

[69] MEDINA (2020), p. 222.

[70] COLBY (2003), p. 614.

[71] VANLEENHOVE (2016), p. 14.

[72] GOTANDA (2003), pp. 6-8.

[73] VANLEENHOVE (2016), p. 14.

[74] *HUCKLE V. MONEY* (1763).

[75] VANLEENHOVE (2016), p. 15.

[76] COLBY (2003), p. 614.

[77] WILCOX (2009), p. 8.

agreed that the former could only hire employees who were members of that group, they threatened to strike unless Rookes quit his job or was fired. The Corporation suspended ROOKES from his work and two months later dismissed him. Rookes sued the Union representatives and the company representative, Barnard, claiming that he was the victim of "tortious intimidation" and that unlawful means were used to induce the company to terminate his contract.[78] The action was initially upheld, but the Court of Appeals dismissed it. The House of Lords finally reversed the latter decision and upheld Rookes' claim.[79]

What matters for this piece of work is the reasoning presented by LORD DEVLIN in his speech. He reasoned that the facts of the case did not satisfy any of the categories that merited punitive damages according to the English *common law* and then clarified these categories as the following: (i) "*oppressive, arbitrary or unconstitutional action by servants of the government*"; (ii) "defendant's *conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff*", and (iii) when these damages are expressly authorised by statutory law.[80] These categories have marked and charted the path of punitive damages in modern tort law.

Additionally in *ROOKES V. BARNARD*, LORD DEVLIN sought to eliminate the confusion between two related but distinct concepts: aggravated damages and exemplary damages. He states "*this* [his] *conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject*".[81] However, the confusion persists to this day in English Law. For example, CANE argues that aggravated damages are undistinguishable from punitive damages, and that they should be abolished;[82] while others, such as BEEVER and MURPHY, acknowledge certain differences and seek to find a place for them within private law.

In essence, BEEVER indicates that aggravated damages are those awards that seek to compensate the victim of an intentional conduct that, in a certain way, denies that he is a holder of rights or the victim's condition of moral person.[83] These damages compensate people when their dignity has been affected. In his view, as these damages do not seek to compensate for the injury to the victim's feelings, but rather for the injury to the victim's dignity, the focus is on the wrongdoer's conduct rather than on how the victim has been left.[84] Therefore, the wrongdoer's conduct has to be analysed to understand how the wrongdoer has injured someone else's interest.[85] In turn, MURPHY explains aggravated damages do not try to punish the wrongdoer but to compensate injuries to victim's dignitary interests.[86]

The discussion about the concept and placement of aggravated damages in private law has an undeniable connection with the discussion regarding the punitive content of *daño moral* in the civil law tradition. Ultimately, in both cases, severe or outrageous conduct have caused a greater harm to the victim and thus lead to greater damage awards. In both cases, the external result is the same: a larger award, although there is not always clarity on the basis for it: whether the existence of more severe conduct or more severe harm.

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[78] *ROOKES V. BARNARD* (1964) [1130].

[79] Ibid [1130].

[80] Ibid [1226].

[81] Ibid [1230].

[82] CANE (1997), p. 114.

[83] BEEVER (2003), pp. 89-90.

[84] Ibid, p. 90.

[85] Ibid, p. 90.

[86] MURPHY (2010), p. 359.

Regarding *daño moral*, perhaps there would be more clarity when analysing the criteria for measuring the awards. For example, in those systems that consider the economic capacity of the wrongdoer to set a higher *daño moral* award (as happened in Mexico), it is easier to recognize a punitive function rather than a compensatory one. However, the study of the measuring criteria goes beyond the scope of this work.

Returning to England, in *AB v. South West Water Services Ltd.*,[87] the Court of Appeal further limited these damages by stating that for a case to fall within the *Rookes'* categories, it had to be a cause of action existing before that case,[88] which later became known as the "cause of action test".[89] Subsequently, in 2001, in *Kuddus v. Chief Constable of Leicestershire Constabulary*, this restriction was removed by the House of Lords, which considered it irrational.[90]

This brief look at the history of punitive damages in England shows the attempts to limit them. However, those are not the only limitations, by the way. Although it is not possible to refer to all of them due to the scope of this work, it is worth noting that it has also been thought necessary to use punitive damages only when other remedies are not sufficient to achieve the objectives of deterrence and punishment, that third parties should not request them but only by the victims, and that they should not be awarded in cases of breaches of human rights, breach of contract, among others.[91]

This shows the constant effort of English law to limit these damages. However, it is interesting to note that, despite the criticism and persistent limitations imposed on this figure, in the 1990s, the Law Commission promoted a discussion on punitive damages, and 72% of the participants favoured maintaining them.[92] Therefore, the commission finally recommended that they be present for any civil wrong committed deliberately and outrageously, disregarding a claimant's rights, except for breach of contract.[93] This was because, despite being a category anomalous to Private law, they allow the punishment and prosecution of minor offences that do not represent a significant concern for the police or other public agencies.[94]

Above all, it should be mentioned that the lack of systematisation that characterises English tort law can also be noticed in how it addresses punitive damages. Indeed, even though the idea of deterring and punishing outrageous behaviours is present, the construction of the accepted categories does not follow clear criteria. Besides, there is no clear explanation for excluding other malicious and outrageous acts. On top of that, the accepted categories present a blurred mixture of behavioural and objective elements, which is difficult to sustain.

II. A TWO-STAGE MECHANISM

So far, it has been shown that, although punitive damages are controversial in England and Chile, they are a reality that cannot be ignored. The punitive components are less abnormal than usually mentioned. As has been pointed out, the punitive function of civil liability is not

[87] *AB v. South West Water Services Ltd* (1993).
[88] Gotanda (2003), pp. 10-11.
[89] Wilcox (2009), p. 20.
[90] Gotanda (2003), p. 11.
[91] Goudkamp and Katsampouka (2018), pp. 94-95.
[92] Morgan (2012), p. 191.
[93] Ibid, p. 191.
[94] Brooke (2009), pp. 2-3.

entirely impossible, since most of the principles of civil liability -including full recovery- are not petrified in the code but have been a doctrinal and jurisprudential interpretation.[95]

Therefore, if Chilean law would like to move forward to a more extensive use of punitive damages (through case law[96] or legal reforms),[97] that is, as a remedy of general application beyond the few specific cases currently accepted in its Civil Code and specific statutory law,[98] it will be necessary to articulate a theoretical framework that allows them to work appropriately within its system of rules and principles. Something that, by the way, precisely English law lacks.

The proposed method envisages two stages. The first stage relates to the requirements to award punitive damages in a specific case. This stage consists of the verification of the fulfilment of two elementary conditions. The first one is the *behavioural element* requirement, useful for assessing the wrongdoer's behaviour. Then, the second condition is the *protected interest* requirement, which specifically examines the interest injured by the wrongdoer's conduct. As can be seen, an analysis with these characteristics considers both the victim and the wrongdoer's position.

Finally, once there is agreement on awarding punitive damages for a particular case, the proposed mechanism should advance to its second stage, which is concerned with the size of the award. This is to say, how far judges (or the legislator) can go in terms of the amount of money the wrongdoer should pay to the victim. However, that is beyond the scope of this work, which will focus only on the first stage.

4.1 First condition: the wrongdoer's behaviour

English Law teaches that punitive damages should be reserved for the most outrageous wrongs.[99] However, even though the English tort law considered this rationale, the categories accepted in *ROOKES V. BARNARD* do not necessarily reflect this idea comprehensibly. They let slip some cases that, while terrible, are not deserving of punitive damages just because it does not fall into these fixed and narrow categories. One possible reason for that approach is that these categories may find their explanation just in the casuistry as well as by English customs and usages, without any further, more comprehensive theory sustaining them.

Considering the above, in the attempt to deal with the most outrageous cases, the Civil Law theory provides us with two enlightening ideas: malice and gross negligence; both of them could act together by encompassing a broader universe of cases, but at the same time, maintaining the necessary coherence and reasonableness inside the legal system.

In general terms, for the proposed scheme, both malice and gross negligence are independent conditions that could allow punitive damages. That is to say, there is no need to prove the wrongdoer's malice as far as it is possible to demonstrate a gross infringement of a duty of care. Likewise, if malice is proven, proving gross negligence in the wrongdoer's behaviour should not be needed.

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[95] DOMÍNGUEZ (2005), p. 65.

[96] PEREIRA (2015), p. 75.

[97] LARRAÍN (2019), p. 718.

[98] "*No podemos, en el estado actual del Derecho Civil, dejar sin comentar (...) la cuestión de los daños punitivos o la llamada `pena privada en sentido amplio´ (...) Algunos autores han llamado a esta institución la pena privada en sentido amplio, pues a diferencia de los demás casos de penas privadas (...) los daños punitivos no están determinados a priori para conductas específicas, sino que tienen un alcance más general*". In: SEGURA (2019), pp. 96–97.

[99] BROOKE (2009), p. 2.

a) Malice

In Chilean private law, the concept of malice is usually referred to as *dolo*, and according to the Chilean Civil Code, consists of "*the positive intention to cause injury to the person or property of another*".[100] In Chilean civil law, *dolo* is an autonomous element of civil liability. Therefore, any malicious action that causes harm to another gives rise to an obligation to compensate for the harm caused.[101]

On the other hand, in English law, the idea of malice is more blurry, and a unanimous definition of it doesn't exist.[102] Furthermore, malice is not an autonomous source of civil liability, maybe because, according to *BRADFORD V. PICKLES,* wrongdoers' motives do not necessarily influence the unlawfulness of their conduct.[103] Nevertheless, malice plays a vital role in configuring certain specific torts.[104]

In both systems, giving value to malice is not an easy task, as accessing a subject's mental state poses an almost impossible epistemological challenge.[105] However, this does not prevent us from inferring it, proving it through presumptions, or even assuming its existence in certain offences that seem they cannot be committed but with malice. The economic torts are an excellent example of the latter in English and Chilean law. For instance, it would be strange to think that two competitors could have accidentally been part of a price fixing cartel.[106]

Despite these practical difficulties, recognising malice in a specific case is a valuable task, given that its existence poses a moral challenge to which private law should not be indifferent.[107] Ultimately, in these cases, society is dealing with the effects of the conduct of someone whose primary motivation has been to cause harm to others. The law should not tolerate these situations and, as far as possible, should deter and punish them; specially when they affect legal interests that need protection. In cases where the harm has been caused with malice, the harm is a consequence that has not been accidental but precisely the calculated and desired result of its author. In this sense, malicious behaviours escape the logic of "accidents" with which tort law is generally viewed.[108]

In English case law, one can find decisions in which the presence of malice has allowed to expand the damages for which the wrongdoer is liable. For example, in *WILKINSON V. DOWNTON*,[109] it was decided that the tortfeasor should be liable for all the damage he has intentionally caused, regardless of whether it was foreseeable.[110] In other words, English case law has drawn a line that differentiates the consequences of negligent conduct from those executed with the intention to cause harm.

Although Chilean law recognises *dolo* as an autonomous source of civil liability, this legal system still does not recognise -fully- the additional disvalue that this type of behaviour represents.

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[100] Original text in Spanish. "*Art. 44, inc. 6. El dolo consiste en la intención positiva de inferir injuria a la persona o propiedad de otro*".

[101] See articles 2284 and 2314 Chilean Civil Code.

[102] FRIDMAN (1958), p. 484.

[103] *BRADFORD V. PICKLES* (1895)

[104] FRIDMAN (1958), p. 496.

[105] CANE (2000), p. 543.

[106] BANFI DEL RÍO (2011), p. 83.

[107] EPSTEIN (1975), p. 392.

[108] GOLBERG and ZIPURSKY (2010), p. 917.

[109] *WILKINSON V. DOWNTON,* 2 Q.B. 57 (1897).

[110] KEITH (2016), pp. 88-89.

Thus, apparently, there is no transcendental difference between civil wrongs committed with *dolo* or mere negligence. That is why it is interesting for Chilean law to examine how English law has dealt with these situations. Some scholars have already started that task, for example, BANFI[111] or to a more subtle extent, MUNITA.[112]

However, this justification, which allows for more severe treatment of malicious acts, may, in turn, open the door to even harsher consequences for these kinds of behaviours, especially when malice has infringed on interests that deserve higher protection. As proposed in this scheme, if a wrong is committed with malice or *dolo* and additionally infringes a protected interest, it is reasonable that the system's answer would be even more severe, and punitive damages achieve that effect.

It is perhaps beyond the scope of this paper, but interesting epistemological distinctions could be made, especially concerning malice, *dolus* and fraud. Also, it could be discussed whether, within malice, a subjective criterion is required to differentiate maliciously executed conduct from those that, even more horrible, deserve to be qualified as outrageous. Perhaps a dual mechanism such as the one presented here would provide a clearer criterion for identifying outrageous conduct without -yet- resorting to concepts from other branches, such as criminal law.

b) Gross negligence

As it was pointed out, malice represents a morally more severe situation than mere negligence or carelessness. That is why when some interests are affected by malicious behaviour, it could be reasonable to award punitive damages. However, malice is not the only way the tortfeasor could act. In this context, it is natural to ask how to deal with situations that, without being intentionally harmful, are more reprehensible than simple negligence.

The answer to that question is found in the concept of gross negligence. The idea of negligence evokes that someone has breached an objective standard of care.[113] In this scenario, the test of negligence doesn't focus on the defendant's intentions or state of mind but on how they behaved. Then, gross negligence particularly refers to "*conduct that falls far below the standard of the reasonable person*".[114] Under the proposed framework, punitive damages could also be awarded in these kinds of cases.

However, gross negligence poses a challenge. In these kinds of cases, there is no such reprehensible intention to harm the victim as in wrongs committed with malice. Thus, the justification for giving grossly negligent behaviours an aggravated treatment lays over the idea that gross negligence gives rise to behaviour that is as reprehensible as wilful misconduct.[115]

The Chilean Civil Code contains the Roman rule "*culpa lata dolo aequiparatur*" (gross negligence is equivalent to fraud), which grants gross negligence the same effects as fraud.[116] The reasons for this are varied, such as their similar external appearance or the fact that gross negligence allows for a presumption of malice.[117] This is not surprising if we take into

[111] BANFI DEL RÍO (2017), p. 69.

[112]"*A su turno, de la lectura de pasajes del Código Civil es posible advertir que el legislador, tras la concretización de especiales circunstancias de hecho, proyecta un recargo en la indemnización a que ordinariamente es posible postular. A modo de ejemplo puede ser revisado el artículo 1558* (...)". In: MUNITA (2022), p. 609.

[113] BARROS (2020), p. 84.

[114] NOLAN (2013), p. 679.

[115] BANFI DEL RÍO (2000), p. 307.

[116] Art. 44. Inc 2. "*Esta culpa [gross negligence] en materias civiles equivale al dolo*".

[117] BANFI DEL RÍO (2000) p. 308.

consideration that the Roman theory of guilt finds its justification precisely in the idea of morality.[118]

For this piece of work, gross negligence is considered as conduct that itself is equally reproachable as malice because the carelessness is so gross or inconsiderate that it seems necessary to treat them differently. Therefore, even without that rule in the Chilean Civil Code, the results should be the same regarding punitive damages.

On the other hand, it is interesting to note that the concept of gross negligence, although well-known in English tort law, has been regarded with reluctance and, in some cases, rejected even with pride.[119] Moreover, English tort law recognises only one standard of care: the reasonable person test.[120] The lack of the concept of gross negligence deprives this legal system of developing more reasonable and coherent categories for punitive damages. Nevertheless, the gates of English tort law are not entirely closed to this concept since it has been recognised for its usefulness in some specific cases, such as the trustee exemption clause.[121] This piece of work postulates an additional utility: gross negligence serves as a justification for awarding punitive damages in cases where, despite the absence of malice, the tortfeasor's conduct is equally reprehensible.

Continuing with the proposed framework, if the negligence is not gross, there should be no room for punitive damages, as this would imply imposing a very severe consequence on someone who has simply been careless. Let us not forget that punitive damages create tension in the classical objectives and structure of the legal system, so their use should be reserved for exceptional cases where they can contribute. This does not seem to be the case for ordinary negligent behaviours, which can be more or less optimally prevented by traditional compensatory mechanisms.

Although in English law, it is also possible to claim punitive damages through the tort of negligence,[122] there seems to be no good justification for it except for some historical reasons. Therefore, to accept such a thing would distort the logic of the proposed scheme. In this sense, if punitive damages are accepted in Chilean law, merely negligent behaviours should be excluded from its scope.

4.2 Second condition: protecting a special interest

A conservative treatment of punitive damages should not only pay attention to the seriousness of the wrongdoer's conduct but also to the type of interest that such conduct has harmed. This is not new to English law. Indeed, much of the theory justifying so-called aggravated damages rests on the idea of protecting dignitary interests.[123] The requirement of this additional element will make it possible to maintain a balanced control of these types of damages, distinguishing these cases from those situations which, although reprehensible, do not seem to require punitive damages. Looking at the violation of a particularly vulnerable interest as a criterion for awarding punitive damages, at the end of the day, is a way of objectifying the identification of outrageous conduct. A reasoning like that is consistent with the following LORD DEVLIN'S statement: "*it does not mean that exemplary damages can be given for every act of deliberate illegality*".[124]

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[118] WRIGHT (1983), p. 187.

[119] Ibid, p. 185.

[120] NOLAN (2013), p. 672.

[121] Ibid, p. 673.

[122] GOTANDA (2003), p. 51.

[123] MURPHY (2010), p. 359.

[124] *ROOKES V. BARNARD* (1964), [1132].

Furthermore, by requiring this second condition, we are accepting the fact that Private law is not only intended to fulfil certain notions of corrective justice[125] but also serves to fulfil certain social goals.[126] In this case, that aim is determined by the need to discourage and punish conduct that may harm particularly vulnerable interests.

These interests may vary from legal system to legal system. In this case, taking into consideration both the English and the Chilean experience, it is possible to set out some minimum interests that could be protected by punitive damages. This is not intended to be an exhaustive catalogue but a starting point to open a discussion on this matter. Indeed, without prejudice to the possibility of discussing the inclusion of additional interests, it would be useful for punitive damages to be used to the protection of physical and psychological integrity, people's dignity, and certain economic interests.

a) Physical and psychological integrity.

One possible interest that punitive damages could protect is people's physical and mental integrity. Protecting the integrity of humankind is a fundamental value that every legal system must adequately pursue, and Private law should not be alien to this task.

Indeed, after the Industrial Revolution provoked an expansion of the different sources of risk to the integrity of persons,[127] the attempt to protect them encouraged important advances[128] in both English and Chilean Private law.

In English tort law, it was necessary to mitigate the effects of the fault-based legal system so the victims were not the ones who bore most of the consequences of the wrongdoer's activities, especially when wrongdoers directly obtained the economic benefit from them. It is possible to see how the desire to protect people from personal injury led to the development of the "*res ipsa loquitur*" principle,[129] as well as other reforms that accepted the inclusion of strict liability cases.[130] Punitive damages also reflect the importance of this interest to English tort law. Indeed, although not too effective, causes of actions relating to *interference with the person* are the second most relevant in legal practice as far as these kinds of damages are concerned.[131]

Chilean Private law, like English Law, also identified the need to lighten the burdens that the system placed on victims' shoulders, when it comes to protect people’s integrity. In this task, the wiling to protect people from these kinds of injuries played an important role. Thus, using as a basis the examples contained in the Chilean Civil Code relating to people's physical integrity, judges and academics proposed to interpret this Code, establishing presumptions of fault against the wrongdoer.[132]

In the case of Chilean private law, it has also been explicitly proposed that punitive damages can be used to protect the physical and psychological integrity of people. In particular,

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[125] WEINRIB (2002), p. 354.

[126] SHARKEY (2020), pp. 6–8.

[127] BARROS (2020), p. 241.

[128] ENGLARD (1993), p. 219.

[129] CANE and GOUDKAMP (2018), Par. 4.2.

[130] Consumer Protection Act of 1987 (“CPA”).

[131] GOUDKAMP and KATSAMPOUKA (2018), p. 105.

[132] BARROS (2020), p. 241. Art. 2329, Chilean Civil Code: “*1º. El que dispara imprudentemente un arma de fuego; 2º. El que remueve las losas de una acequia o cañería en calle o camino, sin las precauciones necesarias para que no caigan los que por allí transitan de día o de noche; 3º. El que, obligado a la construcción o reparación de un acueducto o puente que atraviesa un camino lo tiene en estado de causar daño a los que transitan por él*”.

the 2018 reform to the Chilean Consumer Protection Act[133] included punitive damages in class action procedures for acts that massively cause *"harm to the physical or psychological integrity of consumers*".[134] This seems reasonable since, as noted, the legal system is dealing with a massive affectation on one of the most important interests of human life.[135] However, people's integrity can be violated in different areas of life, not necessarily linked to consumers legal positions.

The second case contemplated in the Chilean Consumer Protection Act shows even more dramatically how important it has been for the Chilean legislature to protect these interests. Thanks to this 2018 legal reform, punitive damages will also be available when the companies have "*endangered the safety of consumers or the community, even if no harm has been caused*".[136] This case is highly striking, as it opens the discussion to pure non-compensatory goals in Chilean Private law given that, at least in appearance, it would be possible to have punitive damages when there is no actual harm, something almost unique in Chilean private law.[137] The repercussions and implications of this case are varied but exceed the scope of this work.

Therefore, given that there is already a tendency to protect these interests through civil liability and especially through punitive damages, it would not be unreasonable to expand the use of this legal tool to protect them in a wider manner. This could protect people, especially when it is not possible to use the class action procedure due to procedural reasons or just because the victims don't fit in the legal definition of consumers.

b) People's dignity.

The second category that could be covered by punitive damages encompasses the affectations on people's dignity. The importance of protecting this interest is simply derived from our humanity, which requires us to treat each other with respect because we are human beings.[138] It has been accepted that tort law could be used as a special mechanism to protect this value,[139] and punitive damages can be an effective tool to deter and punish behaviours that intentionally or grossly negligently affect it.

This interest has been protected in English tort law and Chilean civil law but with different levels of intensity. In the former, the protection has not been so consistent or systematic because to give rise to a tort law case, the facts of the case should satisfy the requirements of specific torts, such as defamation, law of privacy or malicious prosecution, among others.

On the other hand, given the breadth of the Chilean Civil Code rules, any kind of significant affectation to this interest could allow the victim to demand a compensatory award. Also, in this legal system, there has been a special favourable predisposition to protect this interest through "non-pecuniary" damages (*daño moral*), which has been accepted even though it was not an interest considered compensable at the time of the enactment of the Civil Code.[140]

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[133] Ley Nº 21.081 (Chile).

[134] Ley Nº 19.496, Chilean Consumer Protection Act, article 24, letter c.

[135] ENGLARD (1993), p. 219.

[136] Ley Nº 19.496, Chilean Consumer Protection Act, article 24, letter d.

[137] A solution to this problem is presented here: "*Por ello lo que postulamos, es que en el punto en que el legislador menciona que no es necesaria la existencia de daños para que tenga lugar la agravante, se está refiriendo precisamente a daños corporales* (...)" MUNITA (2020).

[138] CORBETT (2017), p. 123.

[139] Ibid. p. 123.

[140] BARROS (2020), p. 241.

Then, specifically speaking about punitive damages, in English law, the number of cases that can be related to people's dignity is not too high, contrary to the most widespread beliefs.[141] For example, in recent times, there have been no reported cases of defamation in which punitive damages were awarded, and the same is true for cases linked to police misconduct.[142] Likewise, cases involving abuse of powers, which in one way or another also affect people's dignity, despite having a high success rate, account for only 6.9% of punitive damages cases.[143]

In Chilean private law, there are specific cases that accept punitive damages when people's dignity is affected. One of them is found in the aforementioned reform of the Consumer Protection Act, which allows punitive damages if consumers' dignity has been "seriously" infringed. This protection of the dignity of persons through punitive damages is consistent with the reality in other legal systems, among them, Argentina.[144] However, as it was mentioned above, such a case will only be possible in the case of massive infringements because that rule is contained in the regulation of consumers' class action procedures.[145] Furthermore, in Chilean labour law, most of the cases that allow punitive damages refer to situations in which the employer has harmed the employee's dignity as well, for example, when they have dismissed the employee, accusing them of sexually inappropriate behaviours without evidence to sustain the accusation.

Taking into consideration the above, accepting the applicability of punitive damages in the case of violations of people's dignity is still coherent with Chilean Private law, especially for cases of massive and systematic infringements. As it was mentioned above, it could be especially useful for situations that cannot activate the consumer's class actions procedure or are not covered by labour law.

c) Economic interests and economic torts.

English economic torts require a special mention. These torts allow the protection of persons concerning "*trade, business or livelihood*".[146] However, given that in the business world, the main goal is to maximise profits; generally, that aim is reached at the cost of others' detriment. Maybe competition law shows this dilemma clearly as "*it has never been unlawful to ruin someone by fair competition*".[147] In other words, some level of economic harm seems to be inherent to legitimate commercial battles.[148] That is one of the reasons why people are protected only from a narrow pool of interferences with their economic interests, mainly those carried out deliberately. In this context, the tort of interference with trade or business by unlawful means and torts of conspiracy stand out among others.[149]

In English law, punitive damages have also had an important presence in these types of torts, occupying 19.8% of the total number of cases reported in recent years.[150] In addition, these torts also report a level of effectiveness of 55.2%, which could be labelled as high.[151] However, it should also be considered that the vast majority of these cases only refer to cases of insurance

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[141] GOUDKAMP and KATSAMPOUKA (2018), pp. 111-112.

[142] Ibid. pp. 111-112.

[143] Ibid. pp. 111-112.

[144] MUNITA (2023), p. 323.

[145] Ibid, p. 323.

[146] DEAKIN and MARKESINIS (2019).

[147] BAKER (2019), p. 479.

[148] BANFI DEL RÍO (2011), p. 83.

[149] DEAKIN and MARKESINIS (2019).

[150] GOUDKAMP and KATSAMPOUKA (2018), p. 114.

[151] Ibid, p. 114.

fraud.[152] Regarding competition torts, it should be noted that English Law has neglected these types of damages, especially when wrongdoer companies have already been penalised.[153]

That is why, the English experience is not worthy of imitation by Chilean Private law. First of all, the above-mentioned cases seem just to be part of the English casuistry rather than of a well-designed area for a deeper development of punitive damages. Secondly, in the Chilean system, it is difficult to talk about *economic torts* because, technically, no specific "torts" are required to obtain compensation in economic cases. However, even though punitive damages for antitrust cases are still a novel issue, there is room for its development due to the wording used by the Chilean Consumer Protection Act (which encompasses antitrust cases as well).

Therefore, considering the above, punitive damages could be an interesting option to protect public faith in markets as well as the competition in antitrust cases. However, it should be noted that given the complexity and challenges posed by these types of offences, their study should be carried out in greater depth, which exceeds the objective covered by this research.

d) ¿Private property?

Finally, a few comments should be presented about property, given that private property has always been at the heart of Private law. However, as will be briefly explained, it is difficult to conclude that protecting private property through punitive damages is necessary, based solely on the English cases considered in this research.

An empirical study on punitive damages has shown that in English tort law, the use of these damages is of great importance regarding the protection of private property. Indeed, punitive damages cases related to "interference with property" represent 35.6% of the total number of cases related to these types of damages.[154] Their importance grows if we consider that these damages were awarded a 53.8% success rate.[155]

However, like the previous case, the importance of this interest for punitive damages is just apparent. That is because by analysing these cases in depth, it could be pointed out that most of them only refer to unlawful evictions from landlords against tenants.[156] Therefore, based on the English experience analysed, this appears to be a specific issue within English society rather than something else.

Taking into account the above, trying to extrapolate these numbers and concerns to the Chilean reality may be counter-intuitive, even more so if one considers that private property lease agreements are deeply regulated in Chilean law.

Moreover, a recent reform to the Chilean Lease Agreements Act has advanced in a totally opposite direction, granting greater powers to landlords as well as a more expeditious procedure so they can recover their properties faster and easier from their tenants.[157] Therefore, at least for now, there is no room to give more powers and tools to tenants in the Chilean legal panorama.[158]

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[152] Ibid, p. 114.

[153] BANFI DEL RÍO (2011), p. 110.

[154] GOUDKAMP and KATSAMPOUKA (2018), p. 112.

[155] Ibid, p. 112.

[156] Ibid, p. 112.

[157] Ley Nº 21.461 (Chile).

[158] "*El arrendamiento es quizá uno de los contratos más democráticos del Código Civil y en un contexto actual el más político e ideológico* (...) *Es también un contrato que muestra los vaivenes ideológicos del poder, al transitar desde una configuración que puede ser muy protectora del arrendatario, forjada al alero de los frentes populares, arraigando al arrendatario en el inmueble en desmedro del propietario, o, en cambio, modelos liberales que refuerzan al casero que ha alquilado el inmueble, cuya manifestación última en Chile ha sido la ley denominada*

e) Final thoughts regarding the protected legal interests

Finally, after presenting the proposed scheme, it is useful to share the following reflection on the relationship between the interests previously described and malicious behaviours.

It could be said that liability rules have a unilateral nature because the action of the party who commits the wrong is sufficient to bind them to the victim. Indeed, there is no need for negotiation between the wrongdoer and the victim because, unlike voluntary agreements, the size of compensatory awards is objectively determined by a court after the wrong has been perpetrated.[159]

In this sense, without the necessary level of punishment and deterrence, the wrongdoer could perceive the law of torts as similar to the law of voluntary transactions. That is to say, they could decide to affect the victim's entitlements just because they are willing to pay such an objectively determined value.[160] The critical point is they could do that even against the victim's will.

Thus, it is particularly important to punish and deter malicious (and grossly negligent) conduct that affects sensitive interests or rights because, if the wrongdoer has sufficient economic backing, they can unilaterally *force* the "transaction" of the victim's interest, thus, collapsing the inherent justice of the liability rules.

This is particularly critical in the case of interests that have previously been presented, as these should not be able to be forcibly "bought" by the wrongdoer. In fact, it is reasonable to treat them as inalienable rights.[161] In other words, in the case of intentional and especially outrageous wrongdoing, the tortfeasor should not be treated as a buyer, but as a thief.[162] Therefore, the proposed scheme reinforces not only the protection of these interests but also liability rules in general against any attempt to collapse the system by wrongdoers who feel they can act with impunity merely because they have the economic capacity to pay the corresponding compensatory awards. The granting of punitive damages could avoid this.

CONCLUSION

Taking into consideration all that has been presented in this article, the following conclusions can be drawn:

1. English tort law and Chilean delict law present important structural differences, but this does not prevent them from being subject to comparison, and mutual lessons can be drawn for the coherent development of both systems with their own institutions, principles, and rules.

2. English law offers a good starting point for any study on punitive damages precisely because it is there where we find the origin of these types of damages and also because of the

`devuélveme mi casa´, bajo el Nº 21.461. La expresión evoca sin duda un uso exacerbado de la propiedad* (...). *En la moción parlamentaria de la referida ley que le dio origen es posible advertir su impronta, al sostenerse que es `importante indicar que la Ley Nº18.101 sobre arrendamiento de predios urbanos se creó, por una razón bastante sencilla: proteger a la parte más débil en la relación contractual, el arrendatario. Sin embargo, esta relación contractual con el tiempo ha ido mutando, de tal forma, que hoy en día, quien se encuentra en una situación de desventaja por todo lo ya descrito, es sin lugar a dudas el arrendador´. (...) *Al alero de okupas, tomas, arrendatarios morosos, se armó una buena ensalada para un estertor televisivo: vamos a proteger al débil, el arrendador, a quien no le pagan y también al propietario que le ocupan su inmueble por ignorancia o tolerancia*" In: PIZARRO (2024), p. 123.

[159] CALABRESI and DOUGLAS (1972), p. 1089.

[160] Ibid, p. 1089.

[161] Ibid, p. 1113.

[162] OWEN (1994), p. 375.

conservative way in which these damages are dealt with. In this sense, the English experience is interesting for a jurisdiction such as Chile, where this discussion is still new but has taken on certain importance due to recent legal reforms.

3. One of the main lessons of English law is the need to control and limit punitive damages. However, as has been shown, the categories in which English law accepts punitive damages do not seem to follow any logic or reasoning but appear to be mere examples of conducts qualified as outrageous wrongdoings under its own culture, casuistry and experience.

4. Considering that Chilean law is gradually opening up to including these types of damages, it has been proposed a theoretical framework that allows addressing such damages as a remedy of general application in a well-balanced manner, considering both the wrongdoer and the victim's role.

5. One of the advantages of the proposed mechanism is that it allows dealing with conducts of different severity in a schematic, coherent and proportionate way. Indeed, the proposed mechanism makes it possible to differentiate between (i) simply harmful behaviours, (ii) behaviours in which the harm has been caused with malice or gross negligence, and (iii) behaviours in which, in addition to having caused harm with malice or gross negligence, a particularly sensitive legal interest has been affected. This article focused on this last category.

6. The way to differentiate between these conducts is to be found in the extent of damages to be awarded. Behaviours in the first category oblige the wrongdoer to compensate the foreseeable damages resulting from their actions; behaviours in the second category make the wrongdoer liable even for unforeseeable damages; and finally, conducts in the third category justify the imposition of punitive damages.

7. Moreover, this last category, being composed of two elements (one behavioural and one that points to the interest affected), allows for a more objective and precise identification of those outrageous conducts, which, as explained above, are those in which punitive damages could more reasonably be accepted.

8. The proposed scheme not only makes it possible to protect special interests through tort law and to prevent and punish, particularly outrageous behaviours but also reinforces the functioning of the system of rules in general by preventing wrongdoers with the sufficient economic capacity to collapse the system by "buying" the victim's interests, even against their will.

9. Finally, the proposed scheme allows that, in case a more extensive use of punitive damages is accepted, they are not unpredictable like a *bolt of lightning*. Clear normative criteria provide certainty and justice to both victims and offenders, as well as economic security to markets.

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LEGISLATION

Chile:

Código Civil

Ley Nº 19.496, del 7 de marzo de 1997, que establece normas sobre protección de los derechos de los consumidores;

Ley Nº 21.081, del 19 de septiembre de 2018, modifica Ley N° 19.496, sobre protecciónde los derechos de los consumidores;

Ley Nº 21.461, del 30 de junio de 2022, incorpora medida precautoria de restitución anticipada de inmuebles y establece procedimiento monitorio de cobro de rentas de arrendamiento.

CASES

Mexico:

Supreme Court of Mexico, Amparo 30/2013 (2014).

England:

HUCKLE V MONEY [1763] C.K.B. 95 E.R.

BRADFORD V. PICKLES [1895] A.C. 587.

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AB V. SOUTH WEST WATER SERVICES LTD [1993] 2 W.L.R.

KUDDUS V. CHIEF CONSTABLE OF LEICESTERSHIRE CONSTABULARY [2001] UKHL 29