

# Flaux-ting the Rules: Punitive Damages in English Law

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PRACTICES Litigation

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English law is slow to award punitive or exemplary damages. They are rarely seen in commercial disputes where the measure of damages tends to be compensatory. Nonetheless, as a matter of legal principle, punitive damages are available for all torts that involve a wilful element on the part of the tortfeasor. Punitive damages have been awarded for defamation, trespass to land or the person (including assault) or false imprisonment, but they are also available for torts involving dishonesty, such as deceit. Victims of commercial fraud could therefore be able to claim more than the loss they have suffered, provided that the requirements for an award of punitive damages are satisfied.

In *Axa Insurance UK Plc v Financial Claims Solutions Ltd* [2018] EWCA Civ 1330, the Court of Appeal overturned the High Court and recently awarded punitive damages for an insurance fraud, where the insurer had detected the fraud before making any payments. This article considers to what extent the Court of Appeal's decision clarified the law or expanded the scope for punitive damages. The crucial question is precisely what needs to be shown to elevate the tortfeasor's conduct from a 'run of the mill' fraud to something more, that warrants a punitive award.

## A Brief History of Punitive Damages in English Law

Any discussion of the modern principles relating to punitive damages starts with *Rookes v Barnard* [1964] UKHL. In that case, the House of Lords narrowed down the circumstances in which such damages can be awarded. As McGregor on Damages put it, the "*situation totally changed*" as a result of *Rookes v Barnard* (19th Ed, 13-03). Prior to 1964, awards of punitive damages had increasingly featured in the English legal landscape since making their first appearances in the 1760s. It should, however, be noted that even in the relative heydays of punitive damages, they were never available for breach of contract, no matter how egregious or deliberate the breach. That limitation was affirmed in *Addis v Gramophone Co. Ltd* [1909] AC 488 and has not been eroded since.

Until *Rookes v Barnard*, the House of Lords itself had never had the opportunity to consider the rationale for punitive damages. That led their Lordships to ask whether, in the absence of binding precedent, they could "... *remove an anomaly from the law of England.*" They did not go quite go that far, instead noting the exceptional nature of punitive damages in the civil law of damages (primarily concerned with compensation and not punishment), confining them to a few exceptional circumstances. Those circumstances are set out in the speech of Lord Devlin, described by the High Court in *Axa* as the "*fount of the modern jurisdiction to award exemplary damages*". Lord Devlin established two categories of cases as surviving the cull. The first category relates to misconduct by public official. The second category, much more likely to be relevant in commercial disputes, was described as follows:

*"Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff ... Where a defendant with a cynical disregard for a plaintiff's rights has*

*calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity.*

*This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.”*

The debate about whether punitive damages had any place in English law has continued since Lord Devlin’s pronouncement. In 1997, the Law Commission published a report concluding that, in their view, the power to award such damages should continue to be part of English law.

In 2001, the House of Lords again considered the matter, in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29. A police officer had simply forged the victim’s signature on a form consenting to the abandonment of a police investigation into the crime in question. The Chief Constable, sued vicariously for the officer’s action, argued that exemplary damages had never before been awarded for this particular type of misfeasance in public office, and sought to have the claim struck out.

To read the full article, see the PDF linked below.

[Flaux-ting-the-Rules-Punitive-Damages-in-English-Law.PDF](#)