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Is There Room for Punitive Damages in Civil Law Countries?
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I Preliminary Remarks

a. Starting point – where everything began.

Since the *summa divisio* of Roman law, a dichotomy has been established between the spheres of civil and criminal law based on pre-tort actions that has remained in effect to the present day. Civil law looks to the past, seeking to repair the consequences of a tort by transferring part of the tortfeasor's assets to the plaintiff. By contrast, criminal law looks to the future, directing the State to penalise the perpetrator to discourage repetition and to send a message to other potential offenders warning against similar conduct.

b. Reference to the idea of punitive damages in common law.

Since 1760, English Common Law has gradually established a precedent for punitive or exemplary damages in exceptional situations that reinforces compensatory damages and is based on the need to punish egregious behaviour. Unlike compensatory damages, punitive damages are not intended to repair suffering but to deter the behaviour in question. Among the remedies offered by civil liability, punitive damages have the important function of deterring socially objectionable behaviour and the salutary effect of discouraging individuals from committing torts.

c. A Trend in Civil Law Jurisdictions?

Although scholars agree almost unanimously on their antipathy towards punitive damages, the legislatures and judiciaries of these countries occasionally seek to extend civil liability beyond purely compensatory damages in cases in which denying exemplary damages would lead to obvious injustice.

II Contexts for the Introduction of Punitive Damages in Civil Law Countries

a) Protection of intangible property - This trend covers the set of cases in which a person acts maliciously by evading the property rule and opting for the liability rule.

b) Conduct aimed at gaining profits that might surpass the damage caused to the injured party - The tabloid press frequently offends the dignity of individuals by making false allegations without any attempt to check the accuracy of information received from third parties, even when there is no urgency to publish the article.

c) Intentional conduct or deliberate indifference toward victims - recent doctrine in the Continent and South America, has asserted that there are situations where tortious liability must take account of the wrongdoer's culpable state of mind when committing a wrong, or even his high-handed behaviour subsequent to the wrong.

d) Breach of contract- In Brazil, there is a movement favourable to a more

dissuasive approach to liability regarding two types of common damage arising from commercial contracts: Social damage and multiple torts and minimal damages.

III – Objections to Punitive Damages in Civil Law Systems

a) Encroachment onto the terrain of criminal liability - Punitive damages will arise only exceptionally in private law – as a last resort - when it becomes clear that compensatory damages are insufficient to promote the purposes of behaviour containment.

b) Excessive awards - Albeit included in the private law system, punitive damages will be subject to the same constitutional limitations as penalties from criminal convictions to the extent that they have an essentially criminal nature. This treatment implies a necessary moderation in the amount of awards.

c) Unjust enrichment - by taking the perpetrator of deliberate outrageous behaviour to court, the victim acted as the spokesperson for sentiments shared by a collective of individuals. The plaintiff consumed his time and energy, and incurred procedural and professional expenses, when the individual financial loss was often small or difficult to prove, which typically would discourage many other victims from joining in a claim with unpredictable results.

d) Conflict between punitive damages and restitution - Actually, restitutionary damages are another remedy that can restore the economic balance disrupted by the tort. The novelty is that the reparation limit is not the loss suffered by the plaintiff, but the gains improperly obtained by the defendant. In turn, the containment of unconscionable conduct continues to be exercised exclusively through the remedy of punitive damages.

e) The Principle of Legality - the application of punitive damages rightfully depends on the pre-existence of a general statutory provision enabling both deterrence and punishment with respect to the violation of a binding norm.

IV – Concluding Remarks

Aware of my minority opinion, I firmly believe that punitive damages – when assessed by means of overriding principles of moderation and proportionality and shielded with all substantive and procedural guarantees – reinforce the notion of tortious liability as a privileged place in which the moral purposes of society can be accommodated. The application of punitive damages in the civil law context does not violate its methodology, even when based on a normativist rationality.

As stated by Sir Henry Brooke, “Just as an important part of the Anglo-Saxon temperament is to distrust codes of law, so too, an important part of the continental temperament is to distrust punitive damages. However just as there is codification in one form or another in Anglo-Saxon jurisdictions, it would be unsurprising if some courts and legislatures on the continent impliedly or covertly award exemplary damages to deter behaviour that is sufficiently outrageous”.

