

EXEMPLARY DAMAGES IN ACTIONS AGAINST THE POLICE

CIVIL WATCH – PRACTICE NOTE

As part of Goldsmith Chambers' Civil Watch series, Joseph Byrne considers the correct approach to exemplary damages in light of the Court of Appeal's decision in [Rees v Commissioner of Police of the Metropolis](#) earlier this year. Joseph is a Civil, Public Law and Immigration practitioner.



WHEN WILL EXEMPLARY DAMAGES BE APPROPRIATE?

1. In addition to basic, aggravated and any other applicable damages¹, practitioners should also consider the applicability of exemplary damages in cases involving false imprisonment, malicious prosecution, misfeasance in public office and other related actions against the police or immigration authorities.
2. Both aggravated and exemplary damages are discretionary but there is a clear conceptual distinction between them. Aggravated damages are compensatory, awarded in addition to basic damages to ensure that the total award properly reflects any aggravating circumstances which caused additional injury to the claimant's feelings. In contrast, the object of exemplary damages is not to compensate the claimant but to punish the defendant (notwithstanding that the claimant receives any award made).
3. [Thompson and Hsu v Commission of Police for the Metropolis \[1998\] QB 498](#), the leading case on damages for actions against the police, held [at 516.G] that *"though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages"*.
4. Further guidance was given in [Muuse v Secretary of State for the Home Department \[2010\] EWCA Civ 453](#), that, while the conduct had to be *"outrageous"* such that it called for exemplary damages to mark disapproval, *"[t]here is no need for malice, fraud, insolence cruelty or similar specific conduct"*. However, in [Lumba \(WL\) v Secretary of State for the Home Department \[2011\] UKSC 12](#) Lord Dyson held [at 166] that the officials' lack of ulterior motives or malice was a material factor in not awarding exemplary damages. Taken together, [Muuse](#) and [Lumba](#) suggest that, whilst bad faith or malice are not pre-requisites for exemplary damages, their absence will weigh against such an award.

¹ E.g. personal injury, special damages, 'just satisfaction' damages under the Human Rights Act 1998

5. The Court of Appeal in Thompson laid out a number of further principles in respect of exemplary damages [516-517]:

(a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view;

(b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants.

(c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public; and

(d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose.

6. Thompson also confirmed that exemplary damages can be awarded where the claim is brought against a chief officer on the basis of vicarious liability, but that “it is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrongdoer, but his ‘employer’” [512.H].

7. In the recent case of Rees v Commissioner of Police of the Metropolis [2021] EWCA Civ 49, the Court of Appeal noted this point in Thompson that the vicarious nature of a defendant’s liability is a relevant consideration weighing against the award of exemplary damages, but added that “it cannot of itself be decisive: indeed, almost invariably in these kinds of cases the defendant is potentially liable on a vicarious basis” [para 51].

QUANTUM AND THE DECISION IN REES v COMISSIONER OF POLICE [2021]

8. In relation to quantum, Lord Woolf MR commented in Thompson that It will be “unusual” for the addition of exemplary damages to basic and aggravated damages to produce a total figure for basic, aggravated and exemplary damages which is more than three times basic damages [518.B]. So for example, if basic damages of £10,000 and aggravated damages of £5,000 are awarded, it would be ‘unusual’ to award exemplary damages of more than £15,000.
9. Thompson gave the following further guidance [at 517.C]:

“Where exemplary damages are appropriate they are unlikely to be less than £5,000 [£9,000]. Otherwise the case is probably not one which justifies an award of exemplary damages at all. Conduct must be particularly deserving of condemnation for an award of as much as £25,000 [£45,000] to be justified and the figure of £50,000 [£93,000] should be regarded as the absolute maximum, with the facts of the claim directly involve officers of at least the rank of superintendent.”

10. Note that figures given by the Court of Appeal will need to be updated for inflation in the usual way, with today’s approximate figures indicated in square brackets above.
11. In Rees earlier this year, a global award of £150,000 exemplary damages had been made, to be split equally between the three claimants. The defendant (cross-) appealed, arguing that this award exceeded the ‘absolute maximum’ figure of £50,000 set out in Thompson, even after adjusting for inflation.
12. The Court of Appeal dismissed the defendant’s appeal, with Davis LJ opining that *“the statements made in Thompson as to the “absolute maximum” available by way of award of exemplary damages are not to be read in so limited a way”*, going on to refer to the well-established principle in Thompson that the figures provided should not be applied in a ‘mechanistic manner’ [53].
13. The Court reasoned that the guidance in Thompson was directed at the paradigm of a single claimant, and plainly a greater number of persons wrongly detained by reason of malicious prosecution or misfeasance in public office must at least be capable of bearing on the quantum of any award of exemplary damages. David LJ noted that, adjusted for inflation, the amount received by each individual claimant was well within the £50,000 ‘maximum’ and concluded that, in the “exceptional” circumstances of the case, the global award of £150,000 was not inappropriate [54-55].
14. This reasoning must be right. At first glance it may appear inconsistent that, on the one hand, exemplary damages are focused squarely on the wrongdoing of the defendant (rather than compensation for the claimant(s)) but that, on the other, the number of claimants affected will be relevant to the quantum of such damages. However, it must be correct that more claimants injured by the defendant’s conduct will generally, if not in every case, make that conduct deserving of greater punishment.
15. There are limits to this principle however. Davis LJ’s judgment in Rees reiterated the point made in Lumba that where there is a large class of claimants, some of whom may not even be before the court, then an award of exemplary damages may not be appropriate at all. As Lord Dyson explained in Lumba [at 167]: *“Unless all the claims are quantified by the court at the same time, how is the court to fix and apportion that punitive element of the damages? If the assessments are made separately at different times for different claimants, how is the court to know that the overall punishment is appropriate?”*

CONCLUSION

16. The judgment in *Rees* confirms the long-established principle that the guidance figures provided in cases such as *Thompson* cannot be applied in strict terms, even where, as here, the language used ('absolute maximum') appears to support such an approach.

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