



# WMH Law Corporation

*Advocates & Solicitors*

12 Eu Tong Sen Street, The Central, #07-169, Singapore 059819

## **Punitive Damages in Singapore - The Positions in Tort and Contract**

### **I. INTRODUCTION**

This article seeks to set out the Singapore courts' current position on awarding punitive damages in tort and contract law. Part II examines the purposes of punitive damages and the need for it. In light of the 2017 landmark decision of *ACB v Thomson Medical* (“ACB”),<sup>1</sup> Part III describes how the object of punitive damages may be aligned with the awarding of damages in tort law. Finally, Part IV examines the court's refusal to award punitive damages in contract law as set out in the 2017 case of *PH Hydraulics Amp Engineering Pte Ltd v Airtrust (Hong-kong) Ltd* (“PH Hydraulics”).

### **II. AMBIT OF PUNITIVE DAMAGES**

As a starting point, punitive damages are meant to punish, deter and condemn.<sup>2</sup> This is distinguished from aggravated damages, which are meant to compensate and are “awarded to augment a sum awarded in general damages to compensate for the enhanced hurt suffered by the plaintiff due to the aggravation of the injury by the manner in which the defendant committed the wrong or by his motive in so doing, either or both of which might have caused further injury to the plaintiff's dignity and pride”.

In the past, the courts have been inclined to limit the ambit of punitive damages within narrow confines and endorsed the categorical test set out in *Rookes v Barnard*.<sup>3</sup>

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<sup>1</sup> *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918.

<sup>2</sup> *Id.*, at [156].

<sup>3</sup> *Rookes v Barnard* [1964] AC 1129.

However, this is disputed by the Court of Appeal in the case of *ACB*, which held that the *Rookes* test “imposes an arbitrary limitation on the jurisdiction of the court to award punitive damages which does not correspond to the underlying principle of its grant”.<sup>4</sup>

Bearing in mind the aim to punish and deter in awarding punitive damages, the Court in *ACB* was of the view that the courts should examine the facts of each case in assessing whether to award punitive damages.

### **III. PUNITIVE DAMAGES IN TORT**

Punitive damages in tort law do not only punish the defendant, but also serve wider social functions such as condemnation, general deterrence and the appeasement of the victim’s rights.<sup>5</sup> The Court held in *ACB* that punitive damages also perform a retributive function by imposing a condign sanction on the conduct of the defendant and a deterrent function by making an example of the particular defendant to deter would-be tortfeasors from committing similar transgressions, influencing societal behaviour, and allowing the victim of the wrong an avenue to vindicate his or her rights.<sup>6</sup> This is in contrast to general damages in tort, which serve to compensate the victim and put him in the position before the wrong was committed against him.

In light of the overarching principles at play, the Court in *ACB* was of the view that the appropriate test in determining whether to award punitive damages under tort law is whether the totality of the defendant’s conduct was so outrageous that it warranted punishment, deterrence, and condemnation.<sup>7</sup>

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<sup>4</sup> *Supra* n 1, at [174].

<sup>5</sup> *Supra* n 1, at [200].

<sup>6</sup> *Supra* n 1, at [200].

<sup>7</sup> *Supra* n 1, at [176].

#### IV. PUNITIVE DAMAGES IN CONTRACT

The purpose of the awarding damages in contract law is to place the plaintiff in a position as if the contract had been performed.<sup>8</sup> Damages aim to compensate the plaintiff for his loss that resulted from the defendant's breach of contract,<sup>9</sup> rather than to punish the wrongdoer.<sup>10</sup> In contrast, the object of punitive damages is to punish the defendant, as earlier mentioned. This purpose is not aligned to the purpose of damages being compensatory in contract law.

It is recognised that where there is a concurrent liability in tort and contract law, the courts have been awarding punitive damages.<sup>11</sup> However, until recently, there was the issue of whether courts should be awarding punitive damages in a purely commercial and contractual context. In the recent decision of *PH Hydraulics*,<sup>12</sup> the Singapore Court of Appeal established that where the case concerns a breach of contract with no concurrent claim in tort, punitive damages cannot be awarded.

The court in *PH Hydraulics* listed out several arguments for and against the awarding of punitive damages in contract law. Ultimately, the court concluded that the arguments against punitive awards far outweigh those in favour of punitive damages.<sup>13</sup>

##### *A. Arguments against punitive damages in contract law*

###### *1. Difference between contract law and tort law*

The idea of punitive damages as punishment and deterrence sits uncomfortably with the concept of a contract entered into voluntarily by parties.<sup>14</sup> In a contractual

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<sup>8</sup> *PH Hydraulics Amp Engineering Pte Ltd v Airtrust (Hong-kong) Ltd and another appeal* [2017] SGCA 26 at [62].

<sup>9</sup> *Ibid.*

<sup>10</sup> *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* [1998] 1 AC 1 at 15, *per* Lord Hoffmann.

<sup>11</sup> *Supra* n 8, at [64].

<sup>12</sup> *Supra* n 8.

<sup>13</sup> *Supra* n 8, at [135].

<sup>14</sup> *Supra* n 8, at [72].

relationship, parties regulate their legal relationship themselves. It is not for the court to regulate their conduct through an external standard - by demonstrating its outrage at the defendant and establishing what proper commercial behaviour ought to be.<sup>15</sup> To do this would be antithetical to the nature and function of contracts themselves. For instance, the rule against penalty clauses -- that is, the rule that a liquidated damages clause must be a genuine pre-estimate of the loss -- is the epitome of how contracting parties themselves regulate their legal relationship themselves.<sup>16</sup>

In contrast, tort law affords much more freedom to courts in regulating conduct between parties. For instance, the tort law imposes standards of normative behaviour between total strangers.<sup>17</sup>

## 2. *No remedial gap*

Furthermore, even if the existing remedies are inadequate to punish and deter outrageous behaviour, courts are reluctant to award punitive damages to fill in the “remedial gap”.<sup>18</sup> Instead, the Court of Appeal summarised a number of alternative remedial options with punitive and deterrent *effects* (as opposed to *object*): “*Wrotham Park* damages”,<sup>19</sup> an award for account of profits for breach of contract,<sup>20</sup> and damages for mental distress.<sup>21</sup> These alternatives to punitive damages remain primarily *compensatory* in object despite their punitive effect.<sup>22</sup>

## 3. *Uncertainty arising from absence of criteria*

Another reason for the refusal of courts to grant punitive damages is an absence of clear criteria to determine when such damages should be awarded.<sup>23</sup> Given that it is widely accepted that contracting parties in a commercial context are normally self-

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Supra* n 8, at [73].

<sup>17</sup> *Supra* n 8, at [74].

<sup>18</sup> *Supra* n 8, at [77]-[78].

<sup>19</sup> *Supra* n 8, at [80].

<sup>20</sup> *Supra* n 8, at [81].

<sup>21</sup> *Supra* n 8, at [83].

<sup>22</sup> *Supra* n 8, at [79].

<sup>23</sup> *Supra* n 8, at [86].

serving., identifying an “outrageous” breach would be elusive and uncertain.<sup>24</sup> If punitive damages were to be awarded, courts would have to identify the defendant’s “outrageous” conduct - which may not in fact be outrageous commercially - and this would result in commercial instability.<sup>25</sup>

This is especially since parties enter contracts with self-interest as their main priority, with profit is their dominant motive. The Court of Appeal held that in these circumstances, it is extremely difficult to ascertain whether a contractual party has crossed the line from “self-interest” to “outrageous” behaviour that would warrant punitive damages.

#### *4. Policy considerations*

Finally, policy considerations militate against awarding punitive damages in contract law.<sup>26</sup> First, claiming for punitive damages would increase the duration and costs of the lawsuit with added complexity.<sup>27</sup> Further, the plaintiff may be placed in an undue advantageous position in forcing large settlements and damages.<sup>28</sup>

Second, the court in *PH Hydraulics* stated that punitive damages were awarded where there was a heightened risk of recurrent reprehensible conduct. It suggested that in contract law, such recurrent reprehensible conduct should be managed by regulation rather than awarding punitive damages.<sup>29</sup>

### ***B. Arguments for punitive damages in contract law***

#### *1. Argument from uniformity*

It was argued in *PH Hydraulics* that there should be uniformity in awarding punitive damages in both tort and contract law, and that it would be unreasonable that morally

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Supra* n 8, at [102].

<sup>27</sup> *Supra* n 8, at [104].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Supra* n 8, at [106].

outrageous behaviour deserving of punishment can only be found in tort cases. However, the court found the argument unpersuasive,<sup>30</sup> given that that tort law was “qualitatively different” from contract law.<sup>31</sup>

## 2. *Distinguishing from case law*

The court in *PH Hydraulics* also considered the Canadian case of *Whiten v Pilot Insurance Company*,<sup>32</sup> where it was endorsed for the first time that punitive damages could be awarded in a purely contractual case.<sup>33</sup> The court decided that the Canadian case should not be relied on as persuasive authority as “there were features of the case not common to ordinary commercial contracts”.<sup>34</sup>

## 3. *Punitive damages should be awarded upon breach of a duty of good faith?*

The court in *PH Hydraulics* held that the existence of a duty of good faith could not, on its own, justify an award of punitive damages in the event of its breach. This is because although such a duty may help overcome the argument that it is undesirable for a court to impose on the parties its own normative standard of contractual performance, it does not necessarily follow that punitive damages should be awarded. Instead, since it is an obligation of good faith, any breach of this obligation and damages awarded pursuant to the breach could arguably be viewed as compensation to the aggrieved party for a breach of such an obligation.<sup>35</sup>

## V. CONCLUSION

In summary, it is recognised that the position on awarding punitive damages in the areas of tort law and contract law is vastly different, given the differing theories and concepts in the respective domains of law.

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<sup>30</sup> *Supra* n 8, at [111]

<sup>31</sup> *Ibid.*

<sup>32</sup> *Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257.

<sup>33</sup> *Supra* n 8, at [112].

<sup>34</sup> *Supra* n 8, at [118].

<sup>35</sup> *Supra* n 8, at [134].

In relation to tort law, the departure from the categorical approach in *Rookes* is commended, as established by the Court of Appeal in *ACB*. However, it is suggested that more guidelines and insights could be offered as to what qualifies conduct so outrageous that it warrants punishment, deterrence, and condemnation.

In relation to contract law, the case of *PH Hydraulics* has provided much needed clarity into the state of the law regarding punitive damages in contract law in Singapore. The position remains that punitive damages are generally not awardable in a purely contractual situation with no concurrent liability in tort. However, at the same time, it should be noted that the possibility of an exceptional case giving rise to punitive damages in a purely contractual context has not yet been ruled out.

For enquiries, you may contact our directors below:-

1) Wilbur Lim

Email: [wilbur.lim@wmhlaw.com.sg](mailto:wilbur.lim@wmhlaw.com.sg)

Profile: <http://www.wmhlaw.com.sg/core-team/wilbur-lim>

2) Mark Lee ([mark.lee@wmhlaw.com.sg](mailto:mark.lee@wmhlaw.com.sg))

Email: [mark.lee@wmhlaw.com.sg](mailto:mark.lee@wmhlaw.com.sg)

Profile: <http://www.wmhlaw.com.sg/core-team/mark-lee>

Author:

**Fiona THAM**

Intern – WMH Law Corporation

**Teri TAN**

Intern – WMH Law Corporation

**Jolene LOH**

Intern – WMH Law Corporation

Supervised and Edited by:

**Wilbur LIM**

Joint Managing Director – WMH Law Corporation

Head of Construction Law Practice

Profile: <http://www.wmhlaw.com.sg/core-team/mark-lee>

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