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# Examining the Adequacy of Exemplary Damages in India: A Comparative Study

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HARSH KHANCHANDANI<sup>1</sup> AND INESH BACHHERIA<sup>2</sup>

## ABSTRACT

*This research paper focuses on evaluating the criteria based on which quantum of exemplary damages are awarded in India. It traces the history and evolution of exemplary damages determining the cases and expanding the scope of how it is awarded. Beginning with the basic reason to award such damages and answering the ongoing debate pertaining to exemplary damages in torts. Further through a comparative study between India and the Foreign Countries. This paper traces through case laws the standards or criteria that are evaluated before awarding such damages.*

*The second part of the paper talks about examining the criteria that have been applied in Indian courts. It talks about the cases where courts have awarded damages without considering any such criteria based upon the discretion of the bench. Through the research done and critically analysing the situation, this research paper passes on recommendations that would help to decide the right quantum of damages that are to be awarded in different circumstances.*

## I. STATEMENT OF PROBLEM

Exemplary damages serve justice on one hand and raise questions on the other. Awarding Exemplary Damages is sometimes not enough. How is it decided, the justification behind the amount determined, on what criteria these damages are awarded, whether the plaintiff has received the damages more than what was required, or whether the defendant did not give the adequate amount of damages when his/her income is taken into consideration are to be considered. With the help of this Research paper, these points are taken into consideration.

## II. RESEARCH QUESTIONS

Based on the current scenario, awarding exemplary damages is adequate or not?

## III. RESEARCH OBJECTIVES

Determining a method and a view to change the current criteria which is used to award

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<sup>1</sup>Author is a student at Symbiosis Law School, Pune, India.

<sup>2</sup> Author is a student at Symbiosis Law School, Pune, India.

exemplary damages so that there is adequacy.

#### **IV. RESEARCH GAP**

As per our research, there is no particular method determined by the courts while calculating exemplary damages. With the help of the analysis done in this research paper, we have put forward the suggestions concerning the same.

#### **V. LITERATURE REVIEW**

##### **(A) AN EMPIRICAL STUDY OF EXEMPLARY DAMAGES IN AUSTRALIA**

###### **- FELICITY MAHER**

This Paper by the author Felicity Maher critically examines the existence of Exemplary damages in Australia. By analysing it between the time span of 2000-2016, it evaluated all decisions that had been made available online and used suitable methods for statistical analysis. In the research, the number of claims for exemplary damages, the frequency and the size of the award is taken into consideration. In determining the quantum of damages that is to be awarded, it made a comparison between the United States and the United Kingdom. The article was concluded by points that suggest that exemplary damages awarded are not (generally) excessive in Australia. Differentiating this from our analysis we focused on the methods and root causes on which courts decide exemplary damages to distinguish and provide solutions.

##### **(B) EXEMPLARY/ PUNITIVE DAMAGES**

###### **- PANKAJ AGARWAL AND KUNAL SHARMA**

This paper by Pankaj Agrawal and Kunal Sharma provided insight into a type of damages, i.e. 'exemplary damages', which is awarded by the judiciary on not so frequent occasions. It also compared exemplary damages with other types of damages; this paper highlighted the perspective of Common law through well-known cases of England and prominent case laws of Indian Courts as well on exemplary/ punitive damages which made a distinction between the two and made it easier to examine the existence of Exemplary Damages. It also highlights the trend used in awarding such damages and the need for the evolution of the courts to analyse circumstances and grant damages. Lastly, it highlighted the certain key points to be kept in mind when someone files for a claim of exemplary damages. Through our paper, we focus on justified quantum that has to be given for exemplary damages.

## VI. RESEARCH METHODOLOGY

The methodology for the proposed paper is doctrinal, taking the support of Indian and International case laws. Secondary sources will be articles by academics and authoritative books on the subject.

## VII. INTRODUCTION

The term 'tort' is the French equivalent of the English word 'wrong'. Norman jurists introduced torts into the English law.<sup>3</sup>The word tort has been derived from the Latin term "tortum" which means twist and implies conduct which is twisted or tortious.<sup>4</sup>In general terms, a tort is a civil wrong which means that if a person performs an unlawful act under this law, the nature of the case brought before the courts are civil. In civil cases, the plaintiff generally files the case himself so that the person who caused him harm through his wrongful act may give compensation. The principle aim of the law of torts is the compensation of victims.<sup>5</sup> Granting exemplary damages in certain cases is to show deterrence of the wrongdoers which is another aim of torts.

The fundamental rule or principle of common law is that the damages in civil cases are awarded as compensation for harm rather than a penalty for wrongdoing.<sup>6</sup> The objective of it is to recompense; and the principle applicable is "restitutio in integrum".<sup>7</sup>Hence, the ultimate purpose or outcome of awarding damages is to return the claimant to the role he would have been in if the wrong had not been done, as far as money can. As said by Lord Blackburn, in the case of *Livingstone v. Raywards Coal Co*<sup>8</sup> "That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation". In tort suits in which the harm of the plaintiff can be determined by a material loss, this concept can be enforced without any difficulty; but, in certain cases where the damage is "large"-in which it includes a considerable subjective element, the feasibility of the concept of restitutio in integrum is doubtful.<sup>9</sup> Moreover, the damages awarded may often be seen as punishing the defendant rather than compensating the claimant; these damages are referred to

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<sup>3</sup> Ratanlal & Dhirajlal, *The Law of Torts*, (27<sup>th</sup> ed. 2016).

<sup>4</sup> Salmond and Heuston, *Law of Torts*, (20<sup>th</sup> ed. 1992).

<sup>5</sup> Volume 4 G. Williams, *The Aims of the Law of Torts*, (1<sup>st</sup> ed. 1951).

<sup>6</sup> *Livingstone v. Raywards Coal Co.*, (1880) 5 A.C. 25, *McCarey v. Associated Newspapers Ltd.*, [1965] 2 Q.B. 86, at 106, *Olabisi Ajala v. Shittu Are & Ors.*, (1985) H.C.N.L.R. 503.

<sup>7</sup> *General Tire & Rubber Co. Ltd. v. Firestone Tyre & Rubber Co. Ltd.*, [1975] 2 All E.R. 173.

<sup>8</sup> *Livingstone v. Raywards Coal Co.*, (1880) 5 A.C. 25.

<sup>9</sup> *Broome v. Cassel & Co. Ltd.*, [1972] A.C. 1027.

as "**exemplary damages**".<sup>10</sup> Therefore, if a court thinks the defendant's act was extremely gross, it grants the plaintiff punitive damages against him. In Black's Law dictionary 'punitive/ exemplary damages' is defined as "Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specific, damages assessed by way of penalizing the wrongdoer or making an example to others."<sup>11</sup> In the Law Lexicon Dictionary, 'exemplary damages' is defined as not being compensatory but awarded to punish the defendant and to deter him and others from similar behaviour in the future.<sup>12</sup>

Exemplary damages are awarded to deter the wrongdoer in the future and not to compensate the plaintiff. The House of Lords<sup>13</sup> allowed exemplary damages to be allowed in three categories. The first category is when there are oppressive, arbitrary, or unconstitutional of the government or its servants. Cases in the second category are related to where the conduct of the defendant has been calculated by him to make a profit exceeding compensation payable. The third category consists of where there is an express authority by statute.

The words "punitive," "vindictive" or "exemplary" damages and "smart-money" have been interchangeably applied to a class of monetary damages granted in tort cases beyond what is required to "compensate" the plaintiff for his injuries. Exemplary damages are only granted where the conduct of the defendant is the consequence of an evil state of mind, such as spite, ill-will, or recklessness.<sup>14</sup> They have been condemned as "a monstrous heresy, an unhealthy excrescence, deforming the symmetry of the body of the law."<sup>15</sup> Following these denunciations, the significant majority of states maintain in full force the doctrine of exemplary harm<sup>16</sup>. Several state codes expressly provide for exemplary damages and others specifically require them in other actions. One court that declined to embrace the concept of exemplary damages<sup>17</sup> was quickly reversed by legislative action.

### VIII. HISTORICAL EVOLUTION

The concept of exemplary damages arose in the eighteenth century in the English courts as a way of justifying the award of damages which exceeded the tangible harm of the plaintiff. Courts adjudicated in several cases which involved government official's unconstitutional

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<sup>10</sup>Vol. 12 Halsbury's Laws of England, (4<sup>th</sup> ed. 2006)

<sup>11</sup>Henry Campbell Black Black's Law Dictionary, (9<sup>th</sup> ed. 2009).

<sup>12</sup>P Ramanatha Aiyar: The Law Lexicon, (3<sup>rd</sup> ed. 2012).

<sup>13</sup>Rookes v. Barnard, [1964] A.C 1129.

<sup>14</sup>Mc Cormick, Damages (1<sup>st</sup> ed. 1935).

<sup>15</sup>Fay v. Parker, 53 N.H. 342, 382 (1873), Pegram v. Stortz, 31 W. Va. 220, 6 S.E. 485 (1888), Murphy v. Hobbs, 7 Colo. 541, 5 Pac. ii9 (1884).

<sup>16</sup>Vincent v. Morgan's., La. & Tex. R.R., 140 La. 1027, 74 So. 541 (1917), Burt v. Advertiser Newspaper Co., 154 Mass. 238, 245, 28 N.E. I, 5 (1891), Boyer v. Barr, 8 Neb. 68 (1878).

<sup>17</sup>Murphy v. Hobbs, 7 Colo. 541, 5 Pac. II9 (1884).

intervention. Initially, courts found justification in regarding exemplary damages as aggravated damages. Further in the case of *Huckle v. Money*<sup>18</sup> the court considered awarding 300 for false imprisonment as "exemplary damages". Soon the ambit of the new principle had been expanded to include other instances where the defendant's conduct deserved punishment, which was "only considered to be so where his conduct was wanton", where it revealed "fraud, malice, violence, cruelty, insolence or the like" or where he acted "in contumelious disregard of the plaintiff's rights". Such cases marked the beginning, noting that damages in civil cases may go beyond mere compensation. One of the more important and leading contemporary decisions in the Anglo-American law on punitive damages is the decision of the House of Lords given in 1964, in particular Lord Devlin's leading judgment in *Rookes v. Barnard*.<sup>19</sup> In a seminal account of the history and origin of the creation of punitive damages, Lord Devlin quoted the 1962 edition of Street's Principles of Damage Law and argued that punitive damages were introduced about 200 years ago. The roots of the punitive damages principle in *Wilkes v. Wood*<sup>20</sup> and *Huckle v. Money*<sup>21</sup> have also been recognized by other common law countries. The Supreme Court of the United States cited *Wilkes* and two other American cases of the late eighteenth century on the grounds that punitive damages were a common feature of state law. The Australian High Court also recognizes that *Wilkes* was the first authority to use the law.

## IX. COMPARATIVE ANALYSIS

Moving on to comparative analysis, Exemplary Damages were established as a practice by Common Law to prevent the defendant's misconduct (if any) and to avoid it in the future. The major controversy with respect to exemplary damages is whether the amount which is awarded is appropriate and how that amount should be calculated. To be specific, damages are given on the basis of the defendant's net worth.

Exemplary Damages were first recognized in the case of *Huckle v. Money*<sup>22</sup>. It was held by the court that compensating the plaintiff because he/she suffered from legal injury is not the sole purpose behind providing damages, it is also given that there can be a prevention of the defendant's egregious misconduct. Similarly, in American Courts, exemplary damages gained recognition.<sup>23</sup>

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<sup>18</sup>*Huckle v. Money*, (1763) 2 Wils 205.

<sup>19</sup>*Rookes v. Barnard*, [1964] A.C 1129.

<sup>20</sup>*Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 498.

<sup>21</sup>*Huckle v. Money*, (1763) 95 Eng. Rep. 768, 769.

<sup>22</sup>*Huckle v. Money*, (KB 1763)95 Eng Rep 768.

<sup>23</sup>*Genay v Norris* (1784)1 SC 3, 1 Bay 6.

There are different views when it comes to awarding Exemplary Damages. Some argue that the Plaintiff, who receives these damages, should be entitled to them because of the large amount of their money, time, and efforts given to obtain these verdicts. The motive is to compensate the plaintiff as a whole and not to reward them for enthusiastic litigation. Yet there are other views that some plaintiffs receive more than what is expected and some don't receive anything. In *BMW, Inc. v Gore*<sup>24</sup>, the Plaintiff sued the car he purchased as the car was repainted to cover the damage while it was being shipped to the dealer. The Jury awarded the Plaintiff \$4 Million as exemplary damages. It was later reduced to \$2 Million by the Alabama Supreme Court. The Supreme Court later held that even \$2 Million were “grossly excessive.” However, there was no Justification given.

To determine how much is enough for the exemplary damages to be awarded, the amount to be given to the plaintiff is left to the prudence of the Jury. The jury determines the defendant's misconduct, the injury suffered by the plaintiff, and the income of the defendant.<sup>25</sup> According to Common law, a defendant's financial condition is considered as a relevant factor before analysing the amount for damages. The defendant's net worth is always taken in mind before providing the plaintiff with damages.<sup>26</sup>

In recent times, many courts throughout the world have argued to restrict or put limits on the amount of exemplary damages. Several courts in California decided not to allow exemplary damages to exceed 10% of the defendant's net worth.<sup>27</sup> In *Weeks v Baker & McKenzie*,<sup>28</sup> the court entertained this 10% threshold and gave \$225,000 as exemplary damages, however, it exceeded slightly more than 10% of the defendant's net worth of \$2 Million. The amount was found acceptable as there was no evidence that payment of that sum will lead to bankruptcy or cause undue hardship on the defendant's ability to pay.

If the defendant's financial condition can become a criterion to determine the exemplary damage, is it also true that such information must be taken into consideration before such an award can be awarded? Before 1991 the courts determined the amount for exemplary damages on their own, without having the idea of the net worth of the defendant.<sup>29</sup>

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<sup>24</sup>*BMW, Inc. v Gore*, (Ala 1994)646 So2d 619.

<sup>25</sup>*Coats v Construction & Gen. Laborers Local No.*, 185 (1971)15 CA3d 908, 916, 93 CR 639).

<sup>26</sup>*Adams v. Murakami*, (1991) 54 C3d 105, 113, 284 CR 318.

<sup>27</sup>*Storage Servs. v Oosterbaan*, (1989)214 CA3d 498, 515, 262 CR 689.

<sup>28</sup>*Weeks v Baker & McKenzie.*, 63 CA4th at 1167.

<sup>29</sup>*Fenlon v Brock*, (1989)216 CA3d 1174, 1179, 265 CR 324.

The problem that arose with the criteria of the defendant's net worth was that numbers could be easily crooked. In *Michelson v. Hamada*<sup>30</sup>, a financial statement was produced by the defendant which showed that his net worth was \$4,400,000 in the year 1988. The second statement showed his net worth at \$2, 080,000 in 1989. The court considered that the second financial statement was manipulated. The court took the second statement to analyse the net worth and the exemplary damage was applied against it.

Exemplary damages should be awarded based on the actual harm suffered by the plaintiff. Courts have determined that exemplary damages must have a reasonable relationship to actual damages suffered. In some cases like *Pacific Mut. Life Ins. Co. v Haslip*<sup>31</sup> the Supreme Court of the US found that exemplary damages of four times the damages suffered were close to being considered as excessive but were still considered constitutional. This doctrine should be an award of actual damages to support the exemplary damages. As said by the Supreme Court of California, "actual damages must be found as a predicate for exemplary damages."<sup>32</sup> According to the Supreme Court of the United States, awards of Exemplary Damages take "the reprehensibility of the defendants' conduct, their financial condition, the magnitude of the harm, and any mitigating facts" into consideration, amongst other factors.<sup>33</sup>

## X. INDIAN SCENARIO

It is noted that the Indian Courts are generally reluctant with respect to exemplary damages. The reason behind this is that there is not enough clarification of damages to be awarded for different circumstances. The Courts in India face problems in awarding exemplary damages in determining the standards, the amount to be awarded in different circumstances, and what shall be the quantum of such damages.

When the question of awarding exemplary damages arises, the damages may be given or awarded to a limit and do not exceed the amount more than twice the damages liable to be paid.<sup>34</sup> The amount determined cannot be biased; the damages shall be awarded to fulfil the necessary condition so that the basic purpose behind giving the adequate amount of damages can be fulfilled.

The motive behind providing Exemplary Damages is that if the wrongdoer needs to be punished, then the way out must be the penal law. In *Rustom K. Karanjia v. Krishnaraj M.D.*

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<sup>30</sup>*Michelson v. Hamada*, (1994) 29 CA4th 1566, 1592, 36 CR2d 343.

<sup>31</sup>*Pacific Mut. Life Ins. Co. v Haslip*, (1991) 499 US 1, 22.

<sup>32</sup>*Mother Cobb's Chicken T., Inc. v Fox*, (1937)10 C2d 203, 205, 73 P2d 1185.

<sup>33</sup>*Exxon Shipping Co. et al. v. Baker., et al.* (2008), United States Reports, Vol. 554, p. 481.

<sup>34</sup>*Kodungallur Film Society and Ors. v. Union of India (UOI) and Ors.* [2018 (6) BomCR 270].



*Thackersey*<sup>35</sup> Mr. Thackersey had claimed for damages as there was an article published on him that was false, malicious, and defamatory in nature. The article defamed his character and injured his reputation in the market and it led to public hatred due to which he suffered a loss in his business and thus the suffered damage was evaluated to Rs. 3,00,000. The defendants challenged that the damages awarded by the court were disproportionate and unreasonable in nature and these damages cannot be awarded in any case. The court referred to another case, *Broadway Approvals, Ltd. v. Odhams Press, Ltd.*<sup>36</sup> Where the court noticed and stated that newspapers publish articles and news for profits. Only when a criminal intention is shown then only it would be liable for damages. Accordingly, it was held that there was a criminal intention behind this action but the damages were indeed excessive, and therefore, the damages were reduced to Rs. 150,000.

In India, there are some cases in which damages are awarded and the whole justification for the same is not given but a partial justification is given. The amount for exemplary damages depends upon different tortious liability. There is no fixed amount for these activities and it is totally at the discretion of the court. The question that arises is whether these damages are excessive or whether they are insufficient in nature or whether they are satisfactory. The purpose behind providing damages does not solely depend upon the defendant's misconduct, it should also be taken into consideration that the plaintiff is compensated because of the legal injury suffered by him.

In *M.C Mehta v. Kamal Nath*<sup>37</sup> it was seen that the amount for exemplary damages is fixed if there is harm caused to the environment depending upon nature and to what extent a person has gone to cause harm to the environment, the categories for punishment in respect to fine or imprisonment or both were determined by various laws in force to prevent, manage and protect the environment and the ecology. Exemplary damages are awarded in environment cases also. Keeping in view the responsibility by the defendant the amount was fixed that he/she should give the damages for the restoration of the ecology which would be separate and different from their liability for the exemplary damages.

Similarly, in *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*<sup>38</sup> the defendant in an advertisement intentionally criticized the plaintiff's product. The defendant had a criminal intent behind this act as they wanted to increase their market share by creating an impact on the plaintiff's goodwill. The High Court of Delhi held that the allegations made by

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<sup>35</sup>Rustom K. Karanjia v. Krishnaraj M.D. Thackersey., AIR 1970 Bom 424.

<sup>36</sup> *Broadway Approvals, Ltd. v. Odhams Press, Ltd.*, (1965) 2 All ER 523.

<sup>37</sup>*M.C Mehta v. Kamal Nath*, AIR 2002 SC 1515.

<sup>38</sup>*Hindustan Unilever Limited v. Reckitt Benckiser India Limited*, 2004 (29) PTC 401.

the plaintiff were not enough for damages. However, there was actual damage occurred which was quantified to Rs. 5 lakh. The plaintiffs appealed and the court referred to *Dabur India Ltd. v. Colgate Palmolive India Ltd*<sup>39</sup> wherein it was found that without mentioning the product of the rivals, a peculiarity of generic criticism will be held objectionable. Therefore, exemplary damage of Rs. 5 lakhs was upheld.

There have been cases where exemplary damages for gross and unacceptable acts have been shockingly low. In the decision from Rudul Shah<sup>40</sup> to Bhim Singh, the courts laid down no basis for qualification of the amount of exemplary costs. Referring to the case of Rudal Shah where a person was illegally detained by the Bihar government for over fourteen years after his acquittal. Courts in this case granted a sum of 25000 rupees which is significantly low considering the nature of the offense. In the case of *Bhim Singh v State of J&K*<sup>41</sup> where petitioner who was an MLA had been illegally arrested and detained to prevent him from attending the meeting, The Supreme court,, in this case,, awarded rupees fifty thousand as monetary compensation by the way of exemplary damages so as to compensate him suitably and adequately. It can be argued, more quantum of such damages being awarded by the state may ultimately put a burden on taxpayer's money. Therefore it must be noted that the state should pay the complainant from public funds but also has to recover the same from people responsible for such unpardonable behaviour as in the case of *Lucknow Development Authority v. M.K. Gupta*.<sup>42</sup>

## XI. ANALYSIS AND CONCLUSION

The Courts in India are generally unenthusiastic when it comes to awarding Exemplary Damages. Due to the lack of quality and standards and difficulty in understanding the circumstances are the main reasons behind this. To look into the reasoning of the court there is no such formula determined before awarding these damages. It can be said with the help of precedent cases that the Indian courts have been giving damages on an ad hoc basis.

Due to a lack of certainty, some Courts award damages to the plaintiff so that the plaintiff can be compensated as he/she suffered from a legal injury. In some cases, the justification is not given wholly before awarding damages. The criteria set for awarding exemplary damages in India depends upon the tortious activity whereas it should be depended upon how much harm is caused to the plaintiff and the defendant should suffer from the legal punishment. The

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<sup>39</sup>*Dabur India Ltd. v. Colgate Palmolive India Ltd.*, 2004 (29) PTC 401.

<sup>40</sup>*Rudal Shah v State of Bihar.*, (1983) 4 SCC 141.

<sup>41</sup>*Bhim Singh v State of J&K.*, (1985) 4 SCC 677.

<sup>42</sup>*Lucknow Development Authority v. M.K. Gupta.*, (1994) 1 SCC 243 at p. 264.

exemplary damages should be awarded keeping in mind, the situation of both, the plaintiff and the defendant. The defendant shall not give excessive damages and the plaintiff shall not be settled for inadequate damages as well. The financial condition of the defendant shall also be determined before granting exemplary damages. Lastly, to clarify the grounds on which such damage is to be provided, formula or method can be introduced so as to justify the reasoning behind awarding quantum of damages as each court is different in its approach and method while awarding the same. It becomes a subjective topic to formulate opinions on.

As per the analysis done based on the research paper, we would like to put forward the following suggestions/recommendations. In a country like India awarding exemplary damages cannot be based simply on the discretion of the Judge, the court should consider the following points before deciding upon the quantum of damages to be awarded:

- The Magnitude of Harm caused
- Mitigating Facts
- Defendant's misconduct
- Financial Condition of the defendant
- Based on different Tortious activity.
- Deciding a fixed method for calculating the Damages

One way to resolve the problem of determining the quantum of Exemplary Damages to be awarded is to follow the treble damage awards rule. According to this rule, it allows the court to grant damages by calculating it three times more than the compensatory damages that have been awarded to the plaintiff. For example, if the compensatory damage is ₹1,000, the plaintiff would get ₹3,000 as Exemplary damages. Indian Courts conversely prefer to double the damages<sup>43</sup>. In a recent Times case, the court decided to grant ₹500,000 as exemplary damages for loss of goodwill and reputation to the plaintiff and there was additional compensatory damage of ₹500,000. In the *Yahoo Inc v Rinshad Rinu & Ors*<sup>44</sup> case, the punitive award had been one-and-a-half times of the compensatory damages, ₹300,000 and ₹200,000 respectively. Thirdly deciding the quantum based on the ten percent rule that had been formulated earlier by courts. Formulation of a formula to avoid arbitrariness and injustice is one way to tackle this situation.

Reviewing and reconsidering all the conditions mentioned, will pave way for justice to

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<sup>43</sup>Kodungallur Film Society and Ors. v. Union of India (UOI) and Ors. [2018 (6) BomCR 270].

<sup>44</sup>Yahoo Inc v Rinshad Rinu & Ors., CS (COMM) 668/2016.

prevail by giving the right amount or quantum of compensation. The basic objective of Exemplary Damage to prevent anyone or the wrongdoer from the same act again would also be fulfilled.

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