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RESEARCH ARTICLE

Public interest damages

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Abstract

This paper argues that punitive, nominal, contemptuous, vindicatory, and disgorgement damages (commonly referred to as non-compensatory damages) can be collectively analysed as public interest damages because all these awards are justified by violations of public interests in addition to violations of the claimant's rights. To the extent they are awarded in the public interest, non-compensatory damages feature a distinctively public element in private law. In contrast to compensatory damages, public interest damages are justified by 'non-correlative wrongdoing', ie infringements of interests which are valuable to the community rather than to the claimant. This helps us to understand how public interest damages differ from traditional damages awards and why public interest damages should be treated as an exceptional remedy. In support of these claims, the paper offers an original analytic framework of reasons that justify damages awards.

Keywords: judicial remedies; non-compensatory damages; justifying reasons; wrongdoing; public interest

Introduction

According to Lord Nicholls, it 'is axiomatic … [that with] the anomalous exception of punitive damages, damages are compensatory'.[1] Yet present English law employs several other categories of damages that are clearly not compensatory. Think of nominal, contemptuous, vindicatory, and disgorgement damages (I will explain these in Section 2(c) below). Accordingly, the axiom should be restated as follows: *Leaving aside the anomalous exception of non-compensatory damages, damages are compensatory.*[2] Such an axiom may seem attractive, as if offers a logically irrefutable insight into this area of law, but it is unclear what we mean by non-compensatory damages (NCDs), whether we can make any claims about NCDs collectively, whether such claims would clearly distinguish NCDs from compensatory awards, and why NCDs should be treated as an anomalous exception in the law of damages. This paper seeks to resolve all those issues.

My original claim is that awards of non-compensatory damages can collectively be analysed as awards that are justified by violations of public interests. This type of justifying reason clearly

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[1] *AG v Blake* [2001] 1 AC 268 at 282.

[2] Similarly eg J Edelman et al (eds) *McGregor on Damages* (London: Sweet & Maxwell, 20th edn, 2017) para 1-008.

distinguishes them from compensatory damages. The very institution of all kinds of damages and the possibility of their award are, of course, justified by reasons of public interest because damages facilitate commerce, support the institution of property, etc, and these things are considered good for the society. However, my claim is not about reasons for damages awards at large. It is about reasons that justify damages awarded in a non-compensatory (as opposed to compensatory) measure.

I also argue that we should prefer this new analysis of NCDs over traditional approaches that are piecemeal and do not view NCDs as awards justified by violations of public interests. This is because unless judges reflect the distinctively public nature of the reasons that justify NCDs, they are likely to make missteps in their reasoning. In particular, they are likely to award NCDs as of the claimant's right even though these awards are in fact discretionary. This is also why NCDs should be regarded as exceptional. Unlike compensatory awards, NCDs cannot be justified solely by the claimant's interests and therefore should not be awarded unless additional justifying reasons are identified. If this analysis is correct, we should start looking at NCDs collectively to achieve more consistent measures of non-compensatory awards that were previously seen as unrelated, to avoid double-counting when awarding NCDs, and to open a transparent debate about whether and when public interests are worthy of such unusual protection.

After setting out the doctrinal scope of NCDs (Section 1), this paper shows that under the wrongs-based model of damages (Section 2(a)) the awards of NCDs are justified by the defendant's wrongdoing against public interests in addition to the defendant's violation of the claimant's private rights and interests (Sections 2(b) and 2(c)). In exploring the reasons that explicitly or implicitly justify NCDs awards, I develop an analytic framework comprising correlative and non-correlative wrongdoing as two defining types of justifying reason for damages awards (Section 2(b)). These two types of reason help us to see why 'public interest damages', which is a term I devised to reflect the distinct reasons that justify NCDs, should be regarded as extraordinary in the law of damages (Section 3). The final section highlights the main findings and benefits of this study.

1. Compensatory and non-compensatory damages

(a) The unclear concept of non-compensatory damages

No one has yet seriously inquired into NCDs as *a unitary category*. Only a handful of cases and statutes explicitly mention NCDs, but none of them provide a definition of NCDs.[3] More often, legal authorities seem to rely on our implicit understanding of the NCDs label and use it as a proxy for various types of damages that are distinct from standard awards. For example, in his dissenting opinion in *AG v Blake*, Lord Hobhouse used the term NCDs to describe a restitutionary award that does not represent a 'substitute for performance'[4] of a contractual obligation that should have been performed.[5] In a different context, the expression 'non-compensatory damages' referred to a nominal and vindicatory award which was supposed 'to mark the abuse of power'[6] by the state that had unlawfully detained the claimants.[7] Elsewhere, Lord Scott argued that 'vindicatory damages, although not

[3]As at 23 November 2019, it was 13 UK courts' decisions, five judgments by the Court of Justice of the EU and five opinions of AG, one decision by European Court of Human Rights, a series of UK legislations prohibiting non-compensatory damages awards in claims against air carriers, and the European Parliament and Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40. These data were retrieved from JustisOne, Westlaw UK, Nexis UK, BAILII and EUR-Lex. Several other cases (not legislations) use the adjective 'non-compensatory' but merely 14 of them do so when discussing damages or compensation.

[4]Above n 1, at 298.

[5]Upheld in *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] 3 WLR 198 at [149]; *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch) at [54]. Indirectly, the same understanding of the adjective 'non-compensatory' was adopted in *Less v Hussain* [2012] EWHC 3513 (QB) at [179]–[180].

[6]*R (Anam) v Secretary of State for the Home Department (No 2)* [2012] EWHC 1770 (Admin) at [30].

[7]See also *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) at [127] (referring to *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245).

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punitive in intent, are, in common with exemplary damages, extra-compensatory in character [and] … essentially non-compensatory'.[8] The phrase 'non-compensatory damages' was also used to refer to a judgment for multiple damages under section 5(2)(a) of the Protection of Trading Interests Act 1980[9] and to denominate the extra-compensatory award of punitive damages against air carriers.[10] Without going into much detail about all these different meanings of NCDs, the important message is that positive law does not define NCDs.

Likewise, scholarly writings have been preoccupied with analysing individual categories of damages rather than theorising about all NCDs collectively.[11] Sometimes, scholars put all (or some of) the other-than-compensatory types of damages under an umbrella heading 'non-compensatory damages', but even then, further investigation of their common features is missing.[12] Again, we can only assume that there is an implicit overarching category of NCDs to which the academic literature refers, but the characteristics of that category remain unclear.

Bound as they are by particular precedents, and confronted as they are with particular claims, it is understandable why judges do not posit or theorise some overarching category of non-compensatory damages. If, however, all NCDs awards are in fact animated by the same type of justifying reasons, it would be desirable that the courts start developing NCDs collectively in view of these reasons and that law-makers also have regard to these justificatory similarities. The unifying category of NCDs might thus have both expository and practicable values. Let us therefore try to define the category.

(b) The doctrinal scope of non-compensatory damages

It seems safe to say that NCDs span categories of damages that the positive law explicitly dubs non-compensatory (ie restitutionary, nominal, vindicatory, and punitive damages, as was shown above). It could also entail damages that are clearly distinguished from compensatory awards in doctrinal writings. Practically all doctrinal texts confirm the non-compensatory nature of punitive and nominal damages.[13] Most doctrinal scholars further separate contemptuous damages from nominal damages, for they presumably rest on different justificatory reasons and pursue slightly different goals.[14] Next, some academic writings also attest the non-compensatory distinctiveness of vindicatory damages,[15] although English courts have not yet expressly approved this type of award.[16] Many texts then

[8] *Ashley v Chief Constable of Sussex* [2008] 1 AC 962 at [28].

[9] *SAS Institute Inc v World Programming Ltd* [2018] EWHC 3452 (Comm) at [213].

[10] *Hall v Heart of England Balloons Ltd* [2010] 1 Lloyd's Rep 373 at [35]; *Hook v British Airways plc* [2011] 1 All ER (Comm) 1128 at [5]; *Hook v British Airways plc* [2012] 2 All ER (Comm) 1265 at [2]; *Stott v Thomas Cook Tour Operators Ltd* [2014] AC 1347 at [31].

[11] A slight exception is P Cane 'Exceptional measure of damages: a search for principles' in P Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press, 1996), although this work does not address NCDs directly. Cane searches for justifying principles of exceptional measures of damages, which he understands as measures that are 'not' justified by correlative gain or loss. Note that he does not explore ordinary (let alone exceptional) measures of non-compensatory damages as such.

[12] See eg A Burrows 'Reforming non-compensatory damages' in W Swadling et al (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford: Oxford University Press, 1999); A Kramer *The Law of Contract Damages* (Oxford: Hart Publishing, 2014) ch 23; J Varuhas *Damages and Human Rights* (Oxford: Hart Publishing, 2016) pp 116–117; Edelman et al, above n 2, part 2 (who all have a separate chapter on 'non-compensatory damages').

[13] WE Peel and J Goudkamp (eds) *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 19th edn, 2014); Kramer, above n 12; P Giliker *Tort* (London: Sweet & Maxwell, 5th edn, 2014); NJ McBride and R Bagshaw *Tort Law* (Harlow: Pearson, 5th edn, 2015); R Mulheron *Principles of Tort Law* (Cambridge: Cambridge University Press, 2016); C Witting *Street on Torts* (Oxford: Oxford University Press, 15th edn, 2018); Edelman et al, above n 2.

[14] PH Winfield *A Text-Book of the Law of Tort* (London: Sweet & Maxwell, 1937) p 151; H Street *The Law of Torts* (London: Butterworth & Co Publishers, 1955) ch 28; Peel and Goudkamp, above n 13, paras 23-006–23-034; Giliker, above n 13, ch 17; Witting, above n 13, p 645.

[15] McBride and Bagshaw, above n 13, p 839 ff; Edelman et al, above n 2, ch 17.

[16] See *R (NAB) v Secretary of State for the Home Department* [2011] EWHC 1191 (Admin) at [6].

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point out the distinctiveness of gain-based damages,[17] but it is sometimes unclear whether they draw a line between gain-based restitutionary damages and gain-based disgorgement damages (I will return to this problem in Section 2(c)(v) below).

To be analytically rigorous, we should also set out negative limits of the doctrinal scope of NCDs. Thus, NCDs cannot include damages that are, by their label, distinct from compensatory damages but follow the same compensatory principle. This applies, for instance, to aggravated,[18] liquidated,[19] delay,[20] user,[21] negotiating,[22] reliance and expectation damages[23] which all reflect different measures of the claimant's compensable loss, but as a matter of their justificatory rationale all of them are compensatory. Likewise, NCDs cannot include extinct heads of damages, such as parasitic damages[24] (refused as a separate category in the 1970s)[25] or conversion damages[26] (abandoned in the 1980s),[27] because they do not represent the current law.

Overall, it seems that six doctrinal heads of damages fall under the NCDs scope: punitive, nominal, contemptuous, vindicatory, and the two types of gain-based damages. The non-compensatory awards that differ in name only need not be looked at separately. This applies, for example, to flagrancy,[28] exemplary,[29] and vindictive damages,[30] which are all synonyms for punitive damages.

2. The common nature of non-compensatory damages

It is commonly observed that what unites NCDs is that they are not compensatory,[31] which observation is as circular and empty as observing that all males are not non-males. Our analytical strategy must be different here. We must look at what the six categories of NCDs share together, rather than what they collectively do not share with compensatory awards. This original inquiry has two necessary conditions. First, we must bring all non-compensatory types of damages to the same level of analysis, so that they can be scrutinised and compared with each other. Secondly, this level of analysis must allow us to draw meaningful distinctions between NCDs and compensatory damages. Sections 2(a) and 2(b) develop an analytic framework that satisfies these conditions and helps me to analyse NCDs collectively in Sections 2(c) and 2(d).

(a) The wrongs-based model of damages awards

To bring all damages to the same level of analysis, we will employ a wrongs-based model according to which all damages function as monetary remedies to legal wrongdoing. On this model, all damages awards are made on the basis of a civil wrong against a legal right and measured by a consequential infringement of some legally protected interests. These interests can take various forms and not all legally

[17] Peel and Goudkamp, above n 13, para 23-034; Giliker, above n 13, ch 17; Kramer, above n 12, ch 23; Mulheron, above n 13, ch 11; Edelman et al, above n 2, chs 14 and 15.

[18] *Ashley*, above n 8, at [102]. See also J Murphy 'The nature and domain of aggravated damages' (2010) 69 Cambridge Law Journal 353; Edelman et al, above n 2, paras 5-012–5-014.

[19] cf Edelman et al, above n 2, para 16-033 (putting liquidated damages under the NCDs heading mainly because of their close connection with contractual penalties).

[20] *J Murphy and Sons Ltd v Beckton Energy Ltd* [2016] EWHC 607 (TCC) at [6], [20].

[21] *Morris-Garner & Another v One Step (Support) Ltd* [2018] 2 WLR 1353 at [25]–[30] per Lord Reed.

[22] Ibid, at [3], [91]–[93], [95], [96]–[98], [100], [102], [106], [109], [123], [127].

[23] See Edelman et al, above n 2, para 4-025 ff.

[24] *Campbell v Mayor, Aldermen, and Councillors of the Metropolitan Borough of Paddington* [1911] 1 KB 869 at 875.

[25] *Spartan Steel and Alloys v Martin & Co (Contractors)* [1973] QB 27.

[26] Copyright Act 1911, s 7; Copyright Act 1956, s 18.

[27] Copyright, Designs and Patents Act 1988, s 31(2).

[28] *Technomed Ltd v Bluecrest Health Screening Ltd* [2017] EWHC 2142 (Ch) at [147].

[29] *Rookes v Barnard* [1964] AC 1129.

[30] *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 at 39.

[31] eg the literature above in n 12.

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protected interests must be expressed in form of legal rights to have effects on damages awards. Rather, interests serve as 'the means by which one could link descriptive categories of harm to normative principles of what a defendant ought to pay'.[32] Sometimes, an interest is synonymous with a claim-right over assets such as property or contract.[33] Sometimes, we think of it 'in a broader sense to mean simply objective or states of affairs which are, or would be, to the person's, or the public's, advantage'.[34]

One can convincingly argue, I think, that the wrongs-based model is normatively sound.[35] On this view, damages are designed to mark wrongs and restore justice by monetary means. The wrongs-based model justifies damages awards by backward-looking reasons of rightness (as opposed to forward-looking reasons of goals).[36] We can thus say that damages are backward-looking remedies for legal wrongdoing and wrongful consequences thereof. This helps us to see why the phrase 'non-compensatory damages' is not easily comprehensible – it refers to a forward-looking goal 'not to compensate the claimant', which could mean almost anything. By contrast, the backward-looking wrongs-based model allows us to identify positive justifying reasons for NCDs awards.

Further, one can argue that the wrongs-based model fits descriptively with large parts of existing English law of damages, as for instance Stevens seeks to demonstrate.[37] I agree with Stevens that liability in damages is rights-based and that 'damages [are] awarded as a "next best" substitute for the primary [claim]-right'.[38] Stevens's rights-based notion of 'substitutive damages',[39] however, does not allow us to distinguish between compensatory and non-compensatory awards, because the only type of rights and interests that are relevant for his account are 'claim rights'.[40] It follows that, for Stevens, the only ground for wrongdoing, and therefore the universal ground for justification of damages awards, must be interference with claim-rights of the claimant. This view demands all awards to be justified in the same way. As I understand Stevens, on his view all damages are universally justifiable by the reasons of rightness – to which end his analysis is fully explicable within the wrongs-based model. If that is true, his view is too broad and does not allow us to make important distinctions between different reasons of rightness. As we shall see in the next section, the wrongs-based (rather than rights-based) model allows us to make these distinctions and we can thus employ it for exploring the differences between compensatory and non-compensatory awards.

(b) Correlative and non-correlative justifying reasons for damages awards

To analyse all NCDs awards at such a level that meaningfully distinguishes them from compensatory damages, we will differentiate between correlative and non-correlative wrongdoing.[41] We will do so because it is widely recognised that compensatory damages can be fully justified by the correlative type of wrongdoing,[42] whereas NCDs cannot be so justified. Under the wrongs-based model, the

[32]G Samuel 'Should jurists take interests more seriously?' (2017) (August) Law and Method 1 at 21.

[33]P Cane *Tort Law and Economic Interests* (Oxford: Clarendon Press, 1991) p 3.

[34]ibid.

[35]See J Gardner 'What is tort law for? Part 1. The place of corrective justice' (2011) 30 Law and Philosophy 1; SA Smith 'Duties, liabilities, and damages' (2012) 125 Harvard Law Review 1727; J Gardner 'What is tort law for? Part 2. The place of distributive justice' in J Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014).

[36]I borrow this distinction from PS Atiyah and RS Summers *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987) p 5. Summers himself considered damages to be an authorised backward-looking response to legal wrongdoing: RS Summers *Form and Function in a Legal System: A General Study* (Cambridge: Cambridge University Press, 2006) p 288.

[37]See especially R Stevens *Torts and Rights* (Oxford: Oxford University Press, 2007); cf J Goudkamp and J Murphy 'The failure of universal theories of tort law' (2015) 21(2) Legal Theory 47 at 69–70 (discussing Stevens's inability to explain the law governing punitive damages).

[38]Stevens, above n 37, p 60.

[39]Ibid, ch 4.

[40]Ibid, p 4.

[41]The distinction is inspired by Cane, above n 11.

[42]eg Stevens, above n 37, ch 4; R Zakrzewski *Remedies Reclassified* (Oxford: Oxford University Press, 2005) pp 53–58; AS Burrows 'Judicial remedies' in AS Burrows (ed) *English Private Law* (Oxford: Oxford University Press, 3rd edn, 2013) p 1255.

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defendant is liable to pay damages in a compensatory measure because (and only because) the claimant's individual rights and interests have been infringed. What the claimant obtains from the defendant in damages correlates with what the defendant causes to the claimant by wrongdoing.

The correlative paradigm is firmly rooted in private law reasoning about damages[43] and helps us, for example, to distinguish contractual provisions on damages from similarly drafted – but non-correlatively justified – penalty provisions. A provision constitutes a penalty if it 'imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the [claimant]'.[44] Similarly, the correlative paradigm helps us to criticise punitive damages as an unjustified and anomalous windfall.[45] This is so because we typically expect damages to be justified by wrongdoing against the claimant, ie by a correlative type of reason. After all, it is the claimant who obtains the award and we want the reasons for the award to reflect the correlative structure of the claimant-defendant relationship. We should note, however, that this critique of punitive damages springs from 'a normative idea'[46] of law which already presupposes that damages awards generally should be justified by correlative reasons only.[47] This paper, nevertheless, takes black-letter categories at their face value and seeks to analyse all non-compensatory damages as 'damages', without prejudice to whether they are justified by correlative or non-correlative reasons.

Under the wrongs-based model we can analyse damages by first looking at the wrongdoing rather than at the award. Such inverted analysis leaves open the possibility that damages could be justified by violation of legally protected interests that are not vested in the claimant. These interests must, by definition, belong to someone other than the claimant and, therefore, cannot be characterised as correlative. Accordingly, it is more conceptually rigorous from the outset to consider the possibility that damages awards could be justified by both correlative and non-correlative reasons, and to permit the possibility that NCDs, unlike compensatory damages, can be collectively analysed as awards that are (at least partly) justified by the non-correlative types of reason.

Before we begin to analyse the six categories of NCDs award in the next section, let me stress the important shift of perspective that I suggest we adopt here. To justify a judicial remedy, the law typically starts from the principle '*ubi* [*i*]*us, ibi remedium*: where there is a right, there should be a remedy to fit the right'.[48] The idea of correlative reasons that justify remedies is also construed this way,[49] which is why we expect the claimant's correlative rights or interests to justify the remedy. We will, by contrast, proceed reversely, starting from the principle *ubi remedium, ibi ius*: where there is a remedy, there should be a right or legally protected interest to justify the remedy.[50]

(c) Non-correlative justifying reasons for non-compensatory awards

(i) Punitive damages

While every legal sanction, including compensatory damages, may be seen as some sort of a punishment,[51] the punitive aim of punitive damages is distinct in that it is 'the sole aim being pursued'.[52] Indeed, under present law, punitive damages can be awarded only if compensation payable to a victim is insufficient to

[43]See *Blackett and Another v Smith* (1809) 103 ER 1110 at 1111; *M'Iver v Henderson* (1816) 105 ER 947 at 949; *The Governor and Company of the Copper Miners of England v Fox* (1851) 16 QB 229 at 237.

[44]*Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] 3 WLR 1373 at [32].

[45]See eg V Janeček 'Exemplary damages: a genuine concept?' (2014) 6 European Journal of Legal Studies 189 at 196–203.

[46]EJ Weinrib 'The juridical classification of obligations' in P Birks (ed) *The Classification of Obligations* (Oxford: Clarendon Press, 1997) p 37.

[47]See especially EJ Weinrib *Corrective Justice* (Oxford: Oxford University Press, 2012) pp 9–37, 87–98; EJ Weinrib *The Idea of Private Law* (Oxford: Oxford University Press, rev edn, 2012) pp 133, 142, 226–227.

[48]*Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 at [25] (emphasis added).

[49]eg Stevens, above n 37, p 2.

[50]*Watkins v Home Office* [2006] 2 AC 395.

[51]*Rookes*, n 29 above, at 1221.

[52]A Burrows 'Reforming exemplary damages: expansion or abolition?' in Birks, above n 11, p 156.

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punish and deter the defendant.[53] In addition, punitive damages can be awarded for legal wrongdoing[54] only if that wrongdoing falls within one of these three categories: (1) 'oppressive, arbitrary or unconstitutional action by the servants of the government';[55] (2) 'the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff';[56] and (3) where such award is 'expressly authorised by statute'.[57]

Under our analytic framework, Category 1 punitive damages – ie the penal award for wrongdoing by public officials – may be seen as a remedy for a civil wrong suffered by the claimant, because it is the claimant whose claim-right (typically a claim-right against misfeasance in public office) was infringed. The mere breach of such claim-right is a correlative justifying reason and explains why the claimant can obtain *some* damages. However, it does not explain why the claimant can obtain damages in the *punitive* measure. Had the claimant suffered a consequential violation of his rights or interests, it would be remedied by compensatory or aggravated damages, and so it makes sense to ask who else suffered from the defendant's wrongdoing which justifies the punitive award in Category 1.

It seems that Category 1 awards protect non-correlative interests of the public. Take for example the reasoning in *Wilkes v Wood* – a case concerning an arbitrary exercise of investigatory powers by the Secretary of State.[58] It was clear in that case that the power to issue a general search warrant on the basis of a mere suspicion 'certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject'.[59] Such a practice was punished by an award of damages because it was 'contrary to the fundamental principles of the constitution',[60] not contrary to the private interests of the claimant. This case 'extended far beyond Mr Wilkes personally … [as it indirectly] touched the liberty of every subject of this country … [and] if found to be legal, would shake that most precious inheritance of Englishmen'.[61]

We can find the same type of argument even in the most recent Category 1 cases. For instance, in *Rees & Others v Commissioner of Police of the Metropolis*, it was stated that 'public censure requires a separate award of exemplary damages to mark the court's denunciation of [the defendant's] unconstitutional behaviour as an agent of the state'.[62] It was made abundantly clear that this case of malicious prosecution and misfeasance in public office by police officers 'is of public importance'[63] and the question in relation to punitive damages is one of 'the need for public condemnation through the courts'.[64]

Arguably, then, the civil wrong against the claimant (which wrong constitutes a justifying reason for the damages award) may result in a consequential violation of non-correlative interests that exist to the public benefit (which violation justifies the punitive measure). Thus in *Rookes v Barnard*, Lord Devlin argued that 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'.[65] His Lordship here reinforced the principles of legality and the rule of law, which bring all members of the community important

[53] *Rookes*, n 29 above, at 1227–1228.

[54] In English law, there is no direct evidence that punitive damages can be awarded for breach of contractual rights or for equitable wrongs. However, it is debatable whether contract law truly forbids these awards. See *Addis v Gramophone Co Ltd* [1909] AC 488 and the discussion in J Goudkamp 'Exemplary damages' in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017) pp 321–329.

[55] *Rookes*, n 29 above, at 1226.

[56] Ibid.

[57] Ibid, at 1227.

[58] (1763) Lofft 1.

[59] Ibid, at 498.

[60] Ibid, at 499.

[61] Ibid, at 490. Similarly see eg *Huckle v Money* (1763) 3 Wils KB 206 at 206, 207; *Entick v Carrington and Others* (1765) 2 Wilks KB 275 at 286, 292.

[62] [2019] EWHC 2120 (Admin) at [48].

[63] Ibid, at [43].

[64] Ibid, at [45].

[65] *Rookes*, n 29 above, at 1226.

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benefits such as predictability of official activity and hence the possibility of better planning, protection from arbitrary and discriminatory actions by officials, and enormous savings of cognitive energy that we would otherwise spend on thinking about the best way to regulate our lives.[66] The justifying grounds for Category 1 punitive damages may therefore be analysed as infringements of non-correlative public interests in an efficient and reliable operation of the principles of legality and the rule of law.[67]

Another argument in support of the view that Category 1 punitive damages are justified by non-correlative reasons comes from the Human Rights Act 1998 (HRA 1998). Section 8 of the HRA 1998 allows for damages 'in relation to any act … of a public authority which the court finds is … unlawful'.[68] The award then must be 'necessary to afford just satisfaction',[69] which goal intellectually originates from Article 41 of the Convention for the Protection of Human Rights regulating the monetary remedy of 'just satisfaction'. The European Court of Human Rights, whose jurisprudence must be taken into account,[70] recently confirmed that the Court may award non-compensatory punitive damages under Article 41 of the Convention on the basis of criteria such as:

> the 'absolute character' of the violated right, the 'particularly serious character of the violations', the 'gravity of the violations', or the 'fundamental importance of that right' … [or where] the Court … finds [the award] to be fair in the particular case, [or on the basis of] general interest … taking into account … exemplary effect.[71]

Again, these reasons do not reflect merely a wrong against the claimant's claim-right or private interest. Rather, they reflect wrongdoing against non-correlative public interests, the wrongdoing which occurs in parallel with the wrong against the claimant.

Category 2 punitive damages can be awarded for the defendant's 'cynical disregard for a plaintiff's rights'[72] and for his aware calculation 'that the money to be made out of his wrongdoing will probably exceed the damages at risk'.[73] For example, in *John v MGN Ltd* – a libel case in which the defendant, with a view to profit exceeding potential compensation, showed reckless disregard of the claimant's rights and of the truth or falsity of the defamatory publication – it was clearly stated that the award of exemplary damages 'fully secure[s] the public interest involved'.[74] Obviously, it was not a correlative interest of the claimant, the violation of which justified the punitive measure. Rather it was a violation of a duty that protects public interests and according to which members of society do not treat each other with disrespect. The profit-seeking disregard for the law may cripple several important public interests and 'it is necessary for the law to show [in these cases] that it cannot be broken with impunity'.[75] For instance, unlawful eviction cases and cases involving 'monstrous' violation of housing rights seem to attract punitive damages primarily because the tortfeasor's conduct is publicly troubling.[76] After all, protection of housing is of eminent societal interest. Another example might be the public interest in fair competition.[77] The justifying reasons for Category 2 punitive damages can thus be identified as infringements of non-correlative public interests.

[66]See SJ Shapiro *Legality* (Cambridge, Mass: Harvard University Press, 2011) pp 395–396.

[67]cf D Nolan 'Tort and public law: overlapping categories?' (2019) 135 Law Quarterly Review 272 at 278–279 (highlighting the public law aspect of the doctrines of exemplary damages and misfeasance in public office).

[68]Human Rights Act 1998, s 8(1).

[69]Ibid, s 8(3).

[70]Ibid, s 8(4).

[71]*Cyprus v Turkey* (2014) 59 EHRR 16 at [13] (footnotes omitted).

[72]*Rookes*, n 29 above, at 1227.

[73]Ibid.

[74][1997] QB 586 at 626D.

[75]*Rookes*, n 29 above, at 1227.

[76]eg *Drane v Evangelou* [1978] 1 WLR 455; *Design Progression Ltd v Thurloe Properties Ltd* [2005] 1 WLR 1.

[77]*2 Travel Group plc (in liq) v Cardiff City Transport Services Ltd* [2012] CAT 19 at [593]–[596]; *Devenish*, above n 5, at [141].

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Category 3 punitive damages seem to be justified by non-correlative reasons as well. Three statutes explicitly permit this category of award. The Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 permits punitive damages for conversion in respect of goods.[78] The relevant provision closely resembles the reasoning in *Borders*[79] – a case which allowed Category 2 punitive damages for conversion – and thus arguably also copies the non-correlative rationale of punitive damages. The Crime and Courts Act 2013 permits punitive damages for publication of news-related material by someone who is not a member of an approved regulator and whose 'conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights'.[80] Again, the justifying reason seems very similar to that of Category 2 punitive damages, even though they do not explicitly demand that the defendant acted for profit. The third example is High Speed Rail (London – West Midlands) Act 2017 which empowers the court to award 'exemplary damages … if the court thinks it appropriate to do so in the circumstances … whether or not another remedy is granted'.[81] This provision sanctions obligations, prohibitions or restrictions imposed by environmental covenant. The covenant secures public interests in local land change, with the overall objective to support construction of a railway. The non-correlative ground for such punitive award is evident.

Legislation not only permits but sometimes also forbids punitive damages, which may help us to analyse the rationale of NCDs too. For example, the Montreal Convention 1999[82] forbids punitive damages awards, because such damages would remedy a violation of some substantive right that the claimant *was originally not guaranteed* by the law.[83] From the perspective of the normative realm of the Montreal Convention 1999, such extra-conventional right thus represents a non-correlative justifying reason for the award.[84] Two other statues – the Competition Act 1988[85] and the Consumer Rights Act 2015[86] – explicitly prevent the court from awarding punitive damages, because both competition and collective consumer proceedings involve important non-correlative public interests the violation of which could otherwise invite the courts to punish the defendant's wrongdoing.

Aside from the categories test, punitive damages are also limited if the defendant was already criminally penalised for the same misconduct.[87] Arguably, this also supports the view that punitive damages protect public interests, similarly to how criminal law protects them.

(ii) Nominal damages

Nominal damages are a symbolic award that gives the claimant 'no right to any real damages at all, yet … [it supports] a right to the verdict or judgment'[88] to affirm the violation of the claimant's legal right. This wrong entitles the claimant to obtain damages regardless of any consequential damage. Unlike in

[78]See s 13(2) of the Act. Lord Kilbrandon doubted, though, that the expression 'exemplary damages' here means anything else than aggravated damages, for by virtue of s 13(6) of the statute, this only applies to Scotland, where exemplary damages are forbidden (*Broome v Cassell & Co Ltd (No 1)* [1972] AC 1027 at 1133).

[79]*Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197.

[80]Crime and Courts Act 2013, s 34(6)(a). See also ss 34–39 of the Act.

[81]High Speed Rail (London – West Midlands) Act 2017, s 51(10) and (11).

[82]Art 29 of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) 1999. See also Carriage by Air Act 1961, s 1 and Sch 1B, Art 29 to this Act. See also Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002, SI 2002/263, Sch 1, Art 29; Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, Sch 1, Pt 2, Art 29, which all copy the text of Art 29 of the Montreal Convention 1999.

[83]Joined Cases C-581/10 and C-629/10, *Nelson v Deutsche Lufthansa AG* EU:C:2012:657 [2013] 1 CMLR 42, paras [20], [28]–[40].

[84]cf recital (5) of the Montreal Convention 1999, which expresses 'the need for equitable compensation based on the principle of restitution', ie the need for correlative reasons.

[85]Section 36.

[86]Section 47C(1).

[87]See eg *Archer v Brown* [1985] QB 401 at 421; *AB v South West Water Services Ltd* [1993] 2 WLR 507 at 527, 531; *Borders*, above n 79, at [17] and [23]; *Devenish*, above n 5, at [20], [28], and [102].

[88]*Owners of the Steamship Mediana v Owners of the Lightship Comet Mediana* [1900] AC 113 at 116.

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the case of compensatory damages (that also implicitly declare violation of some rights by the defendant), nominal damages pursue declaration as the leading justificatory principle. The nominal award may therefore be analysed as a response to an infringement of an authoritatively posited claim-right (typically torts actionable per se) or as a response to breach of a contractually posited claim-right.[89]

On this account, the claimant has a correlative reason to obtain the nominal remedy because the claimant's own rights have been violated. Stevens, for example, thinks nominal damages confirm that tort law is rights-based and that it perfectly fits the correlative feature of tort remedies.[90] Similarly, Goldberg and Zipursky understand nominal damages as evidence that violations of the claimant's rights are the distinctive reasons for tort law actions,[91] and Gardner claims that nominal damages are 'nominally reparative' in that they mark the fact that there are reasons of corrective justice for this award, but there is nothing to repair (no factual loss).[92]

While I agree with this 'private law' correlative understanding of nominal damages, I do not think it explains them entirely. Under the wrongs-based model, it is clear that nominal damages cannot be awarded where there has been no violation of the claimant's right, but the same justifying reasons must apply to all damages awards, which means that those reasons cannot help us to understand the distinct nature of nominal damages. It follows that we should either drop nominal damages as a *distinct* category and stop awarding them, or that we should seek an alternative explanation.

Indeed, one might think that nominal damages should be dropped as a separate category as they are just a liminal case of compensatory award. On this interpretation, nominal damages respond to the smallest harm that is actionable – a mere violation of the claimant's correlative right. That is, however, at odds with positive law.[93] Nominal damages are clearly different from compensatory awards, because, as a matter of positive law, these awards are mutually exclusive regardless of whether the civil wrong in question could justify liability in relation to both types of award. It would be very surprising if the claimant obtained nominal damages in addition to a compensatory award. As Burrows rightly pointed out, 'there is a strong argument that nominal damages are unnecessary given that one can always seek a declaration that one's rights have been infringed. However, under the present law, for better or worse, nominal damages do exist'[94] and we thus need an explanation that can account for them.

To retain nominal damages as a distinct remedy, we are bound to offer an account of these awards that explains their characteristic features. Accordingly, we should be able to explain why nominal damages, given that they are no longer 'a mere peg on which to hang costs',[95] cannot be obtained in addition to compensatory damages made in respect of loss consequential upon a breach of contract or upon a tort actionable per se. Similarly, we should be able to explain why nominal damages are awarded only if the claimant does not show any consequential loss and why nominal damages cannot be obtained for all kinds of infringement of the claimant's rights.

The existing rights-based explanations usually avoid these difficulties and instead resort to all sorts of non-rights-based arguments, such as that it is pragmatically unnecessary to award an additional nominal sum where compensation was already achieved, or that it is a matter of a historical fact

[89]In more detail, see Edelman et al, above n 2, para 12-002.

[90]Stevens, above n 37, p 84.

[91]eg JCP Goldberg and BC Zipursky 'Torts as wrongs' (2010) 88 Texas Law Review 917 at 954–957.

[92]J Gardner 'Torts and other wrongs' (2011) 39 Florida State University Law Review 43 at 56–58.

[93]Though it was a position prior to the House of Lords decision *Mediana*, above n 88, that had clarified this point. For the older position, according to which nominal damages meant a remedy 'for violation of a right, in which case the law will presume damage', see eg *Embrey v Owen* (1851) 6 EX 353 at 368 (citing *Ashby v White* (1703) 2 Ld Raym 938). The earlier position confused: (1) damages for small damage; (2) damages for damage presumed by the law; (3) damages for inappreciable loss such as personal injury or an invasion of property; and (4) damages marking the infringement of the right for the purposes of costs.

[94]A Burrows 'Damages and rights' in D Nolan and A Robertson (eds) *Rights and Private Law* (Oxford: Hart Publishing, 2012) p 280 (referring to Lord Millett's obiter dicta in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763 at [81]).

[95]*Beaumont v Greathead* (1846) 2 CB 494 at 499.

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that some torts are actionable per se and other torts are not. By contrast, the analysis presented in this paper can explain the specificities of nominal damages within the wrongs-based model and does not need to reach out for pragmatic or historical arguments.

To explain the specific features of nominal awards it suffices to adopt a non-correlative perspective to their justifying reasons. From this perspective, it becomes clear that the defendant's wrongful act infringes both a correlative legal right of the claimant and non-correlative interests of the public. Earlier, we have seen that the very existence of damages as judicial remedies manifests important public interests. Nominal damages, however, protect only the most important interests: 'liberty, corporeal integrity, and physical property in one's possession – and the tort of trespass protects them against direct invasion by positive interference even where no actual harm ensues … (libel is another, less happy, example)'.[96] Similarly, it seems to be of important public interest that a person who voluntary assumes an obligation by entering a contract does not breach that obligation. We can support this view by an argument that if contractual promises were not binding regardless of consequential damage, commerce and market would be significantly impaired, which would be detrimental to our society at large.

One may object, of course, that nominal damages are not limited to rights that are regarded as socially vital. For example, there seems to be no vast public interest at stake when a warehouseman converts a few steel coils by holding on to them for longer than she should, but the owner suffers not a penny piece of loss in consequence. In those cases, however, the courts can (and occasionally also do) strike out a statement of a case if it appears to them that the claim would amount to 'an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings'.[97] The overriding objective of the Civil Procedure Rules 1998 is that the courts are required 'to deal with cases justly and at proportionate cost',[98] so the courts need not to award nominal damages if they find the procedure disproportionate to the interests at stake. Accordingly, we may see why the claimant might be denied nominal damages unless some additional public interest – usually a major point of principle – is at stake.

In *White v Withers LLP*[99] the court took this argument a step further. The question arising in the appeal was:

> whether, and if so in what circumstances, the wife's solicitors [engaged in proceedings for ancillary relief after divorce] may be liable in damages to the husband 'for breach of confidence, misuse of personal information, invasion of privacy and wrongful interference with property by possessing, taking or intercepting the claimant's correspondence and documents including personal family letters, private and confidential letters concerning business opportunities and document containing financial information'.[100]

The issue was that the husband did not suffer any compensable correlative loss and that he had most likely pursued this claim maliciously from a motive of private vengeance.[101] The court considered whether to 'call an early halt to [this] lawsuit in tort … [because the] claim for a shilling in damages in order to prove a point and obtain an award of costs is history',[102] or whether to allow it and allow an award of nominal damages. In the end, the appeal was allowed. The court reasoned that 'it must always be remembered that solicitors are officers of the court and if they are shown to have done wrong they should face the judgment of the court. … It is in the public interest that the bounds of proper conduct be clarified'[103] in this case. The point was to vindicate the strength of the law, not to serve the purposes

[96]T Weir *A Casebook on Tort* (London: Sweet & Maxwell, 10th edn, 2004) p 7.
[97]CPR 3.4(2)(b). See *Shaw v Leigh Day (A Firm)* [2017] EWHC 825 (QB) at [19], [36]–[38].
[98]CPR 1.1.
[99][2009] EWCA Civ 1122.
[100]Ibid, at [1].
[101]Note that there was no tort of malicious prosecution at that time.
[102]Ibid, at [71].
[103]Ibid, at [67].

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of a private vengeance induced by the claimant in this satellite litigation of an unwholesome kind.[104] Interestingly, the court even discussed an award of 'aggravated' nominal damages against the solicitors, ie nominal damages awarded at a higher rate 'if, for example, the court finds the interference [with the right] to have been callous, hurtful and unnecessary'.[105] This resembles the award of punitive damages under Category 2, which is clearly justified by non-correlative public interests.

We can conclude that declaratory awards of nominal damages are thus justified by violation of legally protected interests that are somewhat more important and that are worth protecting for the sake of the public itself. This explains why nominal damages are not available for all wrongs and also why it is important to permit their award even if the wrong does not cause the claimant any consequential damage. Moreover, we can say that if the claimant suffers consequential damage, then the public interest in marking the importance of a wrong will always be satisfied by the compensatory award. Hence, there is no reason to award nominal damages on top of compensatory awards.

(iii) Contemptuous damages

Contemptuous damages are awarded in the form of a minimal sum that affirms the violation of the claimant's right,[106] but unlike nominal damages they cannot be regarded as success.[107] Contemptuous damages are never pleaded, but the court has always a discretion to award them, typically to expresses its contempt for the immorality or the profit-seeking nature of the claim.[108] So, although the claimant could have suffered harm, the derisory sum does not reflect it. Instead, the sum represents a symbolic substitute for a compensatory remedy that would have been awarded had the claimant sought compensation instead of profit.

We can analyse this award as a penalty for the claimant (not the defendant) whose conduct has adverse effects on non-correlative public interests. In *Beevis v Dawson*, for instance, the court awarded 'a farthing damages' to find for the claimant but stop this 'lamentable case'[109] and 'save the time of the court and save public expense'.[110] In *Dering v Uris*[111] the court issued a verdict for the claimant but awarded him only a halfpenny because the defendants had already offered Mr Dering fair compensation before the trial. Moreover, because the claimant was wasting the valuable court's time at the expense of other potential claimants, he was denied costs and this denial was deemed in the interest of 'broad justice' and 'policy'.[112]

Analytically, therefore, we may argue that the claimant's attempt to exploit the public system of justice violates public interests and is clearly a non-correlative reason for the discretionary award. In this sense, the symbolic award gives effect to the public contempt as well as to the fact that the claimant suffered a wrong. Insofar as contemptuous damages deprive the claimant of the compensatory award or, consequently, the costs that she would normally have obtained, they seem to penalise the claimant. Contemptuous damages can thus be also analysed as awards justified by non-correlative public interests.

(iv) Vindicatory damages

The purpose of vindicatory damages is to vindicate the claimant's rights which have been infringed and 'to reflect the sense of public outrage, emphasise the importance of the … [infringed] right

[104]Ibid, at [71], [74], [92].

[105]Ibid, at [72].

[106]Some therefore believe that '[s]uch damages are in effect nominal damages awarded for the infringement of a right' (Edelman et al, above n 2, para 12-009 fn 34). If that were true, then the declaratory goal of contemptuous damages would be justified by non-correlative reasons just as in the case of nominal awards.

[107]*R (on the application of Collin) v Secretary of State for the Home Department* [2013] EWHC 4803 (Admin) at [68].

[108]See eg *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024.

[109]*Beevis v Dawson* [1957] 1 QB 195 at 214.

[110]Ibid, at 209.

[111][1964] 2 QB 669.

[112]Ibid, at 672–73.

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and the gravity of the breach, and deter further breaches'.[113] This includes wrongdoing such as an abuse of state power,[114] invasions of privacy,[115] cases involving egregious violations of constitutional rights,[116] and unlawful detention cases.[117] Again, this award is not meant to compensate the victim and is thus clearly distinct from compensatory damages. Yet it is hard to say whether vindicatory damages have any distinct non-compensatory function. In fact, vindicatory damages are sometimes regarded as 'functionally superfluous'.[118] Barker, for instance, argues that they are 'a parasite upon … purposes that already flow through the veins of existing private law remedies',[119] namely nominal and punitive damages. If this is true, then vindicatory damages are justified by non-correlative reasons, just like nominal and punitive damages.

Even if we accept that vindicatory damages have a normative life of their own, their award seems justified by non-correlative reasons. In *Richard Lloyd v Google LLC*, for instance, the court argued that vindicatory damages are not merely intended 'to mark the commission of the wrong',[120] and are thus distinct from nominal awards. In *Rees v Darlington Memorial Hospital NHS Trust*,[121] the majority of the House of Lord thought that the conventional sum award of £15,000 was not compensatory, but neither purely penal or nominal. Instead, it was intended to 'afford some measure of recognition of the wrong done [and] … a more ample measure of justice'.[122] With Varuhas, who has written extensively on the topic of vindicatory damages, we can analyse this conception of vindication as a signal that the judiciary sends to our society about the public importance of underlying rights and interests in the legal system.[123] Similarly, Steel argues that vindicatory damages protect 'the value of the rule of law',[124] which would also suggest that they protect non-correlative public interests.

Other cases concerning vindicatory awards also fit the public interest analysis. In *Gulati v MGN Ltd*, the claimants' 'loss or diminution of a right to control formerly private information'[125] was vindicated on the basis of a broader public interest. In her leading judgment, Arden LJ (with whom Rafferty and Kitchin LJJ concurred) explicitly acknowledged that this 'test' case must be decided with a view that it will have a significant bearing on 'some 70 other cases of the same kind'.[126] The wider importance of the *Gulati* type of award was recently affirmed in *Various Claimants v MGN Ltd*[127] and *Lloyd v Google LLC*.[128] Likewise, the vindication of Mr Ashley's right 'not to be subjected to a violent … attack [by the police]'[129] must have had a non-correlative justificatory ground, because

[113]*AG of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 at [26] per Lord Nicholls. See also *Lumba*, above n 7, at [100].

[114]*Anam*, above n 6.

[115]*Gulati*, above n 7, at [127]; *Gulati v MGN Ltd* [2017] QB 149 at [19]–[20], [42], [44], and [48].

[116]*Lumba*, above n 7, at [99].

[117]See eg *Lumba*, above n 7; *R (O) v Secretary of State for the Home Department* [2016] 1 WLR 1717.

[118]K Barker 'Private and public: the mixed concept of vindication in torts and private law' in SGA Pitel et al (eds) *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013) p 86.

[119]Ibid, p 90. Similarly R Stevens 'Torts, rights and losses' (2006) 122 Law Quarterly Review 565 at 568; D Pearce and R Halson 'Damages for breach of contract: compensation, restitution and vindication' (2008) 28 Oxford Journal of Legal Studies 73 at 86; ED Ventose 'Damages for constitutional infringements: compensation and vindication' (2010) Commonwealth Law Bulletin 223 at 245; JNE Varuhas 'The concept of "vindication" in the law of torts: rights, interests and damages' (2014) 34 Oxford Journal of Legal Studies 253 at 290–292.

[120][2018] EWHC 2599 (QB) at [68].

[121][2004] AC 309.

[122]Ibid, at [8] per Lord Bingham. This majority position was expressly criticised by Lord Hope (dissenting) at [74]; cf D Nolan 'New forms of damage in negligence' (2007) 70 Modern Law Review 59 at 79–80 and A Mulligan 'A vindicatory approach to tortious liability for mistakes in assisted human reproduction' (2020) 40 Legal Studies 55.

[123]Varuhas, above n 12, pp 17–18.

[124]S Steel 'False imprisonment and the fetch of hypothetical warrant' (2011) 127 Law Quarterly Review 527 at 528.

[125]*Gulati v MGN Ltd*, n 115 above, at [48].

[126]Ibid, at [2].

[127][2019] EWCA Civ 350 at [4], [24], [41], [45] (Floyd LJ).

[128][2019] EWCA Civ 1599 at [52].

[129]Ibid at [22] per Lord Scott.

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the victim had died as a result of the wrong. The vindicatory considerations in *Ashley*[130] therefore could not have been framed around correlative rights of the injured party.

One may object that the entire discussion is distracting since, as a matter of English law, Lord Dyson in *Lumba* clearly stated that he sees 'no justification for letting such an unruly horse loose on our law'.[131] This statement appears to be sometimes understood as a general ban on vindicatory damages in English law[132] or at least as a ban on 'vindicatory awards *of the kind* the majority of the Supreme Court held in the *WL (Congo)* case [2012] 1 AC 245 could not be awarded'.[133] For the present analysis, however, it is crucial to highlight that Lord Dyson's speech in *Lumba* did not exclude the possibility that non-correlative public interests might be vindicated by the awards of vindicatory damages. Lord Dyson only dismissed the possibility of introducing vindicatory damages for 'the purpose of vindicating a *claimant's* common law rights'[134] infringed by a false imprisonment or battery and the possibility of introducing vindicatory damages for violations of 'constitutional rights'[135] in the absence of a codified constitution.[136] Subsequent case law indirectly supports this reading of *Lumba*. In *Weller v Associated Newspapers Ltd*, for instance, vindicatory damages were not awarded to avoid a risk of 'double counting … [insofar as they would] "vindicate" the Claimant'.[137] This indicates that if there is a ban on vindicatory damages, it does not concern damages that rectify violations of non-correlative public interests. To this extent, the present analysis of vindicatory awards may thus be of both theoretical and practical significance.

(v) Restitutionary damages

Although all gain-based damages are measured by reference to gain, they can pursue either restitution (restitutionary damages) or deterrence (disgorgement damages) as their main objectives.[138] According to Edelman, '[w]hilst … restitutionary damages are primarily concerned with corrective justice and reversing transfers between parties, disgorgement damages are concerned with broader notions of deterrence'.[139] One may doubt the divide,[140] because the law does not fully reflect this sharp theoretical distinction. This is partly due to the plurality of frameworks in which gain-based awards are conceived – they may be seen as part of the law of restitution, the law of unjust enrichment, or the law of damages. Yet from a wrongs-based perspective adopted in this paper, only the framework of damages matters. This means that any damages award measured by reference to gain must fit either the restitutionary or disgorgement characterisation. Let us therefore accept the analytical divide.

[130] *Ashley*, above n 8.

[131] *Lumba*, above n 7, at [101] per Lord Dyson. Similarly, ibid, at [237] per Lord Collins.

[132] Such an interpretation can be derived from, eg, *Weller v Associated Newspapers Ltd* [2014] EMLR 24 at [189]–[191]; *Gulati v MGN Ltd*, above n 7, at [128]; *Gulati v MGN Ltd*, above n 115, at [19]; *Shaw v Kovac and Another* [2017] 1 WLR 4773 at [50]–[54] and [84]; *Lloyd v Google LLC*, above n 120, at [68].

[133] *Gulati v MGN Ltd*, above n 115, at [44] (emphasis added).

[134] *Lumba*, above n 7, at [101] (emphasis added).

[135] eg ibid, at [100].

[136] *Watkins*, above n 50, at [26]. See also *Shaw v Kovac and Another*, above n 132, at [53] (admitting that it 'may be debated whether actions framed in breach of privacy have possibly something of a special status in this regard') or J Edelman et al (eds) *McGregor on Damages* (20th edn incorporating 1st supplement, Sweet & Maxwell, 2018) para 17-001.

[137] *Weller v Associated Newspapers Ltd*, above n 132, at [191].

[138] See eg J Edelman *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002) ch 3; G Virgo *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2015) pp 4–6; Edelman et al, above n 2, chs 14 and 15.

[139] Edelman, n 138 above, p 86.

[140] The theoretical division is contested by several scholars (eg C Rotherham 'The conceptual structure of restitution for wrongs' (2007) 66 Cambridge Law Journal 172 and F Giglio 'Pseudo-restitutionary damages: some thoughts on the dual theory of restitution for wrongs' (2009) 22 Canadian Journal of Law and Jurisprudence 49; A Burrows *The Law of Restitution* (Oxford: Oxford University Press, 3rd edn, 2011) pp 633–635; K Barnett *Accounting for Profits for Breach of Contract: Theory and Practice* (Oxford: Hart Publishing: 2012) ch 6; S Watterson 'Gain-based remedies for civil wrongs in England and Wales' in E Hondius and A Janssen (eds) *Disgorgement of Profits: Gain-Based Remedies throughout the World* (Cham: Springer, 2015) pp 31, 42–44).

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Restitutionary damages are available in cases where a wrong results in a benefit to the wrongdoer which exceeds the loss to the victim, who suffers a lesser loss or, frequently, no loss at all.[141] It is important that restitutionary damages are justifiable solely by wrongdoing against the claimant and by infringements of the claimant's private interests (we say 'at the claimant's expense'). Take, for example, restitutionary awards for intellectual property wrongs that reflect a reasonable or notional royalty fee for the wrongful conduct.[142]

The reasons for these awards are informed by the correlative claimant-defendant relationship. In this sense, both restitutionary and compensatory damages are of the same nature, because both types of award are justified by correlative reasons. They are both based on the principle of restoration. 'Compensation and restitution for wrongs have a similar, albeit inverse, function'.[143] 'Restitution [here] is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions.'[144] On this account, the main difference between restitutionary and compensatory damages is in how we quantify their measure, whether by reference to gain or by reference to loss, but not in how we justify the measure. Restitutionary damages are, therefore, not justified by non-correlative reasons and do not share the justificatory rationale that is common to all previous NCDs awards.

(vi) Disgorgement damages

Unlike restitutionary damages, 'disgorgement remedies have a deterrent or distributive function', writes Virgo.[145] Just as in the case of punitive or vindicatory damages, the disgorgement award is designed to deter, prevent, mark, and penalise the exceptional gravity of a wrong that was committed by the defendant. But unlike in the case of punitive or vindicatory damages, the disgorgement award is triggered by the occurrence of a wrongful gain on the defendant's side.

Disgorgement damages are available if it is necessary to disgorge any profit gained from the defendant's breach of the contract.[146] They can be also awarded 'for cynical commission of torts as diverse as trespass, conversion, libel, inducing breach of contract, intimidation, fraud and deceit'[147] as well as for some equitable wrongs where compensatory damages are not sufficient to deter the defendant.[148] These awards can strip the wrongdoer of gains that are not acquired from the claimant or at her expense,[149] which implies that they cannot be fully justified by correlative reasons. Disgorgement damages, in contrast with restitutionary damages, demand some 'exceptional circumstances … [or] a legitimate interest in preventing the [d]efendant's profit-making activity and, hence, in depriving him of his profit'.[150] Accordingly, Cane believes that disgorgement damages express public disapproval of the defendant's wrongful conduct and that they do not belong to civil law.[151] Other commentators also notice the social importance of the interests at stake in relation to disgorgement damages.[152]

[141]Edelman et al, above n 2, paras 14-001–14-003. See eg *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

[142]eg *Catnic Components Ltd v Hill & Smith Ltd* [1983] FSR 512; *Blayney (t/a Aardvark Jewellery) v Clogau St Davids Gold Mines Ltd* [2003] FSR 19; *Irvine v Talksport Ltd* [2003] 2 All ER 881.

[143]F Giglio 'Restitution for wrongs: a structural analysis' (2007) 20 Canadian Journal of Law and Jurisprudence 5 at 6. See also R Cunnington 'Gain-based damages for breach of contract' in D Saidov and R Cunnington (eds) *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008) pp 217–219.

[144]*Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3 at [32].

[145]Virgo, above n 138, p 6 (footnote omitted).

[146]*Blue Monkey Gaming Ltd v Hudson* [2014] All ER (D) 222 (Ch) at [605], referring to *AG v Blake*, above n 1, 285. See also *Blue Sky One Ltd v Mahan Air* [2009] EWHC 3314 (Comm) at [320].

[147]Edelman, above n 138, p 136.

[148]Ibid, pp 191 and 212ff. The relevant awards are often labelled account of profits in these cases.

[149]Cane, above n 11, p 321; Watterson, above n 140, p 33.

[150]*Blue Monkey Gaming Ltd v Hudson*, above n 146, at [605].

[151]Cane, above n 11, pp 322–323.

[152]eg H Dagan *Unjust Enrichment: A Study of Private Law and Public Values* (Cambridge: Cambridge University Press, 1997) pp 12–31; C Rotherham 'Deterrence as a justification for awarding accounts of profits' (2012) 32 Oxford Journal of Legal Studies 537 at 544–545.

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In *AG v Blake*, for example, the defendant's invasion of public interests in national security was sufficient to disgorge Mr Blake's profit which he gained by disclosure of state secrets, which was seen as an exceptional justifying reason for the award that stripped Mr Bake of all his profits.[153] We can argue, therefore, that '[w]hat makes the tortfeasor's [successful profit-seeking] conduct especially worthy of sanction is not its impact on the interests of the plaintiff … but its impact on … a social institution'.[154] Similarly, the House of Lords clearly argued by '[t]he damage to the public interest' when disgorging financial gains obtained by misuse of confidential information in *AG v Observer Ltd, AG v Guardian Newspapers Ltd (No 2), AG v Times Newspapers Ltd (No 2)*.[155]

Note that these claims were advanced by the Attorney General (AG), ie a representative of the public interest. In this regard, we must be careful not to confuse a 'legitimate interest'[156] of the public claimant in depriving the defendant of his profit with a legitimate private interest of the claimant. Since the AG represented the public interest, there is no meaningful way in which the disgorgement remedy might be understood as a justified response to the AG's private interests. By contrast, in *Experience Hendrix LLC v PPX Enterprises Inc* (where the claim for an account of profits was expressly inspired in *Blake*)[157] the circumstances were not considered exceptional and the claimant was deemed to have a legitimate *private* interest in depriving PPX of its unjust profit. In this case, not all profit of PPX was deemed unjust because not all of it was wrongfully gained at the expense of *Experience Hendrix LLC*'s private interests. Accordingly, the defendant was ordered to pay only a reasonable sum (user fee) for their use of Hendrix's recordings in breach of the agreement. The defendant was not required to give up on all their profits from that use.

Only in exceptional circumstances, affecting important interests beyond the claimant-defendant relationship, had the House of Lords expressly stated that 'there is a very great public interest in seeking to discourage' others from similar wrongdoing.[158] On this ground, a claim for disgorgement damages was rejected in *Devenish* because there were no exceptional circumstances to justify the award and because, without such justification, 'an account of profits of the kind advanced would give Devenish a windfall. … [T]he law is not in the business of transferring monetary gains from one undeserving recipient to another'.[159]

Justice may sometimes require that the courts have the power to disgorge the wrongdoer's benefits and to teach them that no one should be permitted to take advantage of his or her own wrongdoing.[160] The principle according to which the law should not allow 'a man to make profit by a wrong'[161] also supports the idea that the award of disgorgement damages can be justified by reasons of public interest. In cases where the courts disgorge *all* profits of the defendant even though not all of it was achieved at the expense of the claimant, there needs to be another reason why *all* the profit is considered unjust and wrongful. Supposedly, where the law levels the field and posits some restrictive rules, nobody should take advantage of the fact that others play by those rules. A breach of these rules does not generate profit at the claimant's expense, but gain achieved at the expense of the public at large. In this sense, disgorgement damages rectify violations of public interests and can be analysed as an award justified by non-correlative reasons.

Disgorgement of a wrongful profit and punitive damages for profit-seeking wrongful activities become almost indistinguishable in cases where the profit-seeking intention results in some real

[153]Above n 1. See also M Halliwell 'Profits from wrongdoing: private and public law perspectives' (1999) 62 Modern Law Review 271 at 279–280 (arguing that *AG v Blake* award was justified by public interests which should be regarded as an exceptional type of reason).

[154]Cane, above n 169, p 117. See also P Cane *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002) p 222.

[155][1990] 1 AC 109 at 259, 262.

[156]*AG v Blake*, above n 1, at 285.

[157]*Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830 at [16].

[158]*AG v Observer Ltd*, above n 155, at 197.

[159]*Devenish*, above n 5, at [158] (Tuckey LJ).

[160]*AG v Observer Ltd*, above n 155, passim.

[161]*Jegon v Vivian* (1870–71) LR 6 Ch App 742 at 761.

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gain, but which gain cannot be disgorged in full (eg because part of the gain had already been confiscated in criminal proceedings). In *AT & Others v Dulghieru & Another* – a case concerning young women who were trafficked into the UK from Moldova for the purposes of sexual exploitation and prostitution – the award of £60,000 in punitive damages was made not only to 'mark the court's disapproval of … [the] outrageous conduct',[162] but also to prevent the defendants' unjust enrichment. The defendants' illegal gains totalled approximately £786,000 (as exemplified by confiscation orders)[163] and the court made it clear that 'the rationale behind an award of [Category 2] exemplary damages is primarily one of preventing unjust enrichment'.[164] This strongly suggest that the reasons for disgorgement damages and punitive damages overlap.

Non-correlative reasons seem also to underpin disgorgement awards against fiduciaries and dishonest assistants:

> There is now a body of modern case law at first instance which recognises that the court has the power to order an account of profits against a dishonest assistant, even where no corresponding loss has been suffered by the beneficiary.[165]

More generally, the disgorgement rule against trustees or fiduciaries (requiring them to account for any profits they derive from their office or position) 'ensures that that trustees and fiduciaries are financially disinterested in carrying out their duties'.[166] Most importantly, the rule allows the claimant to demand disgorgement damages against the trustee or fiduciary regardless of whether she has any legitimate private interest in disgorging the profit. It is the very institution of trust – the existence of which is undoubtedly in the public interest – that is protected by those awards. Still, these situations must be distinguished from account of profits 'which ought to have been made'[167] for the claimant as part of the fiduciary duties and which would thus be based on correlative reasons.

(d) What is the common nature of non-compensatory damages?

I hope to have persuaded the reader that the awards of punitive, nominal, contemptuous, vindicatory, and disgorgement damages (as opposed to other gain-based awards) share a justificatory rationale that distinguishes them from compensatory awards. All these NCDs awards are justified by non-correlative reasons and this type of reason does not justify the compensatory measure of remedies. The justifying reasons for NCDs awards can be further specified as non-correlative wrongdoing, ie wrongdoing against rights or interests of persons different from the claimant. Unlike in the case of compensatory damages, an infringement of the claimant's own rights and interests is not sufficient to justify NCDs. What these correlative interests cannot justify is the non-compensatory measure of damages.

In addition, we have seen that the five types of NCDs promote various non-correlative public interests, rather than non-correlative interests of any other individual. Thus, NCDs are not justified by non-correlative reasons in a sense that the claimant would not be the original victim and the defendant the original wrongdoer. Think, for example, of situations where the claimant is an insurance company or where the defendant is vicariously liable for wrongs committed by others. In such scenarios the award would necessarily be justified by non-correlative reasons, because the claimant-defendant relationship would not correlate with the sufferer-wrongdoer relationship. But NCDs are justified by reasons that are non-correlative in a more specific sense. The distinctive justifying reason for their awards

[162][2009] EWHC 225 (QB) at [73].
[163]Ibid, at [69].
[164]Ibid, at [71].
[165]*Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 at [71] (further cases are listed in that paragraph).
[166]*AG v Blake*, above n 1, at 280.
[167]*Novoship (UK) Ltd v Mikhaylyuk*, above n 165, at [124].

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is non-correlative wrongdoing in the sense that it 'infringe[s] the values and interests that the community have a shared and mutual concern for'.[168] NCDs are thus justified by reasons of public interest.

This does not mean, of course, that NCDs awards are not concurrently justified by correlative reasons. Such correlative reasons exist because the claimant has a dual role of being an individual member of the society, in relation to whom the public interests have been infringed, and an agent who acts on behalf of the society and thus rectifies the violations of the non-correlative public interests. In other words, these correlative reasons justify why the defendant can be held liable to the claimant. What such reasons neither explain nor justify is why the award is made in the non-compensatory measure. The wrongdoing for which the defendant is liable in NCDs must, therefore, be clearly distinct from the correlative type of wrongdoing for which one is liable in compensatory damages.

The analysis in this section also suggests that NCDs are obtained by the claimant if, and only if, the defendant's wrongdoing concurrently amounts: (1) to a violation of the relevant public interests that justify the award; and (2) to a violation of the claimant's legally protected private interests. This overlapping perhaps best explains why it is not unjust that the claimant (rather than someone else) obtains the NCDs award and why the private claimant cannot be a mere bystander to the violation of the public interest, if her claim in NCDs is ever to succeed. The claimant's private rights and interests are merely a condition for the award to be made in the non-compensatory measure. They are not a reason for it.

This has some practical implications. It would be wrong, for instance, to get rid of NCDs simply because they seem to present 'an unmerited windfall'[169] to the claimant. This criticism of NCDs is rooted in a premise that damages awards cannot be legitimately justified by other than correlative reasons, which premise was rejected in Section 2(b). As long as we accept that the measure of NCDs awards is justified, and as long as it is not unjust to give the award to the claimant, this argument against NCDs should not worry us. Instead, we should strive to determine some clear limits on the judicial power to award NCDs. The examples discussed in relation to nominal and vindicatory damages, for instance, clearly suggest that not all violations of public interest will legitimately give rise to NCDs awards. The difficult question is how we should determine which public interests merit protection by way of damages and which do not.

3. Exceptionality of non-compensatory damages

Let us turn to the last issue, namely why we should treat *all* NCDs as an exceptional remedy. Why ought the judges generally not award damages in any other than the compensatory measure?[170] To answer that question, we need to determine whether it should be axiomatic that judges ought ordinarily to award damages in the compensatory measure only.

In this regard, I agree with Gardner that the category of correlatively justified awards, ie compensatory damages, should be 'a remedy of first resort … [f]or this is the only remedy against a [defendant] that the successful [claimant] enjoys *as of right*'.[171] Only for such remedies is the court obliged to give effect to the legally protected interests as determined by the claimant. By contrast, NCDs are *discretionary*. In relation to NCDs, the private interests of the claimant are merely a condition for their award, not a reason for it. The reason for an NCDs award is a legally protected public interest which cannot be determined by the individual claimant. Unlike in relation to private interests, the individual claimant has no legitimate authority to determine whether something is in the public interest; she cannot waive those interests or legitimately compel the court by her private claim to protect those interests

[168]J Wall 'Public wrongs and private wrongs' (2018) 31 Canadian Journal of Law and Jurisprudence 177 at 177 (footnote omitted).

[169]*Broome v Cassell & Co Ltd (No 1)* [1972] AC 1027 at 1114. Similarly, *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 at 517; *Hussain v New Taplow Paper Mills* [1988] 1 AC 514 at 523; *Smoker v London Fire Authority* [1991] 2 AC 502 at 533.

[170]cf Cane, above n 11, p 304. See also BC Zipursky 'A theory of punitive damages' (2005) 84 Texas Law Review 105 at 151 (offering a prescriptive reading of non-compensatory punitive damages).

[171]Gardner, above n 92, at 53.

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by way of damages. That is why judges ought not to award NCDs unless another justifying reason exists – a non-correlative reason.

The additional justificatory requirement is exceptional in the law of damages as it falls outside the scope of the claimant's legitimate control. This supports the conclusion that since this non-correlative justification cannot be legitimately invoked by the claimant as of her right, we should treat NCDs as exceptional remedies. Moreover, since the current framework under which we discuss damages does not allow us to discuss these additional reasons transparently and highlight their distinct features, we should consider adopting the framework advanced in this paper. Otherwise, the discretionary nature of NCDs awards and the 'as-of-right' nature of compensatory awards are likely to be confused, which would be plainly wrong and could result in illegitimate awards.

This brings us to the final point, namely that the exceptionality of NCDs can be more fruitfully explained by stressing their public features, rather than by only focusing on their non-correlative aspects. As has been shown, the non-compensatory measure of damages is not justified by correlative *private* interests of the victim, and neither are NCDs designed to rectify violations of non-correlative *private* interests of the claimant (if the claimant is not the victim or if the defendant is not the wrongdoer). Instead, they rectify infringements of non-correlative *public* interests. The essence of their non-correlativity is that they promote values common to the public. This is also the gist of their exceptionality in the law of damages. Besides, if we expressed the exceptionality of NCDs merely by pointing out that they are justified by non-correlative reasons, it would hardly be intelligible to many lawyers. For these reasons, I suggest that we refer to these NCDs awards simply as 'public interest damages'.

Conclusion

The law of damages can be difficult to understand. This applies especially to the piecemeal area of NCDs. In contrast with the existing scholarship, this paper looked at NCDs collectively. I argued that multiple formally distinct categories of damages, typically referred to as NCDs, are underpinned by the same type of justifying reasons. The common nature that distinguishes them from compensatory awards is that their awards are justified by non-correlative reasons, namely by wrongdoing against public interests. With the exception of restitutionary damages, all NCDs are justified by such non-correlative reasons of public interest. This applies to the non-compensatory awards of punitive, nominal, contemptuous, vindicatory, and disgorgement damages, provided that we disambiguate disgorgement damages from restitutionary damages. This theoretical simplification was my first original contribution.

Secondly, I showed why NCDs should be regarded as exceptional remedies and why the judges should only exceptionally award NCDs. This is because public interest damages are not awarded as of the claimant's right but rather as of the court's discretion. Moreover, the court needs to identify a non-correlative justifying reason for the award before it can legitimately exercise that discretion. This additional demand is exceptional in that it requires the court to look beyond the rights and interests of the claimant as submitted in her claim. In other words, if my analysis is correct, it means that the court is required to play an extraordinarily active role when adjudicating the claimant-defendant dispute over NCDs. This gives us a strong reason to prefer my analysis over the current approach because, all else being equal, my analysis favours transparency about the distinct nature of the reasons that underpin that discretion.

Thirdly, I suggested dubbing these exceptional NCDs awards 'public interest damages'. The notion of 'public interest damages' helps us to comprehend the characteristic nature of non-correlative reasons that justify NCD and also better to capture the extraordinariness of public interest damages. My suggestion to implement the phrase 'public interest damages' in our legal debates is, however, not meant to create another doctrinal label or to claim that all NCDs are essentially the same remedy. Instead, by accommodating multiple non-compensatory types of damages under a single conceptual roof, I want to provide a helpful theoretical category in which to understand and develop the law of NCDs.

As I have showed in this paper, the existing doctrinal as well as theoretical approaches to damages do not allow us transparently to see *all* NCDs as remedies unified by a golden thread of public interests

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or as remedies that are *all* clearly distinct from compensatory awards (let alone as damages that ought to be awarded only exceptionally). By adopting the concept of public interest damages or, at least, by accepting the analysis behind the category, we may thus bring the 'very precious commodities … [of] clarity and consistency'[172] into the seemingly heterogenous area of non-compensatory awards. For instance, by putting all non-compensatory awards on a common justificatory ground, we can start comparing their availability and measures against this ground and therefore achieve higher predictability in their application. Further, it can help us to appreciate the justificatory overlaps between public interest damages and public law monetary awards, such as criminal or administrative fines, and therefore better address their problematic co-ordination.[173]

Finally, and perhaps most importantly, the analytic framework proposed in this paper may allow us better to protect important public interests. Recent cases of mass violations of online privacy such as *Lloyd v Google LLC*[174] expose the artificiality of our traditional analysis and the public interest damages framework can help us to protect these emerging domains of human well-being. My point is not that we should use NCDs to protect all public interests in this way, but that we should adopt this new approach in order to set out clear limits on the judicial discretion to award public interest damages. After all, it is far from clear that the courts are in the best position to identify the relevant interests and thus by explicitly discussing NCDs as public interest damages we could lighten the judges' burden when determining the vital interests that merit such exceptional protection. But when discussing the desirability of public interest damages in English law, we should not get distracted by the popular disputes over the windfall in the claimant's pocket. We should not get so distracted because, as has been shown in this paper, it is not a sound premise that damages awards in all forms and measures must be justified correlatively: non-correlative reasons may legitimately justify damages awards too.

[172] *Knauer v Ministry of Justice* [2016] AC 908 at [21] per Lord Neuberger and Baroness Hale.

[173] See eg M Dyson 'Challenging the orthodoxy of crime's precedence over tort: suspending a tort claim where a crime may exist' in SG Pitel et al (eds) *Tort Law: Challenging Orthodoxy* (Oxford: Hart Publishing, 2013).

[174] Above n 128.

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