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THE *NORTH BRITON NO. 45* AND THE DOCTRINAL ORIGINS OF EXEMPLARY DAMAGES

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ABSTRACT. *The companion 1763 tort cases of* Huckle v Money *and* Wilkes v Wood *hold a mythical status in the Anglo-American common law imagination. Few modern accounts of the doctrinal origins of exemplary (or punitive) damages omit reference to them. This article contends that the assumption that these two cases combined to provide damages above and beyond compensation a positive basis at English common law is misconceived. Set back into their historical context, it shows that their true significance is at odds with the decidedly lawmaking significance often ascribed to them by modern judges and scholars alike.*

KEYWORDS: *exemplary damages, punitive damages, aggravated damages, tort, history, John Wilkes, North Briton.*

I. INTRODUCTION

In 1919, an American writer on the law of damages considered the "strongest objection" to any extra-compensatory doctrine of civil remedies "independent of statute, that it has no positive basis in the early common law".[1] Under statutory law, the origins of damages above and beyond compensation have been recently traced as far back as the thirteenth century. Under the influence of Roman law, Anglo-Norman legislators provided a positive basis for the essentially punitive remedy of "multiple damages" across a host of foundational statutes.[2] Independent of statute, however, English judges are supposed to have provided a positive basis for the remedy of exemplary (or punitive) damages curiously late.

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[1] R.S. Bauer, *Essentials of the Law of Damages* (Chicago 1919), 118.

[2] J. Taliadoros, "The Roots of Punitive Damages at Common Law: A Longer History" (2016) 64 Cleveland State Law Review 251, 262–301; J. Taliadoros, "Thirteenth-century Origins of Punitive or Exemplary Damages: The Statute of Westminster I (1275) and Roman Law" (2018) 39 Journal of Legal History 278. See e.g. Statute of Westminster I (1275) 3 Edw. I c. 1.

This positive common law basis is conventionally traced to two companion tort cases decided during the third quarter of the eighteenth century: *Huckle v Money*[3] and *Wilkes v Wood*.[4] Both plaintiffs sued out of *vi et armis* writs of trespass after the Crown controversially used general warrants in its prosecution of the allegedly seditious, forty-fifth, issue of the anti-government newspaper – the *North Briton*. At trials over which the Chief Justice of the Court of Common Pleas, Sir Charles Pratt, presided, the *Huckle* and *Wilkes* juries successively brought in verdicts against both Crown defendants, and with very large damages.

These companion *North Briton* cases now loom large in the modern Anglo-American imagination about the origins of a common law remedies doctrine, which continues to allow civil courts to award damages beyond compensation – typically in aggravated matters of tort – and for various, essentially punitive, purposes. In a distinctly principled treatment of the English law of damages published in 1962, Professor Harry Street declared that only "[s]ince the seventeen-sixties" has it been "the law that damages going beyond mere compensation may be awarded in tort".[5] Two years later, in his landmark speech to the House of Lords in *Rookes v Barnard*, Lord Devlin approvingly cited Street for having "briefly and clearly" accounted for "[t]he history of exemplary damages".[6] Following Street, his Lordship affirmed that a doctrine of exemplary damages (to which, in principle, he too strongly objected) "originated just 200 years ago".[7]

Similar statements appear across a now voluminous scholarly literature on exemplary damages, with *Huckle* and *Wilkes* coming to hold an almost mythical status. They have been described as when the remedy was "first introduced … as a legal doctrine",[8] "first formally recognized",[9] "first explicitly authorized"[10] – when the doctrine received

[3] *Huckle v Money* (1763) 95 E.R. 768.
[4] *Wilkes v Wood* (1763) 98 E.R. 489.
[5] H. Street, *Principles of the Law of Damages* (London 1962), 29. The attribution of significance to *Huckle* and *Wilkes* first appears at least a century prior: T. Sedgwick, *A Treatise on the Measure of Damages, or An Inquiry into the Principles Which Govern the Amount of Compensation Recovered in Suits at Law* (New York 1847), 39, which cites *Huckle* in support of a "rule [of exemplary damages] … settled in England".
[6] *Rookes v Barnard* [1964] A.C. 1129, 1221. For Street's influence on Lord Devlin's internal deliberations, see N. Sinanis, "Punishment in Tort: The Context of Ideas in *Rookes v. Barnard*" (2022) 15 Journal of Tort Law 29, 36–53.
[7] *Rookes v Barnard* [1964] A.C. 1129, 1221. The Australian High Court soon doubted whether 1763 was really when the remedy first "appear[ed] in the law": *Uren v John Fairfax & Sons Pty Ltd.* (1966) 117 C.L.R. 118, 152 (Windeyer J.).
[8] M.B. Miller, "Torts – Punitive Damages: A New Finish on Punitive Damages. *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996)" (1997) 19 University of Arkansas at Little Rock Law Review 519, 524.
[9] A. Calnan, "Ending the Punitive Damage Debate" (1995) 45 DePaul Law Review 101, 112.
[10] D.G. Owen, "A Punitive Damages Overview: Functions, Problems and Reform" (1994) 39 Villanova Law Review 363, 368.

its "first explicit articulation".[11] In a recent, distinctly historical, contribution to this literature, Taliadoros similarly observes that "*Wilkes v Wood* and *Huckle v Money* in 1763 are generally regarded as founding the modern Anglo-American common law doctrine of exemplary … damages".[12]

Yet, despite these statements, few expound exactly how Pratt C.J.'s adjudicative role in the *North Briton* litigation made the remedy of exemplary damages formally part of the English common law. At most, there is an implicit assumption that his role in deciding both cases combined to provide it the positive basis that it previously lacked.

In *Huckle*, Pratt C.J. is the first English judge ever reported to have used the phrase "exemplary damages".[13] He did so in late 1763 during Michaelmas term, the first of four legal terms in which the full common law courts met "in banc" at Westminster Hall and took up post-trial motions. The phrase is specifically attested to in the course of his Common Pleas' emphatic denial of the defeated Crown's motion for the *Huckle* jury's verdict to be set aside, and a new trial granted, on the ground that the damages they had awarded were large to the point of excess. So significant was Pratt C.J.'s ruling upon the Crown's in banc motion that his use of the phrase "exemplary damages" was supposedly its "first use … as a formal legal doctrine".[14]

Despite *Huckle*'s lawmaking significance, it is often assumed (again implicitly) that a doctrine of exemplary damages was not positively founded at common law, at least not fully, until immediately after Michaelmas term 1763. According to Barker, "[t]he story started in *Wilkes*".[15] Yet, unlike *Huckle*, *Wilkes* was not the decision of a common law court sitting in banc during term time. It was the verdict of a trial jury. Its lawmaking significance, in turn, lay in what, in his *Rookes* speech, Lord Devlin characterised as Pratt C.J.'s "direction to the jury".[16] In the course of his charge to the *Wilkes* jurors, the presiding Chief Justice supposedly directed them that they were now allowed to determine his damages, not merely to compensate him for the full extent of his injuries, but to punish the Crown for a severely aggravated trespass.[17]

[11] A.M. Kenefick, "The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment" (1987) 85 Michigan Law Review 1699, 1718.
[12] Taliadoros, "Thirteenth-century Origins", 278.
[13] *Huckle v Money* (1763) 95 E.R. 768, 769.
[14] M. Rustad and T. Koenig, "The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers" (1993) 42 American University Law Review 1269, 1289.
[15] K. Barker, "Punishment in Private Law – No Such Thing (Any More)" in E. Bant, W. Courtney, J. Goudkamp and J.M. Paterson (eds.), *Punishment and Private Law* (London 2021), ch. 2, 52.
[16] *Rookes v Barnard* [1964] A.C. 1129, 1221.
[17] *Wilkes v Wood* (1763) 98 E.R. 489, 498–99.

This article revisits the standard printed reports of *Huckle* and *Wilkes*,[18] and other key contextual sources, with the aim of projecting a truer picture of their historical significance. Examined anew, there is no plausible basis upon which to suppose that any distinctly extra-compensatory principles were "deliberately and designedly installed as a doctrine of civil remedies"[19] by Pratt C.J.'s Common Pleas in 1763. Judicial and scholarly accounts suggesting otherwise, it contends, make two interpretative errors. First, they mistake Pratt C.J.'s use of the phrase "exemplary damages" during Michaelmas term as comprising the tentative articulation of a novel civil remedies doctrine. Second, they mistake his charge at the trial of Wilkes' claim immediately after it as entailing a "direction" to the *Wilkes* jury about how England's judge-made common law (albeit belatedly) now allowed them to determine the nature of Wilkes' damages.

Set carefully back into the historical context in which they were litigated and ultimately decided, this article shows that Pratt C.J.'s conception and engagement with the question of the *North Briton* plaintiffs' recovery did not break with the past. In fact, it was fundamentally consistent with the English common law practice according to which tort plaintiffs recovered damages beyond compensation before Michaelmas term 1763.[20] Although trial judges habitually advised English civil juries on the question of damages, the substantive justice of individual tort awards had ultimately been a question for juries acting entirely within their own adjudicative province. Within this province, the use of damages as a medium of punishment – typically for example's sake – did not involve the judicial direction of juries about what the common "*law*" allowed them to do. Instead, it was a legally undirected and uncontrolled determination, one that juries continued to make collectively in view of each peculiarly aggravated case. Ultimately, *Huckle* and *Wilkes* are more accurately interpreted as politically divisive tort cases in which the Common Pleas' Chief Justice strove to defend this particular province of eighteenth-century civil jury adjudication against improper attempts to subject it to positive legal controls. As shall be seen, these attempts had been repeatedly, even defiantly, made by lead counsel for the *North Briton* defendants: George III's solicitor general, Sir Fletcher Norton.

This article's contextualising account is presented in three parts. Section II begins by setting the *North Briton* cases in their shared factual context.

[18] Both Serjeant George Wilson's *Huckle* report and Capel Lofft's (unattributed) *Wilkes* report are identically reproduced in Thomas Howell's State Trials reports; references throughout are to the former two nominate reports as reprinted in the English Reports.

[19] Foster J. used this phrase in *Fay v Parker*, 53 N.H. 342, 382 (1872), a New Hampshire Supreme Court decision in which the doctrinal origins of exemplary damages confounded him.

[20] This pre-1763 practice has been recently illuminated in N. Sinanis, "Aggravation in Tort Before 1763" (2022) 43 Journal of Legal History 24.

Section III then revisits the report of the Crown's new trial motion on the ground of excessive damages during Michaelmas term 1763. It re-examines Pratt C.J.'s emphatic denial of it in light of his view of the determination of the question of tortious recovery as belonging exclusively within the English civil jury's adjudicative province. In particular, it draws attention to Pratt C.J.'s reassertion of this view at the trial of Huckle's trespass claim earlier in 1763, at which Solicitor General Norton first appeared for the defending Crown. Section IV then revisits the report of the trial of Wilkes' claim immediately after Michaelmas term. It re-examines not only Pratt C.J.'s summing-up comments on the question of Wilkes' damages, but also the opposing trial arguments that had made been in respect of it. In particular, it focuses on those of the reappearing solicitor general, who yet again set out to impose upon on another *North Briton* jury's substantively just determination of that question.

II. John Wilkes and the *North Briton* Newspaper

The first 45 issues of the *North Briton* newspaper appeared in print within a single year. They coincided, not accidentally, with the British prime ministership of the Scottish Tory politician, John Stuart, the third Earl of Bute. Lord Bute's administration commenced on 26 May 1762 and ended, with his resignation, on 8 April 1763. Shortly before its demise, the young parliamentary reporter and Whig partisan, John Almon, decried it as one "of ten months and ten days"[21] during which "[t]he dignity and power of Great Britain languished".[22]

Among Lord Bute's most outspoken critics had been the pamphleteer and radical Whig Member of Parliament for the Buckinghamshire town of Aylesbury, John Wilkes. Soon after acceding to the prime ministership, Bute moved to appoint the fellow Scottish man of letters, Tobias Smollett, editor of an unabashedly pro-government newspaper: the *Briton*. Published on 29 May 1762, its inaugural issue suggests a singular *raison d'être*, to shield an incoming Tory administration from political criticism in the popular, Whig-leaning, press.[23]

Smollett's pro-Butist weekly was met with an immediate Whig response. Within days of the circulation of the *Briton*'s first issue, a staunchly anti-government newspaper appeared: the *North Briton*. The prefix "*North*" was a deliberate slight, as much against Bute personally as against what its founders regarded as an undue Scottish influence in England's political affairs. Although the *North Briton*'s authorship had been officially anonymous, there was general consensus that it was the

[21] J. Almon, *A Review of Lord Bute's Administration* (London 1763), 111.
[22] Ibid., 115.
[23] Anon., *The Briton*, *Number 1* (London 1762), 1.

member for Aylesbury who lay behind many, if not all, of its weekly counter-issues. The first of them entered print on Saturday 5 June 1762. The *No. 1* began by declaring the "*liberty of the press* the birth-right of a Briton",[24] before launching a scathing attack upon what it viewed as Bute's partisan campaign of press suppression. With rhetorical disdain, it must have been Wilkes who asked: "Can we . . . be surprized that so various and infinite arts have been employed, at one time entirely to set aside, at another to take off the force, and blunt the edge, of this most sacred weapon, given for the defence of truth and liberty?"[25]

A. The No. 45 and the Prosecutorial Use of General Warrants

The 45th issue of the *North Briton* was first printed on Saturday 23 April 1763. It subjected to "severe and reproachful commentary"[26] a speech George III had delivered to Parliament at its prorogation only three days earlier. The king's speech had heaped praise on the peace articles of the Treaty of Paris (which Bute's administration had recently brokered with Bourbon France with a view to ending the politically divisive Seven Years War). Yet, the opening lines of the *No. 45* suggest that Wilkes had been rather anxious to clarify the proper target of his criticism. "*The King's Speech*," he began, "has always been considered by the legislature, and by the public at large, as the *Speech of the Minister*."[27] Wilkes' ire, it seems, was carefully directed – not at the monarch – but at his late Prime Minister, who in yet another anti-Scottish jibe Wilkes went on to taunt as "the *Scottish* Prime Minister of *England*".[28]

Despite Bute's recent resignation, in composing the *No. 45* Wilkes' anti-government sentiment may have pushed his pen too far. George III himself was not spared: "[e]very friend of his country must lament that a prince of so many great and amiable qualities, whom England truly reveres, can be brought to give the sanction of his sacred name to the most odious measures, and the most unjustifiable public declarations, from a throne ever renowned for truth, honour, and unsullied virtue."[29] Among those opposed to Wilkes' staunch anti-Butism, the *No. 45* was wide open to being read as contemptuous of the King: by delivering Bute's speech, George III had shown himself a princely pawn – "the dupe of a designing minister", as an anonymous government-minded critic put it, "and so weak as not to understand what his [prime] minister thinks fit to make him speak".[30]

[24] Anon., *The North Briton*, vol. 1 (Dublin 1764), 1, emphasis in original.
[25] Ibid., 1–2.
[26] J. Noorthouck, *A New History of London, Including Westminster and Southwark* (London 1773), 420.
[27] Anon., *The North Briton*, 2nd ed., vol. 2 (Dublin 1763), 164, emphasis in original.
[28] Ibid., 166, emphasis in original.
[29] Ibid., 165.
[30] Anon., *A Dissection of the North Briton Number XLV, Paragraph by Paragraph* (London 1764), 5.

In response, the Crown's most senior law officers (the Whig Attorney General, Sir Charles Yorke, and a Tory solicitor general "big with zeal to the King",[31] Sir Fletcher Norton) advised that the *No. 45* could be prosecuted under the state's criminal seditious libel laws. This was despite its suspected composer's parliamentary privilege against criminal process.[32] Initiated by the moderate Whig George Grenville's new administration, the *No. 45*'s criminal prosecution was put in train by his Secretary of State (for the Southern Department), George Montague-Dunk, the second Earl of Halifax.

On 26 April 1763, Lord Halifax's first decisive action was to issue general warrants to royal messengers in ordinary. "[I]n his majesty's name", these warrants ordered them to:

> *make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, intitled*, THE NORTH BRITON, NUMBER XLV. SATURDAY, APRIL 23, 1763, *and them, or any of them, having found, to apprehend and seize, together with their papers, and to bring in safe custody before me to be examined concerning the premises, and further dealt with according to law.*[33]

The generality of Lord Halifax's warrants was borne out in two ways. First, by their failure to specifically lay "any information or charge".[34] Second, by their failure, neither to specifically name "any person whatsoever",[35] nor any particular locations to be searched or items to be seized. Although not unprecedented, the practice of issuing such warrants had long been impugned as "contrary to the spirit of the constitution".[36] This is because it was viewed as arrogating to the Crown an "infinite power to search",[37] even on the scantest suspicion of criminality.[38] As Lord Halifax later revealed in testimony at the trial of Wilkes' claim, before

[31] *The Grenville Papers, Being the Correspondence of Richard Grenville Earl Temple, K.G., and the Right Hon: George Grenville, Their Friends and Contemporaries*, vol. 2 (London 1852), 464, a characterisation of Norton during the *North Briton* controversy by the Whig Lord Chancellor, Robert Henley, the first Earl of Northington.

[32] The narrow exceptions to such a privilege were if a parliamentarian was arrested for "treason, felony, and actual breach of the peace": *R. v Wilkes* (1763) 95 E.R. 737, 742 (Pratt C.J.).

[33] Ibid., 737, emphasis in original.

[34] *Huckle v Money* (1763) 95 E.R. 768, 768.

[35] Ibid.

[36] *Wilkes v Wood* (1763) 98 E.R. 489, 490.

[37] Ibid.

[38] For evidence of the practice being impugned, often circumspectly, long before the 1760s, see Sir E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (London 1644), 162; Sir E. Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (London 1671), 176–78; and writing a decade after the publication of part four of the *Institutes*, M. Hale, *Pleas of the Crown: Or, a Methodical Summary of the Principal Matters Relating to the Subject* (London 1678), 93. For an indication that this literature was influential during the *North Briton* litigation, see *Money v Leach* (1765) 97 E.R. 1075, 1088 (Lord Mansfield): "Then as to authorities – Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary." For a detailed survey, see L.K. Donohue, "The Original Fourth Amendment" (2016) 83 University of Chicago Law Review 1181, 1207–21.

the first units of royal messengers carried out his orders, his general warrant – despite having already been issued – laid "dormant"[39] for three days. This was so intelligence as to who the "authors, printers, and publishers" actually were could be gathered.

III. During Michaelmas Term 1763 – *Huckle v Money*

In the late evening of Saturday 29 April 1763, four royal messengers arrived at Dryden Leach's residence and printing workshop on Crane Court, Fleet Street, in the City of London. Their suspicion was that it was out of that location that the first copies of the *No. 45* were being printed.[40] Among those present was Leach's journeyman printer, William Huckle. In a *vi et armis* writ of trespass, he declared that John Money (the royal messenger who personally executed Lord Halifax's general warrant upon arrival) first assaulted him, before falsely keeping him in the Crown's custody for six hours.[41]

Huckle's claim came for trial before Pratt C.J. and 12 special jurors at the Common Pleas' trial (or "nisi prius") sittings at Guildhall on 6 July 1763.[42] After deliberating for just eleven minutes, the jury returned a verdict for the journeyman with very large damages of £300. Wilkes, who was present at Guildhall, was reportedly "huzza'd"[43] by his supporters upon the foreman's announcement of the Crown's defeat. Solicitor General Norton, who had been lead counsel for the King's executing messenger at nisi prius, moved for a new trial on the ground that the *Huckle* jury's award of damages was "most outrageous".[44]

A. The Crown's New Trial Motion and Pratt C.J.'s Response

Submissions on the defeated Crown's post-trial motion were not heard before the central Common Pleas bench at Westminster Hall until Michaelmas term 1763, and on which a bare quorum, comprising the Chief Justice and Bathurst J., sat. In support of it, Serjeant Whitaker opened by citing *Chambers v Robinson*, a 1726 malicious prosecution case finally decided in banc by Raymond C.J.'s Court of King's Bench.[45] It was a clear precedent, Whitaker submitted, of a tort verdict having been set aside, and a new trial granted, for no other reason than

[39] *Wilkes v Wood* (1763) 98 E.R. 489, 494.
[40] Leach was also taken into custody and recovered damages of £400 upon a trial at Guildhall before Pratt C.J. immediately after Michaelmas term: *Money v Leach* (1765) 97 E.R. 1075, 1077.
[41] *Huckle v Money* (1763) 95 E.R. 768, 768.
[42] Huckle was one of some 14 journeymen printers "taken up for being concerned in printing the No. 45" and who secured (allegedly excessive) verdicts after *Huckle*: *The Scots Magazine*, vol. 25 (Edinburgh 1763), 410.
[43] Ibid.
[44] *Huckle v Money* (1763) 95 E.R. 768, 768.
[45] *Chambers v Robinson* (1726) 93 E.R. 844.

the excessiveness of the trial jury's damages award.[46] He then gave two reasons for why the *Huckle* jury's verdict should suffer the same fate. His first concerned the successful plaintiff's social rank. Huckle was "only a journeyman to Leech the printer".[47] As for his weekly wages, "a guinea".[48] Whitaker's second reason was that Huckle had only been "confined but a few hours, and very civilly and well-treated by the defendant".[49] Indeed, the evidence presented at the trial of Huckle's claim attests to the prosecuting Crown's seemingly calculated efforts to ensure he "suffered very little or no damages".[50] His imprisoners even went as far to treat him to steak and beer.[51] Thus, even if a jury could consider a man of Huckle's "inconsiderableness"[52] deserving of substantial damages, a sum of £300 was out of all proportion to any injury that he could have possibly proved to have suffered.

Opposing the solicitor general's motion was Serjeant Burland. In defence of the *Huckle* jury's verdict, he referred Pratt C.J. and Bathurst J. to their court's own, and far more recent, decision in *Leeman v Allen*, which it had delivered during Easter term 1763.[53] To the Chief Justice's own in banc speech, Burland attributed the radical proposition that "in cases of tort the Court will never interpose in setting aside verdicts for excessive damages".[54]

Pratt C.J. began his *Huckle* speech by responding to Whitaker's submissions. He agreed with the King's Serjeant insofar as "the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages".[55] As for Whitaker's sense of the precedential force of *Chambers*,[56] he also agreed to the extent that it appeared to be one of "few cases to be found in the books of new trials for torts".[57] For

[46] *Huckle v Money* (1763) 95 E.R. 768, 768. The *Chambers* jury had given £1,000 damages: see ibid., 768.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid. Doing as little as damage as possible, doubtless with a view to diminishing any possible tortious liability, is a theme common to contemporary trespass actions emerging from seditious libel prosecutions: *Wilkes v Wood* (1763) 98 E.R. 489, 491, where Wilkes' first witness testified that Lord Halifax's law-clerk "frequently bade the messengers be cautious and careful"; *Money v Leach* (1765) 97 E.R. 1075, 1077: "the defendants … did gently lay their hands on the said Dryden Leach"; *Entick v Carrington* (1765) 95 E.R. 807, 808: "they the defendants doing as little damage to the plaintiff as they possibly could."
[51] *Huckle v Money* (1763) 95 E.R. 768, 768.
[52] Ibid., 769.
[53] *Leeman v Allen* (1763) 95 E.R. 742. The *Leeman* jury had also given £300 damages for a trespass to land, assault and false imprisonment.
[54] *Huckle v Money* (1763) 95 E.R. 768, 768.
[55] Ibid.
[56] Ibid.
[57] Ibid. For a recent account of the development of the new trial remedy for excessive tort damages in pre-1763 aggravated tort cases, beginning with *Wood v Gunston* (1655) 82 E.R. 864, see Sinanis, "Aggravation in Tort", 11–20.

the Chief Justice, however, a more general point about the jurisdiction of common law courts to grant new tort trials solely on the ground of excessive damages was in order. "Courts of Justice," he reminded counsel, "have most commonly set their faces against them."[58] In a related trespass case decided in banc the following year, Pratt C.J. again conceded that *Chambers* seemed to have been "where ever a new trial was granted merely for the excessiveness of damages *only*".[59] But that did not mean that his Common Pleas was bound to do the same. This, he declared, was because *Chambers* "is not law".[60] Indeed, by Easter term 1764, a comprehensive survey of many other previous cases led Pratt C.J. to the general conclusion that "there is not one single case (*that is law*) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts".[61]

It is important to see that, contrary to Burland's Michaelmas term submission, Pratt C.J.'s view had not been that a court "will never" set aside an excessive tort verdict.[62] Rather his in banc remarks on the point supported two, rather less radical, propositions. First, that the practice of central courts granting new trials for excessive tort damages was far more limited than counsel for losing defendants, like Whitaker, often found convenient to acknowledge. Second, that any earlier instance of a central court seemingly having done so, like *Chambers*, was not legally binding. This was especially so in tort cases couched in peculiar circumstances, like *Huckle*, where in determining the full extent of a plaintiffs' recovery, judges, no more than jurors, "have no measure to direct them".[63]

B. The Solicitor General's Damages Argument at Trial

A closer dissection of Pratt C.J.'s *Huckle* speech reveals key clues about how Norton had engaged the question of Huckle's recovery at trial. Before expanding upon how the present case was "peculiarly circumstanced",[64] Pratt C.J. referred back to the summing-up remarks he had made before ultimately submitting the journeyman's claim to the jury at nisi prius. "I directed and told them," he recalled, "they were not bound to any certain

[58] *Huckle v Money* (1763) 95 E.R. 768, 768.
[59] *Beardmore v Carrington* (1764) 95 E.R. 790, 793, emphasis added.
[60] Ibid.
[61] Ibid., emphasis added.
[62] *Huckle v Money* (1763) 95 E.R. 768, 768. In *Leeman*, Pratt C.J. had specifically said that the new trial remedy "is universal, and extends to all sorts of actions": *Leeman v Allen* (1763) 95 E.R. 742, 743; and in *Beardmore* added: "We desire to be understood that this Court does not say, or lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial": see ibid.
[63] *Beardmore v Carrington* (1764) 95 E.R. 790, 792. Beardmore's counsel similarly described this as the problem of "no two Judges in the world" being able to agree on "what damages ought to be given": ibid.
[64] *Sharpe v Brice* (1774) 96 E.R. 557, 557 (De Grey C.J.), a phrase used in the course of the Common Pleas' later denial of a motion for a new trial, again for excessive trespass damages.

damages against the Solicitor-General's argument."[65] In a short concurrence, Bathurst J. made it clear that he agreed with the advice on damages that the Crown's defence strategy had compelled the Chief Justice to give the *Huckle* jury at trial. "I am of my Lord's opinion, and particularly in the matter of damages," Bathurst J. asserted, "wherein he directed the [*Huckle*] jury that they were *not* bound to certain damages."[66] Pratt C.J. then went on to emphatically declare that "the law has not laid down what shall be the measure of damages in actions of tort".[67] The measure, he insisted, is necessarily "vague and uncertain".[68]

As Pratt C.J.'s Michaelmas term speech clearly indicates, his advice to the *Huckle* jury they were not "bound" to any certain damages had been prompted by an argument of the solicitor general. The solicitor general's trial argument on damages is difficult to reassemble from the report of the Crown's in banc motion. Its essential gist, however, can be gleaned from the Chief Justice's further remarks upon it. He conceded, for example, that "the mere personal injury done to him [Huckle] was very small".[69] He also conceded that "if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20*l* damages would have been thought damages sufficient".[70] Pratt C.J. is not reported to have directly attributed these particular points to the solicitor general. Yet, given Pratt C.J.'s advertence back to the Guildhall trial proceeding, it is safe to assume that, in presenting the Crown's defence, Norton had strongly advocated the position that the jury were to treat the question of Huckle's damages as amenable to measured legal certainty. No doubt anxious to limit the Crown's full financial liability to those most recently set upon by its general warrant regime, he may even have pressed upon the *Huckle* jury the specific sum of £20.

The Crown's defensive strategy with respect to damages is further illuminated by the related 1764 case of *Beardmore v Carrington*, finally decided less than a year after *Huckle*.[71] Like Huckle's claim, that of Wilkes' friend, the London attorney Arthur Beardmore, arose out of allegedly seditious issues of another anti-government newspaper of the day: *The Monitor; or British Freeholder*. Hickman is surely right that Beardmore's own trespass claim (as well as that of his co-editor, John Entick) had "been encouraged by the [very large] awards made in those

[65] *Huckle v Money* (1763) 95 E.R. 768, 769.
[66] Ibid., emphasis in original. Adverting to the 14 *North Briton* verdicts already brought in, Bathurst J. said: "This is a motion to set aside 15 verdicts in effect; for all the other persons who have brought actions against these messengers have had verdicts for 200*l*": ibid.
[67] Ibid., 768.
[68] Ibid.
[69] Ibid.
[70] Ibid., 768–69.
[71] *Beardmore v Carrington* (1764) 95 E.R. 790.

concerning *The North Briton*".[72] Upon a nisi prius trial in early May 1764, and at which Pratt C.J. again presided, Beardmore secured a verdict with allegedly excessive damages of £1,000. Upon an Easter term motion to have it set aside, a unanimous Common Pleas again referred back to the manner of the defending Crown's engagement with the damages question at trial. The court in banc specifically recalled that it had been "strongly argued at the trial of this cause, that the jury were to strictly measure the damages by what the defendant had suffered by this trespass and six days and an half imprisonment".[73] It smacks of the same argument that, like Huckle's damages, so too Beardmore's could be determined according to an essentially certain, legally sanctioned, measure.[74] Incidentally, the report preserves what, in ultimately denying the Crown's post-trial motion, Pratt C.J. had continued to make of the argument "a gross absurdity".[75]

C. The Significance of the Jury's "Oath"

Pratt C.J.'s explicit reference to the English civil jury's "oath" in his *Huckle* speech bears particular note.[76] In 1962 (shortly before Lord Devlin's *Rookes* speech), Brandwen interpreted this reference as a judicial authorisation of juries to go beyond their oath in tort actions. So drastic was its effect that, in determining a tort plaintiff's damages, a jury would no longer be required "to confine itself to its oath to consider the mere personal injury only".[77] In this way, in *Huckle*, the English common law authoritatively, and for the first time, "permitted the invasion of the law of torts by [extra-compensatory] concepts commonly associated with criminal proceedings".[78] In short, Pratt C.J.'s Common Pleas "sanctioned a novel, free-wheeling [punitive] doctrine"[79] of civil remedies.

This interpretation is problematic. It too readily assumes that, up until Michaelmas term 1763, civil tort juries swore to determine a plaintiff's damages strictly according to, but never beyond, a compensatory principle. It is suggested that Pratt C.J.'s real reason for referring to the jury's oath was to address what he considered to be improper about the solicitor general's trial advocacy on the damages question. For the Chief Justice, the impropriety of Norton's argument appears to have been borne

[72] T. Hickman, "Revisiting *Entick v Carrington*: Seditious Libel and State Security Laws in Eighteenth-century England" in A. Tomkins and P. Scott (eds.), Entick v Carrington: *250 Years of the Rule of Law* (London 2015), ch. 2, 65.
[73] *Beardmore v Carrington* (1764) 95 E.R. 790, 793.
[74] See notes 65–68 above.
[75] *Beardmore v Carrington* (1764) 95 E.R. 790, 793.
[76] *Huckle v Money* (1763) 95 E.R. 768, 768–69.
[77] M. Brandwen, "Punitive-exemplary Damages in Labor Relations Litigation" (1962) 29 University of Chicago Law Review 460, 463.
[78] Ibid.
[79] Ibid.

out in light of the adjudicative task that – "by their oath" – civil juries actually undertook. As Oxford University's Vinerian Chair, William Blackstone, was soon to state in Book III of his *Commentaries on the Laws of England*, in civil actions, jurors swore no more than "well and truly to try the issue between the parties, and a true verdict to give according to the evidence".[80]

Incidentally, *Huckle* was not the first in banc hearing at which the Chief Justice had characterised the English jury's oath as, in effect, the only legitimate constraint upon their determination of questions of civil recovery. It is noteworthy that Pratt had acceded to the Common Pleas chief justiceship in January 1762 after almost five years as Attorney General. It was a post to which Lord Bute's predecessor, the Whig elder, Thomas Pelham-Holles, the first Duke of Newcastle, had recommended him, not least on account that "Mr. Pratt is a known Whig stock".[81] Pratt C.J. is first reported to have addressed the civil jury's oath during Easter term 1763. He did so in *Leeman*. In that case, a Common Pleas jury gave allegedly excessive damages of £300 against an armed group of reforming constables for unlawful entry, assault and false imprisonment. In the course of denying the defeated constables' motion for a new trial, Pratt C.J. had described the setting aside of "verdicts . . . given by twelve men upon their oaths" in stark terms – a judicially sanctioned "overthrow".[82] In his view, it seems, to attempt to bind an English jury's determination of damages to a certain, legally sanctioned, measure – as Norton clearly had – would be to improperly impinge upon their oath-bound duty to try the question of damages in each case solely "according to the evidence".[83]

D. The Peculiar Aggravating Circumstance of Money's Trespasses

For Pratt C.J., the ultimate key to upholding the *Huckle* jury's allegedly excessive verdict was to recapitulate the case's peculiar circumstance as it "appeared upon the evidence at trial".[84] This was the constitutionally questionable general warrant that Lord Halifax had first issued, and that, in obedience to it, Money went on to execute. The question of its legality had clearly been critical to the cases originally pleaded, and ultimately presented, by both sides.

[80] W. Blackstone, *Commentaries on the Laws of England, Book the Third* (Oxford 1768), ch. 23, 365.
[81] Sir L. Namier and J. Brooke, *The History of Parliament, House of Commons 1754–1790: III Members K–Y* (London 1985), 322. The phrase appears in a private letter sent by the Duke of Newcastle to his confidant, Philip Yorke, the first Earl of Hardwicke, dated 28 August 1756.
[82] *Leeman v Allen* (1763) 95 E.R. 742, 743.
[83] Blackstone, *Book the Third*, ch. 23, 365. See also note 155 below.
[84] *Huckle v Money* (1763) 95 E.R. 768, 768.

The Crown's original response to Huckle's declaration had been twofold. First, it took issue by plea of the general issue "not guilty".[85] It comprised a denial of all the material allegations that Huckle had made in support of a trespass to his person. Its effect was to put him to proof before a jury. Second, the Crown also took issue by special plea of justification. Whereas the former (general) plea denied all material allegations of trespass, the latter sought to justify Huckle's assault and imprisonment as, in all the circumstances, legal.[86] It was under the latter that the legality of a practice of State Secretaries issuing general warrants of arrest, search and seizure was put in issue at the trial of the journeyman's claim in early July.[87]

As Pratt C.J.'s in banc *Huckle* speech shows, at trial, Huckle's counsel also had relied on the illegality of Lord Halifax's warrant for two purposes. The first went to the question of liability: to show that Money's trespasses were unjustified. The second went to the question of the full extent, even the nature, of Huckle's damages: to show that, because the illegal general warrant had sufficiently touched the *vi et armis* interferences specifically declared upon, he was deserving of larger damages. That, in aggravation of damages, the journeyman's counsel had relied upon Lord Halifax's outrageous general warrant is made clear from Pratt C.J.'s later in banc speech, in which he laid bare his own opposition to it as constitutional. As he declared:

> the small injury done to the plaintiff [Huckle], or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them.[88]

As for the extent, or indeed nature, of the increase to Huckle's damages warranted by the case's aggravating circumstance, it had been properly for the *Huckle* jury to determine. So much so, that Pratt C.J. thought it entirely improper for him, albeit sitting in review of their £300 award, to say what "I should have given if I had been upon the jury".[89]

[85] As part of disproving the general issue, Huckle's counsel successfully "proved that the No. 45 of the *North Briton* was not printed in the house where the plaintiffs were employed, and that neither they nor their master had any hand in printing it": *Scots Magazine*, 411.

[86] On the contemporary commonality of defendants pleading both generally and specially in the same action, see Sir J. Baker, *An Introduction to English Legal History*, 5th ed. (Oxford 2019), 96–97.

[87] *Huckle v Money* (1763) 95 E.R. 768, 768: "the defendant attempted to justify under the general warrant of a Secretary of State"; and 769: "King's Counsel … endeavour[ed] to support and maintain the legality of the warrant in a tyrannical and severe manner."

[88] Ibid., 769.

[89] Ibid.

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E. Properly Conceiving the New Trial Motion for Excessive Damages

It has been recently said that, over the course of the eighteenth century, "jury awards became subject to 'review' by the motion of seeking a new trial as a *matter of law*".[90] The apparent suggestion is that, the more often central judges sat in review of allegedly excessive tort awards, the greater their inclination to make determinations about whether the English common law allowed juries to award particular types of damages. In aggravated tort cases, this included damages of a distinctly extra-compensatory nature. This suggestion, however, is open to question. Again, it may too readily assume that, simply by "ruling" upon such new trial motions, eighteenth-century judges necessarily laid down what A.W.B. Simpson dubbed "rules of law"[91] on civil damages. And the consequence of in banc courts establishing such rules, or doctrines (including a doctrine of exemplary damages, in Michaelmas term 1763) was for trial judges to begin to exert a decidedly *legal* form of direction on, or control over, a jury's determination of a tort plaintiff's recovery.

Eighteenth-century juries did not, of course, have total *carte blanche* over the damages question.[92] Not only did trial judges take interest in the question, but they often sought to influence the jury's determination of it. Indeed, in his 1764 *Beardmore* speech, Pratt C.J. himself considered it proper for them "to advise, but not to control juries".[93] Trial judges exercised this advisory function via the device of judicial comment on the evidence. According to Helmholz, it was via this device that, historically, they had been able to "guid[e] the discretion of juries in making the award".[94] Indeed, by the middle of the eighteenth century, Washington suggested that trial judges had become more confident that their guiding advice to juries regarding damages "was of weight".[95]

Yet, instances of trial judges commenting on evidence that tort plaintiffs specifically gave in aggravation of damages contemporaneous with the *North Briton* litigation are scarce. This is because it is not until later in the eighteenth century that reports of tort trials begin to regularly appear. Despite their scarcity, contemporary pamphlet reports, typically of scandalous tort trials involving high-profile litigants, shed interesting light. One example is the pamphlet report of the 1757 criminal

[90] Taliadoros, "Roots of Punitive Damages", 262, emphasis added.
[91] A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts" (1979) 46 University of Chicago Law Review 533, 550.
[92] J. Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* (New York 2006), 66.
[93] *Beardmore v Carrington* (1764) 95 E.R. 790, 793.
[94] R.H. Helmholz, "Damages in Actions for Slander at Common Law" (1987) 103 L.Q.R. 624, 627.
[95] G.T. Washington, "Damages in Contract at Common Law II" (1932) 48 L.Q.R. 90, 91, 90–91, suggesting by the late 1760s, contract actions saw a "transition to a more direct [legal] control". On this point, see also Simpson, "Horwitz Thesis", 549–51.

conversation trial between two senior naval officers.[96] Before submitting admiral Charles Knowles' claim to the jury, the presiding Chief Justice of the King's Bench, Lord Mansfield, is reported to have "delivered a very learned and ingenious charge to the jury, setting forth the evidence on both sides in a plain and distinct manner".[97] What counsel described as the "Heinousness and Obliquity"[98] of Captain Gambier's affair with the plaintiff's adulterous wife was largely borne out by the outrageous circumstance that it began in admiral Knowles' own residence in colonial Jamaica, before then continuing on board a ship bound for London.[99] Indeed, this and other evidence Lord Mansfield reportedly "dwelt some Time on".[100] Yet, there is little indication that, via his charge to the *Knowles* jury, Lord Mansfield had sought to advise them on the question of damages, much less to legally direct or control their determination of it.

As discussed above, at the trial of Huckle's trespass claim in early July 1763, Pratt C.J. had, as he put it, "directed" the *Huckle* jury on their adjudicative role in determining damages.[101] A short report of the Guildhall proceeding in the popular Scottish press suggests that his advice had been brief; not unlike Lord Mansfield in 1757, he is reported to have "summed up the evidence, and left the damages to the jury".[102] As Pratt C.J.'s later in banc speech compellingly suggests, the reason he advised the *Huckle* jury had been to dispel the very legal control that the solicitor general had improperly set out to exert over their determination. Contrary to Norton's argument, the thrust of his advice had been to assure them that, as to their nature and extent, Huckle's damages were not determinable according to any legal measure of damages. In turn, their ultimate decision to award such damages as would make a public example of the prosecuting Crown can be seen as one over which the presiding Chief Justice emphatically refused to *legally* direct, much less control.

Given, therefore, what the sources suggest about Pratt C.J.'s approach to the question of Huckle's damages at trial, it is implausible that his denial of the Crown's new trial motion for excessive damages during Michaelmas term 1763 in any way comprised an authoritative "ruling" to the effect that damages of an extra-compensatory nature were now recoverable in tort "*as a matter of law*". Properly conceived, he had declined, emphatically, the Crown's invitation to impeach the *Huckle* jury's award as substantively unjust.

[96] Anon., *The Proceedings on the Trial of Captain Gambier, Late of His Majesty's Ship the Severn, on an Action on the Case Where Damages Sued for Was 10,000l* (London 1757).
[97] Ibid., 56.
[98] Ibid.
[99] Ibid., 7–8.
[100] Ibid., 56.
[101] *Huckle v Money* (1763) 95 E.R. 768, 769.
[102] *Scots Magazine*, 411.

F. Pratt C.J.'s First Defence of the Jury's Province

Yet, what seems to have made Pratt C.J.'s ultimate denial of the Crown's motion in *Huckle* noteworthy was that he chose to express his personal view that, in ostensibly determining the plaintiff's damages according to an exemplary measure, the *Huckle* jury had done justice in a substantive sense.[103] Indeed, it was in a display of solidarity with a English civil jury threatened with "overthrow" that in his Michaelmas term speech he confessed: "I think they have done right in giving exemplary damages."[104] It cannot be certainly known why in *Huckle* Pratt C.J. chose, not simply to uphold the jury's allegedly excessive verdict, but to publicly commend the primary purpose for which they had apparently returned it. A reasonable guess is that he had seen a jury collectively defy a solicitor general who, in presenting the Crown's defence, had set out not merely to tie their determination of damages to a certain measure, but to do so on the false pretence that the common law bound them to.[105]

Viewed in this context, it is rather difficult to see how Pratt C.J.'s use of the phrase "exemplary damages" comprised any explicit articulation of a "novel" damages doctrine. The more compelling interpretation is that he used it in support of a proposition of adjudicative competence. As a closer consideration of Burland's submissions in support of the *Huckle* jury's allegedly excessive verdict show, this was the proposition "that the jury are the sole judges of the damages".[106] Before the *North Briton* litigation, the only previous occasion on which Pratt C.J. is reported to have engaged with this proposition was during Easter term 1763, again in *Leeman*. With seemingly greater conviction than Lord Mansfield's King's Bench,[107] Pratt C.J. appears to have embraced the reforming constables' Easter term motion as an opportunity to articulate, in sufficiently general terms, "the facts upon which the Court could pronounce the damages to be excessive".[108] This involved formulating a rule according to which judges may legitimately overthrow tort juries on

[103] This was not the first reported instance of a reviewing judge supposing that a tort jury may have applied an exemplary measure: *Wilford v Berkeley* [K.B. 1758] Inner Temple Library M.S. 195, fol., 250 (Lord Mansfield), cited in J. Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill 2005), 342: "[the jury's award was] for public example, as well as private recompense."

[104] *Huckle v Money* (1763) 95 E.R. 768, 769.

[105] As a barrister, Pratt had already advocated a larger province of criminal seditious libel jury adjudication: *R. v Owen* (1752) 18 St. Tr. 1203, 1228.

[106] *Huckle v Money* (1763) 95 E.R. 768, 768. See also *Barker v Dixie* (1736) 95 E.R. 180, 181 (Hardwicke C.J.): "the language of the law is that the jury are judges of damages."

[107] See *Wilford v Berkeley* (1758) 97 E.R. 472, 472, where Lord Mansfield commented that, in determining damages, the "circumstances" of criminal conversation cases were "properly and solely under the cognizance of the jury". In *Beardmore*, Pratt C.J. later attributed to Lord Mansfield's *Wilford* speech the proposition that "in cases of tort the jury are the only proper judges of the damages": see *Beardmore v Carrington* (1764) 95 E.R. 790, 793.

[108] *Beardmore v Carrington* (1764) 95 E.R. 790, 793.

this particular ground.[109] A comparison of the terms of Pratt C.J.'s denial of the Crown's post-trial motion in Michaelmas term, and that of the constables' in Easter term, shows that his preferred formulation would make any judicial inroad upon an English civil jury's adjudicative power to freely determine questions of damages in tort, if not impossible, then certainly very difficult. Restating his earlier formulation of the rule in *Leeman*,[110] in order to be legitimately set aside, any reviewing common law court would need to satisfy itself that "all mankind at first blush"[111] would consider the impugned award an outrage.

Yet, in repeating his *Leeman* formulation in *Huckle*, there is a noticeable intensification in Pratt C.J.'s tone. Whereas in *Leeman* he asked judges to "be very cautious how they overthrow [jury] verdicts",[112] in *Huckle* he declared it "very dangerous for the Judges to intermeddle in damages for torts".[113] Read in conjunction with his distinctly commendatory use of the phrase "exemplary damages", what has been described as Pratt C.J.'s "intemperate language"[114] in denying the defeated Crown's Michaelmas term motion can be adequately explained by the manner of Norton's engagement with the *Huckle* jury on the question of damages at trial. It is a tempting speculation that Pratt C.J. had welcomed the solicitor general's new trial motion as an opportunity to defend, from within the royal precincts of justice at Westminster, yet another civil tort jury threatened with overthrow.[115] Unlike in *Leeman*, however, in *Huckle*, the threat had been more menacingly made by a defeated, even humiliated, Crown.

During the litigation of Huckle's trespass claim, therefore, the Whig-leaning Common Pleas Chief Justice may, yet again, be seen championing the adjudicative proposition that Burland submitted to his reviewing court in banc in two ways. Prompted by the solicitor general, he first did so at trial to ensure that the *Huckle* jury's award would be determined solely within their province. Prompted again by their attempted overthrow, he did so a second time in banc to further delegitimise a practice of central judges "intermeddling" too freely with a question that they, themselves, were powerless to determine.

[109] For Pratt C.J., the rule that seemed to have guided Raymond C.J. in *Chambers* was entirely unsatisfactory: "to give the defendant a chance of another jury": see ibid.

[110] *Leeman v Allen* (1763) 95 E.R. 742, 743: "[the damages must be] unreasonable and outrageous indeed, as if 2000*l* or 3000*l* was to be given in a little battery, which all mankind might see to be unreasonable at first blush."

[111] Pratt C.J. went on to repeat, for a third time, the same formulation of the rule in *Beardmore v Carrington* (1764) 95 E.R. 790, 793.

[112] *Leeman v Allen* (1763) 95 E.R. 742, 743.

[113] *Huckle v Money* (1763) 95 E.R. 768, 769.

[114] Note, "The Anomalous Doctrine of Punitive Damages" (1918) 5 Virginia Law Review 492, 492.

[115] I have recently suggested that *Leeman* provides sound evidence of Pratt C.J. having already "looked to assert the constitutional importance of civil trial by jury as a buttress of English liberties": Sinanis, "Aggravation in Tort", 42.

IV. Immediately After Michaelmas Term – *Wilkes v Wood*

In the late morning of Saturday 30 April 1763, four royal messengers followed John Wilkes to his residence on Great George Street, in the City of Westminster on the suspicion that he had composed the *No. 45*. They were accompanied by Lord Halifax's deputy, Robert Wood. Following Wilkes' arrest,[116] Wood ordered and oversaw the collection and confiscation of his private papers, a two-hour operation.[117] In a *vi et armis* writ, Wilkes declared that Wood had unlawfully entered his house and seized his private papers. He laid extravagant damages of £5,000.

A. The Trial of Wilkes' Trespass Claim

Wilkes' claim came for trial at bar before Pratt C.J. and a special Middlesex jury at the Common Pleas at Westminster Hall on 6 December 1763. Wilkes' lead counsel was Serjeant Glyn, supported by the Recorder of London and a quartet of Whig-sympathising barristers. The Deputy Secretary's lead counsel was, again, Solicitor General Norton, supported by three King's Serjeants. The Crown's defence strategy remained, in substance, the same: initially, the general issue plea of "not guilty";[118] and a special justification, again giving it "the Opportunity . . . of bringing the Validity of the Warrant into Debate".[119]

That the presiding Chief Justice had recently used the phrase "exemplary damages" in the course of protecting the *Huckle* jury from government-led overthrow must have influenced the tenor of argument made before the trial court. For Wilkes' counsel, it surely showed that, in determining Wilkes' damages, they could properly act upon aggravating evidence of an unconstitutional general warrant. For Norton, it demonstrated the need to enlarge upon mitigating circumstances should the Crown's defence pleas be rejected again. It was in the presentation of these arguments immediately after Michaelmas term that the phrase "exemplary damages" sounded again.

Its second reported appearance was in the course of Glyn's opening statement to the *Wilkes* jury. He reportedly began by "enlarg[ing] fully, on the particular circumstances of the case",[120] an indication perhaps that, for Wilkes' counsel, the real contest was not over the existence of

[116] Upon which Wilkes' lawyers applied for a habeas corpus to have him released from the Tower of London. Pratt C.J. agreed with Wilkes' counsel that, as a parliamentarian, Wilkes was entitled to privilege: *R. v Wilkes* (1763) 95 E.R. 737, 741–42.

[117] *Wilkes v Wood* (1763) 98 E.R. 489, 491, being the testimony of Wilkes' butler.

[118] Ibid., 493, 498.

[119] Anon., *A Defence of the Minority in the House of Commons, on the Question Relating to General Warrants* (London 1764), 11, though the extent to which the Crown actually relied upon the justification at trial, despite having pleaded it, is unclear. Curiously, the Government only added its special justification in early November upon a motion to amend its pleading: *Wilkes v Wood* (1763) 95 E.R. 767.

[120] *Wilkes v Wood* (1763) 98 E.R. 489, 490.

Wood's tortious liability, but over its full extent and, indeed, nature. "In vain has our house been declared, by the law, our asylum and defence," Glyn told the jury, "if it is capable of being entered, upon any frivolous or no pretence at all, by a Secretary of State".[121] "[I]f found to be legal", he warned, Lord Halifax's general warrants "would shake that most precious inheritance of Englishmen."[122]

B. Repetition of the Phrase "Exemplary Damages"

Yet, it was Glyn's characterisation of the primary injury for which Wilkes sought damages that is particularly noteworthy. Addressing the confiscation of Wilkes' manuscripts, Glyn insisted that "of all offences, it was the least capable of reparation".[123] "[N]o reparation whatsoever," he pressed it upon the jury, "could be made."[124] It is tempting to assume that Glyn's immediate emphasis on the irreparability of Wilkes' injuries was intended to pre-empt a damages argument that the, now reappearing, solicitor general had already unsuccessfully made before a jury of the chief justice (namely, that in such cases, the common law bound juries to a clear and certain measure).[125] Before yielding to the Recorder, Glyn again pressed it upon the *Wilkes* jury that the "fatally wounded"[126] constitution was a proper basis for some punitive increase of Wood's full financial liability. He exhorted them to express their collective "resentment . . . by large and exemplary damages".[127] "Trifling damages"[128] would send entirely the wrong message.

The solicitor general's engagement with the damages question was manifold. It included an early admission of being "at a loss . . . to understand what Mr Wilkes meant by bringing an action against Mr Wood".[129] "[H]e was neither the issuer of the warrant," Norton pointed out, "nor the executioner of it."[130] As for the wound to the constitution, he queried why Lord Halifax himself, who had issued the general warrant, had not been the Crown servant named in Wilkes' *vi et armis* writ. By pursuing his deputy, Norton disparaged Wilkes for smuggling via a "private [tort] action" a public "cause of all the good people of England".[131] It was a clever argument. In part, it may have intended to distance Lord Halifax's non-issuing and non-executing deputy, Wood,

[121] Ibid.
[122] Ibid.
[123] Ibid. See also *Entick v Carrington* (1765) 95 E.R. 807, 817–18: "for papers are often the dearest property a man can have."
[124] Ibid.
[125] *Huckle v Money* (1763) 95 E.R. 768, 769.
[126] *Wilkes v Wood* (1763) 98 E.R. 489, 490.
[127] Ibid.
[128] Ibid.
[129] Ibid., 493.
[130] Ibid.
[131] Ibid.

from the evidentiary basis upon which Wilkes sought an aggravation of his damages.

But, by itself, Norton's argument was not enough. In a further attempt to induce the jury to weigh lightly upon the Secretary's deputy in damages, he asked them in a rhetorical jab: "[i]s Mr, Wilkes, at any event entitled to tenfold damages?"[132] In explaining why he was not, Norton drew the jury's attention to the enormity of the seditious libel that the *No. 45* now stood accused. Recalling how it had been received in Parliament, he reminded them that it was "of such nature, that when it was before the two Houses . . . not one single person, in either House, ever uttered one single word in defence of it".[133] Like Glyn, he too exhorted the *Wilkes* jury that "so far from thinking him worthy of exemplary damages . . . they would view him in his true and native colours".[134]

By the trial of Wilkes' trespass claim in early December 1763, Norton's aversion to Wilkes seems to have only grown. After the *No. 45*'s publication in late April, the solicitor general was referred to by name in subsequent issues of the *North Briton*. One example is *No. 52*, which appeared soon after the success of Huckle's claim in early July. After describing George III's Chamber Composer, the Scottish musician, James Oswald, "a much better Christian than Musician", Wilkes derisively bracketed: "(I think my friend Norton cannot call that a libel)."[135] Furthermore, upon the moderate Whig Charles Yorke's resignation of the attorney-generalship in early November 1763, it was Norton who moved *ex officio* to file a criminal information against Wilkes as the *No. 45*'s suspected composer, and in the more government-minded of common law fora – Lord Mansfield's King's Bench.[136] Given the acrimony that had rankled between Wilkes and Norton during the closing months of 1763, Norton's vicious portrayal of Wilkes' "colours" to the jury is unsurprising: "a vile and wicked incendiary, and sower of dissension amongst His Majesty's subjects."[137]

In a departing volley, Glyn insisted that Lord Halifax's illegal general warrant had allowed "very improper persons"[138] to pry into Wilkes' most private affairs. One final time, he called for "an increase of damages"[139] on that score. Before resting, he expressed to the *Wilkes* jury his

[132] Ibid.
[133] Ibid.
[134] Ibid., 494.
[135] J.C. Wilkes (ed.), *The Political Controversy: Or Weekly Magazine of Ministerial and Anti-ministerial Essays*, vol. 4 (London 1763), 518.
[136] See *Wilkes v R.* (1768) 97 E.R. 123, 123.
[137] *Wilkes v Wood* (1763) 98 E.R. 489, 494.
[138] Ibid., 498.
[139] Ibid.

confidence that "they would find a verdict for the plaintiff, with large and exemplary damages".[140]

The bandying around of the phrase "exemplary damages" by Glyn and Norton in December must have been influenced by Pratt C.J.'s recent use of it in *Huckle*. But it should not be supposed that, by repeating it, Glyn and Norton were making substantive submissions before the presiding Chief Justice about the applicability, to the aggravating facts, of a novel damages doctrine in the midst of positive recognition by his court. Their allusions to an exemplary measure strike as little more than non-technical, essentially informal, exhortations; and in every instance, they were directed squarely at the twelve *Wilkes* jurors. In this way, they are perhaps better interpreted in the context of a wider political discourse about the legality of general warrants.

Writing in response to the House of Commons' first debate of the legality question in mid-February 1764, a partisan pamphlet noted the "Language"[141] that, over a period of months, had come to mark this discourse. It specifically criticised the suggestion that the legalisation of general warrants in England risked "annihilat[ing] *Magna Charta*", or, indeed, any another "Pillar of the Constitution".[142] It had been in the course of suggesting as much two months earlier that Glyn had exhorted a "jury of Englishmen"[143] to award Wilkes "exemplary damages".[144] It should also be noted that it had been in the form of highly emotive jury appeals that trial advocates are ever reported to have alluded to extra-compensatory measures before Wilkes' claim came on for trial in December 1763. For example, at the trial of admiral Knowles' criminal conversation claim six years earlier, his counsel opened, like Glyn, by exhorting the jury to "punish the defendant, as may deter".[145] Appealing this time to the jury's moral sensibilities, what was at risk, he warned them, was "the peace of society, and of that tranquillity and happiness, which ought to subsist in every family".[146]

C. Pratt C.J.'s Advice to the Wilkes Jury on Damages

Given both Glyn and Norton's strong appeals to the *Wilkes* jury, it is unsurprising that Pratt C.J. would, once again, advise them on the question of the plaintiff's damages. His rehearsal of the evidence,

[140] Ibid.
[141] Anon., *A Defence of the Majority in the House of Commons, on the Question Relating to General Warrants, in Answer to the Defence of the Minority* (London 1764), 46.
[142] Ibid.
[143] *Wilkes v Wood* (1763) 98 E.R. 489, 490.
[144] Ibid., 490, 498.
[145] Anon., *Trial of Captain Gambier*, 11. See also Anon., *The Tryals of Two Causes Between Theophilus Gibber, Gent., Plaintiff, and William Sloper, Esq., Defendant* (London 1740), 26: "[there] appears no remedy against this conduct except another verdict as may be a sufficient warning to him."
[146] Ibid.

however, must be understood in the context of his specific directions regarding the primary question of the existence of Wood's tortious liability. As the Chief Justice commented, the common law bound the *Wilkes* jury to return a verdict for Wilkes, with damages, should Wood's defensive pleas be rejected. Conversely, satisfactory proof, both of Wood's limited involvement in the occupation of Wilkes' house and confiscation of his papers, as well as the particulars of the special justification, would require a verdict for Lord Halifax's deputy.[147]

The particulars of the defendant's special justification are not clearly specified in the *Wilkes* report. At least one appears to have been the legality of Lord Halifax's general warrant.[148] The solicitor general's principal means of establishing its legality had been to cite to the trial court "office precedents"[149] showing that the historical practice of State Secretaries issuing general warrants had been "constant [and] uninterrupted".[150] It is unsurprising, in turn, that Pratt C.J. went on to closely engage the legality question in his charge to the *Wilkes* jury. However well precedented, in doing so, he did not suppress his own view that, faithful to his Whig principles, warrants of a general disposition were, as he put it, "totally subversive of the liberty of the subject".[151] But it was ultimately for the jury to decide. "If they should be found to be legal", he pressed it upon them, "they are certainly of the most dangerous consequences".[152] The implicit suggestion is that a finding that the practice was legal would, at least in part, prove the Crown's special justification.

It was then that Pratt C.J. told the *Wilkes* jury that, if they found the practice to be without legal foundation, they "*must* aggravate damages".[153] His reported use of the imperative form "must" cannot be ignored. It was surely intended to dispel any doubt from the jurors' minds that the constitutional "wound" inflicted by Lord Halifax's general warrant could be properly acted upon in determining the full extent of Wilkes' recovery.

But it was not all one way. With equal propriety, Pratt C.J. made it clear to them that, should they be satisfied that general warrants had been "the

[147] *Wilkes v Wood* (1763) 98 E.R. 489, 498.

[148] Another appears to have been whether Wilkes really had composed the *No. 45*, and thus "covered by the description in the warrant of the [specific] person to be arrested": "The General Warrant on which John Wilkes was Arrested, 30 April 1763" in D.B. Horn and M. Ransome (eds.), *English Historical Documents 1714–1815* (London 1956), ch. 65, 256; *Wilkes v Wood* (1763) 98 E.R. 489, 498 (Pratt C.J.): "If upon the whole they [the jury] should esteem Mr. Wilkes to be the author and publisher, the justification would be fully proved."

[149] *Wilkes v Wood* (1763) 98 E.R. 489, 499.

[150] Ibid., 496, and with Norton having contended that general warrants "had existed before, at, and since the Revolution, and had been till this case unimpeached": see ibid., 493.

[151] Ibid., 498.

[152] Ibid.

[153] Ibid., 499, emphasis added.

constant practice of the office", they may act upon that circumstance "in mitigation of [Wilkes'] damages".[154] As to how they would come down, it was a matter for them. Indeed, before leaving them to deliberate, he simply asked the *Wilkes* jury – as, indeed, "by their oath" they had already sworn – "to do justice, according to the evidence".[155]

It bears note that, in advising the *Wilkes* jury on the question of damages, Pratt C.J. is reported not to have used the phrase "exemplary damages". Given the lawmaking significance often attributed to his very recent use of it in *Huckle*, this may seem odd. If his recent use of it during Michaelmas term genuinely involved the tentative articulation of exemplary damages as "a formal legal doctrine", then it is not unreasonable to have expected him to have repeated it in *Wilkes*.

Although Pratt C.J. did not use the phrase "exemplary damages" in his summing-up immediately after Michaelmas term, he did more than merely affirm for the *Wilkes* jury that Wood's execution of an unconstitutional general warrant may properly aggravate Wilkes' damages. In an often-cited passage, he went on to comment as follows:

> I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.[156]

In making the above comment, Pratt C.J. has been interpreted – including, most authoritatively, by Lord Devlin in *Rookes*[157] – as having "directed" the *Wilkes* jury as to how they may now lawfully determine yet another *North Briton* defendant's full financial liability. The veracity of this interpretation seems largely to depend on the crucial assumption that the "opinion on another occasion" to which Pratt C.J. referred was in fact that of his Common Pleas, sitting in banc, in *Huckle*. This assumption has been explicitly made: in further alluding to damages above compensation at the trial of Wilkes' claim, Pratt C.J. has been interpreted as having gone on to give "express judicial approval to this [the *Huckle*] development".[158] Thus, as it had been supposedly directed to the *Wilkes* jury immediately after Michaelmas term, the common law's – now expressly approved – doctrine of exemplary damages comprised three,

[154] Ibid. Notably, Pratt C.J. later added: "It is my opinion the office precedents … are no justification of a practice in itself illegal": see ibid.
[155] Ibid. See Blackstone, *Book the Third*, ch. 23, 365.
[156] Ibid., 498–99.
[157] *Rookes v Barnard* [1964] A.C. 1129, 1222 (Lord Devlin): "Pratt C.J., in his direction to the jury, said: 'Damages are designed'." See also Taliadoros, "Roots of Punitive Damages", 258: "Lord Chief Justice Pratt instructed the jury that '[d]amages are designed'."
[158] H. Ogunniran, "Awarding Exemplary Damages in Tort Cases: The Dilemma of Nigerian Courts" (1992) 36 Journal of African Law 111, 112.

distinctly extra-compensatory, measures.[159] The first was punitive: by applying it, the *Wilkes* jury may inflict a measure of deprivation reflecting the enormity of the defendant's aggravated trespass. The second was deterrent: they may seek to prevent a similar civil proceeding being brought again. The third may be described as exemplary: to convey their collective disapproval of a general warrants case against which the Crown had, once again, risen to defend.[160]

After deliberating for less than half an hour, the *Wilkes* jury returned a verdict ("upon both the issues"[161]) for Wilkes. His damages were determined in the very large and ostensibly exemplary sum of £1,000. It may, in turn, be supposed that the *Wilkes* jurors were the first English civil jury ever to determine a tort plaintiff's aggravated recovery by applying a doctrine of exemplary damages as "laid down" to them by a trial judge.

D. The Solicitor General's Defiant Damages Argument

Despite its modern influence, Lord Devlin's authoritative interpretation of Pratt C.J.'s further comment on the question of Wilkes' damages as involving a legal "direction" was itself based on a shortened excerpt of what Pratt C.J. had reportedly said. Crucially, Lord Devlin's excerpt omitted the phrase that had prefaced the Chief Justice's supposed "direction". Immediately prior to referring to one of his recently delivered opinions, Pratt C.J. had said: "[n]otwithstanding what Mr. Solicitor General has said."[162] This, in itself, certainly supports the possibility that he had directed his further comment, as much to the deputy's lead counsel, as to the "sole judges" of the damages question.

As Hickman recently points out, by the closing weeks of 1763, Solicitor General Norton must have been "shocked by the level of the [*North Briton*] awards".[163] Nonetheless, a more discerning reading of the entire *Wilkes* report reveals that he had failed to temper his argumentative strategy regarding damages. With a criminal information already filed against Wilkes, it seems that the Crown was especially intent on depriving Wilkes of much of the £5,000 damages he had laid in his declaration. Indeed, in persisting with this strategy, the report suggests that Norton went beyond merely pressing certain matters firmly upon the jury in mitigation of damages.

[159] Pratt C.J.'s use of the term "satisfaction" may connote more easily ascertainable injury, such as Wilkes' broken locks and the specific "papers [that] were taken away", see *Wilkes v Wood* (1763) 98 E.R. 489, 499, as well as less easily ascertainable injury, such as the insult or humiliation caused by the Crown's invasion of his property and "promulgation of … [his] most private concerns": ibid., 490.
[160] *Huckle v Money* (1763) 95 E.R. 768, 769.
[161] *Wilkes v Wood* (1763) 98 E.R. 489, 499.
[162] Ibid., 498.
[163] Hickman, "Revisiting *Entick v Carrington*", 64.

After he declared Wilkes unworthy of "exemplary damages",[164] he presented a familiar argument. "Damages," he admonished the *Wilkes* jurors, "should always be reckoned according to the injury received."[165] Norton's comment is reminiscent of that which he had previously made to the *Huckle* jury at Guildhall in early July, and which during Michaelmas term, Pratt C.J. not only went on to recall, but rebuke.[166] Yet, despite Pratt C.J.'s firm opposition to this line of argument, Norton's repetition of it in *Wilkes* appears to have carried a decidedly more threatening tone. "A jury that ever acted on any other principles," he avowed, "certainly forswore themselves."[167] Norton was undoubtedly referring to extra-compensatory principles of recovery. And his less than veiled threat to the *Wilkes* jury was that, should they "reckon" Wilkes' damages according such principles, they would perjure themselves. As the eighteenth-century legal lexicographer, Giles Jacob, explained, it had been via the medieval writ of attaint that defeated litigants in actions at common law set out to "stain or *taint* the Credit of the Jury with Perjury".[168] Although its severity had waned over time, the purpose of the attaint remedy remained the subjection of perjuring jurors "to Punishment by the Common Law".[169] By the 1760s, however, any suggestion that an attaint could lie against an English civil jury solely for giving excessive damages was manifestly absurd.[170] Indeed, in a 1757 speech in banc, Lord Mansfield had already roundly dismissed it as a "mere sound in every case".[171]

It could not have surprised the presiding Chief Justice that it was the defending solicitor general who had threatened the *Wilkes* jurors with attaint. It appears to have been entirely characteristic of Norton's manner of trial advocacy. A barrister who appeared on circuit before Lord Mansfield in 1784 recalled a dinner at which the Chief Justice shared "anecdotes of persons who had practised before him, with their different manners of conducting business".[172] Norton earned the first mention. Despite having personally recommended him for the vacant solicitor-generalship in 1762,[173] Lord Mansfield's assessment was frank. "Sir Fletcher Norton's art was very likely to mislead a Judge and jury,"

[164] *Wilkes v Wood* (1763) 98 E.R. 489, 494.
[165] Ibid.
[166] See notes 65–70 above.
[167] *Wilkes v Wood* (1763) 98 E.R. 489, 494.
[168] G. Jacob, *A New Law Dictionary: Containing the Interpretation and Definition of Words and Terms in the Law*, 2nd ed. (London 1762), s.v. "attaint", emphasis in original.
[169] Ibid.: "now there is a pecuniary Penalty appointed."
[170] The last reported suggestion to this effect appears some 100 years earlier: see *Roe v Hawkes* (1663) 83 E.R. 316, 316 (Wyndham J.): "if the damages are excessive an attaint lies."
[171] *Bright v Eynon* (1757) 97 E.R. 365, 366.
[172] W. Adam, *A Practical Treatise and Observations on Trial by Jury in Civil Causes, as Now Incorporated with the Jurisdiction of the Court of Session* (Edinburgh 1836), 119.
[173] Namier and Brooke, *House of Commons*, 214.

he remarked, "and with him I found it more difficult to prevent injustice being done than with any person who practised before me."[174]

E. Pratt C.J.'s Second Jury Defence

Viewed in the neglected context of Norton's persistent, even defiant, damages argument, it is difficult to persist in the view that it was the *Wilkes* jurors alone to whom Pratt C.J. had aimed his further summing-up comment on damages. It is also implausible that, in addressing that question, he had purported to "direct" them about how the common law now allowed them to determine, not only the full extent, but also the nature of Wilkes' damages. Had Pratt C.J. genuinely purported to legally direct the *Wilkes* jury on the question of damages, it may seem odd that he is not reported to have directly addressed them in the second person. There is no indication, for example, that he told the jury: "in determining the damages, *you* are now allowed"; or, indeed, "the law now allows *you*" (emphasis added). This perhaps makes it probable that the *Wilkes* jury were, indeed, not the intended target of his further comment.

Another important, though often overlooked, feature of Pratt C.J.'s putative direction was his insistence on whose "power" it was to "give damages for more than the injury received"[175]: the jury's. By referring to what an English civil jury have "in *their* power", it is more compelling that, in alluding to extra-compensatory measures of damages, his actual purpose had been to champion the same proposition of adjudicative competence that Burland had submitted to his court during Michaelmas term.[176] Like at the trial of Huckle's claim, he must have surely again felt compelled to defend – this time the adjudicative province of the *Wilkes* jury – against the intrusion of a solicitor general "big with zeal" to George III's cause against the *No. 45*.

It cannot be denied, of course, that in ultimately determining Wilkes' damages, the jury would have been emboldened by Pratt C.J.'s defence of them. And they surely could not have put out of their minds the three extra-compensatory measures to which he chose to specifically allude. The fundamental point, however, is that in ultimately receiving their very large £1,000 verdict the presiding Chief Justice had ensured that, in rendering it, they had satisfied their collective sense of substantive justice, not the defending Crown's. Perhaps pre-empting yet another *North Briton* jury's public commendation from the central Common

[174] Adam, *Trial by Jury in Civil Causes*, 119. Later anecdotal evidence also attests to a "want of courtesy" on Norton's part when pleading, see C.M. Archer (ed.), *The London Anecdotes for All Readers: Law and Lawyers*, vol. 5 (London 1848), 49.
[175] *Wilkes v Wood* (1763) 98 E.R. 489, 498–99.
[176] *Huckle v Money* (1763) 95 E.R. 768, 768.

Pleas bench, the solicitor general, advisedly, decided not to move for the *Wilkes* jurors' overthrow. Their verdict stood.

V. Conclusion

This article has set out to challenge the mythical view that, as a positive matter of English common law, Pratt C.J.'s Common Pleas "deliberately and designedly installed" the modern doctrine of exemplary damages in 1763. Illuminated afresh in the mid-eighteenth-century context in which they were litigated and ultimately decided, it has contended that *Huckle* and *Wilkes* did not, in fact, combine to provide tort damages awards going above and beyond compensation the positive, common law, basis that they previously lacked. By reportedly using the phrase "exemplary damages" in *Huckle* during Michaelmas term, Pratt C.J. did not articulate, however tentatively, any legal doctrine of exemplary damages. By further alluding to specific extra-compensatory measures of damages in *Wilkes* immediately after Michaelmas term, he also did not direct the *Wilkes* jury on such a doctrine, and by application of which, they could now lawfully determine to hold out the trespassing Crown as a public example. The contrary view surely reflects a modern anachronistic tendency to read official accounts of the common law in remoter periods as necessarily containing statements of law.

Despite Pratt C.J.'s allusions to damages above compensation, this article has shown that his *North Briton* decisions did not break with the adjudicative practice according to which damages of an essentially punitive nature were previously awarded in aggravated tort cases. Fundamentally consistent with the period before 1763, the exemplary punishments ostensibly meted-out by the *Huckle* and *Wilkes* juries continued to be administered outside the positive remit of a judge-made common "*law*". According to this practice, juries did not determine the nature of an aggravated tortfeasor's full financial liability according to judicial directions about what particular civil remedies doctrines allowed, or did not allow. This is not to suggest that, in peculiarly aggravated tort cases, the manner of a presiding judge's charge to a jury did not influence their determination. Rather it means that the question of the nature of a plaintiff's damages remained determinable within the exclusive province of the jury, and thus outside any distinctly *legal* direction or control.

It is further apparent that the Whig Chief Justice of the Common Pleas was among the staunchest defenders of this province of eighteenth-century English civil jury adjudication. It was in those highly politicised trespass cases arising from the prosecution of anti-government literature – like the *North Briton No. 45* – that this province has been shown to have come under sustained attack. So much so, that Pratt C.J.'s allusions to

extra-compensatory recovery are most plausibly interpreted as aimed at defending the *North Briton* juries' determination of the question of damages from the very positive legal controls to which George III's solicitor general had sought, defiantly, to subject it. From Pratt C.J.'s perspective, Sir Fletcher Norton's trial advocacy regarding damages transgressed proper attempts to urge juries to show restraint in determining them. It effectively usurped the *North Briton* juries' adjudicative "power" to rebalance the relationship between the prosecuting Crown, and those that its unconstitutional general warrant regime had targeted, according to their collective sense of substantive justice.

Ultimately, the historical picture projected anew by this article implies that the doctrine of exemplary damages may have come about rather differently from how modern judges and scholars assume. The conventional view that it was positively "founded" in a single case, or combination of cases, surely belies a more complex historical reality. Indeed, it may be more accurate to conceive of it in terms of a pre-1763 practice of English civil juries awarding tort damages beyond compensation that, over time, gradually "hardened into 'law'".[177] Yet, even via such a potentially slower process, *Huckle* and *Wilkes* clearly never paled into obscurity. Perhaps this is because, despite making no legal ruling about the jury's ability to award exemplary damages, it is all too easy to interpret Pratt C.J.'s *North Briton* decisions as, in the words of the Supreme Court of the United States, "validating exemplary damages".[178] It was perhaps inevitable, therefore, that his decisions would come to be regarded as the seeds of a common law doctrine of exemplary damages; one, indeed, which English judges would formally recognise, and explicitly articulate, *after* 1763. It is this slower process – beginning seemingly in the aftermath of *Huckle* and *Wilkes*, and continuing into the nineteenth century – that remains for legal historians to retrace.

[177] Baker, *Introduction*, 124.
[178] *Pacific Mutual Life Insurance Company v Haslip* 499 U.S. 1, 15 (1991) (Blackmun J.).