

**15th June 2016, Vienna - ECTIL**  
**The Functions of Tortious Liability in the Brazilian Civil Code of 2002**  
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**I Preliminary Remarks**

**a. Starting point – Overview on Civil Liability in Brazil**

Following the model founded by the Napoléon Code, in the Brazilian Civil Code of 2002, tortious liability can be defined as compensation for harm resulting from the violation of a duty of care, even when there is no prior legal relationship between the victim and the person who caused the damage. The primordial objective of civil liability is to undo losses, namely compensating the victim's estate by transferring the damage to the agent that caused them.

**b. Prerequisites of Fault-Based Liability**

There are four prerequisites for fault-based liability to arise: (a) an unlawful act; (b) fault or abuse of right; (c) an unjustified injury; (d) a causal link between the damage and the act. Those four elements are listed together in art. 927 Brazilian Civil Code, a general clause of fault liability.

**c. The Brazilian Civil Code of 2002 - A Shift in the Field of Strict Liability**

The four prerequisites described above are related to the traditional fault-based liability that under the former Civil Code of 1916. However, in 2002 the new Brazilian Civil Code brought about a shift in the field of strict liability. It created rules that go beyond the fault-based liability, namely, in cases of liability for others, liability for ruined buildings, liability for things that fell off or down from a building and liability for animals, among others. Most of these acts were previously cases of presumed fault and now are true models of strict liability.

However, the most impressive progress in the Code of 2002 relates to the development of a general clause of liability regardless of a wrongful act. Beyond the various situations where a specific law indicates the adoption of strict liability, the obligation to compensate harm arises simply because the injuries were produced during a regular activity with inherent risks to the right of others, due to its specific nature. The purpose of the move to strict liability is to shift the core of the liability:

from culpability to causation. Thus, the losses suffered by the victim will be transferred to the defendant, regardless of whether the latter acted with malice or fault; it suffices that an organised activity shows itself to be the appropriate cause of the unjustified injury.

## **II – The Functions of Tortious Liability**

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 have 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.

## **III – Is There Room for Punitive Damages in Brazil? Sectors where Liability Goes Beyond Compensatory Damages**

- a) Protection of intangible property** – this trend covers the set of cases in which a person acts maliciously by evading property rules and opts for liability rules.
- 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** – 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.

## **IV – Objections to Punitive Damages**

- 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 influence.

**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.

## **V – Concluding Remarks**

The current Brazilian scenario remains hostile to punitive damages. The “compensation-only” dogma is not easily dismissed. Old habits die hard!

I am aware that my opinion is not widely shared, but, I advocate that punitive damages – when assessed by means of overriding principles of moderation and proportionality and shielded with all substantive guarantees – reinforce the notion of tortious liability as a privileged place, in which the moral purposes of society can be accommodated.