Thoughts about tort law and its compensation, deterrence and sanctioning functions

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Abstract: This journal article examines the compensation, deterrence and sanctioning functions of torts law in light of modern legal, economic and scientific developments. Moreover, it refers to legal-economic reasoning and Comparative Law methodology, taking as examples of potential scenarios and cases from Latin American, European and Anglo-Saxon countries. The aim is to provide the reader with an exercise in critical reflection and to highlight how it is increasingly complex to distinguish the functions of torts law in practice. Based on the above, the authors concluded by presenting the consideration of the difficulty of discerning between the functions of torts as a valid reason to justify that the current systems aspire in the first order to the protection of the human person and not to forget their role as governing mechanism, that is, as *ratio iuris*.

Keywords: civil law; legal theory; tort law; comparative law; legal systems.

JEL codes: K1, K14.

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1 Introduction

The expansion of the essential role of civil responsibility, together with society's greater complexity, has led the doctrine to reflect on its functions. Based on this primary notion, the objective of this article will be to analyse the three main functions of civil responsibility, that is:

a The compensatory function.

b The deterrent function.

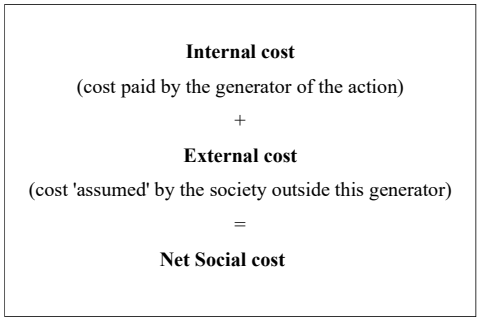
c The sanctioning function.

Therefore, this proposal is presented from a comparative perspective and supports why it is often difficult to distinguish them in practice. This assessment arises above all when referring to compensation for non-pecuniary damages, punitive damages, and the absence of the majority doctrine of specific and objective quantification criteria. It is important to note that the debate in other legal systems, such as the Italian legal system, has revealed how courts awarding compensation for non-pecuniary damages must balance claims that seek 'justice' and 'predictability'. Moreover, it is necessary to consider that the use of schedules and caps are not always satisfactory if the final objective is to achieve adequate compensation and new scientific developments may-still-seem unsatisfactory and less effective.

The sanctioning function, exercised through punitive damages, is the most novel and discussed in the 'civil law systems'. Although gradually and cautiously accepted, the internalisation of the sanctioning function of tort law seems to range from an evident permeability to very subtle masking. The latter often occurs by applying non-pecuniary damages in systems that – in tessitura – do not admit punitive damages. However, American sitcoms' punitive damages popularised bring up legal and economic and social problems. Technically, the question that emerges in the jurist's eyes remains: to what extent can the illicit act be punished?

Furthermore, an examination of the various accepted models shows that, in the event of damage to the environment or consumers, prejudice becomes social. Therefore, in the legal-economic tradition, this social prejudice is considered a recurrent model and usually suggests net social costs. The latter can be presented through the following formulation (see Illustration 1).

Figure 1 Formulation of the net social cost



Source: Elaboration: own by the authors

Therefore, in scenarios where the damage becomes social, there is also a merger of compensation, sanction and deterrence. The latter, evaluated mainly with economic analysis tools, seems difficult to achieve optimally in practice but is also imposed from a de jure condemnatory perspective. Then, this article considers that the fundamental role of tort law must be exercised regardless of the prevalence of one function or another. Furthermore, it implies putting the protection of the individual as the maxim of the liability system first.

2 Considerations on the clearing or compensatory function

The doctrine has highlighted in delimiting tort law's functions that it is impossible to put them in a hierarchical scale because this is ultimately the result of an "analytical approach that does not always describe things' reality. It is undeniable that by changing the historical period and the social environment (as can also be seen in the reading of codified systems in Europe), one function becomes pre-eminent in comparison with another and vice versa" [Alpa, (1999), p.132]. Moreover, recent experience shows above all how the function of compensation, the function of sanction and the deterrent function are intertwined in reality, in such a way that their adequate distinction is not only complicated but is often useless or innocuous.

On the other hand, it is necessary to bring up other relevant aspects. The first of these involves considering that judges and jurists traditionally regard the compensation function as the most important. However, its achievement is not straightforward due to the current difficulty quantifying current and present damage, and this impacts directly. That is, it extends to the entire compensation system. To exemplify the above, let us think about the determination of the benefits and net profits sacrificed. It is a reality in rapid evolution that, for resolving disputes, technical and scientific knowledge is increasingly required and not related to the legal culture. The adoption of one or the other method to determine losses often implies opposite results, and many times this is minimised or even overlooked.

This contextualisation is even more evident in the hypothesis of non-patrimonial damage, as Nicolussi (2011, p.538) points out when he argues that "the possibility of measuring harmful events by reference to economic value is both the advantage and the

limit of the economic conception of damage". Therefore, its granting is not exempt from criticism. It is argued that:

1 it is too complex to identify correctly

2 it is too 'subjective'

3 it is highly variable

4 it is unpredictable

5 it is difficult if not impossible to translate into a sum of money the pain, that is, the suffering caused by the violation and affectation of goods that do not have an explicit monetary or patrimonial value.

To the above, we must add further considerations, and one of these is obtained from a not very biased review of what happened in the Italian system. With decisions 8827 and 8828 of 2003, a constitutional reading of Art. 2059 of the Italian Civil Code is imposed, which exceeds the limits of its admissibility only in a criminal case.

This scenario would not be unheard of either in countries with a civil law tradition such as Ecuador and even Peru, given the unequivocal social character assumed by their highest courts or constitutional tribunals.

Likewise, it is worth noting that in the face of uncertainty and certain discrepancies, subsequent jurisprudential guidelines emerged, such as the 2008 San Martino rulings, which were significant. It contributed to the solution of immaterial damages. Then, through the Sez. Un., 11 November 2008, n. 26972 (Corte de Casación, 2008), it has been stated that:

> "Within the general category ... no different subcategories arise, but the specific cases determined by law, at the highest level constituted by the Constitution, of reparation of immaterial damages are materialised (...) Moreover, as a simple descriptive summary, the different names (moral damages, biological damages, damages for loss of parental relationship) adopted by the twin judgments of 2003 and implemented by the judgment, n—233/2003 of the Constitutional Court."

Also, through the Sez. Un., 11 November 2008, n. 26972 (Corte de Casación, 2008) specified that: The case catalogue thus determined does not constitute a closed number. The protection is not limited to cases of inviolable rights of the person expressly recognised by the Constitution at the present historical moment, but by the openness of Art. 2 Const. For an evolutionary process, it must be considered that the interpreter can find in the general constitutional system adequate indexes to evaluate whether the new interests that have emerged in the social reality are not generically relevant to the system but a constitutional rank that adheres to inviolable positions of the human person.

The descriptive and not autonomous nature of the existential damage has also been affirmed. The Italian Court of Cassation, through the Sez. Un., 11 November 2008, n. 26972 established that:

> "It cannot refer to a generic subcategory called existential damage, because through this, we also end up placing non-patrimonial damage in the atypical nature, although through the identification of the apparent typical categorical figure of existential damage, in which, however, cases are not necessarily foreseen by the law for compensation for this type of damage flow. At the same this situation is not desired by the ordinary legislator, nor is it necessary by the

> constitutional interpretation of art. 2059 of the Italian Civil Code because it remains satisfied by the compensation of specific values of the person protected by inviolable rights according to the Constitution."

However, these decisions have not completely 'abrogated' the function of compensation for existential damage, which is still generally considered by civil courts. However, they have proved helpful in 'limiting' the application cases to the assumptions of constitutionally protected interests and more significant damages (Trimarchi, 2017).

It is interesting to note that the same discussion is in force in Latin American countries such as Peru, where reference is made to damage to the life project (a concept of great legal significance defended by the Peruvian master Carlos Fernández Sessarego).

On the other hand, and from a comparative theoretical-doctrinal conception, in the still existing debate on existential damage (Ziviz, 1999), it is necessary, above all, to adopt a substantialist approach and not to focus on a nominalism as unproductive as it is harmful. It is clear that regardless of the autonomy or not of this element of the damage, what is relevant is the full reparation of the harm suffered by the person who should be placed in the same position as he would have been in the absence of the tort.

Then, the Draft Reform of the Italian Civil Code (1942) discussed by the Senate proposes, by enshrining jurisprudential developments, to "rationalise the hypotheses of compensation for immaterial damages for non-contractual liability, and inappropriate contractual cases, also separating it from a rigid legislative typification and introducing selection criteria directly related to the constitutional rank of the injured interests".

However, the most discussed proposal refers to the complexity of quantifying the damage that could notoriously affect the compensatory function of liability. There is a marked tendency to resort to tables or *caps* in different systems. In the first place, the reason identified lies in the need to ensure homogeneous compensation in similar situations. This profile assumes particular relevance in light of the psychological mechanisms that guide the determination of the *quantum*.

Empirical data have shown the impact of anchoring: judges and juries tend to modulate compensation according to the application whenever this seems reasonable. Besides, bias and subjective impressions affect the situation. The injury suffered; the persons involved. It is known that physical injuries are more highly valued than psychological ones, although they can be of the same gravity. Above all, it is noted that unnecessary harm is often quantified intuitively, and the arguments for justification are found below.

Besides, tables and caps are helpful to avoid the negative economic consequences of a variable or high compensation (leading to overcompensation and the emergence of perverse incentives that end up 'undermining' the system). However, the majority doctrine has highlighted the need to distinguish two proposals:

1 the first one related to problems arising from unpredictability

2 the second one addressing a proposal not necessarily derived from quantity.

In the USA, this led to an intra-systemic tendency at the state and federal levels to transition from applying statutory rules to a case-by-case approach. In this regard, a court decision on the vicarious liability of a hospital established that:

> "Patients, hospitals, doctors, nurses, other licensed professionals, risk managers for government agencies, and insurance companies should have predictable ground rules that set vicarious liability parameters in this situation. The use of

> case-specific decisions by individually selected juries is an ineffective, unpredictable, and most important source of avoidable litigation." (Roessler v. Novak case – 858 So. 2d 1158, Fla. Dist. Ct. App. 2003, cited by Sharkey, 2010)

Therefore, what is sought is a 'predictable risk assessment', and this requirement also extends to the quantification of damage (Sharkey, 2010).

In terms of health liability, uncertainty led to an increase in 'defensive medicine'. It was reflected in the recurrent refusal to carry out high-risk interventions and an increase in insurance costs with a general reflection on those of the system. Finally, the sector's crisis led to a reform of health liability in Italy through which the applicability of the articles was institutionalised. 138, and 139 cod. assic. priv (Corrias et al., 2019).

Initially, reference is made to a later ministerial regulation that is currently only relevant to Art. 138 cod. ass. priv. concerning minor injuries. While severe injuries mentioned in the previous article, the Court of Milan's judicial tables and then consecrated at the national level by the Court of Cassation continue to be used.

Interesting reflections derive from the French tort law reform project (Gangemi, 2020). Article 1269 states that compensable damages are determined article by article according to a 'non-restrictive" classification prepared by decree by the Conseil d'Etat. The preparation of a table approved by regulation is then established (Art. 1270), and the Conseil d'Etat must set the values based on the amounts paid by the judges of merit (Art. 1371). The doctrine has recognised the desire to favour harmonisation based on concrete cases that would seem more satisfactory than the Italian model's uniformity with various difficulties.

However, the mistrust of an 'artificial standardisation' was also found in the USA, where limits for non-pecuniary damage were introduced in many states. Moreover, it is valid to argue that today's jurisprudence seems to 'oscillate' to accept its legitimacy. For example, the Supreme Court of Georgia found 'artificial standardisation' contrary to the Constitution in a medical liability case. Moreover, similar pronouncements are found in Alabama, Florida, Illinois, Kansas, Missouri, New Hampshire, North Dakota, Oklahoma, Oregon, Washington and Wisconsin. In some states, the boundaries were modified following the critical points highlighted by the courts.

Unconstitutionality arises concerning "the Access to Courts, the Substantive due process clause, the Equal protection clause, the Right to trial by jury, the Separation of powers, the Privileges and Immunities clause" (Hubbard, 2020).

The position expressed in Judge Teitelman's (2010) concurring opinion in Klotz v. Anthony Medical Centre can be shared. This judge emphasised that limits on non-pecuniary damages have adverse effects on the most fragile people, even to the point of being a lock on the courthouse door. The opinion is influenced by the particular characteristics of the 'US system', both concerning the absence or weakness of the welfare state and the high costs of proceedings.

However, it should be noted how limited individualisation could be, by its effects, poor overall. Those who have a more advantageous or consolidated economic-financial capacity manage to meet the demands of compensation and recover independently of the established compensation. However, in other circumstances, adequate compensation can only be the result of differences in the quantum. It, therefore, seems ironic that the tools born to ensure equality should result in discrimination. Furthermore, empirical data have not found a significant reduction in costs in the hypothesis of applying caps and tables to justify their use. Therefore, it seems necessary to find a balance between the needs for

predictability and fairness. A possible solution is using the tables mentioned above in conjunction with the – wide-ranging- possibility of customisation, motivated by the specific case's characteristics.

Likewise, the compensatory function often vanishes in the desire to seek social assistance, especially when there is a perception of the welfare state system's insufficiency. The doctrine has highlighted how this is found in the hypotheses of responsibility for natural disasters (San Martin Neira, 2019). However, the function of social assistance is different.

The main objection lies in the very nature of the judicial procedure, which tends to decide the concrete dispute, but should not represent a way of solving complex policy problems. Social welfare policies should be based on knowledge and information that is not always available to the judge in the trial, or the judge has sufficient time and tools to prepare such a decision. Nevertheless, above all, they often involve a compromise and a balance between different needs on the fate of public finances that the decision-maker cannot operate.

Furthermore, a judgment does not allow the analytical act of policymaking or does not necessarily entail a considered and relevant legal assessment that, on the other hand, and ultimately should be unavoidable. It is an inherent aspect of fair, effective, efficient and effective judgement. It is because often the judge as a decision-maker does not manage to formulate an adequate legal image of the general situation and, therefore, comes to lack the legitimacy to make individual decisions, which in the margin could also be unpopular, contravene ideological postulates and sacrifice other interests and hidden claims.

2.1 Additional considerations: pain and compensation

To this, we must add a second remarkable general recital. Progress in scientific studies may also provide valuable indications for the decision-maker in the determination of non-patrimonial damages. It has been rightly stressed that, in the field of medicine, when a person claims to suffer, he or she has no reason to lie, unlike in a court case (Davis et al., 2015). However, through neuroimaging techniques, it seems possible to capture brain changes due to pain. Therefore, it is possible to find a relationship between the activity of some areas of the brain and painful stimuli and to identify the difference between chronic and transitory pain based on a signal that would be a marker that can be used to verify the nature of the suffering.

Some different ideas and even indirect questions are then raised. If it remains, however, still complex to assess "what is excess pain or what is hyperalgesic pain, how do we know where the limits are (...)" Therefore, the big problem is to decide what "is more than standard pain" [Greenspan et al., (2015), p.241]. One reason for the assumption that civil courts seem more likely to grant relief in the presence of nociceptive pain. The even more incredible difficulty remains when considering chronic or psychological pain.

In this vein, it can even be stated that "(we) develop a physical brain system, a nociceptive system, and we also develop a brain mechanism to represent the social world (...) those circuits that process these social and emotional processes are co-opting physical pain" [Wagner, quoted by Chandler et al., (2015), p.286].

We are facing a highly complex scenario. To date and given the advance of science and technology, even neuroscience does not seem – still – to help convincingly to

distinguish between chronic and psychological pain, nor how they influence each other. Consequently, further considerations are needed that link the analysis of the origin or cause with the objectives, and the specification of the compensatory function still needs to be done by experts from various disciplines.

Indeed, focusing only on the aspect concerning the delimitation of the concept of pain is, in fact, somewhat complicated (to which any other 'bifurcation' of legal relevance must still be added). However, let us not forget that for the International Association for the Study of Pain (2020), pain consists of physical, sensory, affective and evaluative aspects: it is "although an unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage".

However, as noted, responses to pain are "significantly influenced by the psychosocial context, by the meaning of pain for the individual, by the patient's cultural background, and by his or her beliefs and ability to manage his or her resources" (Kolber, 2014). Besides, emotional states such as anxiety and depression can dramatically influence perception, so their severity cannot be considered simply concerning the degree of tissue damage.

3 Considerations on the deterrent function

From the difficulty in identifying specific quantification parameters, the relationship between non-pecuniary and punitive damage can be glimpsed. This consideration has been highlighted by the Italian doctrine that underlines that when we refer to the relationship between non-pecuniary and punitive damages:

> "The idea is too uncertain, subjective, spiritually unconvincing, logically weak to act as a solid basis for that dogmatic construction. Simultaneously, the monetary response's uncomfortable moment is ready to emerge and lend itself as a natural catalyst for the conviction that the private sentence is adequate to make the civil law reaction to immaterial damages fall within its framework." [Bonilini, (1983), p.298]

According to this perspective, for example, money does not eliminate and, in many cases, cannot even lessen the emergence of negative feelings as a consequence of the illicit act, but can only serve as a sanction for the person who committed the illicit act. Furthermore, parliamentary work in Italy warned of the need to compensate for punitive damages in criminal cases because the offence against the legal order is more intense, and the need for more vigorous repression on a preventive basis becomes more relevant.

This reflection is confirmed by experience. Some civil law systems introduced punitive damages through moral damages. In 2014, in Mexico, the First Chamber of the Court of Justice was called upon to rule on the damage due to the parents of a child who died in an artificial lake due to an electric shock. The Court recognised that punitive damages are implicit in the Mexican system and can be obtained through a free and teleological interpretation of art – 1916 of the Civil Code governing moral damages. The criteria for determination include the seriousness of the defendant's conduct and also his property: the same reasons highlight the need for a sanction and deterrence.

Especially from Amparo directo 30/2013 (Sala Primera de la Corte Justicia, 2013), it is clear that, in the Mexican experience, punitive damages are an essential component of fair compensation:

> "In effect, using compensation, the law discourages people who act illegally and rewards those who comply with the law. It reinforces the victims' conviction that the legal system is fair and that their decision to act legally was applicable. In other words, compensation is a social expression of disapproval of the illegal act, and if this sanctioning is not given, the recognition of such disapproval practically disappears."

It implies that, for example, punitive damages are not sufficient to show disapproval of the agent's conduct and, their admission does not imply acquiescence to illegal behaviour either. It brings us back to the 'traditional' argument according to which, without the prediction of punitive damages, the opportunistic behaviour of those who commit the illegal act is not discouraged, counting the difference between the profit obtained and the damages compensated.

The case of Peru (García Long, 2019) is analogous. The V Supreme Jurisdictional Plenary in Labour and Social Security matters admitted punitive damages in the labour legislation. A different solution was affirmed by the II Pleno Distrital Laboral y Procesal Laboral of Lima in 2020. As argued by Hilario (2017, pp.456–457):

> "If the *punitive damages* are so high as to be unpredictable in the United States law, it is because, in their application, the punitive function against conduct that one wants to discourage at all costs is predominant. From this perspective, American judges are free to consider, equally, the possibilities that the tortfeasor has to evade the rules of tort law. If such references are taken into account, the worst thing about the version that the Peruvian judges have designed in the sentence mentioned above is that it would be, unfortunately, punitive damages 'in the Peruvian way (a la peruana)', that is, a compensatory item devoid, no more and no less, of that dissuasive and preventive burden that this figure retains, in any case, in its original environment (…)"

In this way, it is also established through the V Supreme Jurisdictional Plenary in Labour and Social Security matters (4 August 2017) that:

> "Only to fraudulent dismissal and to dismissal on account of its mainly vexatious nature against the worker. As can be seen, punitive damages are always incidental, i.e., they are lifeless in themselves, requiring the presence of essential or principal damage, and only meriting the award of punitive damages in the circumstances of each particular case."

Even in the absence of express recognition of punitive damages in Brazil, moral damages are attributed to a sanctioning function. The debate in the doctrine is heated and is also reflected in jurisdictional pronouncements such as the one made by the Superior Court of Justice (STJ) in its Special Appeal: Resp. 839.923 MG 2006/0038486-2 (STJ, 2006) when it held that:

> "Since the agent's intentional conduct is directed towards the unlawful end of causing harm to the victim, through the use of reprehensible physical violence, the arbitration of compensation for moral damages must also be based on the punitive and pedagogical nature of the compensation, without losing sight of the prohibition of unjust enrichment of the victim."

In Italy, the analysis of the criteria used by the courts in quantifying non-pecuniary damage, especially the seriousness of the defendant's conduct, reveals a punitive rather than merely compensatory aspect.

The relationship between punitive and compensatory damages also arises in *common law* systems. Moreover, the origin of punitive damages is attributed precisely to the need

to compensate for non-pecuniary damages that the old English system did not allow to be compensated. The US Federal Supreme Court warned that in cases where significant non-pecuniary damages are awarded, punitive damages should be reduced to avoid recovery duplication. Although therefore, the distinction between these types of damages appears in a clear and straightforward theory. In reality, it tends to fade away both because of the difficulty of determining damages in the absence of specific, precise criteria and a clear tendency of the decision-maker to conceive compensation in a unitary way. This has meant that, in cases of established limits for non-pecuniary damages, punitive ones have been increased or vice versa.

The traditional rejection of tort law's sanctioning function seems to be fading in the civil law systems that have started to admit it. In some systems, it has even been expressly provided for by the law in general or in some cases by the judicial apparatus. In others, such as the French case (Arret 1090/2010), the traditional approach that considered inadmissible the exequatur of foreign judgments allowing punitive damages has been overcome.

Similarly, in Italy, moving from the already existing regulatory guidelines and in light of an alternative conception of the notion of public order more suitable for a globalised and multilevel society, the 'Sezioni Unite' affirms the now multifunctionality of tort law (Benatti, 2017). For this reason, the trend compatibility between the punitive damages characteristic of the common law systems and the Italian legal system is established when the hypotheses of conviction are typical and foreseeable, and limits are set on the amount of compensation. It is not an introduction of punitive damages substantially, but the decision that was taken certainly represents an important step. However, contrary to what happens in France, the Italian code's draft reform does not mention them, and their continued masked use seems to be more than the underlying reality.

The express affirmation of the sanctioning function represents a delicate political choice. However, as Grondona (2020) has observed:

> "In tort law, there is a meeting point between the social order and the legal order (...) how it functions within a given order is, therefore, a reflection of the institutional framework, as well as of the value judgements that members make above all in themselves and their sphere of action and, therefore, of freedom." (p.331)

There are dangerous hypotheses, which go beyond the limits of acceptability in which punitive damages could be advantageous. However, the United States experience shows the need to balance sanctioning with legal certainty and the penalty's proportionality. Arbitrary or out-of-control liquidations also affect a country's economic system: excessive punitive damages have caused negative externalities expressed through investment crises linked in good faith to companies' difficulties in the face of rising costs of goods and services. It led to the Federal Supreme Court of the United States intervention, which, following the well-known BMW v. Gore decision (Certiorari a la Corte Suprema de Alabama No. 94-896, 1996), imposed quantification parameters on state legislative intervention.

Finally, states such as Missouri (Corte Suprema de Missouri, 2020) have not only limited their application to cases in which "the defendant intentionally harmed the plaintiff without just cause or acted with deliberate and flagrant disregard for the safety of others" but have also established the need for "clear and convincing evidence".

The issue at stake is indeed a sensitive one. The characteristic sanctioning function is strictly related to flexibility often recognised by the regulatory provisions themselves. However, even the *bad man* mentioned by Holmes has the right to know and foresee the consequences of his actions. In Florida, a balance was struck that distinguishes between average scenarios in which a limit of $500,000 or three times the compensatory damages applies and those in which the behaviour is motivated by an unreasonable gain to the defendant, or there is knowledge of the likelihood of an injury occurring. Therefore, a limit of $2,000,000 is provided. The variety of legislative interventions in the United States then allows for the determination of the complexity of the institution's regulation that may specifically affect:

a The prediction of typical cases or criteria, such as behavioural requirements or high testing standards.

b On the determination of the quantum, both through more rigid procedures and through *caps*, multipliers or percentages of the defendant's turnover.

c On the final destination of parts of the *punitive* damages to general or specific funds.

Therefore, some additional considerations should be introduced. First, we note the difficulty for courts to concretise the Federal Supreme Court's parameters, both individually and themselves, due to the majority opinions from State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) that have not been very precise. These are 'anchored' to issues such as the seriousness of the conduct, the relationship to compensatory damages, and the civil, criminal and administrative penalties provided for similar scenarios. Furthermore, an additional specification has been found, and it is necessary to consider the following requirements:

a The nature of the physical damage or if this damage was only an economic damage.

b The indifference or lack of attention to the health or safety of others.

c The actor's vulnerability, the repetitiveness of the behaviour, the intentionality or the existence of fraud or deception.

The value of each of these requirements and their relationship is not clear. Courts often interpret them broadly or creatively to apply punitive damages where the conduct is considered severe, even based on only one of them.

A symptom of uncertainty emerges from the divergent understanding of the second requirement. It relates to the single-digit ratio established in the State Farm case between punitive and compensatory damages in some jurisdictions. It is identified as any ratio less than 10:1, in other 4:1.

The second requirement was often seen as actually serving as a guideline and therefore suggested to be non-binding. There also remains a significant discrepancy in assessing the potential harm that the actor might have suffered. Above all, the choice of how to calculate the relationship between punitive and compensatory damages when there are multiple defendants. The determination, in some cases, has been made with particular reference to the lump sum and in others individually. However, the difference can be significant.

On this point, the decision of the Supreme Court in Exxon was not very clear. Although it referred to maritime law, it seemed to indicate a favour for a 1:1 relationship. The doctrine, however, objected that the modalities for establishing the benchmark were

obscure and the motivation unconvincing. Besides, the view expressed in State Farm on the need to reduce punitive damages in the presence of 'substantial compensatory damages' was reinforced, even if the courts interpreted the notion differently.

A third criterion established in Gore, namely the relationship to civil, criminal and administrative sanctions, rarely influenced the establishment of the punitive damages that could be awarded, perhaps because it was no longer part of the American tradition and was imposed from scratch. Also, the courts encountered obstacles in identifying possible benchmarks against which to compare punitive damages. However, it is considered that the seriousness of the conduct remains the fundamental element on which the determination of quantum is based and depends on a careful analysis of the specific case and the judge's perception.

If Gore's criteria were close to that road to nowhere, which Judge Scalia had predicted with his usual lucidity, and only indicated a tendency to follow, the very limits set by the law raise some doubts. In some states, such as Arkansas and probably Montana, the equal protection clause and the right to trial by jury were used to establish the unconstitutionality of the limits. The Missouri Supreme Court in Lewellen v. Franklin (41 S.W.3d 136, 145) (Corte Suprema de Missouri, 2014) stated that any statutory damage caps on causes of action existing in 1820, including Lewellen's common law claim for fraudulent misrepresentation, necessarily changes and impairs the right of a trial by jury 'as heretofore enjoyed' and unconstitutionally infringed upon the right to a jury trial. There is a desire to exclude, especially the tort of fraud. In Lindenberg v. Jackson National Life Insurance Company, a Tennessee court (Tribunal de Tennessee, 2018) said that the limits on punitive damages were unconstitutional (304 F. Supp. 3d 711), but the decision appears to stand alone. The State Supreme Court called to rule on immaterial damages found the arguments used in Lindenberg to be "unconvincing" (McClay v. Airport Management Services, LLC, case number 3:17-cv-00705).

In other states, such as California, there are legislative proposals to raise non-economic damages parameters. These are interesting because the sanctioning element, in the presence of limited punitive damages, could be introduced by a crossover in non-pecuniary damages. Moreover, these categories of damage are affected by economic, social and political conditions and, therefore, continuous variations can be foreseen both in the maintenance of the limits and in their amount. Finally, it remains challenging to guarantee the predictability of punitive damages when determining the amount is entrusted to juries, which are more subject to emotions and sensations. The progressive improvement of the instructions given to them does not seem to be a sufficient remedy.

Practice shows, however, a clear trend line. There is greater control of punitive damages (see also Corte Suprema de los Estados Unidos, 2019). Above all, the federal courts seem to have caught the U.S. Federal Supreme's indication that it has been favourable to accept a sacrifice of the sanctioning function favouring greater predictability. In a recent Monsanto case involving health damage caused by herbicide, punitive damages were reduced from $78.5 million to $20 million, while compensatory damages were set at $5.3 million (Tribunal de Apelación de los Estados Unidos para el Noveno Circuito, 2019).

4 Deterrent considerations: compensation vs. sanctioning

The punitive idea is merged with the compensatory one in the studies of economic analysis of law, not so much from an individual but from a social perspective. This methodology is based on the observation that some goods' affectation has severe consequences for the individual and the community that must be repaired. Moreover, a subject is often not sued for certain damages that are individually insignificant or even not perceptible but collectively constitute significant social harm. The thesis gained the most strength in the doctrine from Polinsky and Shavell (1998) and was adopted by Calabresi in Ciraolo v. The city of New York, 216 F. 3d 236 (Tribunal del Distrito Sur de Nueva York, 2000). In this decision, a distinction is made between actual sanctions and socially compensatory damages.

It applies in cases where the wrongdoer has harmed numerous subjects, but only one or a few decide to take legal action and serve to close the gap between the harm caused and the harm that should have been compensated. What is essential is the compensatory nature of these damages and their possible application, even in negligent cases.

This thesis, which is considered more normative than descriptive, gave rise to studies that see punitive damages as social damages (Sharkey, 2003) In this perspective, civil law systems, such as Argentina and China, have admitted punitive damages in cases of injuries that are not strictly individual but have broader repercussions. It is accompanied in some legal systems by its return to state funds. In the US, many states have already introduced this measure to avoid unjustified enrichment of the actor, often compared to a lottery winner. This attributes a higher social purpose to punitive damages that could be used for general interest purposes.

Therefore, if the destination of a part of the punitive damages to state funds could be justified in some scenarios, this proposal concerning non-pecuniary damage is not acceptable. Part of the Italian doctrine focused on dealing with the consequences of Covid-19 has pointed out that social solidarity is a duty, in line with its Constitution's letter. Moreover, one cannot and will not question that the author of the crime could also be forced to compensate for non-economic damages in the name of social solidarity. However, social solidarity is everyone's duty, and that is the Italian Constitution's real message.

All this means that the injured party is no more and no less than the injurer. Therefore, we consider that to impose the fulfilment of social solidarity's duties on the injured party is not necessary to comply with the rule. Furthermore, we believe that the social solidarity seen by the injured party should not consist in "diverting a component of the obligation of compensation towards the protection of public health" (Maggiolo, 2020). Otherwise, the opposite thesis would ignore the mainly compensatory function of non-patrimonial damages, which would be further reduced and, above all, would run the risk of attributing the duty of solidarity to a person who is already in a weak or fragile condition and who may, therefore, need attention and care in the first place. Non-patrimonial damage is the person's responsibility, not the State, which can also take advantage of the tax instrument to make appropriate investments as a means of prevention and containment.

It should be noted that, in the case of social damage or when it is desired to avoid underestimating the damage, the functions of sanctions and compensation are intertwined with the deterrent function that has assumed a fundamental role. The doctrine has pointed

out how this can be done through full reparation of the damage, even in the absence of a prediction of punitive damages.

However, in practice, we see the difficulty of achieving adequate compensation because of the complexity of proving the injury's amount. Determining the deterrent function itself is not simple, as optimal deterrence is necessary. An overdetermination would cause an increase in precautions taken and costs, and underdetermination would not prevent similar behaviour. Furthermore, we consider that a valuable contribution could be derived from legal models of the economic analysis of law applied to the study of tort law (Buendia De Los Santos, 2020), including Polinsky and Shavell's (1998) multiplier, Hylton's (2007) theory of profit elimination and Haddock et al.'s (1990) property model.

Despite their theoretical-conceptual appeal, these proposals have not found, except in sporadic cases, acceptance in the jurisprudence. It is due to judges' difficulty handling mathematical models and the impossibility of using them in a complex and chaotic reality, especially when the objectives may be different from economic efficiency. It is also observed that, however, they would give different results: for Polinsky and Shavell (1998), the decision at Exxon with which they had been awarded $5 billion in punitive damages was incorrect. For Hylton (2007), it was not. The divergence is based on an opposing assessment of the conduct.

There is evidence of the prevalence of the deterrent function in those systems that quantify harm in terms of profit. In the first hypothesis, the incentives to engage would be removed even if there may be severe and unprofitable cases. In the second, consideration is given to how the same compensation might deter a small business, but not a large multinational. However, the assessment introduces a redistributive function of liability with possible negative impacts on the economic system. We can also ask ourselves whether it is appropriate to entrust this role to tort law.

It is observed that, regardless of the prevalence of compensation, deterrence or sanctioning, tort law can be founded as it is in the studies of corrective justice on a moral vision influenced by Aristotle and Kant's philosophy (Coleman, 1991). According to this doctrine, it tends to rectify the injustice committed by a person against another: in particular, "corrective justice links the responsible and the one who suffers an injustice in terms of its correlative positions" [Weinrib, (2002), p.351]. It differs from the theories of distributive justice that bind "all parties through the benefit or the burden they share". [Weinrib, (2002), p.351]

From a Dworkinian perspective, it can be seen that:

> "Sometimes we have to say, clearly and loudly, that this defendant injured the plaintiff, and our saying may be significant apart from the material consequences that follow (...) The judgment that the defendant injured the plaintiff is not preliminary to the important business that tort law has to do; it is the critical business, and everything that follows afterwards is in the service of the trial, not the other way around. In other words, we are inclined to think that the tort is an expressive institution, not just incidentally, but primarily." [Hershovitz, (2018), p.408]

This perspective could justify an opening to punitive damages in cases of damage to fundamental rights. Despite the criticism made against the theory, it is undeniable that tort law has this *expressive function* that arises mainly in the compensation of non-pecuniary and over compensatory damages. These theses serve to reiterate the need to look at crime not only from an economic perspective, as has been the case for a long time

because the law can and must pursue other values. It does not mean abandoning efficiency but completing it with other evaluations.

5 Conclusions

As explained throughout this article, the doctrine highlights the impossibility of finding a unifying theory of 'civil wrongdoing'. Let us remember that the law is a human creation resulting in a complex interaction of other laws, judicial decisions, and doctrinal considerations. Therefore, and as a culmination of this contribution, we must quote Hershovitz (2017), who maintains that:

> "(…) the laws of physics are what they are regardless of us. If they are simple and elegant, it is because we have not had a chance to ruin them. However, our institutions are ours. We can make them whatever we want. Moreover, our will is often complicated and compromised. We must expect our institutions to be the same. There is no doubt that civil responsibility is like that. Nevertheless, there is good news here. Our institutions are ours. We can make them whatever we want. Furthermore, we can want them to be better than they are. The tort theory task is to show us what tort contributes to our lives and help us imagine what might contribute if we have the will to improve it." (p.969)

Finally, we would like to conclude this article, prepared as a reflection, by arguing that it is essential that tort liability is aimed at protecting the person since this constitutes his 'true function'. As Barbero (1962, p.13) has pointed out: "the true law, the 'law' in any form, natural or positive, written or oral, must be rooted in the man".

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