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**WHY ARE PAIN AND SUFFERING TORT DAMAGES SO EXCESSIVE AND WHAT IS THE JUSTIFICATION FOR THE PUNITIVE DAMAGES IN THE U.S. LEGAL SYSTEM? ANALYZING THESE TORT DAMAGES FROM A CIVIL LAW PERSPECTIVE.**

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## **INTRODUCTION**

In this paper I will analyze the pain and suffering damages and the punitive damages, and will try to explain the reasons of their excessiveness in the common law system. I will also describe the theories developed and in some cases implemented for reducing them. Finally, I will compare the civil and common law systems and discuss which system works better.

## **I. THE COMMON LAW SYSTEM IN THE UNITED STATES**

### **A) The Common Law Precedents**

To be able to understand the cases that will be analyzed in this paper regarding pain and suffering and punitive damages, it is necessary first to understand how case law

and precedent work in common law. In the common law system the individual case does not matter as much as the construction that courts give to a line of cases over time, and the principles and policies that are extracted from them. Common law's fidelity is to principle and not to the isolated decision, and common law courts can vary past rulings if the law established in them is no longer practical in application.<sup>1</sup>

Individual states in the United States are sovereign and only subject to the United States Constitution, and in some cases to the federal statutes. Each state has its own Constitution and its own judiciary. This is why common law and the statutory law of one state can differ substantially from that of others.

## **B) Legislation and Regulation in Common Law**

Although the United States legal system is principally based on the common law system, in recent decades legislative activity has intensified.<sup>2</sup> Notwithstanding this, the area which is the object of the present paper, tort law, is one of the few areas that remains almost untouched by legislation. The Second Restatement of Torts is one of the few statutes that regulate this area of Law.

## **C) Tort Law in Common Law, with a Special Focus in the Issue of Injury**

The term "tort" derives from Latin roots meaning "twisted". It refers to twisted conduct which departs from existing norms.<sup>3</sup> Tort law determines when a person who suffers injury can obtain redress from the actor who caused the harm. Torts are private

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<sup>1</sup> NEW YORK UNIVERSITY SCHOOL OF LAW, FUNDAMENTALS OF AMERICAN LAW, 18-21 (Oxford University Press ed. 1998)

<sup>2</sup> This is especially true regarding the Federal government, which has enacted federal statutes and regulations of federal agencies and departments.

<sup>3</sup> Dan B. Dobbs, *The Law of Torts*, Hornbook Series, 2, West Group, St. Paul, Minn. (2000)

legal actions in which one person seeks a remedy, usually money, for damages caused by another.<sup>4</sup> In the civil system, its equivalent is the “Responsabilidad Civil” or Civil Liability.

In American tort law, a person can be liable under three theories: intentional torts, negligence and strict liability. Negligence is the most common basis for liability, and it refers to instances in which a person causes harm to another due to his inadvertence or imprudence.<sup>5</sup> In order to establish an actionable claim for negligence, the plaintiff has the burden of proving (i) that the defendant owed the plaintiff a duty of care, for instance, not to engage in unreasonably risky conduct; (ii) that the defendant breached that duty by his unreasonably risky conduct; (iii) that the defendant’s conduct in fact caused harm to the plaintiff; (iv) that the defendant’s conduct was not only a cause in fact of the plaintiff’s harm but also a proximate cause<sup>6</sup>, and (v) the existence and amount of damages, based on actual harm of a legally recognized kind such as physical injury to person or property.<sup>7</sup>

Among the injuries that can be compensated are (i) time losses, as for example the recovery of the loss of wages or the value of lost time or earning capacity where injuries prevent work; (ii) expenses incurred by reason of the injury, as for example the medical expenses and (iii) pain and suffering in its various forms, including emotional distress and consciousness of loss. Courts sometimes also award punitive damages, not to compensate the plaintiff but to punish the defendant for his wrongdoing<sup>8</sup>. The final

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<sup>4</sup> NEW YORK UNIVERSITY SCHOOL OF LAW, *supra* note 1, at 239.

<sup>5</sup> AARON TWERSKI & JAMES A. HENDERSON JR., TORTS: CASES AND MATERIALS, 109-110 (Aspen Publishers, 2003)

<sup>6</sup> This means that the defendant’s conduct has to have a significant relationship to the harm suffered by the plaintiff.

<sup>7</sup> Dobbs, *supra* note 3, at 269.

<sup>8</sup> Dobbs, *supra* note 3, at 1048.

damages recovery can be subject to various adjustments, as for example remittitur<sup>9</sup> and limits on the total award. In the absence of a statute, the prevailing party does not recover for her attorney fees.<sup>10</sup>

## II. PAIN AND SUFFERING DAMAGES

### A) Awards for Pain and Suffering in the US: concern about their predictability and rationality

The plaintiff is entitled to recover for the conscious physical and emotional suffering proximately caused by the negligence of the defendant, including future suffering. According to Jaffe<sup>11</sup> nonpecuniary damages appease the victim's anger, deflect vengeance, and restore self-confidence. Awards for pain are not easy to evaluate because there is no objective criterion for judgment.<sup>12</sup> Therefore it is difficult to set rational limitations on awards. As Abel affirms<sup>13</sup>, the trier of fact needs a metric in order to calculate damages. The market provides an adequate one for pecuniary damages: lost property, income, and medical expenses. But there is no market for human emotions, and attempts to commodify it rightly provoke intense opposition.

The Second Restatement of Torts §903 is consistent with this opinion, establishing that when "tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position." A claim for pain and suffering is therefore a serious threat to the defendant since, lacking any highly objective elements, it

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<sup>9</sup> Remittitur refers to the process by which a court requires either that the case be retried, or that the damages awarded by the jury be reduced.

<sup>10</sup> Dobbs, *supra* note 3, at 1048.

<sup>11</sup> Louis L. Jaffe, *Damages for Personal Injury: The impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 221 (1953), cited in Abel, *infra* note 21, at 267.

<sup>12</sup> Richard L. Abel, *A Critique of American Tort Law*, BRITISH JOURNAL OF LAW AND SOCIETY, 291, Vol. 8, No. 2. (1981)

<sup>13</sup> Abel, *infra* note 21, at 291.

permits juries to set an award in an arbitrary way, without having to justify it.<sup>14</sup> The standard jury instructions recite a general exhortation to act reasonable, as in California: “No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense”.<sup>15</sup> Appellate courts, in exercising a review function, ordinarily have no more guidance than the common-law dictate to overturn awards only if they “shock the conscience”.<sup>16</sup>

Some plaintiff’s lawyers use controversial techniques to help juries measure the value of noneconomic losses, as for example, the one known as the per diem argument. This method divides the plaintiff’s pain and suffering into discrete units of time, such as days or hours, and assigns a monetary value to each unit. The jury is asked to determine the relevant value of the suffering in a unit of time, and then to multiply that value by the number of units the plaintiff endured and will endure the pain<sup>17</sup>. Some jurisdictions do not allow the use of this argument.<sup>18</sup> Another technique proposed by economists is called the “willingness to pay” technique (WTP). It consists in asking jurors to consider how much money they would ask to change places with the victim. Some courts have explicitly prohibited this technique.<sup>19</sup>

The problem with pain and suffering awards is that, due to the impossibility of measuring them, they cannot be predictable, and there is no criterion to establish their

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<sup>14</sup> Dobbs, *supra* note 3, at 1050, 1051.

<sup>15</sup> JUD. COUNCIL CAL., ADVISORY COMMITTEE ON CIVIL JURY INSTRUCTIONS §3905A (2005), available at <http://www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf>, cited in Rabin, *infra* note 32, at 374.

<sup>16</sup> Seffert v. Los Angeles Transit Lines, 364 P.2d 337 (Cal. 1961), cited in Rabin, *infra* note 32, at 374.

<sup>17</sup> Twerski & Henderson Jr., *supra* note 5, at 628

<sup>18</sup> Caley v. Manicke, 182 N.E.2d 206 (Ill. 1962); Beagle v. Vasold, 417 P.2d 673 (Cal.1966), cited in Twerski & Henderson Jr., *supra* note 5, at 628, 629.

<sup>19</sup> Dunn v. Pennsylvania R.R., 20 Phil. 258 (Ct. C.P. 1890); Jeffrey O’Connell & Keith Carpenter, Payment for Pain and Suffering Through History, 50 INS. COUNS. J. 411, 415 (1983), cited in Abel, *infra* note 21, at 300.

rationality. As Joseph King affirms<sup>20</sup>, uncertainty of value fosters unpredictability of outcomes, hence undercutting optimal deterrence and rational experience-rating. Correspondingly, uncertainty promotes wide disparity among recoveries, hence violating fairness notions of like treatment for like cases.

Abel, regarding this unequal treatment<sup>21</sup>, points out that one example of this problem is that juries give women more money for facial injuries than men<sup>22</sup>. Should they reinforce gender stereotypes? Should a woman get more for her slashed face because her beauty made her popular? What about racial stereotypes? If juries actually display such biases, does that violate the Fourteenth Amendment?

Other problem with the pain and suffering awards is that unlike the past, currently the money awarded for pain and suffering surpasses substantially the awards for compensatory damages in tort cases.<sup>23</sup> One solution for this problem is that the judge, by remittitur, reduces these damages when he or she thinks they are excessive. This mechanism helps substantially to curb the excessiveness of these awards.

## **B) Justification for the Excessive Awards for Pain and Suffering**

Diverse scholars try to explain the reasons for the excessive awards for pain and suffering that are currently a latent problem in American justice. One of them, Antonio Gidi, comparing the civil law and the common law system, affirms that one of the justifications for the high awards in the United States is that American civil procedure

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<sup>20</sup> Joseph King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004), cited in Rabin, *infra* note 32, at 300.

<sup>21</sup> Richard L. Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, DEPAUL LAW REVIEW, 314, 315, Vol. 55, No. 2 (2006)

<sup>22</sup> *Nikkari v. Jackson*, 32 N.W.2d 149 (Minn. 1948); *Freer v. Palmer*, 55 Pa. D. & C. 109 (1946), cited in Abel, *supra* note 21, at 314.

<sup>23</sup> Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. Rev. 47, 64-65 (2002), cited in Niemeyer, *infra* note 25, at 1419.

evolved in tandem with the jury system, which necessarily interjects an element of amateur legal administration and consequently a degree of unpredictability and often high damage awards.<sup>24</sup> This could be a good explanation, especially taking into account that in civil law countries there is no jury system and they don't have a problem of excessive awards ordered by the courts.

Another explanation given by some scholars is that pain and suffering damages are given to cover plaintiff's attorneys' fees. This explanation is based in the fact that, unlike civil law systems, in the United States even if the plaintiff wins the lawsuit, he has to pay his own attorney's fees. These fees usually amount to 30 or 40% of the total recovery of damages. I think this is also a good justification for the excessiveness of these awards, taking into account that the only way to make the plaintiff whole in the American legal system is to compensate him, by way of pain and suffering awards, the percentage he will have to pay to his attorney.

According to Niemeyer, pain and suffering are genuine injuries that cause a depreciation in the quality of the plaintiffs life, and, with the extra money given to the plaintiff via pain and suffering damages, he can attempt to improve the quality of his life by purchasing benefits unrelated to his injury, ameliorating in this way the effects that pain and suffering causes or will cause him.<sup>25</sup> We agree with Niemeyer in that, although the award for pain and suffering will not put the plaintiff in the situation he was before the injury, it will help him recover from the emotional harm suffered, by way of improving his life in other ways.

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<sup>24</sup> Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, THE AMERICAN JOURNAL OF COMPARATIVE LAW, 316-317, Vol. 51, No. 2.

<sup>25</sup> Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, VIRGINIA L. REV. 1419, Vol. 90, No. 5 (Sep. 2004).

Abel considers that tort law responds to intangible injury by extending the fundamental concept of capitalism --the commodity form. In this way, it would be understood that for every pain suffered there is some equivalent pleasure that will erase it -a pleasure that can be bought with money. The jury therefore must simulate a market in sadomasochism by asking themselves what they would charge to undergo the victim's misfortune.<sup>26</sup> He criticizes this way of evaluating pain and suffering awards, affirming that the assertion that victims want only money for pain and suffering is wrong. According to him any normative theory of damages must also attend to victim concern with prevention, acknowledgement of responsibility, and recognition of the wrong. General damages are at best an indirect means towards these ends and at worst irrelevant, distracting, and inconsistent.<sup>27</sup> I agree with Abel, and consider that one way to improve the system would be that judges start issuing more injunctions, in order to stop or ameliorate the negligent conduct of the defendants, along with the pain and suffering awards.

### **C) Proposals for the Reduction and Rationalization of this Awards**

After the tort reform, over half the states enacted some kind of cap on damages recoverable, and some of them imposed a cap only on “noneconomic” damages, like those awarded for pain and suffering.<sup>28</sup> For example, California’s cap for pain and suffering in medical liability cases is \$250,000.<sup>29</sup> The main objection of the caps is that reduction of damages actually suffered eliminates appropriate compensation and reduces

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<sup>26</sup> Abel, *supra* note 12, at 207.

<sup>27</sup> Abel, *supra* note 21, at 267.

<sup>28</sup> CAL. CIV. CODE § 3333.2; MD. ANN. CODE, CT. & JUD. PROC. § 11-108, cited in Dobbs, *supra* note 2, at 1072.

<sup>29</sup> This cap was established by the California’s 1975 Medical Injuries Compensation Reform Act (MICRA)

appropriate levels of deterrence. Also, scholars argue that this cap system will provide a full recovery to the least injured but only a limited portion of the damages suffered to the most seriously injured.<sup>30</sup> I agree with this critic, and consider that the cap system is not an efficient way of curbing the excessiveness of the pain and suffering awards.

Some scholars that disagree with the statutes imposing damages caps propose the fixing of a minimum threshold that excludes small claims, allowing in this way that only the pain and suffering damages of a significant amount be covered, reversing in this way the cap effect. I don't think this is a good technique either, because the fixing of the minimum threshold will always be an arbitrary one. Also, this threshold will impede that plaintiffs below the threshold, that have gone through pain and suffering and that would otherwise have the right to this award, receive it.

Another proposition to curb the excessiveness of these awards is that jurors be asked to compare the case they heard with a set of ten or so other standardized scenarios ranging from very little injury and pain to the most serious. The law could fix damages for each scenario increasing in this way the predictability of awards. I think that this could be an efficient way to curb the pain and suffering awards, but the only problem would be to establish a fair standard for the fixing of these damages. This mechanism, if implemented, can achieve the uniformity of these damages and the predictability of them.

Some scholars have proposed that a good solution for this problem would be to apply to pain and suffering awards the factors determined by courts in punitive damages to assess its excessiveness. In this case, courts attempted to impose rationality in individual cases where punitive damages were awarded, by developing factors for juries to consider when measuring them. Three cases decided by the U.S. Supreme Court finally

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<sup>30</sup> Dobbs, *supra* note 3, at 1072

addressed punitive damages under the U.S. Constitution and concluded that the irrationality of punitive damages awards presented a constitutional issue because they undermined the rule of law. This rulings will be commented below, when addressing the punitive damages awards.

Niemeyer also considers that the problem presented by punitive damages awards is also applicable to awards for pain and suffering. He proposes that the best solution for excessive awards for pain and suffering would be for legislatures to set limits for these awards, for example, by authorizing a fixed amount either in the absolute or in relation to the duration of the pain experienced. Other solution he proposes is to fix these awards in relation to the amount of compensatory damages found.<sup>31</sup>

Robert L. Rabin considers that the scheduling of damage awards, by contrast to ceilings, would create profiles of harm, crystallized into discrete categories of specified awards with upper and lower limits, ranked according to severity of physical injury. Also, informational strategies could provide data on past awards to a jury (or trial judge) and, to the extent that an informational approach was coupled with a requirement of explaining substantial deviation from the data, would resemble a scheduling scheme. These two techniques are premised on a graduated approach that is realistic about the limits of precision in monetizing the intangible, and yet designed to recognize the qualitative differences between the psychic impacts of a spectrum of injuries ranging from quadriplegia to temporarily disabling bone fractures.<sup>32</sup> This proposition is very similar to the one referred to standardized scenarios. Although I think Rabin's technique would be more accurate and fair for the establishment of pain and suffering award than this other

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<sup>31</sup> Niemeyer, *supra* note 25, at 1421.

<sup>32</sup> Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, DEPAUL LAW REVIEW, 376, Vol. 55, No. 2 (2006).

technique, the proposition of creating standardized scenarios could be more easy for the jury to apply, and therefore, more practical.

#### **D) Pain and Suffering Damages in the Civil Law Legal System**

In the civil law legal system the pain and suffering damages are not as significant as in common law. They usually do not surpass the compensatory damages and are awarded in cases where the court considers that the suffering of the plaintiff was important. They are fixed by judges, not juries, and subject to appeal.

Nevertheless, the civil countries, as the common law countries, are also worried about finding a way of measuring the pain and suffering damages that favors the uniformity of these awards. Some civil law countries difference between the biological damage and the moral damage. The first would refer to cases in which the plaintiff has suffered a psychological harm due to a physical damage, e.g. loss of a leg, while the moral damages would refer basically to a momentary suffering.<sup>33</sup>

Regarding the proof of the pain and suffering damages, in civil countries it is considered in *re ipsa*, this is, it's enough to show the circumstances in which the harm was done to presume the existence of the pain. Some civil countries, like for example Italy, consider that the only method that is able to reflect in monetary terms the moral damage, is the equitable criterion. This method takes as factors for the fixing of the award for pain and suffering, the gravity of the wrongful conduct, the intensity of the suffering, the sensibility of the plaintiff, the relationship between the plaintiff and the victim of the

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<sup>33</sup> Juan Espinoza Espinoza, *Derecho de la Responsabilidad Civil*, Gaceta Juridica Editores, 2da. Ed., 141 (2003)

wrongful conduct and the state of coexistence.<sup>34</sup> Some countries such as Peru, by the issuing of its mandatory car insurance law, have created a table of values for each part of the body lost. In these cases the compensation is automatic and uniform for all the victims.<sup>35</sup>

**E) Which system is preferable? And why?**

I believe that the civil law legal system is preferable because it creates more predictability regarding non compensatory damages. Also, it does not create such a heavy economic burden for the defendant. This happens because he or she principally has to compensate the plaintiff for the damages he proves to have suffered.

I consider that one of the facts that allows the civil law legal system to award pain and suffering damages lower than the compensatory damages awards, is that when the ruling of the court is for the plaintiff, the defendant has to pay not only the award, but all the costs of the process and the fees of the plaintiff's attorneys. In this way, the legal system achieves the goal of making the plaintiff whole, or at least compensating him or her entirely for the damages proved.

Another factor that also affects the pain and suffering awards in the civil law countries is that the judge is the person who determines the amount of these awards. The judge is usually a more impartial and less emotional person than the jury. As stated by one commentator "It is usually much easier to arouse a jury's emotion or anger than it is

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<sup>34</sup> Juan Espinoza Espinoza, *Derecho de la Responsabilidad Civil*, Gaceta Juridica Editores, 2da. Ed., 141, 142 (2003)

<sup>35</sup> Art. 29 of the National Rules of Civil Liability and Mandatory Insurance for Transit Accidents of Peru, approved by D.S. No. 049-2000-MTC (10.10.00)

to persuade a judge to abandon her comparatively detached and balanced view of a pending case”.<sup>36</sup>

In conclusion, for the common law legal system to adopt the civil law approach which we believe is a better approach regarding pain and suffering damages awards, first it would have to enact a law establishing that the defendant that loses a case would have to pay all the costs of the proceeding and the plaintiffs’ attorneys’ fees. In this way, the necessity to make the plaintiff whole by awarding excessive pain and suffering damages would disappear. Another way to curb the pain and suffering awards would be to adopt the technique of comparing the case with other different scenarios, and deciding to which it is most alike. In this way uniformity could be achieved. Finally, if the judge, instead of the jury, is the one who establishes at least the non compensatory damages, this could also help to lower these kind of awards.

### **III. PUNITIVE DAMAGES**

#### **A) Definition and characteristics of Punitive Damages**

While compensatory damages seek to put the victim in the position he or she would have been in had the defendant not committed the wrongful act, punitive damages are aimed at punishing the wrongdoer and deterring the wrongful conduct.<sup>37</sup> In the great majority of states, the common law rule allows but does not require juries to assess punitive damages in cases in which the tortfeasor committed quite serious misconduct,

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<sup>36</sup> Graham C. Lilly, *The Decline of the American Jury*, U. COLO.L.REV. 53, 56 (2001), cited in Ryan, *infra* note 40, at 75.

<sup>37</sup> Volker Behr, *Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, CHICAGO-KENT LAW REVIEW, 109,110, Vol 78:105 (2003)

such as with a bad intent or bad state of mind<sup>38</sup>. Some courts insist upon malice, ill-will, and intent to injure, evil motive or the like, while others have found it sufficient that the defendant engages in wanton misconduct with its conscious indifference to risk.<sup>39</sup>

Since the early 1900s, punitive damages have been available only for tort, not for contract damages<sup>40</sup>, with some exceptions<sup>41</sup>. Punitive damages are discretionary and are never given as a matter of right.<sup>42</sup> No cause of action exists for punitive damages as such; they are available only when the plaintiff has suffered legally recognized harm and can recover at least nominal damages.<sup>43</sup> While compensatory damages must be equal to the loss suffered by the victim, punitive damages are determined by the seriousness of the wrong, the seriousness of the plaintiff's injury, the extent of the defendant's wealth, the profit the defendant made from his wrongful act, the necessity to deter the defendant and others like him from similar wrongful conduct, and the necessity to improve law enforcement.<sup>44</sup>

## **B) Current status of Punitive Damages**

As Behr correctly affirms,<sup>45</sup> the common law concept of punitive damages is currently undergoing a development on the technical side from common law practice towards additional and detailed statutory regulation. A number of statutes have placed limits on the amount of punitive recoveries, either by putting a flat dollar limit on these

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<sup>38</sup> Dobbs, *supra* note 3, at 1062

<sup>39</sup> E.g., *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988); *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 407, 368 S.E.2d 268, 283 (1988), cited in Dobbs, *supra* note 3, at 1064.

<sup>40</sup> *Trammel v. Vaughan*, 59 S.W. 79 (Mo. 1900), cited in Ryan, *infra* note 40, at 74.

<sup>41</sup> *Given v. Field*, 484 S.E.2d 647 (W.Va. 1997), cited in Ryan, *infra* note 40, at 74.

<sup>42</sup> Patrick S. Ryan, *Revisiting The United States Application of Punitive Damages: Separating Myth from Reality*, ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW, 74, 75, Vol. 10:69 (2003).

<sup>43</sup> Dobbs, *supra* note 2, at 1063.

<sup>44</sup> Behr, *supra* note 35, at 111.

<sup>45</sup> Behr, *supra* note 35, at 115.

damages, by limiting them to a multiple of compensatory damages or by a combination of both.<sup>46</sup> The criticism to this formula is that the punitive award will not be fixed according to the defendant's aggravated misconduct or the need for deterrence, and because of this, the damage award will not accomplish much. Also, this formula will not address the problem of excessive awards at lower levels. Finally, caps will protect the tortfeasors who are perceived by the trier to be the guiltiest of the most aggravated misconduct.<sup>47</sup> I agree with this opinion regarding caps, and consider, that caps are not the most efficient way to solve the problem of the excessiveness of punitive damage awards.

Also Behr establishes that the common law concept of punitive damages is undergoing a development in substance towards granting part of the damage award to the state, persons, or institutions other than the plaintiff. Several states are providing for allocation of a portion of the punitive award to a state agency, which, from the point of view of the plaintiff, operates like a cap. From the defendant's point of view, this reallocation does nothing to minimize punitive damages awarded. On the other hand, the limitation on punitive damages may cut the funds from which attorneys' fees and litigation costs can be paid, with the result that some suits will not be pursued at all. In this way, the defendants who most deserve punishment or deterrence will be the ones who escape liability altogether.<sup>48</sup> Regarding this development, I also consider that allocating a portion of punitive awards to other persons or institutions different than the plaintiff will only make the situation of excessive punitive awards worst.

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<sup>46</sup> COLO. REV. STATS. ANN §13-21-102 (may not exceed compensatory damages); CONN. GEN. STAT. ANN. §52-240b (products liability cases, twice the compensatory damages awarded); FLA. STAT. ANN. §768.73 (three times compensatory, with an escape clause), N.J. STAT. ANN. 2A:15-5.14 (five times the liability of that defendant for compensatory damages or \$350,000 whichever is greater), cited in Dobbs, *supra* note 3, at 1074.

<sup>47</sup> Dobbs, *supra* note 3, at 1074, 1075.

<sup>48</sup> Dobbs, *supra* note 2, at 1074, 1075.

Finally, Behr explains us that the common law concept of punitive damages is also undergoing a development in substance, albeit still vacillating, from out-of-control amounts of punitive damages towards restrictions as to the permissible amount of punitive damages. In the next point I will proceed to analyze the two rulings that the Supreme Court issued regarding the excessiveness of punitive damages and that explain this development, which is showing to be favorable for the reduction of this type of awards.

### **C) Rulings regarding Punitive Damages in the US**

The first ruling issued by the Supreme Court of the United States, that had the purpose of curbing the excessiveness of punitive damages awards, was the case BMW of North America, Inc. v. Gore. In this case, Dr. Ira Gore Jr. filed a lawsuit against German Auto, BMW AG, and BMW NA, in which he claimed that an Alabama dealership sold him a supposedly new 1990 BMW 535i automobile for \$40,000 and after 9 months of driving the car he discovered that the car was partially repainted, due to damage caused by acid rain.

During the trial the plaintiff proved that a minimum of 983 other cars, each with at least \$300 in damages, had been sold to American customers without disclosing this damages, constituting this conduct a program conducted by BMW's of nationwide fraud. The jury found that the damage devalued the car by \$4,000, or approximately 10% of the price paid by Dr. Gore and returned a verdict against all three defendants for \$4,000 in compensatory damages and \$4 million in punitive damages against BMW. The ratio of actual damages versus punitive damages was 1000:1.

The BMW defendants appealed this verdict. The Alabama Supreme Court agreed with the trial court that BMW's misconduct was reprehensible and merited punishment, but it also found that the jury should not have considered the fraudulent acts occurring outside Alabama. Because of this, the Alabama court reduced the punitive award by 50%, to \$2 million. In this way, the ratio of actual damages was reduced from 1000:1 to 500:1.

BMW then appealed to the United States Supreme Court<sup>49</sup>, which accepted the case through a process in United States law known as certiorari<sup>50</sup>. This court vacated the reduced \$2 million award and remanded the case to the Alabama Supreme Court, finding the actual harm slight and the misconduct to be minor. The court considered that the outset of this case violated the Due Process Clause of the Fourteenth Amendment, which prohibits a state from imposing "grossly excessive" punishment on a tortfeasor<sup>51</sup>. Also, the court, to assist lower courts in determining the constitutional boundaries of punitive damages offered the following three guideposts to determine whether a punitive damages verdict violated substantive due process: (i) The degree of reprehensibility of the defendant's misconduct: regarding this, the court pointed out that the risk of bodily injury would be deemed more serious and more deserving of a sanction than pure economic torts. In this regard, the court considered that the harm to Dr. Gore was certainly not especially or unusually reprehensible enough to warrant \$2 million in punitive damages; (ii) The relationship (ratio) between the punitive award and the actual harm: The court considered that punitive damages must rationally relate to the award of compensatory

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<sup>49</sup> BMW of N. Am. Inc. v. Gore, 517 U.S. 559 (1996).

<sup>50</sup> Certiorari is most commonly used by the United States Supreme Court, which is selective about which cases it will hear on appeal, cited in Ryan, *supra* note 40, at 73.

<sup>51</sup> BMW, 116 U.S. at 562 (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993)).

damages, and that in this case, the ratio of 500:1 was “breathtaking”<sup>52</sup>; and (iii) The difference between the punitive damages remedy and the civil or criminal penalties authorized or imposed in similar cases: In this case the court noted that the maximum civil penalty authorized by the Alabama Legislature for violation of its deceptive trade practices act was \$2,000<sup>53</sup>. The court found that the sanction imposed versus the legislature’s \$2,000 fine was overly drastic.

The court remanded the case to the Alabama Supreme Court and required that it analyze the case with an application of the United States Supreme Court’s newly established tests. Upon remand, the Alabama Supreme Court applied these tests and reduced the punitive damages award to \$50,000<sup>54</sup>. This case was very important, because in it the Supreme Court finally established some criteria to measure the punitive damages in a rational way.

The second case in which the Supreme Court established new criteria regarding the excessiveness of punitive damages, was in the case of State Farm Mutual Automobile Insurance Company v. Campbell<sup>55</sup>. In this case the facts were the following: Curtis Campbell was driving with his wife on a two-lane highway in Utah and had a car accident in which two other cars were involved. The driver of one car –Tod Ospital- was killed, and the other driver –Robert Slusher- was permanently disabled.

The Campbells were insured by State Farm, and this company’s own internal investigators concluded that Campbell was probably responsible for the accident<sup>56</sup>. Prior

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<sup>52</sup> *Id.* At 583

<sup>53</sup> BMW, 116 U.S. at 584.

<sup>54</sup> BMW of N. Am., Inc. v. Gore, 701 So. 2d 507 So.2d 507, 515 (Ala. 1997).

<sup>55</sup> State Farm Mutual Automobile Insurance Company v. Campbell, 123 S.Ct. 1513, 1517 (2003), cited in Ryan, *supra* note 26, at 88.

<sup>56</sup> *Id.* 1518

to trial, Slusher and Ospital offered to settle the matter out of court with Campbell for the policy limit of \$25,000 each<sup>57</sup>. State Farm, however, refused the offer to settle and insisted on challenging the matter in court. Later it was determined that State Farm altered the records from their own investigation to hide their determination that Campbell was at fault. When State Farm insisted on litigation, company representatives reassured the Campbells that their assets were safe, that they had no liability for the accident, that State Farm would represent their interest and that they did not need to procure separate counsel<sup>58</sup>.

State Farm proceeded with challenging the matter in court and lost at the court of first instance,<sup>59</sup> which determined that Campbell was 100% at fault and awarded damages to Slusher and Ospital of \$185,849. In spite of their earlier promise to indemnify the Campbells, State Farm then refused to pay the \$135,849 in excess liability. Representatives from State Farm boldly told the Campbells, “You may want to put sale signs on your property”.<sup>60</sup> State Farm further refused to represent Campbell any further through an appeal process and therefore Campbell hired his own lawyer to appeal the judgment. Eventually, after many months and a series of litigious activity, State Farm decided to pay the \$135,849 in excess liability. Still, the Campbells believed that their refusal to settle and their advice to sell their home was bad faith, and further that State Farm had committed fraud and intentional infliction of emotional distress.

The Campbells sued State Farm and argued in the trial that State Farm’s decision not to take the case to trial was the result of a national scheme to fraudulently limit

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> State Farm Mut. Auto Ins. Co. v. Campbell, 65 P. 3d 1134, 1141 (Utah 2001).

<sup>60</sup> State Farm, 123 S. Ct. at 1518

payouts companywide. The jury of the court of first instance awarded the Campbell's \$2.6 million in compensatory damages, and \$145 million in punitive damages. However, the judge of first instance partially corrected the verdict, citing the then recently decided BMW v. Gore decision, and reduced the verdict from \$2.6 million and \$145 million to \$1 million and \$25 million respectively. Both parties appealed and the Utah Supreme Court reinstated the jury's \$145 million punitive damages, but left the \$1 million in compensatory damages intact<sup>61</sup>. State Farm then appealed to the U.S. Supreme Court.

The Supreme Court, as in BMW v. Gore, reviewed the amount of punitive damages. In State Farm the ratio of punitive damages was 145:1. Regarding the first Gore guidepost (reprehensibility of the conduct) the court concluded that due to the fact that the claim was not related to damage or risk of bodily injury, the amount of punitive damages should be relatively low. Regarding the second guidepost (ratio of punitive damages to compensatory damages) the Supreme Court provided further clarification on what they believed would be reasonable in cases where reprehensibility was low. While not providing a mathematical formula, the court stated that single digit multipliers were more likely to comport with due process, while still achieving the state's goal of deterrence and retribution, than awards in the range of 500:1, or in this case, 145:1. The third guideposts (ratio of punitive damages to statutory criminal fines) receive little discussion. Finally, the Supreme Court emphasized that the application of punitive damages should be limited to harm related to the plaintiff, and not as in State Farm case, in which the lower court's punitive damages award was also based on nation-wide conduct.<sup>62</sup> This case is important because by the issuing of it the Supreme Court clarified

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<sup>61</sup> State Farm, 65 P.3d at 1153.

<sup>62</sup> Ryan, *supra* note 42, at 88, 91.

the second guidepost established in *BMW v. Gore*, and established that in cases where reprehensibility is low (as in *State Farm v. Campbell*) the rational ratio of punitive damages should be of a single digit multiplier.

#### **D) Proposals for the Reduction and Rationalization of these Awards**

Although punitive damages vary tremendously from state to state, currently most states have limited them. Significant limitations on punitive damages have been introduced by individual state legislation, federal legislation and U.S. Supreme Court jurisprudence. Although most recent state statutory regulations have not abolished punitive damages, many states have introduced general ceilings on punitive damages or have capped the amount of allowable damages.<sup>63</sup>

#### **E) Punitive Damages in the Civil Law legal system**

In most civil law countries punitive damages are rejected, because all punishing functions are left to criminal law, an area in which states enjoy a constitutional monopoly.<sup>64</sup> In these countries, the purpose of a civil action, particularly in tort law, is to restore the plaintiff to the position in which he would have been if the tort did not occur, not to punish him.<sup>65</sup> This fact explains why some of the civil law countries deny recognition and enforcement of American punitive damages awards. One example of this

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<sup>63</sup> Behr, *supra* note 35, at 116.

<sup>64</sup> Ryan, *supra* note 42, at 75.

<sup>65</sup> Keeton Et. Al., *Cases and Materials on Torts, and Accident Law*, West Publishing Co. (1983), cited in Ryan, *supra* note 42, at 75.

is that in Germany, American punitive damage awards are not enforced because they are considered contrary to German public policy.<sup>66</sup>

Nevertheless, as Luis Perez, partner at Hogan & Hartson and ranked consistently among Florida's premier corporate lawyers correctly affirms, the same trends that hit the United States in the past now are developing in Latin America.<sup>67</sup> Class actions and punitive damages, or "moral damages," are emerging. Some countries like Venezuela and Brazil have drafted legislative proposals to implement class actions and punitive damages. Others, like Peru, have created administrative punitive damages in consumer law cases.<sup>68</sup>

**F) Do punitive damages work? Should civil law countries introduce them into their legal system?**

Civil law legal systems are not comfortable with uncertainties that arise from common law claims for punitive damages.<sup>69</sup> According to Antonio Gidi<sup>70</sup> the American political culture has long supported litigation as a positive way of regulating society and changing the status quo. This approach contributes to a flexible legal climate without the delays of legislation, but the threat of liability may lead to overdeterrence of socially useful activities.

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<sup>66</sup> Behr, *supra* note 35, at 108.

<sup>67</sup> Luis Perez, *The Expansion of "Moral" Damages*, ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 68, Vol 20, No. 1, 2003

<sup>68</sup> Law 27311 (Law for the Protection of the Consumer), Art. 42, Inc. k

<sup>69</sup> Ryan, *supra* note 42, at 92.

<sup>70</sup> Gidi, *supra* note 24, at 317.

University, argues that the high punitive damages in the U.S. litigation system, together with the high compensatory damages awarded, including those for pain and suffering, are a very significant reason for the high cost of doing business in the United States.<sup>71</sup> The availability of punitive damages is notorious. Over the last fifteen years, awards have gotten out of hand both in individual and class action cases. According to Schotland the problem with punitive damages is not so much that they are routinely awarded, since many defendants in individual cases are able to avoid a showing of clear and convincing evidence of gross or willful negligence. The problem arises when punitive damages do accrue; they are out-of-sight. She also affirms that when punitive damages are awarded in one case, plaintiffs are encouraged to go after punitive damages in another case, and the very same conduct of the defendant may be subject to repeated punishment, sometimes causing the bankruptcy of the defendant.<sup>72</sup>

Because of all these reasons, I think that the civil law countries are better off without including the punitive damages awards into their legal systems, because if they do so, they will exclude predictability of the outcome of the cases, in cases of wanton conduct, will impose a heavy economic burden on the defendants, and will provide a disincentive for investors to come invest in the civil law countries, affecting in this way their economy and development.

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