

The Power of Punitive Damages –
Is Europe Missing Out?

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Lotte Meurkens & Emily Nordin (eds.)

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Lotte Meurkens
Emily Nordin

PREFACE

A new brush sweeps clean, but an old brush knows the corners...

Punitive damages: real plum or recipe for disaster?

Punitive damages are traditionally not awarded in Continental European legal systems. There, punishment is an exclusive power of the government that should stay part of the public law domain. The strong European view is that punitive damages should in no way be utilised to protect private law interests. Compensating the victim for his or her loss is the objective of tort law. 'American situations', especially the awarding of exorbitant amounts of punitive damages, are feared and should in the opinion of most European scholars by all means be avoided. However, since the strict difference between public and private law seems to be fading, new opportunities are created and old axioms are being reconsidered. European legal scholars have explored the American concept of punitive damages as a way to strengthen tort law and as a new means of private enforcement. For this reason, in November 2010 the Ius Commune Research School on its annual conference devoted the Liability and Insurance workshop to 'the Power of Punitive Damages' and the function that this legal remedy could serve in Europe. This book does not merely include the papers of the speakers but also other papers written in the aftermath thereof.

The book starts with an introduction into the punitive damages debate, with reference to general aspects of American punitive damages law, explanations for the absence of punitive damages in Continental Europe, and causes for the growing European interest in punitive damages (Lotte Meurkens). Further analyses of American punitive damages law are contained in the first part of this book, including four contributions by the American authors Jim Gash, Mark Geistfeld, David Owen and Anthony Sebok. This first part also includes contributions relating to the common law systems Australia (Danuta Mendelson) and England (Jonathan Morgan), as well as the mixed legal system Cyprus (Sofia Michaelides-Mateou). The second part goes into the European punitive damages debate, including contributions of Evelien de Kezel for Belgian law, Ulrich Magnus for German law, Chantal Mahé for French law, Marta Otero Crespo for Spanish law, Marta Requejo Isidro for the private international law perspective of punitive damages and Cedric Vanleenhove for European law. The third and final part contains

contributions relating to punitive damages and special themes, to be precise human rights (Vanessa Wilcox), enforcement in family law (Sara Matthé), insurability (Emily Nordin and Daily Wuyts), bad faith insurers (Lodewijk Smeehuijzen), contract law (Robert Hardy), law and economics (Louis Visscher) and enforcement of EC competition law (Angela Ortega González).

In short, this book tries to promote a better understanding of the different approaches towards punishment in private law, and will give new perspectives on punitive damages.

The editors would like to thank Gerrit van Maanen for giving two young researchers the opportunity to edit this book, and Ton Hartlief, David Owen and Aloïs Van Oevelen for their advice. Our thanks also go out to the authors, whose book this is.

Lotte MEURKENS and Emily NORDIN
Maastricht/Antwerp, September 2011

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ABBREVIATIONS

A 2d	Atlantic Reporter, second series (preceded by volume number, followed by beginning page number)
A U L Rev	American University Law Review
ABA	American Bar Association
AC	Law Reports, Appeals Cases
Act dr Fam	Actualités du droit de la famille
AG	Advocate-General
AJT	Algemeen Juridisch Tijdschrift
Ala L Rev	Alabama Law Review
Alaska L Rev	Alaska Law review
ALER	American Law and Economics Review
ALI	American Law Institute
All ER	All England Law Reports
ALR	American Law review
Am J Comp L	American Journal of Comparative Law
Am Jur	American Jurisprudence
Am L Reg	American Law Register
Am U L Rev	American University Law Review
Ann Fac Dr Liège	Annales de droit de Liège
Ann Rev L & Soc Sci	Annual Review of Law and Social Science
Ann	Annotated
App	Appellate (Court)
APR	Algemene Praktijk Rechtsverzameling
Arr Cass	Arresten van het Hof van Cassatie
B U L Rev	Boston University Law Review
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BRH	Belgische Rechtspraak in Handelszaken
BYU L Rev	Brigham Young University Law Review
Brook L Rev	Brooklyn Law Review
BS	Belgisch Staatsblad
Buff Crim L Rev	Buffalo Criminal Law Review

Abbreviations

Buff L Rev	Buffalo Law Review
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
CABG	Cahiers Antwerpen Brussel Gent
Cal Civ Code	California Civil Code
Cal L Rev	California Law Review
Cal Rptr	California Reporter (preceded by volume number, followed by beginning page number)
Cal	California
Cal Law	California Law
Cambridge L J	Cambridge Law Journal
Cass	Hof van Cassatie
CBR	Canadian Bar Review
CBR	Centrum voor Beroepsvervolmaking Rechten
CC	Spanish Civil Code
CD	Central District of United States Federal Court (followed by state abbreviation)
Chi-Kent L Rev	Chicago-Kent Law Review
CJEU	Court of Justice of the European Union
CJS	Corpus Juris Secundum
CLB	Commonwealth Law Bulletin
Clev St L Rev	Cleveland State Law Review
CLR	The Competition Law Review
CLR	Commonwealth Law Bulletin
CMLR	Common Market Law Review
cmt	Comment
Co	Company
col	column
Colo	Colorado
Colum J Transnat'l L	Columbia Journal of Transnational Law
Colum L Rev	Columbia Law Review
CoM	Committee of Ministers
Conn	Connecticut
Cornell L Rev	Cornell Law Review
CPC	Commission for Protection of Competition
CQ	The Classical Quarterly
Ct App	Appellate Court
D	United States Federal District Court (followed by state abbreviation)
DAJV	Deutsch-Amerikanische Juristen-Vereinigung (German-American Lawyers Association)
DCFR	Draft Common Frame of Reference
Del	Delaware
DePaul L Rev	DePaul Law Review
Duke L J	Duke Law Journal

EBOLR	European Business Organization Law Review
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECT	European Community Treaty
ECtHR	European Court of Human Rights
EC-Treaty	Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community
Ed	Editor or edition
EEC	European Economic Community
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Act to the German Civil Code)
EJ	Echtscheidingsjournaal
EJLE	European Journal of Law and Economics
EL Rev	European Law review
EMLR	Entertainment and Media Law Reports
Emory L J	Emory Law Journal
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
EU	European Union
EWCA Civ	Court of Appeal (Civil Division)
EWHC	England & Wales High Court (Administrative Court)
f	following page
ff	following pages
FIDE	Fédération Internationale de Droit Européen
FJR	Tijdschrift voor familie- en jeugdrecht
Fla L Rev	Florida Law Review
Fla	Florida
Fordham L Rev	Fordham Law Review
Ga L Rev	Georgia Law Review
Ga	Georgia
GC	Grand Chamber
GCR	Global Competition Review
Geo L J	Georgetown Law Journal
GG	Grundgesetz
GS	Großer Senat
Hamline L Rev	Hamline Law Review
Harv J L & Pub Pol'y	Harvard Journal of Law & Public Policy
Harv L Rev	Harvard Law Review
Hastings Int'l & Comp L R	Hastings International and Comparative Law Review
Hastings L J	Hastings Law Journal
HGB	Handelsgesetzbuch
HL	House of Lords

Abbreviations

HL Deb	House of Lords Debates
Hofstra L Rev	Hofstra Law Review
Hous L Rev	Houston Law Review
HR	Hoge Raad
HRA	Human Rights Act
I IR	International Insolvency Review
IR	Irish Reports
ICQL	International & Comparative Law Quarterly
IEHC	High Court of Ireland
IESC	Supreme Court of Ireland
Ill L Rev	Illinois Law Review
Ill	Illinois
Ilsa J Int'l & Comp L	ILSA Journal of International and Comparative Law
ILSA	International Law Students Association
Inc	Incorporated
Ind	Indiana
Indus	Industry, Industries, Industrial
Ins	Insurance
Int I LR	International Insurance Law review
Int Rev Law & Econ	International Review of Law and Economics
INT'L L Practicum	International Law Practicum
Iowa L Rev	Iowa Law Review
IPR	Intellectual Property Rights
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IR	Irish Reports
J Am Acad Matrim Law	Journal of the American Academy of Matrimonial Lawyers
JCP (G)	JCP / La semaine juridique, Edition Générale
J Empirical Legal Stud	Journal of Empirical Legal Studies
J L & Com	Journal of Law and Commerce
J L Econ & Org	Journal of Law, Economics, & Organization
J Legal Stud	Journal of Legal Studies
J Marshall L Rev	John Marshall Law Review
J of Products Liability	Journal of Products Liability
J	Judge
JC	Jurisprudencia Civil
JDI	Journal du Droit International
JELS	Journal of Empirical Legal Studies
JETL	Journal of European Tort Law
JLE	Journal of Law and Economics
JLEO	Journal of Law, Economics and Organization
JLM	Journal of Law and Medicine
JLS	Journal of Legal Studies
JOCLEC	Journal of Competition Law & Economics

JPE	Journal of Political Economy
JT	Journal des tribunaux
JUR	Jurisprudencia Aranzadi Westlaw
JZ	JuristenZeitung
Kan	Kansas
La L Rev	Louisiana Law Review
Law & Contemp Probs	Law and Contemporary Problems
Law Com Rep	Law Commission for England and Wales, Report No 247, Aggravated, Exemplary and Restitutionary Damages, London: HMSO, 1997
Law Q Rev	Law Quarterly Review
Lawyers J	The Lawyers Journal
LC	Law Commission
LCD	Spanish Unfair Competition Act
LGSS	Spanish General Act on Social Security
LM	Spanish Trademarks Act
LOIMH	Spanish Organic Law for the effective equality between women and men
LOPHIPI	Spanish Organic Act for the Civil Protection of honour, personal and family privacy and image
Loy Consumer L Rev	Loyola Consumer Law Review
Loy L A L Rev	Loyola of Los Angeles Law Review
LP	Spanish Patent Act
LPA	Les Petites Affiches
LPI	Spanish Intellectual Property Act
LPJDI	Spanish Legal Protection of Industrial Design Act
LQR	Law Quarterly Review
MA	Massachusetts
Md	Maryland
Mich L Rev	Michigan Law Review
Minn J Int'l L	Minnesota Journal of International Law
Minn L Rev	Minnesota Law Review
Minn	Minnesota
MJECL	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
MN	Minnesota
Mut	Mutual
N Am	North America
N C L Rev	North Carolina Law Review
N Ky L Rev	Northern Kentucky Law Review
N	North
n	Note
NC	Nullum crimen: tijdschrift voor straf- en strafprocesrecht
ND	North Dakota

Abbreviations

Nev Rev Stat Ann	Nevada Revised Statutes Annotated
Nev	Nevada
NH	New Hampshire
NH	New Hampshire Reports
NJ	New Jersey
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift
NJWB	Nieuw Juridisch Weekblad
NM	New Mexico
Nw U L Rev	Northwestern University Law Review
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht
NW	North Western Reporter (preceded by volume number, followed by beginning page number)
NY Int'l L Rev	New York International Law Review
NYU L Rev	New York University Law Review
NZLR	New Zealand Law Reports
OECD	Organisation for Economic Co-operation and Development
Ohio St L J	Ohio State Law Journal
OJ	Official Journal (European Union)
OJEC	Official Journal of the European Communities
Okla	Oklahoma
Or L Rev	Oregon Law Review
Or	Oregon
OUP	Oxford University Press
Oxford J Legal Stud	Oxford Journal of Legal studies
PA	Pennsylvania
Pa	Pennsylvania
Parl St	Parlementaire Stukken
Pasin	Pasinomie
PECL	Principles of European Contract Law
Pepperdine L Rev	Pepperdine Law Review
PETL	Principles of European Tort Law
PL	Public Law
QB	Law Reports, Queen's Bench
QRTL	Quarterly Review of Tort Law
R Cass	Recente arresten van het Hof van Cassatie
R	Regina
RABG	Rechtspraak Antwerpen Brussel Gent
RCJB	Revue critique de jurisprudence belge
Res Civ et ass	Responsabilité civile et assurances
resp.	respectively
Rest. (2d) Torts	Restatement of the Law, Second, Torts
RDC	Revue des Contrats
Rev Not b	Revue du notariat belge
Rev Stat Ann	Revised Statutes Annotated

RGAR	Revue générale des assurances et des responsabilités
Riv Dir Int Pr Pr	Rivista di Diritto Internazionale Privato e Processuale
RJ	Repertorio de Jurisprudencia Aranzadi Westlaw
RTC	Repertorio de Jurisprudencia Constitucional Aranzadi Westlaw
RTDF	Revue trimestrielle de droit familial
Rutgers L Rev	Rutgers Law Review
RW	Rechtskundig Weekblad
S C L Rev	South Carolina Law Review
S Cal L Rev	Southern California Law Review
S Ct	United States Supreme Court Reporter (preceded by volume number, followed by beginning page number)
S Texas L Rev	South Texas Law Review
s	section
SC	South Carolina
SD Codified Laws	South Dakota Codified Laws
SE	South Eastern Reporter (preceded by volume number, followed by beginning page number)
Stat Ann	Statutes Annotated
STC	Sentencia del Tribunal Constitucional (Spain)
Sw U L Rev	Southwestern University Law Review
SW	South Western Reporter (preceded by volume number, followed by beginning page number)
T Fam	Tijdschrift voor familierecht
T Verz	Tijdschrift voor verzekeringen
T Vred	Tijdschrift van de vrede- (en politierechters)
TBBR	Tijdschrift voor Belgisch burgerlijk recht
TBH	Tijdschrift voor Belgisch handelsrecht
Tenn L Rev	Tennessee Law Review
Tex Const	Texas Constitution
Tex L Rev	Texas Law Review
Tex	Texas
TFEU	Treaty on the Functioning of the European Union
Tit	Title
TJCE	Repertorio de Jurisprudencia del Tribunal Europeo de Justicia Aranzadi Westlaw
TJK	Tijdschrift voor jeugdrecht en kinderrechten
Tort Ins L J	Tort and Insurance Law Journal
TPR	Tijdschrift voor Privaatrecht
Tulane L Rev	Tulane Law Review
TvVP	Tijdschrift voor Vergoeding Personenschade
TvW	Tijdschrift voor wetgeving
U Chi L Rev	University of Chicago Law Review
U Colo L Rev	University of Colorado Law Review
U Mich J L Reform	University of Michigan Journal of Law Reform
U Pa L Rev	University of Pennsylvania Law Review

Abbreviations

U Pitt L Rev	University of Pittsburgh Law Review
U St Thomas L J	University of St. Thomas Law Journal
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
U Pa L Rev	University of Pennsylvania Law Review
US	United States of America
US	Reporter of the Decisions of the Supreme Court of the United States (preceded by volume number, followed by beginning page number)
USA	United States of America
USC	United States Code
USF L Rev	University of San Francisco Law Review
Utah L Rev	Utah Law Review
Va L Rev	Virginia Law Review
Va	Virginia
Va J Int'l L	Virginia Journal of International Law
Vand L Rev	Vanderbilt Law Review
Vill L Rev	Villanova Law Review
vol	Volume
Vt	Vermont
Wake Forest L Rev	Wake Forest Law Review
Wash & Lee L Rev	Washington & Lee Law Review
Washburn L J	Washburn Law Journal
Wash U L Q	Washington University Law Quarterly
WC	World Competition: Law and Economics
Willamette J Int'l L & Disp Resol	Willamette Journal of International Law and Dispute Resolution
WIR	West Indian Reports
Wis L Rev	Wisconsin Law Review
Wis	Wisconsin
WL	WestLaw.
Wm Mitchell L Rev	William Mitchell Law Review
World Competition	World Competition – Law and Economics Review
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
Yale L J	Yale Law Journal
YPIIL	Yearbook of Private International Law