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## THE NATURE AND DOMAIN OF AGGRAVATED DAMAGES

JOHN MURPHY\*

### I. INTRODUCTION

Surprisingly little academic attention has been devoted to ascertaining the true nature and function of aggravated damages. In itself, this is not a problem. But the fact that those who have reflected on these issues generally divide into two diametrically opposed schools of thought is both perplexing and question-begging. On the one hand there are those who believe that “aggravated damages are effectively indistinguishable from punitive damages”;<sup>1</sup> while on the other there are those who side with the Law Commission’s view that aggravated damages are no more than a particular species of compensatory damages which are sometimes awarded to claimants in respect of mental distress.<sup>2</sup> The difference in function – punishment versus compensation – could hardly be more pronounced.

Given the profound divide between these two schools thought, the theoretical case for exploring the nature and purpose of such awards becomes patent enough. But bearing in mind the fact that such damages are sought fairly frequently (especially in the context of actions against the police), there is also an important practical dimension to the enquiry.

With these prefatory comments in mind, the two main aims of this article can now be stated. The first is to present a robust explanatory account of aggravated damages: that is, one which is to a significant degree supportable by the leading authorities.<sup>3</sup> *En route* to doing so, it will be shown that neither of the two major schools of thought fare

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<sup>1</sup> P. Cane, *The Anatomy of Tort Law* (Oxford 1997), p. 114; A. Robertson, “Constraints on Policy-Based Reasoning in Private Law” in A. Robertson and W.H. Tang (eds.), *The Goals of Private Law* (Oxford 2009), p. 276; A. Ripstein, *Equality, Responsibility and the Law* (Cambridge 1999) p. 151. Feldthusen offers a slightly nuanced version of this position positing that, while a *theoretical distinction* can be drawn between aggravated and exemplary damages, there is probably no *practical difference* between them: see B. Feldthusen, “Punitive Damages: Hard Choices and High Stakes” [1998] *New Zealand L. Rev.* 714, at 750.

<sup>2</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247 (1997), para 2.1. See also R. Stevens, *Torts and Rights* (Oxford 2007), p. 85 for a similar interpretation.

<sup>3</sup> It is possible, also, to look to the law that we find in practice when constructing a theory of the law (see, e.g., J. Levin, *Tort Wars* (Cambridge 2008); J. Coleman, *Risks and Wrongs* (Cambridge 1992), p. 8). But the empirical demands associated with supplying an account that explains both the law

particularly well when tested in this way. The second aim is to explore the proper (or, at least, potential) domain of aggravated damages; for it is sometimes claimed, but never rigorously shown, that aggravated damages have neither a place in the tort of negligence nor in the context of breach of contract.<sup>4</sup> In this respect it will be argued that, once the true nature of aggravated damages has been clarified, there is no reason in principle why they should be excluded *absolutely* from these two realms.

## II. TWO UNTENABLE ACCOUNTS

### A. Aggravated damages as punishment

For those who see no distinction between aggravated and exemplary damages, Lord Devlin must be taken to have failed in his endeavour to “remove from the law a source of confusion between aggravated and exemplary damages ... which has troubled learned commentators on the subject”.<sup>5</sup> But at least from an English perspective there are several reasons why this position is ultimately unappealing. First, there is a distinct lack of authority for the view that aggravated and exemplary damages are ultimately the same. So, although Peter Cane, Andrew Robertson and Arthur Ripstein are all on record as subscribing to this view, not one of them cites a single case in support of their position.<sup>6</sup> The second reason for doubting the conclusion that aggravated damages serve a punitive function can be drawn from the reasoning deployed by Cane to justify this claim. He says this:

Such damages may be awarded even if the tort victim suffers no compensatable loss, but only humiliation, outrage or indignity.<sup>7</sup> [Yet] [i]t is doubtful whether wilfully or intentionally inflicting outrage or indignity on a person is tortious in itself.<sup>8</sup>

in the decided cases and the law in practice are too great for the present enterprise. Consequently, all that is essayed here is an account that seems best to fit the most important of the reported cases.

<sup>4</sup> See, e.g., the Law Commission, *op. cit.* n. 2, at para 1.10: “[a]ggravated damages cannot be awarded for the tort of negligence or for breach of contract”. The only authority cited for this rather bald assertion is the non-authoritative first instance case of *Kralj v. McGrath* [1986] 1 All E.R. 54. Further judicial support for this view can be gleaned from the speech of Stuart Smith L.J. in *AB v. South West Water Services Ltd.* [1993] Q.B. 507, 528 where the correctness of what was said in *Kralj* was quoted with approval but without analysis.

<sup>5</sup> *Rookes v. Barnard* [1964] A.C. 1129, 1230.

<sup>6</sup> In his *Anatomy* (*op. cit.* n. 1), Cane spends just seven lines outlining his understanding of the nature of aggravated damages. Robertson (*op. cit.* n. 1) offers only four words asserting (but not showing) that punitive damages “respond to dignitary loss”, while Ripstein (*op. cit.* n. 1) also fails to stretch his analysis beyond a single page. In fairness to these Commonwealth jurists, however, a strong argument can be made to support their assertions insofar as the judges in their countries rejected the reasoning in *Rookes v. Barnard* and the insistence therein that the use of exemplary damages should be severely restricted: see, e.g., *Uren v. John Fairfax & Sons Pty Ltd.* [1966] 117 C.L.R. 118; *Taylor v. Beere* (1982) 1 N.Z.L.R. 81.

<sup>7</sup> P. Cane, *Atiyah's Accidents Compensation and the Law* (Cambridge 2006), p. 420.

<sup>8</sup> *Loc. cit.*

The flaw is to assume the very thing he really ought to be proving: namely, that a loss of dignity is not a compensable loss. Just because a loss of dignity is not actionable in its own right is no basis for concluding that it can never form the basis of compensation. We do not in general terms have a right not to have economic loss inflicted on us, but (even leaving to one side those exceptional cases where it has been regarded as actionable in its own right) it has long been recognised as a form of compensable loss where it occurs in conjunction with the infringement of some or other right that is actionable. There is no reason to rule out an equivalent approach to dignity. So, just as economic loss will readily be compensated where it is contingent upon negligently inflicted property damage, so, too, are we free to regard the loss of dignity as compensable where it arises in conjunction with, say, a fraud, battery or false imprisonment. This, indeed, is what happens.

The third reason for maintaining a difference between aggravated and exemplary damages is rather a technocratic one. Section 1(2)(a) of the Law Reform (Miscellaneous Provisions) Act 1934 expressly prohibits the post-death survival of actions in respect exemplary damages, but no such prohibition exists in relation to aggravated damages. Furthermore, the House of Lords has signalled a willingness to permit claims for such damages by the estate of a deceased person.<sup>9</sup> As such, the conclusion that they are categorically different is irresistible.

### B. Aggravated damages for mental distress

Probably the most prominent advocates of the idea that aggravated damages comprise a peculiar species of compensatory damages sometimes awarded in respect of mental distress are the Law Commission. For them, the starting point for understanding aggravated damages was Lord Devlin's speech in the then leading case of *Rookes v. Barnard*. According to Lord Devlin:

in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure *the plaintiff's proper feelings of dignity or pride*. These are matters which the jury can take into account in assessing the appropriate compensation.<sup>10</sup>

Conspicuous by its absence in this passage is any mention of the infliction of mental distress which the Law Commission considered to be so central. Without explicit mention of it by his Lordship, one wonders

<sup>9</sup> See *Ashley v. Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 A.C. 962 (discussed in section III, below).

<sup>10</sup> [1964] A.C. 1129, at 1221 *per* Lord Devlin (emphasis added).

why the Commissioners concluded that: “[a]lthough the precise meaning and function of ‘aggravated damages’ is unclear, the best view, in accordance with Lord Devlin’s authoritative analysis in *Rookes v. Barnard*, appears to be that they are damages awarded for a tort as compensation for the plaintiff’s mental distress”.<sup>11</sup> It is of course true that there will be many instances in which the defendant’s conduct causes both injury to dignity and mental distress, but there is no reason – either as a matter of common sense or law – why injury to one’s “proper feelings of dignity” should be seen as contingent upon, or synonymous or coextensive with, mental distress.<sup>12</sup>

In section III(B), I shall explain at length why it is important that an objective construction (which negates the need for sentience on the part of the victim) must be placed on Lord Devlin’s reference to a claimant’s “proper feelings of dignity or pride”. But for now it is sufficient to note that there is clear support for this construction within the existing case law. For example, in one case involving a more or less instantaneous murder that took place in extremely horrific circumstances, the judge nonetheless granted an award of aggravated damages observing that, although the victim “was immediately murdered [and thus suffered no distress or feelings of indignity] ... I have no doubt that an award is justified ... [given] the circumstances in which he was assaulted”.<sup>13</sup> Equally, in *Ashley v. Chief Constable of Sussex*,<sup>14</sup> another case involving an immediate death (caused by a police officer’s shooting of a suspect), the House of Lords notably did not rule out the defendant’s potential liability to pay aggravated damages.<sup>15</sup> Finally, it is notable that even a corporation has been awarded aggravated damages despite the impossibility of it experiencing any feelings at all.<sup>16</sup>

Having stripped away the requirement of sentience in respect of real persons, we recognise readily, and as a matter of common sense, that it is entirely possible to injure the dignity of the infantile, the unconscious and others lacking sufficient mental awareness even though they may

<sup>11</sup> Law Commission, *op. cit.* n. 2, at para 2.1.

<sup>12</sup> Allan Beever has argued that one can distinguish mental distress from a loss of dignity on the basis that “dignity is not a feeling ... [so that] the claimant may be entitled to aggravated damages [even] though she is not distressed”: see A. Beever, “The Structure of Aggravated and Exemplary Damages” (2003) 23 O.J.L.S. 87, at 90. While Beever is correct, his claim nonetheless presumes something that ought to be shown (and which I show below): namely, that Lord Devlin – who of course made explicit reference to “feelings” – is best understood as anchoring an award of aggravated damages to an objective loss of dignity *per se*, rather than a subjective sense of that loss.

<sup>13</sup> *Shah v. Gale* [2005] EWHC 1087, at [58]–[59].

<sup>14</sup> [2008] UKHL 25, [2008] 1 A.C. 962.

<sup>15</sup> No such damages were ultimately paid in the case because the defence of self-defence could be invoked to justify the police officer’s shooting of the suspect.

<sup>16</sup> *Messenger Newspaper Group Ltd. v. National Geographic Association* [1984] I.R.L.R. 397. While the case lends clear support to the idea that sentience is not a prerequisite for an award of aggravated damages, it is dubious insofar as it is hard to see how a mere corporation can possess dignity. See further n. 73 below.

not personally experience an affront to their dignity.<sup>17</sup> Perhaps more importantly, though, there is strong evidence to suggest that, as a matter of English law, the term “mental distress” is generally taken to refer to something qualitatively different from the feelings of punctured pride, shame, embarrassment or worthlessness that tend to characterise injured dignity.<sup>18</sup> Thus, using an electronic database,<sup>19</sup> 653 cases could be found at the time of writing in which the courts have dealt with aggravated damages, yet in only 63 of these was there any mention of mental distress. Equally, a search based on “mental distress” revealed a total of 410 cases, but in only 46 of these was dignity also mentioned. Furthermore, closer inspection of the mental distress cases revealed that they were typically characterised by claimants suffering one of three things: a condition falling short of a recognised psychiatric illness (in what are generally called “nervous shock” cases);<sup>20</sup> a condition brought about by the stresses and strains of being overworked;<sup>21</sup> the anxiety associated with medical misdiagnoses.<sup>22</sup> Yet none of these things – witnessing unsettling events, being overworked or having medical conditions misdiagnosed – enjoys any obvious or immutable link with the dignitary interest to which Lord Devlin specifically anchored awards of aggravated damages.

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What this section has sought to reveal is that neither of the two most prominent accounts of aggravated damages provides a very satisfactory explanation of their true nature and that, consequently, an alternative, more compelling account is needed. One notable attempt to fill this explanatory gap has been offered by Allan Beever.<sup>23</sup> In his view, aggravated damages are observably different from both punitive damages and damages for mental distress on the basis that aggravated damages are only available (and are the only kind of damages available) in respect of “an injury to the victim’s moral dignity that results from the defendant’s denial that the victim is entitled to respect as

<sup>17</sup> It is because sentence logically cannot be taken as a precondition of an award of aggravated damages that an alternative account, which sees such damages as assuaging “the anger and outrage felt by the victim of a tort”, cannot ultimately fare any better than the one advanced by the Law Commission. For just such an account, see N. J. McBride and R. Bagshaw, *Tort Law* (Harlow 2008), pp. 682–683.

<sup>18</sup> A similar distinction could be made under Roman law. As Peter Birks has explained, “[t]he tort the Romans called *iniuria* ... [involved] contemptuous harassment of another ... [and protected] not an interest in emotional calm, but the victim’s right to his or her proper respect”: P. Birks, “Harassment and Hubris: The Right to an Equality of Respect” (1997) 32 *Irish Jurist* 1, at 11.

<sup>19</sup> *Westlaw*.

<sup>20</sup> See, e.g., *Calveley v. Chief Constable of Merseyside* [1989] A.C. 1228; *Reilly v. Merseyside RHA* [1995] 6 *Med. L. Rev.* 246.

<sup>21</sup> See, e.g., *Barber v. Somerset CC* [2004] UKHL 13, [2004] 1 *W.L.R.* 1089.

<sup>22</sup> See, e.g., *Gregg v. Scott* [2005] UKHL 2, [2005] 2 *W.L.R.* 268.

<sup>23</sup> *Op. cit.* n. 12. A like-minded, but analytically mixed, account can be found in J. Berryman, “Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss” (2004) 41 *San Diego L. Rev.* 1521.

a moral person”.<sup>24</sup> So far as it goes, this observation is largely to be applauded. One problem with it, however, is that it only takes us part of the way.<sup>25</sup> So, while Beever correctly suggests that aggravated damages serve to “compensate for violations of dignitary interests”<sup>26</sup> he signally fails to explain just what those dignitary interests are or entail. He also fails to tell us how he gets from Lord Devlin’s reference to “the plaintiff’s proper *feelings of dignity*” to the protection of dignity per se (which, as we have already seen, can perfectly well be infringed without the claimant necessarily feeling anything). These matters are both crucial. But what requires elaboration in the first instance is a serviceable understanding of the dignitary interest that underpins awards of aggravated damages.

### III. THE NATURE AND ROLE OF THE DIGNITARY INTEREST

It has already been suggested that aggravated damages are best regarded as a form of reparation for the harm occasioned to one’s dignity. Thus, although the leading cases tend to stress the presence of high-handed or arrogant conduct on the part of the defendant,<sup>27</sup> it would be a mistake to think that such conduct is the key to understanding aggravated damages.<sup>28</sup> As Beever has explained, the search for such conduct is a mere means to an end: it is only necessary “to discover the injury [to dignity]” given that “our sole epistemological access to the claimant’s injury is through the examination of the defendant’s actions”.<sup>29</sup> His point is that certain forms of conduct – though in tangible terms no more harmful than other forms of conduct – are apt to add insult to injury and it is by taking cognisance of the defendant’s behaviour that we can identify where this has occurred; and an example can help to illustrate it. If I knock another patron’s drink over her in a café by accident, the tangible damage caused is precisely the same as if I

<sup>24</sup> *Loc. cit.* at 89. For a similar judicial view, see *Vorvis v. Insurance Corporation of British Columbia* [1989] 1 S.C.R. 1085, 1099 *per* McIntyre J.: “they take account of intangible injuries and will generally augment damages assessed under the general rules relating to the assessment of damages”.

<sup>25</sup> Only about 6 out of a total of 24 pages are devoted to analysing aggravated damages in Beever’s essay; and the majority of this limited amount of space is concerned with undermining the accounts of others.

<sup>26</sup> *Loc. cit.* at 90.

<sup>27</sup> See, e.g., *Rookes v. Barnard* [1964] A.C. 1129, 1129 *per* Lord Devlin; *Jolliffe v. Willmetts & Co* [1971] 1 All E.R. 478, at 485 *per* Geoffrey Lane J.; *Sutcliffe v. Pressdram Ltd.* [1991] 1 Q.B. 153, at 184 *per* Nourse L.J.; *Hill v. Church of Scientology* [1995] 2 SCR 1130, at 1205–06 *per* Cory J.; *Thompson v. Commissioner of Police of the Metropolis* [1998] Q.B. 498, at 516 *per* Lord Woolf M.R.; *Horsford v. Bird* [2006] UKPC 3, [2006] 1 E.G.L.R., at [14] *per* Lord Scott.

<sup>28</sup> For the view that such conduct is crucial, and that aggravated damages are designed to pacify the claimant in the face of such treatment, see McBride and Bagshaw, *op. cit.* n. 17, pp. 682–684.

<sup>29</sup> Beever, *op. cit.* n. 12, at 92–93. This is true only so long as the defendant was the actual actor. Where the tort was committed by an employee, inspection of the defendant employer’s conduct will not enlighten us as to the loss of dignity; only the conduct of the immediate tortfeasor – the employee – can do this.

knock it over deliberately. In both cases I may ruin her £500 suit and cause some scalding to her legs. This does not mean, however, that the patron *feels* the same in both cases. Oliver Wendell Holmes captured the point well in his oft-quoted quip along the lines that even a dog can tell the difference between being stumbled over and being kicked.<sup>30</sup> The point is that, where the spillage is deliberate, insult to dignity is likely to be added to the tangible injury caused. But the aggravated damages due are to compensate the injury to dignity, not to punish the tortfeasor.

It thus follows that, if we are properly to understand aggravated damages, our central task must be to evince a clear conception of the dignitary interest that they are designed to repair. For while the case law provides ample guidance on what it means to engage in arrogant and high-handed conduct, or to act with contumelious disregard for the dignity of the claimant,<sup>31</sup> it fails almost entirely to elucidate what the dignitary interest entails. How, then, is this to be understood?

If we are to alight upon a serviceable understanding of the dignitary interest protected by aggravated damages, a set of three key tasks must be undertaken. The first, and most general, is to select from a sizeable menu of competing conceptions of what dignity entails an understanding that is both meaningful within, and pertinent to, the sphere of private law. Having done this, the next task is to assess whether infringements of dignity are to be assessed on a subjective or an objective basis (bearing in mind Lord Devlin's reference to compensation for injury to "the plaintiff's proper *feelings* of dignity or pride"). The final task is to disentangle the dignitary interest from the interest in reputation which underpins the law of defamation,<sup>32</sup> and with which it is apt to be confused. To do so is important since there may be a danger of under- or over-compensation, depending on which interests are actually harmed in any given case.

#### A. *The dignitary interest in private law*

Philosophers, theologians, political theorists and lawyers have all grappled with the interest in (some would say, right to) dignity. But even if viewed purely through the lens of the lawyer, we can identify a range of related, yet observably different meanings which can be ascribed to dignity. For example, it can be seen as a human right in and of itself. It can also be seen, not as a human right *per se*, but as a sort of

<sup>30</sup> *The Common Law* (New York 1991), p. 3.

<sup>31</sup> For a summary of the kinds of conduct revealed by the case law, see McBride and Bagshaw, *op. cit.* n. 17, pp. 684–686.

<sup>32</sup> The classic definition of a defamatory statement is one "which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule": *Parmiter v. Coupland* (1840) 6 M & W 105, at 108 *per* Parke B.



overarching principle which helps explain the range of more specific human rights that we have;<sup>33</sup> or even as a brake on the exercise of certain other human rights (as in the elective abortions debate<sup>34</sup>). Outside the human rights context, dignity can be used as a synonym for the respect commanded by the political autonomy of sovereign states, or as the basis for anti-discrimination laws, or laws designed to protect and preserve a particular group or cultural identity.<sup>35</sup> It can even be invoked to underpin the essentially public law duty of equal concern and respect owed by the state to all citizens.<sup>36</sup>

For present purposes, however, the appropriate conception of the dignitary interest must reflect the essential characteristics of the kind of private law action in which such damages may be sought. In saying this, I do not mean to imply or suggest that private law can be defined simply and accurately. The weight of scholarship points far too heavily in the opposite direction.<sup>37</sup> But even so, it can be asserted with some confidence that the archetypal private law action will focus on the rights and interests of the claimant *as an individual*.<sup>38</sup> It is by virtue of the fact that private law is overwhelmingly concerned with the breach of duties owed to individuals *qua* individuals (rather than as, say, representatives of society or humanity),<sup>39</sup> that enables us to focus on those aspects or notions of dignity that are placed in jeopardy when the private rights of individuals are infringed. And because private law only protects dignity to the extent that it is bound up with certain recognised rights – such as the right to freedom of movement or the right to bodily integrity – it is possible to disregard in this context very broad or abstract conceptions of dignity which refer to, or are derived from, fairly abstract ideas of the common human good or human

<sup>33</sup> See, e.g., J. Griffin, *On Human Rights* (Oxford 2008). Griffin prefers this bottom-up approach according to which “one starts with human rights as used in our actual social life ... and then sees what higher principles one must resort to in order to explain their moral weight”: *loc. cit.*, at 29.

<sup>34</sup> In such cases, the dignity of the pregnant woman (in the Kantian sense that is bound up with her autonomy) is pitted against that of the unborn foetus. It is much the same in the context of the euthanasia debate where the sanctity of human life is placed in opposition to an individualised notion of dignity proffered by a terminally ill person: see *Pretty v. United Kingdom* 24 E.H.R.R. (1997) 423.

<sup>35</sup> In *R v. Keegstra*, the Supreme Court of Canada linked the “fostering of human dignity” to the “respect for the many racial, religious and cultural groups in our society”: [1990] 3 S.C.R. 697, 746 *per* Dickson C.J.

<sup>36</sup> For full discussion of this right, see R. Dworkin, *Taking Rights Seriously* (London 1978), ch. 12.

<sup>37</sup> In fact, providing a water-tight and pragmatically purposeful definition of private law is a remarkably difficult task with a variety of definitions – all of which suit different ends or beliefs about the nature and purpose of private law – being possible: see, e.g., N.E. Simmonds, “The Possibility of Private Law” in J. Tasioulas (ed.), *Law, Values and Social Practices* (Aldershot 1997) and W. Lucy, “What’s Private about Private Law?” in A. Robertson and H.W. Tang, *op. cit.* n. 1.

<sup>38</sup> Class actions are of course possible, but these generally only entail an aggregation of *individual* actions rather than the pursuit *en masse* of some kind of communitarian goal.

<sup>39</sup> The formulation here is an adaptation of Peter Birks’ definition of a tort: namely, “the breach of a legal duty which affects the interests of an individual to a degree which the law regards as sufficient to allow that individual to complain on his or her own account rather than as a representative of society as a whole”: see P. Birks, “The Concept of a Civil Wrong” in D. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford 1995), p. 51.

flourishing.<sup>40</sup> Such understandings offer little or nothing when it comes to assessing the damages due in respect of a private law wrong done to particular claimant X by defendant Y.

In the context of private law, we are concerned with what might be called “individual dignity”.<sup>41</sup> This entails the irreducible, intrinsic worth of each human being simply by virtue of their personhood. Thus, wherever an individual is subjected to conduct that constitutes or implies some form of disregard for the innate values associated with personhood – be it their deliberate humiliation or objectification (in the sense of treatment as though a mere thing or object) – that person can be said to have suffered an affront to his or her dignity. It is the explicit or implicit treatment of another in a manner which undermines or demeans their human status or moral worth that comprises an affront to dignity. It is treating them as though they were somehow worth less than oneself, or simply worthless.<sup>42</sup> It is a failure to show the minimum equal measure of respect due to all persons.<sup>43</sup>

The innate values of personhood may well have theological roots – according to which understanding all persons possess dignity because they are made in the image of God<sup>44</sup> – but they can be perfectly well be captured in secular terms that are better suited to the purposes of private law. An example of such secular expression is the Universal Declaration of Human Rights 1948 which provides that “All human beings are born free and equal in dignity and rights”.<sup>45</sup>

Nor is there any need to premise the private lawyer’s understanding of dignity on the Kantian approach which sees dignity as being inextricably bound up with autonomy (because treating people with dignity requires respecting their freedom to choose their own destiny), even if, in general terms, this approach offers a good deal for human rights lawyers and legal philosophers.<sup>46</sup> Apart from avoiding the obvious

<sup>40</sup> For insights into the various forms that these notions may take, see D. Feldman, “Human Dignity as a Legal Value: Part 1” [1999] Public Law 682, at 684; C. McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19 *European Journal of International Law* 655, at 658–660; P. Lee and R.P. George, “The Nature and Basis of Human Dignity” (2008) 21 *Ratio Juris* 173, at 174–175.

<sup>41</sup> For a similar conclusion that private law is concerned with “an interference with individuality”, see E.J. Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 *New York Univ. L. Rev.* 962, at 1003.

<sup>42</sup> In this respect it closely resembles the gist of the Roman law tort of *iniuria*: see Birks, *op. cit.* n. 18, at 5–14.

<sup>43</sup> See Birks, *loc. cit.* To varying degrees, many people treat others in this way quite frequently. But if this is all that they do – that is, if they treat them in this way without simultaneously committing some or other recognised tort – their “wrongdoing” is not compensable as a freestanding tort. Whether it should be is another question, and the one that animates Birks’ enquiry.

<sup>44</sup> For such an account see, e.g., G. Pico della Mirandola, *On the Dignity of Man*, trans. C.G. Wallis (Indianapolis 1965), p. 5.

<sup>45</sup> For an equally secular account see Lee and George, *op. cit.* n. 40; McCrudden, *op. cit.* n. 40, at 664–672.

<sup>46</sup> See, e.g., G. Bognetti, “The Concept of Human Dignity in European and US Constitutionalism” in G. Nolte (ed.), *EU and US Constitutionalism* (Cambridge 2005), p. 79; McCrudden, *op. cit.*

problems associated with explaining how the infantile, mentally incapacitated etc can be said to possess innate dignity when they clearly lack the ability to make rational, autonomous choices, there is another major advantage associated with viewing dignity in terms of the innate moral worth of personhood. It is the ease with which this conception of dignity can be grafted on to the kinds of *in personam* private law actions in which aggravated damages are apt to be sought.

Before moving on to consider whether infringements to dignity should be construed on an objective or subjective basis, and the various ways in which the dignitary interest differs from the one in reputation, there is one final point that ought to be made here. It is this: treatment with dignity demands a certain irreducible respect for all persons simply because they are persons and not because they are the bearers of certain *rights*. It is therefore a mistake to think, as Beever does,<sup>47</sup> that a person's dignity will be infringed just because certain rights, such as those generated by a contract, are ignored or denied. Dignity is inextricably bound up with personhood in a way that mere contractual entitlements very seldom are. As such, there must be more than a mere deliberate breach of contract in order to injure another person's dignity. Similarly, the complete denial of even a basic human right – such as the right to liberty in the case of a convicted prisoner – does not necessarily imply that the person so denied has been treated without dignity. Equally, although it is difficult to think of the dead as holders of rights, it is perfectly possible to consider that their dignity endures. This, as Grotius explained, is the reason why we must bury our dead enemies: it “is to be found in the dignity of man” and “burial ... cannot be denied even to enemies, whom a state of warfare has not deprived of the rights and nature of men”.<sup>48</sup> The same personhood-rooted notion of dignity also explains why some consider the unborn to possess human dignity, too.<sup>49</sup>

### B. Objective versus subjective injury to dignity

The burden of this section is to explore the import of Lord Devlin's reference in *Rookes v. Barnard* to the “injury to the plaintiff's proper feelings of dignity”. The important question in issue here is whether aggravated damages are to be awarded in respect of an objective affront to dignity, or whether they are available merely to repair the claimant's hurt feelings (implying a subjective loss). While the case law

n. 40; Feldman, *op. cit.* n. 40, Berryman, *op. cit.* n. 23; Dworkin, *op. cit.* n. 36, p. 198; Beever, *op. cit.* n. 12, at 90; Griffin, *op. cit.* n. 33.

<sup>47</sup> Beever, *op. cit.* n. 12, at 88–89.

<sup>48</sup> H. Grotius, *De Jure Belli ac Pacis*, trans. A.C. Campbell (London 1814), Book II, ch. 19 (available online at <http://www.constitution.org/gro/djbp.htm>).

<sup>49</sup> See, e.g., Convention on Human Rights and Biomedicine, CETS No. 164 (1997), Preamble.

contains many references to the latter,<sup>50</sup> this need not be taken to imply that only subjective losses are protected, or even that subjective losses are the law's prime concern.

Now, the matter is of importance because there is no reason why one's sense of indignity, on the one hand, and actual harm to one's dignity, on the other, need occur in tandem. The infantile, the severely mentally incapacitated and the permanently unconscious are all incapable of experiencing a loss of dignity; but so long as dignity is seen as being bound up with their very personhood, it is perfectly possible for their dignity to be injured whether or not they are conscious of it.<sup>51</sup> Even sentient adults can suffer an objective, but not subjective, loss of dignity. The famous children's story of *The Emperor's New Clothes* provides one graphic illustration. James Griffin's hypothetical "undetected peeping Tom" provides another so long as we attach significance to "nakedness and certain other culturally determined forms of modesty".<sup>52</sup>

In just the same way that an objective violation of dignity can occur in isolation, so, too, can a subjective injury to one's dignity occur in the absence of any objective injury. Take, for example, an elderly patient in hospital who is heavily dependent upon the ministrations of the nursing staff. She may well feel a complete loss of her dignity – by virtue of requiring bed baths, a commode or whatever – but in the eyes of others, her enduring courage and self-respect point very much more readily to the fact that, objectively and in the light of her admirable stoicism, she has entirely retained her dignity. The overly proud and conceited are also persons apt to suffer a sense of punctured pride but, in objective terms, no genuine loss of dignity in their everyday dealings.

It is precisely because subjective and objective losses of dignity need not go hand in hand that private law must grapple with the question of what the appropriate basis for an award of aggravated damages should be: an objective loss of dignity, a subjective loss or (conceivably) a combination of the two? By far the most difficult candidate to justify would be an award of aggravated damages grounded purely on a subjective sense of loss: the claimant's assertion, in other words, that he or she feels abused, shamed, degraded or whatever. Can it be right that an award should be made when no-one else – or at least no reasonable person – shares this view? From a practical perspective, one would suppose the answer to be in the negative for there would otherwise be a real danger of fabricated claims succeeding. Moreover, even if the

<sup>50</sup> See, e.g., *Broome v. Cassell & Co Ltd.* [1972] A.C. 1027, 1124 per Lord Diplock; *AB v. South West Water Services Ltd.* [1993] Q.B. 507, 532 per Sir Thomas Bingham M.R.; *Kuddus v. Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 A.C. 122, at [50] per Lord Nicholls.

<sup>51</sup> The right to dignity of the permanently unconscious receives extended treatment in *Birks, op. cit.* n. 18.

<sup>52</sup> J. Griffin, "The Human Right to Privacy" (2007) 44 *San Diego L. Rev.* 697, at 715–716.

courts were able confidently to detect and dismiss such fabricated claims, there would still be the problem that allowing claims on a subjective basis would involve the adoption of an infinitely variable (and therefore unworkable) standard according to which defendants would be held liable. The principle of treating like cases alike would be left in tatters.

In order to avoid committing itself to such an unworkable standard, the Ontario Court of Appeal held that “[t]he assessment should be undertaken from a subjective-objective perspective”; the perspective of “a reasonable person, dispassionate and fully apprised of the circumstances” yet “under similar circumstances ... [to] the rights claimant”.<sup>53</sup> And this concern to introduce an element of objectivity in order to eschew the twin dangers of unworkable standards and fabricated claims is very much the stuff of private law. In contract cases, for example, the subjective-objective standard is used to gauge whether exceptional losses are too remote: the court must assess whether the loss was “such as may *reasonably be considered* to have been *in the contemplation of the parties*, at the time they made the contract”.<sup>54</sup> In tort, too, it is well established in the law of private nuisance that the hypersensitive claimant will not succeed unless his claim also has some kind of objective basis to it. As Knight-Bruce VC once put it, for an interference to constitute a nuisance, the claimant’s assertion that he has been wrongly incommoded must be “more than fanciful, more than one of mere delicacy or fastidiousness”; there must be an inconvenience to “the ordinary comfort physically of human existence, not merely according to elegant or dainty modes of living, but according to plain and simple notions among the English People”.<sup>55</sup> In other words, the judge must be sure not just that the claimant has suffered an inconvenience, he or she must also be confident that the interference “would disturb an ordinary man”.<sup>56</sup> In short, the common law tradition, when faced with the potential for artificially inflated claims, seems to be to judge the losses of the claimant from a subjective-objective perspective.

Against this background, what are we to make of Lord Devlin’s reference in *Rookes v. Barnard* to “the plaintiff’s proper feelings of dignity or pride”. If we stress the word “feelings”, there is a suggestion that what his Lordship saw as critical was the subjective aspect of dignity. If, however, we pay heed to the accompanying adjective and enquire as to what he meant by “*proper* feelings”, a rather different picture emerges. This is because we are forced to enquire what it would be proper for the claimant to complain about in just the same way that

<sup>53</sup> *Halpern v. Attorney-General* [2003] 65 OR (3d.) 161, at 79.

<sup>54</sup> (1854) 9 Exch. 341, at 354 *per* Alderson B.

<sup>55</sup> *Walter v. Selfe* (1851) 4 De G & Sm 315, 322.

<sup>56</sup> *Halsey v. Esso Petroleum Co Ltd.* [1961] 1 W.L.R. 683, 698 *per* Veale J.

the hypersensitive nuisance victim is required to show that an ordinary man would also be disturbed in a way that goes beyond the ordinary give and take of life. In other words, tethering aggravated damages to the “*proper* feelings of dignity” of the claimant should be understood as attaching them to a requirement that a reasonable person in the claimant’s position would consider there to be an affront to dignity. Indeed, it is by insisting that a reasonably minded third party – in reality the court – would consider there to be an affront to dignity that lends propriety to the claimant’s own sense of indignation or outrage. As Lord Hailsham L.C. said in *Broome v. Cassell & Co Ltd.*, “[i]n awarding ‘aggravated’ damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a moderate award”.<sup>57</sup>

It is by insisting that any feelings of humiliation or punctured pride asserted by the claimant should be *proper* in this sense that the common law manages to avoid aggravated damages being awarded in respect of fabricated claims or claims made by the overly proud or sensitive.

### C. Differentiating between dignity and reputation

The failure to distinguish between dignity and reputation is by no means novel. It has an ancient pedigree in that, under Roman Law, *dignitas* formed the gist of the *actio iniuriarum* (the equivalent to a modern-day defamation action); and the term *dignitas hominis* was essentially understood in terms of a person’s status and honour.<sup>58</sup> The confusion between the two concepts – most obviously played out in the context of defamation law – persists even today. Thus, for example, Post has affirmed that “[t]he law of defamation can be conceived as a method by which society polices breaches of its rules of deference and demeanour, thereby protecting the dignity of its members”.<sup>59</sup> In similar vein, Berryman has asserted that “in defamation cases ... compensation is not awarded for a measurable harm but ... for loss of dignity”.<sup>60</sup>

However, while an undeniable overlap between the two concepts does exist, there are, as a matter of law, some very significant differences between our respective interests in dignity and reputation. Accordingly, any tendency to elide the two or to see them as coterminous in the private law context is a potentially serious mistake to make in

<sup>57</sup> [1972] A.C. 1027, 1073 (emphasis added).

<sup>58</sup> H. Cancik, “‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero De Officiis I 105–107” in D. Kretzmer and E. Klein, *The Concept of Human Dignity in Human Rights Discourse* (The Hague 2002), p. 19.

<sup>59</sup> See, e.g., R.C. Post, “The Social Foundations of Defamation Law: Reputation and the Constitution” (1986) 74 California L. Rev. 691, at 710. See also the American Convention on Human Rights 1969, Art 11(1): “Everyone has the right to have his honor respected and his dignity recognized”.

<sup>60</sup> Berryman, *op. cit.* n. 23, at 1527.

defamation cases where aggravated damages are often sought. To begin with, in the absence of the commission of a recognised tort, there is no available remedy in the English law of torts merely for causing someone else to lose their dignity. To put the matter more bluntly: simply to injure another's dignity is not *prima facie* a tort:<sup>61</sup> the injury must occur, as was noted earlier, in tandem with the commission of some or other recognised tort. By contrast, to defame someone – and by definition to inflict a loss of reputation – is to commit a free-standing tort.

At the heart of this first distinction is the fact that English tort law recognises a right to reputation, but no more than an interest in dignity; and it is overwhelmingly the infringement of a primary right that grounds an action in tort.<sup>62</sup> There is nothing in English common law that comes close to suggesting that a person's interest in dignity is so important an interest as to warrant the appellation “legal right”. Even within the scheme of the European Convention on Human Rights it possesses no higher status than that of a foundational principle from which other, more specific rights emanate.<sup>63</sup> It is therefore impossible to maintain that a right to dignity has been imported into English law via the Human Rights Act 1998 or that the common law ought to develop in line an extant Convention right to dignity.<sup>64</sup> This, then, is the first and most profound difference between the often related, but nonetheless discrete, interests in dignity and reputation. While all rights reflect human interests, not all human interests constitute exigible rights.

A second point of distinction between dignity and reputation inheres in the fact that while dignity is an innate moral and human attribute, best seen as being bound up with personhood, reputation is different. Human dignity is a constant.<sup>65</sup> It is a uniform value that does not vary from one person to the next. Scoundrels and philanthropists

<sup>61</sup> It is a failure to recognise this that undermines Peter Birks' otherwise fairly valuable contribution to the understanding of aggravated damages. In his view, “[i]f enhanced damages protect a distinct interest, and if that interest is in an equality of respect, then there is a distinct tort of contemptuous harassment” because “an independent tort is a breach of a duty designed to protect a distinct interest according to a given principle of liability”: Birks, *op. cit.* n. 18, at 32. But this is demonstrably wrong in so far as the tort of negligence very obviously protects a wide range of interests, and equally obviously sits at the head of the family of torts. In cutting across a range of interests in this way, negligence is not alone. Descheemaeker, for example, has shown how defamation law shares this characteristic of protecting no fewer than four different kinds of interest: see E. Descheemaeker, “Protecting Reputation: Defamation and Negligence” (2009) 29 O.J.L.S. 603, at 611–617.

<sup>62</sup> See Stevens, *op. cit.* n. 2. While there are a number of exceptions to this rule, none of these exceptions has anything to do with the claimant's dignitary interest: see J. Murphy, “Rights, Reductionism and Tort Law” (2008) 28 O.J.L.S. 393, at 399–405.

<sup>63</sup> Cf the position in German Law where dignity enjoys the status of a fundamental human right. According to the Grundgesetz, Art 1, “Human dignity is inviolable. To respect and protect it shall be the duty of all state authority”: see the English translation at [www.iuscomp.org/gla/statutes/GG.htm#1](http://www.iuscomp.org/gla/statutes/GG.htm#1).

<sup>64</sup> See D. Feldman, *op. cit.* n. 40; McCrudden, *op. cit.* n. 40.

<sup>65</sup> For a detailed natural law argument as to why all human beings possess the same “full moral worth”, see Lee and George, *op. cit.* n. 40, at 181–182.



alike are endowed with precisely the same human dignity, simply by virtue of being people, and recognition of this evident in the rule of law insofar as it insists that all are equal before and under the law. Reputations, by contrast, can vary greatly. They have a quasi-proprietary quality,<sup>66</sup> and it is the very fact that a reputation can be diminished or lost that animates the law of defamation.

A third difference, as we have already seen, stems from the fact that infringements of dignity are not contingent upon the knowledge or involvement of third parties. This much is clear from another leading case on aggravated damages: *Thompson v. Commissioner of Police for the Metropolis*.<sup>67</sup> In that case, Mrs Thompson was arrested at 5.00am and subsequently mistreated in police custody with no witnesses present at any stage. However, the court made clear that,

[a]ggravating features can include *humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest ... which shows that they had behaved in a high handed, insulting, malicious or oppressive manner*.<sup>68</sup>

This recognition that high-handed treatment of the claimant at the time of arrest, without there being any onlookers, stands in obvious contrast to defamation law's insistence upon publication to a third party.<sup>69</sup> Recall, the gist of a defamation action is not an injury to the claimant's self-esteem, but a diminution in the esteem in which others hold the claimant.<sup>70</sup> Indeed, the very name of the tort, defamation, draws on the Roman lawyers' concept of *fama*, connoting "good name, reputation, fame, renown".<sup>71</sup> One's good name, reputation, fame and renown exist only in the minds of others.

A fourth difference between a claim for aggravated damages and a claim in defamation is the following rather technical one. While the right to sue for loss of reputation is extendable to trading corporations,<sup>72</sup> the concept of dignity – bound up as it is with personhood and the innate worth we attach to it – is something that could only ever

<sup>66</sup> It is proprietary in the Lockean sense, for as Cheryl Harris has explained "[t]he idea of self-ownership [in Locke's time] ... was particularly fertile ground for the idea that reputation, as an aspect of identity earned through effort, was ... property": "Whiteness as Property" (1993) 106 Harvard L. Rev. 1707, at 1735. For a similar conclusion, see B. Chapman, "Punitive Damages as Aggravated Damages: The Case of Contract" (1990) 16 Canadian Bus. L. J. 269.

<sup>67</sup> [1998] Q.B. 401.

<sup>68</sup> [1998] Q.B. 498, at 516 per Woolf M.R. (emphasis added).

<sup>69</sup> See, e.g., *Pullman v. Walter Hill & Co* [1891] 1 Q.B. 524, 527 per Lord Esher M.R.; *Huth v. Huth* [1915] 3 K.B. 32, 38 per Lord Reading C.J.

<sup>70</sup> See, e.g., *Sim v. Stretch* [1936] 2 All E.R. 1237, 1240 per Lord Atkin; *Rubber Improvement Ltd. v. Daily Telegraph Ltd.* [1964] A.C. 234, 285 per Lord Devlin; *Drummond-Jackson v. BMA* [1970] 1 All E.R. 1094, 1104 per Lord Pearson.

<sup>71</sup> See Descheemaeker, *op. cit.* n. 61, at 609.

<sup>72</sup> As Kay L.J. once explained, a company has a "trading character which may be destroyed by libel": *South Hetton Coal Co. v. North Eastern News Association* [1894] 1 Q.B. 133, 147. For recent confirmation see *Jameel v. Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44, [2006] 3 W.L.R. 642.



meaningfully be invoked by a human claimant.<sup>73</sup> A fifth distinction would also appear to exist. It derives from the fact that, while the Law Reform (Miscellaneous Provisions) Act 1934 generally allows for the survival of causes of action vested in a deceased person, it makes an express exception in the case of defamation.<sup>74</sup> In other words, although a legitimate claim for aggravated damages could well be pursued by the estate of a deceased person where that person has been the victim of, say, a battery, no such facility will exist with respect to any defamation claim. So much was as good as confirmed by the House of Lords in *Ashley v. Chief Constable of Sussex*.<sup>75</sup>

In that case, one of the issues for the House of Lords was whether the estate of a man who had been shot as a result of a genuine but mistaken belief on the part of an armed policeman could pursue before their Lordships a claim based on assault and battery. The defendant Chief Constable had previously conceded that, should he be found liable for negligence, he would be prepared to pay full compensatory damages including a sum by way of aggravated damages. He therefore argued that the assault and battery action had nothing further to yield, for there was nothing more that the claimants could hope to obtain if the claim were allowed to proceed. Part of the reason why their Lordships were, however, prepared to allow the battery claim to proceed was a general perception of the propriety of seeking aggravated damages on the basis of that tort rather than on the basis of negligence. What they did not seriously question was whether aggravated damages could be claimed by the victim's estate.<sup>76</sup>

#### IV. AGGRAVATED DAMAGES IN NEGLIGENCE AND CONTRACT

It is generally thought that aggravated damages cannot be awarded in the context of either a negligence action or one based on breach of contract. In *Kralj v. McGrath*,<sup>77</sup> a case in which aggravated damages were sought in connection with a patient who had been subjected to

<sup>73</sup> For this reason the award of aggravated damages to the claimant corporation in *Messenger Newspaper Group Ltd. v. National Geographic Association* [1984] I.R.L.R. 397 should be seen as dubious. It could be argued that certain other animal species warrant treatment in accordance with basic dignity; but such arguments go beyond the scope of this paper and in any case do not affect the point made in the text about trading corporations.

<sup>74</sup> Law Reform (Miscellaneous Provisions) Act 1934, s 1(1).

<sup>75</sup> [2008] UKHL 25, [2008] 1 A.C. 962.

<sup>76</sup> The closest that any of their Lordships got to disputing this was in the speech of Lord Carswell when he said of the victim: "it is more than a little difficult to see how such damages can be in question, when it is very questionable whether the deceased was conscious and sentient for any significant period between the shooting and his death": *ibid.*, at [80]. Implicit in this, however, is the acceptance that, if such damages were due in the first place, they could readily be claimed by the deceased's estate. Similarly, Lord Neuberger, who delivered the other dissenting speech, had no objection to the idea of claims for aggravated damages being able to survive; he simply felt that, as a matter of the court's discretion, the battery claim should not be allowed to survive in this case.

<sup>77</sup> [1986] 1 All E.R. 54.

outrageous treatment by the defendant during childbirth, Woolf J said this:

It is my view that it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages. If it were to apply in this situation of a doctor not treating a patient in accordance with his duty, whether under contract or in tort, then I would consider that it must apply in other situations where a person is under a duty to exercise care. It would be difficult to see why it could not even extend to cases where [actions for] damages are brought for personal injuries in respect of driving. If the principle is right, a higher award of damages would be appropriate in a case of reckless driving which caused injury than would be appropriate in cases where careless driving caused identical injuries. Such a result seems to me to be wholly inconsistent with the general approach to damages in this area, which is to compensate the plaintiff for the loss that she has actually suffered, so far as it is possible to do so, by the award of monetary compensation and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant.<sup>78</sup>

This precise dictum received the express approval of Stuart-Smith L.J. in *AB v. South West Water Ltd.*,<sup>79</sup> but it is submitted that the reasoning displayed in this passage is fundamentally flawed by virtue of a false assumption about the ways in which a breach of contract, or the tort of negligence, can be committed.

To begin with it is important to revisit the example of the accidentally and deliberately spilled drinks given earlier. The key difference, it will be recalled, lay in the fact that *only* in the case of a deliberately pouring of a drink over a fellow customer in a café could a claim for aggravated damages be countenanced. Thus, assuming that aggravated damages will only be available on occasions when the defendant has deliberately wronged the claimant,<sup>80</sup> the critical thing is not to *presume* that such conduct is necessarily absent in all negligence cases and in all cases of breach of contract, but rather to *explore* whether this is so. Only then may aggravated damages be suitably ruled out in those contexts.

### A. Negligence

It is often thought that the tort of negligence can only be committed through inadvertent or otherwise non-intentional conduct. If this were so, it would be difficult to imagine how a defendant could be said to

<sup>78</sup> *Ibid.*, at 61.

<sup>79</sup> [1993] Q.B. 507, 528.

<sup>80</sup> For reasons explored fully below, it is possible for D occasionally to be liable for aggravated damages even though D was not personally guilty of deliberate wrongdoing towards C.

have treated a claimant's rights with the requisite contempt to cause an affront to his or her dignity. Any loss or injury resulting from such conduct would lack the intentionality that underpins the kinds of high-handed, arrogant and outrageous conduct to which the judges faithfully advert in cases concerning aggravated damages. As it turns out, however, this rather commonplace assumption is unfounded.

In order to determine the narrow question of whether any given defendant has acted negligently, we must address the question of whether he or she acted in breach of a duty of care. And in order to answer that question, we need only know whether the defendant's conduct fell short of the standard we might expect of the reasonable man. Once this point is grasped, there is no reason in logic or law why intentional or reckless conduct cannot ground a successful negligence action.<sup>81</sup> Indeed, according to one Australian judge, "[m]ost acts of what we call actionable negligence are in fact wholly or partly a product of intentional conduct".<sup>82</sup> And as Conor Gearty has argued:

It is no answer to the action [in negligence] to say that, far from being negligent, D positively wanted or consciously risked the damage. It would be absurd if this were the case... [For] why should the owner of an oil tank escape liability for the negligent discharge of its contents by convincing the court that he desired this very eventuality? ... The tort of negligence embraces, as it logically must, a tort of intention.<sup>83</sup>

Judicial recognition of the point in this jurisdiction does exist in the speech of Lord Neuberger in the *Ashley* case considered earlier. He began by making the familiar observation that aggravated damages are awarded "as a result of the particularly egregious way or circumstances in which the tort was committed".<sup>84</sup> He then noted that such conduct is not necessarily incompatible with the law of negligence adding that, "[i]f that is so, I cannot see why such damages should not logically be recoverable in some categories of negligence claims".<sup>85</sup> More importantly, however, he then went on to say this:

It appears to me that it would be reminiscent of the bad old days of forms of action if the court held that the *Ashleys'* claim could result in aggravated damages if framed in battery, but not if framed in negligence. In my view, there is a strong enough case for

<sup>81</sup> In *Letang v. Cooper* [1965] 1 Q.B. 232, 239, Lord Denning M.R. attempted to rule out actions in battery based on negligent conduct. However, he did not say anything specific about the possibility of intentional acts grounding an action in negligence (even though, arguably, his obiter remarks were aimed at forging a clear separation between the two torts).

<sup>82</sup> *Carrier v. Bonham* [2001] Q.C.A. 234.

<sup>83</sup> C. Gearty, "The Place of Nuisance in the Modern Law of Torts" [1989] C.L.J. 214, at 223. See also G. Williams and B. Hepple, *Foundations of the Law of Tort* (London 1984), p. 124 and Cane, *op. cit.* n. 1, p. 100.

<sup>84</sup> [2008] UKHL 25, [2008] 1 A.C. 962, at [102].

<sup>85</sup> *Ibid.*

saying that aggravated damages would be recoverable for the instant negligence.<sup>86</sup>

With this observation in mind, the potential scope for granting aggravated damages in some cases of negligence would seem plain enough.<sup>87</sup> But there may even be a way in which mere inadvertent conduct could suffice.

Once it is grasped that adverting to the defendant's high-handed or egregious conduct serves merely as a useful means by which the violation of the claimant's dignity may objectively be gauged, the question naturally arises whether such conduct is a genuine precondition of suing for aggravated damages. In favour of such an argument, would be the ostensibly plausible contention that any behaviour falling short of this would be incapable of amounting to a sufficient disregard for the personhood of the claimant so as to constitute an infringement of his or her dignity. To illustrate the point, it is perfectly true to say that in a run of the mill negligence case – which will not be characterised by egregious conduct – the defendant will not have done anything that is tantamount to denying the moral worth of the claimant. Defendant, D, can genuinely maintain at one and the same time that he never relinquished his respect for the rights and bodily integrity of the claimant, C, yet also admit that he injured C by virtue of his careless driving. But does this mean that mere inadvertent wrongdoing – archetypal negligence, in other words – can never be said to violate the claimant's dignity?

One possible answer to this question can be found in a case of negligent false imprisonment: *W v. Home Office*.<sup>88</sup> In that case, the claimant was an asylum seeker whose papers became confused with those relating to someone else, due to administrative carelessness. As a consequence of the mistake, the claimant suffered a period of wrongful detention. Those directly responsible for his confinement were relative men of straw, so the claimant pursued a negligence action against the Home Office on the basis of vicarious liability. And although ultimately the claimant's action failed for reasons that are irrelevant for present purposes, it was accepted in principle that loss of liberty could form the gist of a negligence action.<sup>89</sup> This is important to the extent

<sup>86</sup> *Ibid.*, at [101].

<sup>87</sup> Beever, too, suggests that aggravated damages should be available in negligence. However, he attempts to justify his claim by reference to the following example which is redolent more of deceit than negligence: "I negligently injure a person, then send a team of lawyers who on my instructions convince him with undue pressure that he has no cause of action when I know that such an action has good foundation": Beever, *op. cit.* n. 12, at n. 28. In his own terms this is a case of Hegelian "deception" rather than an Hegelian "ordinary" wrong, and as he somewhat contradictorily avers (at 93), "acts of negligence ... are [mere] 'ordinary' wrongs"; the kind that do not attract aggravated damages.

<sup>88</sup> [1997] Imm. A.R. 302.

<sup>89</sup> For a fuller account of this and a number of similar cases, see D. Nolan, "New Forms of Damage in Negligence" (2007) 70 M.L.R. 59, at 62–67.

that it is well established that the tort of false imprisonment can ground a claim for aggravated damages. So, where a false imprisonment has occurred by virtue of an administrative error, is it possible to identify a suitable measure of contempt or disregard for the claimant's moral worth? Arguably, it is.

In the criminal law, where the future liberty of the accused is frequently at stake, proper respect for his or her rights – but especially his right to liberty – finds expression in the criminal standard of proof. This very high standard operates as a check on wrongful convictions (and therefore false imprisonment) and it reflects the fact that liberty is one of what Griffin calls the substantive values of personhood.<sup>90</sup> In W's case, however, there was no such check. The administrative system was woefully shoddy despite W's liberty being at stake. The operation of such a flawed system – one that lacks appropriate checks and double checks – could conceivably be seen in terms of a sufficient disregard for the liberty of W and others and hence an affront to their dignity. Recalling the objective element canvassed earlier, it is eminently possible that a reasonable person could reach the conclusion that the casual mismanagement of a case involving another's liberty amounted to an affront to their dignity.<sup>91</sup>

Finally in this context it is perhaps worth stressing that, had W's action succeeded in negligence, it would have been the administrator's employer that would have been vicariously liable and therefore required to pay the aggravated damages. That, too, is potentially significant given that vicarious liability is generally taken to entail liability *regardless of personal fault*.<sup>92</sup> For this reason, too, it is difficult to maintain firmly that high-handed or oppressive conduct on the part of any given defendant is a genuine precondition of an award of aggravated damages: while employee X may have behaved in such a way, employer Y (who is ultimately sued) need not.

### B. Contract

The argument against granting aggravated damages in cases of breach of contract is unclear to the extent that it is seldom if ever spelled out. If one proceeds along the lines of insisting that aggravated damages serve an essentially punitive function, then a host of familiar objections

<sup>90</sup> Griffin argues forcefully that liberty is one of three "highest level human rights" and a constituent element in personhood: see Griffin, *op. cit.* n. 33, ch. 9.

<sup>91</sup> The objection that although "the wrong is in some sense 'outrageous' (as, for instance, for showing a shocking lack of professional skill) cannot make it into a contempt" (Birks, *op. cit.* n. 18, at 20), is unconvincing on its own terms. Those things which cause outrage and shock do so precisely because we consider them to be blows way below the belt: the very stuff of contemptuous treatment.

<sup>92</sup> But for a creditable defence of the largely discredited "master's tort" version of vicarious liability, see Stevens, *op. cit.* n. 2, pp. 259–267.

concerning punishment within the civil law arise. But if one's view is that aggravated damages serve a compensatory function – as has been argued here – then these objections are immediately emasculated. Furthermore, when one bears in mind that it is perfectly possible to commit a blatant breach of contract that may cause just as much an affront to dignity as many forms of tortious wrongdoing, there begins to appear the germs of a case for the use of aggravated damages in this context. The case can then be strengthened by reference to those contract law theories which have at their core the values inherent in promising and trustworthiness.<sup>93</sup> These values, though by no means synonymous with dignity, are clearly linked to it in so far as they place emphasis on trust and respect. As such, blatant breaches of promises (and the trust that they engender) can perfectly well be seen as capable of causing an affront to dignity.

Canadian law is instructive in this respect. In the case of *Whiten v. Pilot Insurance Co*<sup>94</sup> the appellant and her husband discovered a fire at their home. They managed to escape the flames but the fire destroyed the house. Thereafter, in clear bad faith, their insurers sought to deny any liability alleging among other things that the appellant and her husband were arsonists who had started the fire themselves. The intention behind this groundless denial of liability was to force the Whitens to accept a settlement well below the sum due under the insurance contract. At the heart of the insurance company's ploy was coercion. And coercion would amount to an infringement of dignity on just about any account of that concept and would certainly constitute a violation of the Whitens' normative agency or personhood.<sup>95</sup>

In the Supreme Court, Binnie J was prepared to award *punitive* damages (as sought by the Whitens in their statement of claim) noting that a "breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss".<sup>96</sup> Importantly, he went on to remark that "[p]unitive damages are very much the exception rather than the rule, [and] ... imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour".<sup>97</sup> In other words, though *punitive* damages were actually dispensed in that case, the language used by the judge was

<sup>93</sup> See, e.g., C. Fried, *Contract as Promise* (Cambridge, Massachusetts 1981), p. 17.

<sup>94</sup> [2002] 1 S.C.R. 595.

<sup>95</sup> For the intimate inter-relation between normative agency and personhood, see Griffin, *op. cit.* n. 33, pp. 44–48.

<sup>96</sup> *Ibid.*, at [79]. American case law also recognises that an insurer owes to the insured an implied duty of good faith and fair dealing according to which it is bound to do nothing to deprive the insured of the benefits of the policy. The duty entails the obligation to act reasonably and in good faith to settle claims: see *Crisci v. Security Ins. Co.* (1967) 66 Cal. 2d. 425; *Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal. App. 3d. 376.

<sup>97</sup> *Ibid.*, at [94].

precisely the kind of language used in English aggravated damages cases.

There are only really two potentially significant arguments against the invocation of aggravated damages in contract law. The first stems from the proposition that, since respect for dignity is never a contractual term, it must follow that compensation for an affront to dignity caused by a deliberate breach must be beyond the remediable pale. The promisee, so the argument would have it, has no genuine expectation that the promisor will act with a view to respecting his or her dignity. The second argument follows from the lawyer-economists' contention that efficient breach is permissible.

The first objection can presumably be met by reference to a recognised implied term of mutual respect between the parties for the established rules of contracting. The very fact that the defendant has promised X carries with it an implied promise that the claimant can rely on him to respect the contractual rights now conferred upon the claimant by honouring his side of the bargain by performing as agreed. Such implied terms really need to exist if contract law is to function effectively.<sup>98</sup> If a bystander were to ask either of the parties whether mutual respect and trust was important to their agreement, they would no doubt answer him with the famous "oh, of course!" so familiar to contract lawyers. So, once it is accepted that such an implied term exists, it becomes readily apparent that any malicious breach of contract – whereby the promisor flagrantly attempts to deny that the promisee has a particular contractual right (such as the right to the insurance payment in *Whiten*) – is apt to cause an affront to dignity and thus warrant an award of aggravated damages.<sup>99</sup>

<sup>98</sup> It could be argued that because English law's default remedy is damages rather than specific performance, it is hard to square the parties' expectation that they would have to pay damages in the event of a breach with an implied term along the lines argued here. However, this objection presupposes that the rules on remedies both (a) comprise part of the law of contract and (b) speak to the nature and existence of contractual obligations when neither should be presumed. As Stephen Smith has ably shown "contract law, properly understood, is limited to the rules that govern the creation and content of contractual obligations": S.A. Smith, *Contract Theory* (Oxford 2003), p. 388. Equally, as he goes on to show, an order for specific performance requires more by way of justification than the mere fact that it would give effect to a primary obligation. "That I have a duty to perform does not, in itself, justify a court in ordering me to perform" in just the same way that although I have "a duty to drive carefully, no one would imagine that this justifies a court in ordering me to drive carefully": *loc. cit.*, pp. 390–1.

<sup>99</sup> English law comes close to the position argued for here insofar as the House of Lords has recognised that, in principle, a claimant should be entitled to sue on the basis of an implied term of trust and confidence in circumstances where breach of this term is likely to stigmatise the claimant. Such claims, however, have tended to fail on the grounds that, the wrongful dismissal cases in which they have been raised, are not apt to accommodate them for policy reasons associated with the background statutory framework: see *Johnson v. Unisys Ltd.* [2001] UKHL 13, [2003] 1 A.C. 518; *Malik v. BCCI* [1998] A.C. 20. In the latter case Lord Steyn was explicit (at 51) in reiterating the longstanding rule that "an employee cannot recover exemplary or aggravated damages for wrongful dismissal" adding that this was "still sound law". But note just how narrow his exclusion is: it is linked purely to cases of wrongful dismissal. It therefore does not preclude the argument advanced here in favour of the availability of aggravated damages elsewhere in the general law of



Turning to the lawyer-economists' objection, it would run thus. If efficient breach is generally considered acceptable, then it simply cannot be maintained that a deliberate breach – no matter how insulting – should ever warrant an award of aggravated damages. The defendant is merely doing something he is entitled to do and thus displays no especial contempt for the rights of the claimant. This objection can be met on at least two grounds. First, it can be sidelined from an English perspective on the simple basis that while the economic approach to law has a very respectable pedigree on the other side of the Atlantic, it has never really taken root in this jurisdiction. More generally, however, the contention can also be rebutted on the footing that the lawyer-economist is failing to make a distinction here between a simple efficient breach (in which the promisor does not deny the promisee his right to sue for damages, but merely engages in a deliberate yet *non-malicious* breach) and malicious breach (such as the one in *Whiten*) in which the promisor is in bad faith seeking to deny that the promisee has any contractual rights at all. The difference, of course, broadly reflects the Hegelian scheme of wrongs which, although originally designed to justify the use of punishment, can also be usefully invoked in the context of aggravated damages.<sup>100</sup> On balance, then, the stronger arguments seem to lie in favour of the possibility of aggravated damages within contract. And since *Whiten* was decided, the Canadian Supreme Court has since confirmed the availability of aggravated damages within contract in that jurisdiction.<sup>101</sup>

## V. CONCLUSIONS

In this article, I have tried to elucidate the distinctive nature of, and a particular role for, aggravated damages in English law. In doing so, the primary task was to expose the flaws that beset the two most prominent existing accounts of such damages. Thereafter, I attempted to elaborate a serviceable understanding of the dignitary interest which they protect.

contract. Indeed, in many respects, the dictum as a whole might be thought very much in tune with it.

<sup>100</sup> For a brief elaboration of the tripartite Hegelian scheme, see Beever, *op. cit.* n. 12, at 88–89. But note that only a two-way division is employed here; for although Beever separates cases of deception from cases of coercion (on the basis that whereas the former amounts to a denial that X is worthy of the rights he claims, the latter amounts to an outright denial that X has any such rights) it seems to me that the distinction need not be made in the present context. This is because where compensation for an affront to dignity (rather than punishment) is in issue, it is just as likely that treating X as though he is not worthy of rights will cause an affront to dignity just as readily as treating X as though he does not possess rights at all. Equally, asserting, as Beever does (at 90), that it is only in cases of coercion that aggravated damages are warranted fails to explain the award of (what English lawyers would call) aggravated damages in cases like *Whiten*. In sum: although Hegel would wish to distinguish cases of deception and from cases of coercion for the purposes of justifying punishment, the distinction serves no purpose where what is in question is whether C's dignity has been violated by some or other high-handed or arrogant conduct on the part of D.

<sup>101</sup> See, e.g., *Fidler v. Sun Life Assurance Co of Canada* [2006] 2 S.C.R. 3 and *Honda Canada Inc v. Keays* [2008] 2 S.C.R. 362.



I suggested that within the context of private law, infringements of dignity are best understood in terms of the inappropriate valuation of others' inherent moral worth; failing to pay proper regard, in other words, to the innate and constitutive values of personhood.

Having settled upon a workable understanding of what dignity entails, it was also stressed that affronts to dignity are not exigible in their own right<sup>102</sup> and that, rather like a number of other interests that are not independently actionable in private law,<sup>103</sup> an affront to dignity is compensable only as a form of consequential loss.<sup>104</sup> In other words, quite beyond the violation of some or other primary right (to, say, bodily integrity or reputation), the claimant (or his representatives) must also show treatment that in some objectively verifiable way degrades or devalues him.<sup>105</sup> The significance of objective verification was shown to be threefold: it ensured that aggravated damages were not available only to the sentient; it ensured consistency within the common law which elsewhere shuns subjective measures of damages; it ruled out the prospect of entirely bogus claims based purely on the claimant's assertion that he has suffered injury to his sense of pride.

Finally, having evinced a serviceable understanding of aggravated damages and the interest they protect, it was suggested that, insofar as it is possible to commit both the tort of negligence and a breach of contract in high-handed and malicious ways, there seems no good reason to exclude aggravated damages from those contexts. It certainly seems anomalous that a wanton breach of the duty of care in the tort of negligence, or an equally wanton disregard of one's contractual obligation to make an insurance payment should not carry the potential for an award of aggravated damages in English law.<sup>106</sup>

<sup>102</sup> Of course, it could be argued that dignity should be independently exigible, and there have certainly been calls for formal recognition of an independent tort according to which a right to dignity would be actionable. For Peter Birks, the creation of tort of "contemptuous harassment" was the right answer (see Birks, *op. cit.* n. 18); while for Réaume, a tort of "intentional outrage to dignity" was the way forward (see D. Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28 *Queen's Law Journal*. 61). This is an interesting question that arguably warrants further exploration; but it falls beyond the scope of the present endeavour to offer a robust explanatory account of the law as it stands.

<sup>103</sup> For example, defamation law allows parasitic claims in respect of loss of custom (see *Ratcliffe v. Evans* [1892] 2 Q.B. 524), though no independent right to have paying customers exists. It also allows a parasitic claim in respect of the loss of free food and drinks resulting from being shunned by one's former acquaintances (*Davies v. Solomon* (1871–72) L.R. 7 Q.B. 112), though clearly there is no freestanding right to free food and drinks. For other examples of consequential losses that can be claimed only parasitically, see Stevens, *op. cit.* n. 2, ch. 3.

<sup>104</sup> For the suggestion that, in defamation law, the protection of dignity and various other interests "is parasitic" in the sense that the claimant must first show injury to his reputation, see Descheemaeker, *op. cit.* n. 61, at 616.

<sup>105</sup> Notably, in its own review of the area, the Ontario Law Reform Commission considered that an objective affront to dignity *per se* should be an acceptable basis upon which to claim aggravated damages: Ontario Law Reform Commission, *Report on Exemplary Damages* (1991), pp. 27–30.

<sup>106</sup> Arguably, a malicious wrongful dismissal should be treated likewise 'despite the courts' reluctance thus far to take this step'.

Finally, and admittedly tentatively, it was suggested that in some cases, high-handed and arrogant conduct may not be required at all. However, it is readily conceded that the plausibility of these arguments turns on what answers are given to two difficult questions which fall beyond the purview of this essay: whether false imprisonment ought to be capable of being grounded on the basis of negligence and whether the master's tort explanation of vicarious liability is the most compelling. These are difficult questions for another day.<sup>107</sup>

<sup>107</sup> Some preliminary sources are, however, these: (i) on the plausibility of "the master's tort" understanding of vicarious liability, see R. Stevens, "Vicarious Liability or Vicarious Action?" (2007) 123 L.Q.R. 30; (ii) on the juridical sense of permitting claims for false imprisonment where the tortfeasor has been merely careless, see 'Nolan, *op. cit.*, n. 89'.