



Comparative Study on Punitive Damages in Tort and Contractual Liability

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Abstract: Many scholars and courts typically believe that Punitive Damages are merely belonging to action based in tort law. Usually the Punitive Damages appear only in connection with breach of tort. Notwithstanding the normative and positive arguments in favor of a distinction between available remedy in contract and tort liability, I refute prevalent argument in support of this view. In my view, efforts to make contract liability conform and exception punitive damages from it, is misleading. I argue that Punitive Damages can awards in both -contract and tort- action. Like other contract rules, Punitive Damages can apply in determine condition in contract area. A comparative law study in this article, showing that many legal system do not opt punitive damages exclusively for tort remedy. This article argues that the core question is how and when Punitive Damages should be award. The simple answer is return to justice.

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1. Introduction

This Issue That Tort and Contractual Liability Is unit Regime or Two Separate Structure Have many effects. In one view, to be believed the plurality or the unity of the responsibilities does not different because of in any way we can not deny the practical differences between the rules governing these two and some serious differences in the results of establishment of each of these responsibilities. The point is refers that without existence of agreement there is no contractual responsibility can be assume and allege. While in the citing and proof of contract in tort liability are not substantially raised. Despite the adoption of general obligations law rules, that in some systems¹ are applicable for both responsibility and the recent tendency to reduce differences between tort and contractual liability distinction between the responsibilities still glaring. In Research and legal reference books by take into account differences between tort and contractual liability are emphasized distinction of these. And the most prominent scholars² will insist on restoring and maintaining the boundaries between domains.

Indeed distinction of them has find legal justification.³

On the other hand, it should be pointed out that some editor like Grant Gilmore – U.S. Professor- says theory of tort into which contract is being reabsorbed is itself a much more expansive theory of liability than the theory of tort from which contract was artificially separated a hundred years ago.

Classical contract theory might well be described as an attempt to state out an enclave within the general domain of tort. The dykes and special condition like offer, acceptance and consideration which were set up to protect the enclave have, it is clear enough, been crumbling at a progressively rapid rate. We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.⁴

Alleged the type of compensable damages and calculating the amount payable on contract and

¹ - Articles 241-304 of German Civil Code regarding the obligations are provided in general.

² -Katouzian. Dr. Nasser, **Civil liability**, Volume 1, Tehran University press, 2009, Pp129-131, Droudian, Dr. Hasanali, **Lessons of Civil Code**, Tehran University press, 1999, Pp 9-10.

³-Ferrari, dr.Franco, **Comparative Ruminon the Foreseeability of Damages**, 1993, p1.

⁴ - Grant, Dr.Gilmore, **Death of Contract**, Published by the Ohio State University Press, Edited by: Collins Ronald k.I, 2nd Ed, 1995, Pp95-96.

tort responsibilities are distinct. From punitive damages as one of the Differences in the type of compensable damages in two responsibilities, are learning. Attempt to prove this claim is in order to prove the existence of the plurality systems.

2-The concept of punitive damages

The first references to the extraordinary remedy of damages (in addition to actual damages) have been in the Treaty of Hammurabi and the Old Testament.¹ But the historical origin and the first sentence of punitive damages returns to the common law legal system especially England in eighteenth century, It is merely to tort claims under influence the rules of equity. In British courts Payment of these damages are limited to certain case.² But in America, and Australia this type of limitations has not considered.³ In defining of this type of damage all⁴ are unanimous that is not compensated and in due to punish and deter from committing similar conduct⁵ in the future the order

¹ - Calleros, Charles, **Punitive Damages, Liquidated Damages, And Clauses Penalties In Contract Actions: A Comparative Analysis Of The American Common Law And The French Civil Code**, Brook Journal International Law, Vol.32:1, 2006, Pp74-75.

² - The consensus of scholars in England The modern concept of punitive damages returned to the case *Rooker V. Barnard* in 1964 House of Lords in which to formulate and explain the principles and rules governing the payment of these damages. Judgment containing punitive damages are limited to three factors: 1) where the claimant is victim of unfair behavior of public officer contrary to the constitution act. 2) Where the defendant committed tort for its benefit So that by the calculation of potential gains and losses arising from the committed tort liability, it is committed. 3) Where the law is permitted this kind of sentences. Quoted by: abdollahi, Dr. mohsen, **punitive damages in international law**, international office journal, no.30. 2005, p 89-90.

³ - abdollahi, Dr. mohsen, **Op.cit.**, p 85.

⁴ - Rogers W.V.H, Winfield & Jolowicz on Tort, **Op.cit.**, p555. Rubin, dr.Paul H., Courts And The Tort-Contract Boundary In Products Liability, **Op.Cit.**, p6. & Fleming John G., **An Introduction to the Law Of Tort**, Oxford, Clarendon Press, 1985, p131.

⁵ -additional of breach, some circumstances Should be strongly about such hatred or evil motives and evil bad fait or a fraud behind of defendant or disregard to the interests of others or that must exist the practice of arbitrary or excessive quoted by: ali poorghorchi, salman, **comparable effects of**

is placed. And prove that "the fault does not benefit."⁶ Timothy Sullivan⁷ compensation for breach of contract does not contain a punitive duty, because with this does not occur violates the objective standards of social behavior.

3-The causes of non-prescribed punitive damages for breach of contract

Punitive damages generally does not warrant for breach of contract case.⁸ The adherents of this view are as follows:

Reason that in defense of this claim, by the fans of Judge Holmes is raised, it is Maintain the contract in the common law is means a prediction that if you do not maintain the contract must pay damages. So the parties are free to decide perform or pay damages for failure of enforcement. Another reason is proposed that such payments prevent the effective (efficient) violations and the subsequently, is create packages of the social losses.⁹ Professor Joseph Perillo argues that Justice Holmes's statement has been misconstrued and he only suggested that breach of Contract is considered as a fault behavior, in the same level of tort behavior.¹⁰

intentional or unintentional fault in iran and u.s. law, comparative law journal, 2005, p 267.

⁶ - Aghaie, Dr. bahman, **Dictionary Of Law**, first edition, gangedanesh press, 2000, p525.

⁷ - Timothy J. Sullivan, **Punitive Damages in the Law of Contract: the Reality and the Illusion of Legal Chance**, Minn Law Review, Vol.61, 1977, p207.

⁸ - Damages given to punish the defendant rather than (or as well as) to compensate the plaintiff for harm done. Such damages are exceptional in tort, since the general rule is that damages are given only to compensate for loss caused. they can be awarded in three cases: (1) when expressly authorized by statute, (2) to punish oppressive, arbitrary, or unconstitutional acts by government servants, (3) when the defendant calculated that the profits to be made out of committing a tort (e.g. by publishing a defamatory book) may exceed the damages at risk .in such cases, exemplary damages are given to prove that tort does not pay. Exemplary damages can not be given for breach of contract: **A Concise Dictionary of Law**, Oxford University Press, Second edition, 2010, p159.

⁹ - Droff, dr.Michael, **Attaching Tort Claims to Contracts Action: an Economic Analysis of Contort**, Seton Hall Review, Vol.28:390, 1997, p404.

¹⁰ - Perillo, dr.joseph,M. **Misreading Oliver Wendell Holmes On Efficient Breach and**

Maybe Remedy multiplied the actual amount of compensation, virtue the parties are thinking ahead to visualize costs and encourage tendency and desire to financial windfall will rise. Moreover, discover the fact that violated party act with bad fait¹ is not always easy. Also due to the lack of objective models in the calculation, the judges and jury staff shall follow their own feelings to assess the degree of penalty for violation.²

The importance argument for unwillingness to verdict Punitive damages in breach of contracts should be knew the aim of contract responsibility that the remedy is for compensated of damages of victim and not for punish the offender or sentences him, therefore punitive damages not suitable for these category claims. Unnerving effect of punitive damages in an action for breach of contract, and other ways of self-help (self supporting) is another reason of opposition.

Another reason not to prescribe punitive damages for breach of contract based on the premise that all contractual violations are discovered and so obligator with the expectation of chance to escape from remedy does not unlikely possibility of compensation, which he comforted according to having committed Breach of contract.³ But in tort cases, Violators may be by thinking about the punitive damages verdict in the case of a violation is discovered failure of violating despite the low probability of discovering the breach. In fact, in the latter case, Punitive damages to create incentives in deter to potential violator.

Some researchers⁴ are defending from the issuance of punitive damages in cases of breach of contract because they believed that is not moral fault within violation. But it should be noted while in some onerous and unreasonable enforcement and involuntary t violations, breach seems morally plausible. But we can certainly also outlined some of the contractual duty to refrain from them is immoral, because the concept of fault comes after moral duty, hence refusing to execute the agreement may be unethical.⁵

Tortious Interference, Fordham Law Review, Vol.68, 2000, p1085.

¹ - Restatement (Second) of Tort, § 908.(1979): courts may award tort plaintiffs punitive damages if the harm was caused intentionally or recklessly.

² - Droff, Dr.Michael, **Op.Cit.**, p404.

³ - Droff, Dr.Michael, **Op.Cit.**, p400.

⁴ - Shiffrin, Dr.Seana, **Could Break Of Contractual Be Immoral?**, Michigan Law Review, Vol.107, 2009, p1551.

⁵ - Shiffrin, Dr.Seana, **Op.Cit.**, p1567.

Some writers⁶ acknowledge say the responsibility upon breach of contract is strict, So many violations rather than intentional, is involuntary. Additional intentional violations can also be effective and socially rather than being fault, can be desirable.

In cases where the contractual compensation restrictions will cause Many of the victims of the violation, do not get proper compensation.To solve this problem and Facilitate access to larger remedy in context the contract violations, there are some proposals. Including Professor William dodge recommends Punitive damages, except to unintentional contract violations, extend to all type of breach of contract and he considered it as a Factor to encourage parties to negotiate for breach of contract by mutual consent.⁷ Calabresi and melamed have identified two categories of rules in support of legal ownership. According to Professor Dodge view, losses expected acts like liability rules. Instead, punitive damage acts such as property rules.

Thus, in the state that obligor is reluctant to continue the contract, as required by the negotiated contract for breach and release Rather than allow him to pay damages for the breach and to act alone. Although cost of negotiation not low but is less than the action costs.⁸ Professor sebert⁹ proposed Broader interpretation of the concept of non-financial losses or extraordinary damages Instead of the traditional and neoclassical limitations, As a solution to bring justice.

4- Punitive damages in procedures

Today, reluctance for give Punitive damages verdict in contractual claims in the two categories of claim i.e. claims respect of consumer transaction and insurance actions is become very low. In some limited circumstances, punitive damages could be compensated to benefit the consumers. Provided that by virtue a reasonable

⁶ - Posner, Dr.Richard A., **Common- Law Economic Torts: An Economic And Legal Analysis**, Arizona Law Review, Vol.48:735, 2006.

⁷ - Dodge, Dr.Williams, **The Punitive Damages In Contract**, Volume48, Duke Law Journal, 1999, Pp630-690.

⁸ - Dodge, Dr.William s, **Op.Cit.**, Pp 630-34.

⁹ - Chang Paskof, dr.Catherine, **Two Wrongs Can Make Two Rights: Why Courts Should Allow Tortious Recovery for International Concealment of Contract Breach**, Columbia Journal of Law and Social Problems, 39:40, 2005, p 49.

method, a higher standard than what is needed for other cases, be used for proving the guilty. For example, Proof beyond a reasonable doubt to be done.¹

In Insurance contract, also occurs which the insured refused to defend the insurer and the claim is settled within the prohibited area. And the cases which insurer with bad fait refuses to solve of problem and accepting responsibility and supply according insurance policy. Evidence of Possibility intentions of the responsibilities of the insurance contract is this contract is the nature of support and affects the public interest. Where there is no power to negotiate the terms of insurance contract. So without the threat of punishment for tort insurer can refuse from most claims with economic Trickery (device). Courts were gradually chosen these types of damage and tort actions extend to the contract claims are same- to create peace, safety and trading inequality - contract of insurance.²

In the Roman system³ penalties for civil cases not imposed and only have been maintained within criminal cases. In France, due to the judges' option in determining the compensation amount, to believe of someone rule of complete remedy of damage, has been weakened.⁴ On the other hand, some of French act imposes penalties which are known as amende civile. This civil penalty has been set for serious bugs that need punitive response, but not necessarily criminal punishment.⁵ According article 1150 Civil Code of France, In case of violation contract with bad fait the court allowed seeking the entire damages in their judgments, with no restrictions due to rule of foreseeability.⁶ It is believed that enforcement of contract acts also direct and stronger of punitive damages and reduces the number of violations in countries such as France.⁷ While rules such as the ability to predict losses and other rules apply in the

case of contractual liability and applying economic theories⁸ seem as well as a huge obstacle in the way way of punitive damages in contract actions. The final argument is that allow punitive damages in civil actions caused entry punishment in civil action without existence protections in criminal justice proceedings.⁹ Since 2004 some reforms in the French civil code were introduced.¹⁰ Among the proposed amendments the proposed text for Article 1371 Civil Code of France is attractive.¹¹

In America's legal structure, one of the feature of civil liability rules to be verdict Punitive damages for obligor that deliberately obstruct justice and has Offensive behavior.¹² Reluctance for Punitive damages in the contractual claims has changed. If defendant in breach of contract with his behavior is violated a statutory duty independence of contract (under the tort law), Punitive damages are available for contract claimant.¹³ Accordingly, some writer¹⁴ have suggested that If the breach of contract may contain elements like bad fait Punitive damages verdict will be used by courts. Perhaps the issue returns to recent court decisions

⁸ - There is this fear that Compensation for actual damages and punishment defendant in breach of contract economically go over the inadequate allocation of resources and caused the possibility of disappointment in economic activity and trade. On the other hands, is also raised to create a barrier due to the extreme and effective re-allocation of resources.

⁹ - Rogers, Winfield & Jolowicz on Tort, Sweet & Maxwell, 2002, number 22.12, p 756.

¹⁰ - Gotanda, John Y., **Charting Development Concerning Punitive Damages**, Villanova University School Of Law, 2006, p15. Available at: <http://law.bepress.com/Villanovawps/papers/art65>.

¹¹ -« one whose fault is manifestly permitted, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides a compensatory damages .the judge may direct a part of such damages to public treasury .the judge must provide specific reason for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim. ».

¹² - Katouzian. Dr. Nasser, Civil liability, Volume 1, **Op.cit**, P235.

¹³ - Restatement (Second) of Contract, § 355.(1981); punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

¹⁴ - Katouzian. Dr. Nasser, Civil liability, Volume 1, **Op.cit**, P 235.

¹ - Rubin, Dr.Paul H., Courts And The Tort-Contract Boundary In Products Liability, **Op.Cit.**, p7.

² - For example, in 1980 The Nevada Supreme Court violation of fair treatment in dismissed an employee treated as a bad fait and lead to punitive damages compensation based on tort. In this case the court looked at the motives of dismissed the employees.

³ - France, Germany and Italy.

⁴ - Von bar -dr.Christian, Drobing -Ulrich, **Study on Property law and Non- Contractual Liability as they relate to Contract Law**, 2003., nom.152, p130.

⁵ - Calleros, dr.Charles, **Op.Cit.**, p98.

⁶ - Calleros, dr.Charles, **Op.Cit.**, p99.

⁷ - Calleros, Dr.Charles, **Op.Cit.**, p97.

in this regard in the United States of America which In the case of contracts, even commercial contracts were allowed to call punitive damages.¹ In all of these ordinances², courts refer to the Deceit and unfair trade practices apart from a breach of contract. Although this particular situation can not be in true means, allowed punitive damages in the contractual obligations because of it is subject to Breach of statutory duty separate and additional violation of the contractual obligation. And breach of contract itself is not as a tort liability or under the punitive damages.

Under Article 1-106 of the United States Uniform Commercial contracts offset losses in selling the goods has been set. Article 1-203 of the Act imposes duty of bona fide and fair treatment on the parties to the contract. Case law interpreted the provisions of the Uniform Commercial America as Suggests that Indicate approval the old rules and breach of bona fide³ as a contractual obligation not knows as an independent tort,⁴ but it only recognized as the contract pleading. Indeed do not distinguish between the deliberate violations with other contractual violations. Breach of duty Independent tort must be, the violation, beyond the mere breach of obligation is imposed by contract. Danger of being annexed any dispute of breach of contract to action of fraud should not be overlooked or considered too small and thereby Instead ran away of the scope of the compensation theory and limitations in all cases of violations.

Classic situations that punitive compensation rules are in United States is include: Breach of marriage contract Claims, claims relating to public service companies, Claims relating to a relationship contain confidence feature, the fraudulent behavior of the defendant, Breach a duty independent of contract, Conceal and distort the

violation, Responsibility for defective products⁵, and Eventually Breach of insurance contract⁶. Such Such claims may be classified under three categories: 1) when there is interest in the contract, Claims about the relationship contains confidence feature such surgeries, and marriage claims take place in this category. 2) When violation due of behavior that is to form an independent fault, Like the fraudulent behavior of the defendant and Existence a independent tort duty. 3) When a violation is subject to public service activities (broadly related to the public).

Posner⁷ is including of persons that allowed punitive damages for breach of contract. Posner takes the name seven types of compensable damages for breach of contract; one of them is punitive damages. In his believe each of these seven compensation in proportion has depends to positions and expediency.

In Germany, some interpretations increase the attraction to punitive damages and gradually public order related to Punitive damages is changing. Up to now Germany has declined even of the recognition and enforcement of foreign judgments related to punitive damages relying conflict with public policy in this country⁸. The German legislator once and for all is separate criminal law from the civil law. While German law states that compensation should be gratuitous, frequently courts have ruled that the damage that can not seriously to be considered gratuitous and compensated. For example, in a case involving damage to the personality, the German Federal Supreme Court ruled that the amount of compensation contained in the lower court verdict, is much smaller than that have the deterrent effect. Also in intellectual property cases some available methods for calculating damages is seeking beyond mere compensation.⁹ Section 339 German Civil

¹ - Doering, Amy G., **Blurring the Distinction between Contract and Tort: Courts permitting business plaintiffs to recover Tort Damages for Breach of Contract**, Business Tort Journal, Volume.12, Number2, winter 2005, p2.

² - For example see: Western Star Trucks, Inc V. Big Iron Equipment Service, Ice -& Robinson Helicopters Company V. Dana Corporation – Beacon property Management, Inc, V. Pnr, Inc.

³ -Samavatie, Dr. heshmatollah, damage of breach the contractual obligations, khate sevvom press, third edition, 2005, p 122.

⁴ - This interpretation, which is opposed to those ideas that say bona fide duty and fair treatment to disrupt the boundaries between contract and tort liability.

⁵ - Hodgson- dr.John, Lewthwaite- dr.John, **Tort Law**, Published by Oxford University Press Inc., New York, 2004, p 379.

⁶ - Avallon, Patricia Maria Basseto, **The Award Of Punitive Damages AND Emotional Distress in Breach Of Contract Cases: a Comparison Between The American and Brazilian legal Systems**, University of Miami, Comparative Law, 2001, Pp6-8.

⁷ - Posner, dr.Richard A., **Economic Analysis of Law**, 4th, 1999, Pp 89-92.

⁸ - Aufinkolk, Von Hendrik, **U.S. Punitive Damages awards before German Court-Time For A New Approach**, Freilaw, Freiburg Law Students Journal, 2007, p1.

⁹ - Gotanda, John Y., **Op.cit**, p17.

Code, allows the penalty for breach of contract. But in spite of its criminal effect, civil nature of Regulation is never in doubt.

Russian Civil Law Act 1994, is accepted fines in the articles have been 332 to 329 for breach of contract.¹

This means acceptance of punitive in contracts. Vienna Convention International on selling goods in 1980 does not provision about punitive damages. Such damage can not be sentenced under Article 74. Because it explicitly refers to the compensation of the actual losses, so warrant punitive damages is prohibited under the Convention even if it is allowed in internal law for breach of contract. Only if the parties agree, the court is entitled to verdict punitive damages but to the extent that applicable law, be permitted.²

According Article 9:503 of the Principles of European Contract law in the presence Deliberate and gross negligent criteria of being foreseeable of losses is removed of the condition. So give a punitive aspect to this Regulation. But still only actual losses will be compensated.³ Article 7-4-13 principles of international commercial contracts stipulated merely has endorsed on punitive terms agreed by both parties, and the possibility of decrease it has also predicted.

What that content has been concluding as the aim in Article 10:101 European principles of tort law⁴, it indicates that punitive damages are not accepted by this Act.

Some writers⁵ in the Iranian legal system think some sanctions on Iran's legal system which the type and quantity of punishment is determine by court have an equivalent role of these kinds of damages. Said that in the philosophy of Islamic law Ta'zir for two purposes has been established. First, prevent offenders and others from Continuity and repeat of guilty. Second, punish the guilty⁶, I.e. the same targets in the punitive damages. God for the Attention to the rights and intellectual capital of

human, by some Methods shall Prohibits the offending from continue the sin. And he is punished for committing sin. One of the ways of punishment is a financial Ta'zir.⁷ But according to Ta'zir being the criminal penalties and scope of apply it is only in criminal, It is obvious that Ta'zir is not comparable whit Punitive damages in contracts - at least in the context of the current debate -. On the other hand, Dual face - punitive and aimed at the victim's consent - has caused to this think that this concept is similar to the blood money in our law.⁸

5-Conclusion

All this mixed borders back to tend to respect and justice. In such situations the judges certainly themselves think which is more important, Provide fair compensation or Resolving questions of borders and formalities. Undoubtedly identify some fault behavior in the frame of contract as a tort is In order to protect the public interest and reflection of social fairness and justice concept in contracts. In many contracts there is support of public interest particular contracts that contain Supply product or service that is related to public welfare. Even if accept the contract theory of Judge Holmes⁹ about choosing between the violation or performance of contract Still we can not claim have concluded contract for concealing breach of contract or destroy it and other cases. The fact that, with fraud we get out of the scope of contractual relationships. And will demonstrate irrational behavior in the society.

Where the issuing punitive damages for breach of contract is appropriate, Is rare. But rarity does not mean being never. if a party of contract acts deliberate or in fraudulent manner, to obtain contractual benefits by used from existing gap in the compensation structure, so that the compensation shall be an inadequate remedy in such a position to sentence Punitive damages for offenders it seems appropriate action to deter from opportunistic behavior.¹⁰ Otherwise, the equity can lead to unfair.

The fact that fault is wrong and Despite a framework in which it occurs is taken to prevent is

¹ - Hendly -Kathryn, Murrell -Peter, Ryterman – Randi, **Punitive Damages for Breaches in Comparative Perspective: The Use of Penalties by Russian Enterprises**, Wisconsin Law Review, 2001, p8.

² - CISG Advisory Council Opinion No.6.

³ - Official Comment on PECL Article 9:503.

⁴ - PETL.

⁵ -Soltani nezad, Dr.hedayat, **civil law of moral damages**, nooralsaghaleen press, 2002, first edition, p322.

⁶ -Nagibie, Dr. seyed abolghasem, **moral damages in iran and another systems law**, amirkabir press, first edition, 2006, p192.

⁷ - Nagibie, Dr. seyed abolghasem, **op.cit.**, p201.

⁸ - Katouzian. Dr. Nasser, Civil liability, Volume 1, **op.cit.**, p235

⁹ - Chang Paskof, dr.Catherine, **Op.Cit.**, p 82.

¹⁰ - Posner, dr.Richard A., **Common- Law Economic Torts: an Economic and Legal Analysis**, Arizona Law Review, Vol.48:735, 2006.

Universal acceptance. Justice¹ must be everywhere current. And any fraudulent must not be without review. So the arguments made, I believe, punitive damages are not limited to the tort actions. In interpreting of contract and because some aspects of certain support and confidence especially in professional and service contracts, Punitive damages can be the logical outcome. Possibility of punitive damages verdict in liability claims is accepted as a rule. But like all rules contain exceptions during the enforcement, so does not ability to apply in all cases.

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