

**AGGRAVATED, EXEMPLARY
AND PUNITIVE DAMAGES IN
ROAD TRAFFIC ACCIDENTS**
*Non-compensatory damages in
Europe: a comparative
perspective*

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**COMPARATIVE RESEARCH ON
AGGRAVATED, EXEMPLARY
AND PUNITIVE DAMAGES
IN ROAD TRAFFIC ACCIDENTS**

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THE STUDY

The study and research questionnaire focused on the on the awards other than the sums awarded aiming to compensate the claimants for the pecuniary and non-pecuniary effectively sustained (damages other than compensatory and restitutionary damages). The category of awards subject to this research included all non-compensatory and non-restitutionary damages, as for example "punitive", "vindictive", "exemplary", "aggravated" damages, conceived as a "punishment" or (civil) "sanction" for the defendant's conduct or awarded in consideration of the defendant's particular behaviour and irrespective of the pecuniary and/or non-pecuniary losses effectively sustained by the claimants

THE RESEARCH QUESTIONNAIRE

- **General: scopes for awarding damages**
- **General questions on personal injury and death compensation**
- **Punitive damages and other similar awards in the area of road traffic accidents (*Questions on factual cases*)**
- **Other areas *Questions on factual cases (damaging events other than road traffic accidents)***
- **The limits to punitive damages**

RESEARCH PROJECT (STILL) GOIN' ON!



THE STUDY

12 national reports

**Austria Belgium England & Wales
Finland Germany Grand Duchy of
Luxembourg Hungary Ireland
Italy Malta Norway Romania**

The drunken driver

A drunken driver kills a pedestrian aged 10 years old who is crossing a street on the zebras with his parents (green light for the pedestrians). The parents of the primary victim issue an action for damages against the driver.

The drunken driver

Is the particular circumstance that the driver was drunk a factor likely increasing the final award for non-pecuniary damages?

The drunken driver

- **No (5)**
- **No, because there is no right to compensation for non-pecuniary damages (1)**
- **No, since there are fixed caps for the award of non-pecuniary damages in fatal accident cases (2)**
- **Yes (4)**

The drunken driver

Can the parents claim for non-compensatory damages as for example exemplary or punitive damages? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

The drunken driver

No (9)

England: *“Under English law the fact that the driver was drunk is not a factor that would increase any final award for non-pecuniary damages. Exemplary damages would not be available because the tort does not involve oppressive, arbitrary or unconstitutional conduct and neither is there any intention to profit from the conduct. In any event, exemplary or aggravated damages are unlikely to be available in this context as such a case normally would involve a claim in negligence”* (Philip Mead and James Tunley)

The drunken driver

Yes (3)

Norway: *"Yes, parents can claim for punitive damages (maximum ... euro 15000 ... ruled by our Supreme Court), and yes, the non-compensatory and the compensatory damages are awarded separately"* (Carl Jerstad); Romania: *"The victims can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"* (Adrian Brebenel); Hungary (Dr. Károly Bárd)

The taxi-driver under drugs

A taxi-driver is under drugs and the passenger is not able to realise the driver's conditions. Because the abuse of drugs the taxi-driver has a collision and the passenger sustains severe injuries.

The taxi-driver under drugs

Is the particular circumstance that the taxi-driver was under drugs a factor likely increasing the final award for non-pecuniary damages?

The taxi-driver under drugs

- **No (7)**
- **No, since non-pecuniary damages are not compensated for (1)**

The taxi-driver under drugs

Yes (4) Grand Duchy of Luxembourg: *“In the civil part of the process, normally the judges should not take into consideration the fact that the driver was drunk to assess the amounts to be awarded. Nevertheless, we can not declare without any doubt that the use of drug by the driver would have no influence at all on the decision of the judges awarding compensation for the victim non pecuniary damages. Indeed, as non pecuniary damages are assessed by judges ex aequo bono, judges would possibly in such a case increase the amounts awarded. In that case, what would actually be punitive damages would be kept silent and would appear in the judgment as included in the compensation sums awarded for non-pecuniary damages (“préjudice moral”)”* (Patrick Goergen, Céline Tritschler)

The taxi-driver under drugs

Is the gravity of the infringement of the contractual duties a factor likely increasing the final award for non-pecuniary damages?

- **No (11)**
- **Yes (1)**

The taxi-driver under drugs

Can the victim claim for non-compensatory damages as for example exemplary or punitive damages? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

The taxi-driver under drugs

- **No (8)**
- **Yes (4)** Norway: *"Yes, they can claim for punitive damages and the non-pecuniary and pecuniary awards are made separately"* (Carl Jerstad); Romania: *"The victims can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"* (Adrian Brebenel);

The taxi-driver under drugs

YES (4)

Hungary *“YES the victim can claim for non-compensatory damages, but not for exemplary or punitive damages – and the sum for non-compensatory damages awarded is separately from the compensatory damages”* (Dr. Károly Bárd);

The taxi-driver under drugs

YES (4)

Ireland: "The fact that the taxi driver was adversely affected by drugs which caused an accident resulting in injury to his passenger, may provide grounds for a non-pecuniary damages award, either as aggravated or exemplary damages. If the court considers that the conduct in all the circumstances of the case was of a sufficiently oppressive or outrageous nature as to require punishment; to deter the driver and others from similar conduct and to mark the court's disapproval of the conduct, such an award may be made. If any such non-pecuniary damages were awarded in this case, the amount of the award made under each head of damage would be separately identified. The level of the exemplary damages award should be proportionate to the compensatory damages awarded and the overall sum awarded should represent fair but not excessive compensation in the circumstances" (David Harris)

The drunken bus-driver

A bus driver is drunk. The ten passengers are not able to realise the driver's condition. Because his particular conditions the bus driver has a severe collision against a wall and five passengers die and the rest sustains severe injuries.

The drunken bus-driver

Is the particular circumstance that the bus driver was drunk a factor likely increasing the final award for non-pecuniary damages?

The drunken bus-driver

- **No (7)**
- **No, since non-pecuniary damages are not compensated for (1)**
- **Yes (4)**

The drunken bus-driver

Is the gravity of the infringement of the contractual duties a factor likely increasing the final award for non-pecuniary damages?

- **No (10)**
- **Yes (1)**

The drunken bus-driver

Can the victim claim for non-compensatory damages as for example exemplary or punitive damages? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

The drunken bus-driver

- **No (8)**
- **Yes (4)** Norway; Romania: *“The victims can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages”* (Adrian Brebenel)

The drunken bus-driver

Yes (4)

Hungary *"YES the victim can claim for non-compensatory damages, but not for exemplary or punitive damages, however its amount does not depend from the "forms" of the accident"* (Dr. Károly Bárd); Ireland: *"whether in the circumstances it was necessary to punish the driver and to deter the driver and others from repeating similar conduct and whether it is viewed as necessary to mark the Court's detestation of the behaviour"* (David Harris)

The drunken bus-driver

What if the bus is a school bus?

- **Not relevant (8)**
- **May increase the award for compensatory damages (4)**

***The driver escaping from
the accident and not
assisting the victim***

**A driver hits a pedestrian who is
crossing a street on the zebras
(green light for the pedestrian).**

The driver escaping from the accident and not assisting the victim

- What if the driver escaped after the accident not assisting the victim?
- Is this particular conduct relevant for the purposes of awarding damages?
- Will a court take into consideration this particular circumstance? If yes, will this factor give rise to a separate award or will it increase the final award for non-pecuniary losses?

The driver escaping from the accident and not assisting the victim

- **Not relevant (7)**
- **May increase the award for compensatory damages (5)**

The driver escaping from the accident and not assisting the victim

Norway: *"It could increase the award for punitive damages"* (Carl Jerstad);

Romania: *"The victims can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"* (Adrian Brebenel)

The driver escaping from the accident and not assisting the victim

Ireland: "The conduct of the driver following a negligent act can provide grounds for the award of aggravated damages in recognition of the added hurt and insult caused to the injured party and to mark the seriousness of the wrongful conduct. Only if an award of aggravated damages was viewed as insufficient to satisfy any requirements of public deterrence would an award of exemplary damages then be considered" (David Harris)

The driver insulting the counterpart

Driver A has a collision with the vehicle of B who is the negligent party. B sustains a personal injury. On the site of the accident Driver A, although fully liable, insults B with bad words.

The driver insulting the counterpart

Is the **insult** a factor increasing the award for the whiplash?

The driver insulting the counterpart

- **No (6)**
- **No, but an additional and separate sum of money for the insult may be awarded (compensatory damages) (3)**
- **No, but "*It can give rise to a separate award for exemplary damages*" (Romania; Adrian Brebenel) (1)**
- **Yes (2)**

Defective car and product liability

For a considerable number of years a car producer sells a particular model of cars perfectly knowing that this specific model is defective and not advising the public and consumers about the existence and the implications of the defect on the safety of the model

Defective car and product liability

1. Because the car's defect a driver has a severe collision with another vehicle and dies because the accident.

Defective car and product liability

Is the carmaker's conduct a factor increasing the awards to primary and secondary victims?

Defective car and product liability

- **No (7)**
- **Yes, but not in fatal accident cases (1):** Ireland:
“Because of the limited statutory recovery which is available in fatal injury cases, the conduct of the car producer would not be a basis to award increased non-pecuniary damages. If the driver had not died and thereby was able to pursue his usual common law tort remedies, the deliberate and wilful conduct of the car producer could provide a basis to make non-pecuniary damages awards” (David Harris)
- **Yes (3)**

Defective car and product liability

Can victims claim for non-compensatory damages as for example exemplary or punitive damages? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

Defective car and product liability

- **No (9)**
- **Yes (2)** Norway: *"Yes, and separate awards"* (Carl Jerstad); Romania: *"The victims can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"* (Adrian Brebenel)

Defective car and product liability

What if the producer is caught trying to destroy the evidence of the circumstance that it knew the damaging effects of its product? Can victims claim for non-compensatory damages as for example exemplary or punitive damages for this additional conduct? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

Defective car and product liability

- **No (10)**
- **Yes (2)** Ireland: *“The conduct of deliberately destroying evidence in an attempt to avoid liability in the context of pending or contemplated legal proceedings would equally provide a basis to increase the level of non-pecuniary damages”* (David Harris)

Defective car and product liability

2. Is there any difference from case *F.1* and the case where there is a large number of road traffic accidents caused by the car's defect?

Defective car and product liability

- **No (10)**
- **Yes (1)** Ireland: *"In the event there were a large number of road traffic accidents caused by the relevant car defect to which members of the public were knowingly exposed, multi-party or mass tort litigation might be commenced. ... the level of non-pecuniary damages in mass tort cases is likely to be less than that awarded in a single individual case as the aggregate amount of non-pecuniary damages in a mass tort case should not be disproportionate or excessively punish the Defendant"* (David Harris)

Failure to maintenance obligations

Is the particular circumstance that the accident took place because the transport company's failure to maintenance obligations a factor likely increasing the final award for non-pecuniary damages?

Failure to maintenance obligations

- **No (7)**
- **No, since non-pecuniary damages are not compensated for (1)**
- **Yes (4)**

Failure to maintenance obligations

Is the gravity of the infringement of the contractual duties a factor likely increasing the final award for non-pecuniary damages?

Failure to maintenance obligations

- **No (11)**
- **Yes (1)**

Failure to maintenance obligations

Can the victims claim for non-compensatory damages as for example exemplary or punitive damages? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

Failure to maintenance obligations

- **No (9)**
- **Yes (3)** Norway: *"Yes, they can claim punitive damages and awards of non-pecuniary and pecuniary are separate"* (Carl Jerstad)

Failure to maintenance obligations

Romania: *"The victims can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"* (Adrian Brebenel); Ireland: *"In order to punish and deter the breach of maintenance obligations and to mark the gravity with which such conduct is viewed, aggravated damages or an award of exemplary damages may be considered warranted"* (David Harris)

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

A person severely injured presents his claim for compensation to the insurance company of the driver at fault. There is not any ground for a denial of liability, thus liability is not an issue. Moreover, the letter, by which the injured party claims for compensation, has been written in full conformity with the requirements provided by the law and it contains all the details enabling the insurance company to make a reasoned offer.

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

Nevertheless, the insurance company decides to ignore the victim's claim and does not make any reasoned offer and does not even send a reasoned reply within the three-month time-limit running from the date on which the injured party presented his claim for compensation. Therefore the claimant is forced to issue proceedings.

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

Apart from the possible application of the administrative penalties provided by the law and the award of interest, is there any possibility for the claimant to be awarded with a sum sanctioning such insurance company's behaviour?

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

- **No (11)**
- **Yes (1)** Romania: *"The victim can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"*
(Adrian Brebenel)

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

Is the insurance company's conduct a factor likely increasing the final award for the damages effectively sustained?

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

- **No (9)**
- **Yes (3)**

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

Can the victim claim for non-compensatory damages as for example exemplary or punitive damages? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

- **No (11)**
- **Yes (1) Romania**

Insurance Company's failure to comply with the statutory obligation to make a reasoned offer or to send a reasoned reply within three months of the date when the injured party presented his claim

However: Ireland: *"It is unlikely that the conduct of an insurance company in failing or refusing an offer of acceptance without the necessity of issuing legal proceedings would be seen as warranting a non-pecuniary damages award. Whilst it has been well established that exceptional conduct during the course of a trial or in relation to pending legal proceedings can justify an award of aggravated damages, it is not considered a failure to settle a potential claim before the issue of proceedings could reasonably attract such an award under present Irish law"* (David Harris)

Insurance Company's strategy to make low offers

A person severely injured presents his claim for compensation to the insurance company of the driver at fault. There is not any ground for a denial of liability, thus liability is not an issue. Moreover, the letter, by which the injured party claims for compensation, has been written in full conformity with the requirements provided by the law and it contains all the details (including information on the quantum of damages) enabling the insurance company to make a reasoned offer.

Insurance Company's strategy to make low offers

Nevertheless, the insurance company decides to make an offer which is manifestly too low and that does not take into consideration the pecuniary and non-pecuniary losses sustained by the victim. Therefore the claimant is forced to issue proceedings in order to be compensated for the difference between the awards corresponding to the damages effectively sustained and the sum offered by the insurance company. In the course of the proceedings it comes out that the insurance company's conduct is part of a deliberate strategy to make low offers in order to save money and make higher profits.

Insurance Company's strategy to make low offers

**Is there any possibility for the
claimant to be awarded with a sum
sanctioning such insurance
company's strategy?**

Insurance Company's strategy to make low offers

- **No (11)**
- **Yes (1)** Romania: *"The victim can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"* (Adrian Brebenel)

Insurance Company's strategy to make low offers

**Is the insurance company's
conduct a factor likely
increasing the final award for
the damages effectively
sustained?**

Insurance Company's strategy to make low offers

- **No (10)**
- **Yes (2)**

Insurance Company's strategy to make low offers

Can the victim claim for non-compensatory damages as for example exemplary or punitive damages? If yes, is/can the sum for non-compensatory damages awarded separately from the compensatory damages?

Insurance Company's strategy to make low offers

- **No (11)**
- **Yes (1)** Romania: *"The victim can claim for non-compensatory damages. The sum for non-compensatory damages is awarded separately from the compensatory damages"* (Adrian Brebenel)

Insurance Company's strategy to make low offers

England: award of **aggravated damages** for the conduct during the course of legal proceedings: Sutcliffe –v- Pressdram Limited [1990] 1 All ER 269, per Nourse LJ

"Failure to make any or any sufficient apology and withdrawal (of libellous statements); a repetition of the libel; conduct calculated to deter the Plaintiff from proceedings; persistence, by way of prolonged or hostile cross-examination of the Plaintiff or in turgid speeches to the jury, in a plea of justification which is bound to fail; the conduct whether of the preliminaries or of the trial itself in the manner calculated to attract further wide publicity; persecution of the Plaintiff by other means."

foreign court decisions awarding exemplary or punitive or non- compensatory damages

A group of European citizens, severely injured because a pharmaceutical product made in United States of America and distributed in Europe, manages to obtain an affirmative judgment from a US court. This judgment fully recognises that the US pharmaceutical product caused the injuries sustained by the victims. Moreover, in consideration of the pharmaceutical company's intentional conduct, the US judgment awards the victims with punitive damages.

**foreign court decisions awarding
exemplary or punitive or non-
compensatory damages**

**Is it possible to enforce/execute this
US judgment in your country in
relation to the award for punitive
damages?**

foreign court decisions awarding exemplary or punitive or non- compensatory damages

- **No (2) “public order” (Italy,
England)**
 - **Yes (4)**
- **No case-law/“I do not
know” (6)**

PROVISIONAL CONCLUSIONS

- **Most of European countries do not award punitive damages or other similar categories as such**
- **However in some countries it is an accepted idea that compensation for non-pecuniary damages may take into consideration the wrongdoer's behaviour (this is more frequent in areas other than road traffic accidents)**

PROVISIONAL CONCLUSIONS

- **Differences do not correspond to the traditional distinction between civil law countries and common law countries**

PROVISIONAL CONCLUSIONS

**IS IT FAIR TO TREAT TORTFEASORS
WITHOUT LOOKING AT THE
PARTICULAR CIRCUMSTANCES OF
THEIR CONDUCTS?**

**IS IT FAIR THAT A NEGLIGENT
DRIVER IS TREATED IN THE SAME
WAY OF A DRIVER UNDER DRUGS?**

PROVISIONAL CONCLUSIONS

**... DO WE NEED
PUNITIVE/AGGRAVATED DAMAGES
IN ORDER TO MAKE DISTINCTIONS
BETWEEN DIFFERENT KINDS OF
CONDUCTS?**

**THANK YOU FOR YOUR
ATTENTION!!!!**