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Civil liability and moral damages: an analysis of the preventive, educational, and punitive functions of compensation

Responsabilidade civil e dano moral: uma análise das funções preventiva, pedagógica e punitiva da indenização

Responsabilidad civil y daño moral: un análisis de las funciones preventiva, pedagógica y punitiva de la indemnización

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Abstract:
The purpose of this article is to analyze the institute of moral damage and its characteristics in relation to the punishment and discouragement of harmful practices performed by large companies in order to make a profit because of impunity. The problem in question was addressed by analyzing the fundamentals of civil liability, moral damages, the main functions of moral damages, the application of the US concept "punitive damages" to the Brazilian legal system, as well as the possible consequences of this application and the opinion of authors who agree or disagree with the use of this institute.

Keywords:
Moral damage. Civil liability. Punitive damages. Law.

Resumo:
O presente artigo possui a finalidade de analisar o instituto do dano moral e suas características em relação à punição e desestímulo de práticas danosas realizadas por grandes empresas com o intuito de aferir lucro por causa da impunidade. O problema em questão foi tratado ao analisar os fundamentos da responsabilidade civil, do dano moral, as principais funções do dano moral, a aplicação do conceito norteamericano "punitive damages" ao ordenamento jurídico brasileiro, bem como quais seriam as possíveis consequências desta aplicação e a opinião de autores que concordam ou discordam da utilização deste instituto.

Palavras-chave:
Dano moral. Responsabilidade civil. Punitive damages. Direito.

Resumen:
Este artículo tiene como finalidad analizar la institución del daño moral y sus características en relación con el castigo y la disuasión de prácticas lesivas realizadas por grandes empresas con el propósito de obtener beneficios gracias a la impunidad. El problema se aborda mediante el análisis de los fundamentos de la responsabilidad civil, del daño moral, de sus principales funciones y de la aplicación del concepto estadounidense de «punitive damages» al ordenamiento jurídico brasileño, así como de las posibles consecuencias de esta aplicación y de las opiniones de autores que coinciden o discrepan con el uso de esta institución.

Palabras clave:
Daño moral. Responsabilidad civil. Daños punitivos. Derecho.

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1. Introduction

Civil liability is one of the main legal instruments for protecting individual and collective rights, playing a fundamental role in maintaining the balance of social relations and in protecting the dignity of the human person. Traditionally associated with the obligation to repair losses resulting from illicit conduct, its application has been subject of doctrinal and jurisprudential transformations, especially in view of the complexity of economic, social and consumer relations in contemporary society.

In the Brazilian legal system, reparation for moral damages is based on the Federal Constitution of 1988, particularly in article 5, items V and X, which ensure the right to compensation as a result of violation of individual rights and personality. In addition, articles 186, 187 and 927 of the Civil Code establish the legal assumptions of the unlawful act, the abuse of law and the duty to reparation, consolidating civil liability as a mechanism for protecting legally protected interests (Brasil, 1988, 2002).

Although the compensatory function represents one of the central foundations of civil liability for off-balance sheet damages, contemporary doctrine has expanded discussions about its preventive, pedagogical and punitive functions. In this context, Souza e Silva (2022) highlight the need to understand the autonomy and limits of the different functions attributed to civil liability, considering its compatibility with the principles and foundations of the Brazilian legal system.

The preventive function is related to the adoption of mechanisms capable of avoiding the occurrence of new damages, while the pedagogical dimension seeks to promote awareness of the agent causing the illicit and collectivity about the legal consequences of certain conducts. In turn, the punitive function is based on the possibility of imposing patrimonial consequences to the offender, in order to discourage recidivism and prevent the practice of illicit acts from becoming economically advantageous.

This discussion assumes particular relevance in consumer relations, in which consumer vulnerability and economic asymmetry between the parties may favor the perpetuation of abusive practices. Nascimento, Sordi and Amaral (2023) discuss the punitive nature of civil liability in this context, questioning the limits of repair and the impacts of applying the theory of mere annoyance on the protection of consumer rights.

From this perspective, the debate about punitive damages stands out, an institute developed within the scope of Anglo-American legal tradition, whose purpose is to punish certain illicit conducts and discourage its repetition. The possibility of incorporating elements of this institute into the Brazilian legal system raises controversies related to proportionality, reasonableness, prohibition of enrichment without cause and extension of damage as a parameter for fixing damages (Amaral, 2024; Nunes; Oliveira, 2024).

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In view of this scenario, the following research problem is established: to what extent the preventive, pedagogical and punitive functions of compensation for moral damages can contribute to discourage illicit practices, without compromising the foundations and limits of civil liability in the Brazilian legal system?

It is based on the theoretical assumption that compensation for moral damages, when based on criteria of proportionality, reasonableness and analysis of the circumstances of the concrete case, can perform functions that go beyond the individual compensation of the victim, contributing to the prevention of new crimes and to the protection of personality rights.

This article aims to analyze the preventive, pedagogical and punitive functions of compensation for moral damages in the scope of Brazilian civil liability. As specific objectives, we seek to understand the legal foundations of civil liability and moral damage; examine the different functions attributed to off-balance reparation; discuss the limits and possibilities of applying punitive damages in Brazil; and analyze the contribution of the discouragement theory to face abusive practices in consumer relations.

As for the methodological procedures, a qualitative research of bibliographic and documentary nature is proposed, with an exploratory and analytical character, based on Brazilian legislation, legal doctrine, scientific articles and jurisprudential decisions related to civil liability and reparation for moral damages.

The scientific and social relevance of this research lies in the need to deepen the understanding about the multiple functions of civil liability, considering the contemporary challenges of protecting individual and collective rights. In this way, it is intended to contribute to the legal debate on the construction of indemnity mechanisms that reconcile the fair compensation of the victim, the prevention of new harmful conduct and legal certainty, respecting the structuring principles of Brazilian Law.

2. Contractual and non-contractual civil liability and strict and fault-based civil liability

Contractual liability stems from the default of pre-existing obligation, while non-contractual liability, also called Achilles, stems from the violation of general legal duty (Brasil, 2002, arts. 186, 389 e 927).

The extracontractual modality is the one in which there is a direct violation of a norm. So see, in our example mentioned above, about the roadkill of the person, when you pierced the red sign, it is evident that there was no formalized agreement of will that had as expectation the production of this effect, that is, to run over the person.

The violation that you committed was not a previous adjustment of will in the contractual scope of a legal business, but it was legal. You, from the moment you stopped serving that command of the state and advanced the red light, violated an expectation that the law created in you.

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In the case of an important article of the Civil Code, in the extracontractual modality, we have article 186, which says: "Art. 186. He who, by action or voluntary omission, negligence or imprudence, violates right and causes harm to others, even if exclusively moral, commits an unlawful act". Here, we will study the concept of damage, which is the next subject, so we will unravel this in two moments. The first moment is now, in civil liability and the second is in damage and what it will bring about consequences from this.

The concept of illicit act brought in article 186 is well treated there in article 927 of the Civil Code, which will say: "Art. 927. He who, by unlawful act (arts. 186 and 187), causes damage to others, is obliged to repair it".

Then see that the attribution of consequences will be given by a combination of these two concepts, article 186 and article 927. Because in article 927 will tell us that if you commit illicit act, you are obliged to indemnify. This obligation to repair, in accordance with the law, is the attribution of the effects that we speak about at the beginning.

Let's see, if you stop doing something that your boyfriend expected, you will have the attribution of consequence for this. If you fail to comply with a contract, there will also be consequences, but of another type. Now, if you commit an unlawful act and cause damage, you will be obliged to repair it by legal provision.

Subjective responsibility requires, in general, the demonstration of guilt or intentionality, damage and causal link. The objective responsibility dispenses with the demonstration of guilt, but not, in general, the proof of damage and causal link (Brasil, 2002, art. 927).

3. Moral damage

The moral damage is characterized by the injury to interests of a legally protected extra-patrimonial nature, especially those related to personality rights, honor, image, intimacy, privacy and dignity of the human person. Its configuration is not restricted to the occurrence of psychological suffering, since it can result from the violation of intangible assets and interests recognized by the legal system.

In the Brazilian context, the legal protection of extra-patrimonial damages is based on the Federal Constitution of 1988, particularly in article 5, items V and X, which ensure the right to compensation for material, moral and image damage, conferring constitutional protection to personality rights (Brasil, 1988).

In the infraconstitutional scope, articles 186, 187 and 927 of the Civil Code establish the normative foundations of civil liability and the duty to reparation. Article 186 recognizes as an unlawful act the commissive or omissive conduct that, through intentional or guilt, violates right and causes damage to third parties, even if exclusively moral. Article 187, in turn, contemplates the abuse of law, characterized by the exercise of a legal prerogative in

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disagreement with the limits established by its economic or social purpose, good faith or good customs (Brasil, 2002).

In addition, article 927 of the Civil Code establishes the obligation to repair damages resulting from unlawful acts, consolidating the legal relationship between the occurrence of damage and the duty to reparation, observing the specific assumptions of the applicable liability regime.

The systematic interpretation of these devices allows us to understand that the characterization of moral damage does not necessarily depend on the demonstration of emotional or psychological suffering. In certain circumstances, the violation of a personality right itself can substantiate the indemnity claim, according to the nature of the interest achieved and the legal particularities of the specific case.

The quantification of compensation for moral damages is a relevant issue in the scope of civil liability, considering the extra-patrimonial nature of protected interests and the absence of universal mathematical criteria for injury measurement. In this context, the jurisdictional activity must observe parameters of proportionality, reasonableness, extent of damage and reasoning of decisions, avoiding both the insufficiency of repair and the fixation of disproportionate values.

Among the criteria developed by Brazilian jurisprudence, the biphasic method of arbitrage of compensation for moral damages stands out. In the first stage, a basic value is established through the analysis of precedents related to the injured legal interest. In the second, the specific circumstances of the case are considered, allowing the adequacy of the compensation amount to the particularities of the situation examined (Brasil, 2019).

The adoption of this method seeks to confer greater rationality, predictability and coherence to judicial decisions, without removing the need for individualization of reparation. However, the use of precedents as guiding parameters does not imply the pricing of moral damage, since the characteristics of each situation should be considered in the justification of the indemnity value.

The discussion about the quantification of off-balance sheet damages also involves the delimitation of functions attributed to civil liability. Although the compensation of the victim constitutes one of its central purposes, contemporary doctrine discusses the possibility of recognizing preventive, pedagogical and punitive effects, as well as the legal limits of its application (Souza; Silva, 2022).

When submitted to judicial review, the recognition of moral damage and the determination of the amount indemnification must observe the constitutional guarantees of due process legal, contradictory and broad defense. The analysis should consider the relevant evidence, the assumptions of civil liability and the circumstances legally relevant, except for the hypotheses in which jurisprudence admits the configuration of presumed moral damage.

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In this way, the reparation for moral damages is an instrument of protection of extra-patrimonial interests, whose application requires the compatibility between the protection of personality rights, the legal basis of decisions and legal certainty.

4. Preventive function of civil liability

The preventive function of civil liability comprises the set of legal mechanisms aimed at avoiding the occurrence, continuity or repetition of potentially harmful conducts. Unlike the exclusively reparatory perspective, oriented towards the compensation of losses already achieved, the preventive dimension contemplates the possibility of action prior to the occurrence of damage, without removing the autonomy of the reparatory function (Mill, 2022; Souza; Silva, 2022).

In the Brazilian legal system, the recognition of the preventive dimension finds interpretive support in Enunciate No. 446, approved in the 5th Civil Law Day, promoted by the Federal Justice Council, according to which: The civil liability provided for in the second part of the single paragraph of article 927 of the Civil Code should take into account not only the protection of the victim and the activity of the offender, but also the prevention and interest of society (Conselho da Justiça Federal, 2011, Enunciado n.º 446).

Although the statements of Civil Law Days do not have a binding normative character, they constitute instruments of doctrinal and interpretative guidance, contributing to the understanding of the fundamentals and possibilities of application of Brazilian civil legislation.

The contemporary scientific, technological, economic and social transformations have expanded the discussion about the risks associated with the development of certain activities. Sectors such as health, transportation, industrial production, service provision and technological development present situations in which the realization of damages can produce individual and collective consequences of different magnitudes.

In this scenario, civil liability starts to be analyzed not only from the perspective of reparation after the occurrence of damage, but also in relation to legal mechanisms for management and risk reduction. This expansion of the debate highlights the need to examine the limits of traditional models of accountability in view of the characteristics of contemporary activities (Mill, 2022).

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4.1 The distinction between risk and prevention in civil liability

The conception of risk associated with preventive function is not completely confused with the one that underlies objective civil liability. In the latter, risk constitutes one of the possible legal grounds for the imputation of the duty to repair, regardless of the demonstration of guilt, as established in the sole paragraph of article 927 of the Civil Code (Brasil, 2002).

The objective responsibility assumes, in general, the occurrence of damage and the existence of causal link between the activity developed and the damage experienced by the victim. The preventive function, in turn, is directed to the early identification of potentially harmful situations and to the adoption of measures aimed at reducing the probability of their implementation.

This distinction shows that objective responsibility and preventive function operate in different legal dimensions, although they may present complementary relationships. While the first establishes criteria for imputation of the duty to repair, the second includes instruments aimed at protecting legal interests in the face of risks of injury.

Prevention, therefore, does not necessarily imply the replacement of traditional repair mechanisms, but the expansion of legal protection possibilities, considering the nature of protected interests and circumstances related to the occurrence of damage.

4.2 The principles of prevention and precaution

The principles of prevention and precaution are relevant for the analysis of the preventive dimension of civil liability, particularly in situations involving potentially harmful activities and risks of difficult measurement.

The principle of prevention is related to the adoption of measures aimed at avoiding damage associated with risks previously identified or sufficiently known. Its application presupposes the existence of elements that allow to recognize the possibility of occurrence of certain damage and establish appropriate measures for its reduction or elimination.

The precautionary principle, in turn, relates to situations characterized by scientific uncertainty regarding the occurrence or magnitude of certain damages. In these cases, the absence of conclusive knowledge about risks does not necessarily prevent the adoption of protective measures, especially when there is a possibility of serious or irreversible consequences.

Although these principles have acquired greater development in the scope of Environmental Law, their discussion also reaches other legal fields, such as Consumer Law, Sanitary Law and civil liability arising from technological and economic activities.

The application of preventive and precautionary measures, however, raises controversies regarding its legal limits and possible repercussions on economic freedom,

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innovation and scientific development. The adoption of excessive restrictions, without sufficient technical or legal grounds, can produce disproportionate effects in relation to the intended protection objectives.

In this sense, the application of these principles requires the consideration of criteria of proportionality, reasonableness and adequacy, in order to reconcile the protection of individual and collective rights with the development of economic, scientific and technological activities.

4.3 Socialization of risks and prevention mechanisms

The socialization of risks is another relevant aspect for understanding the transformations of civil liability. Instruments such as insurance contracts enable the distribution of economic impacts resulting from certain harmful events, contributing to the patrimonial protection of those involved and to the viability of repair.

However, the existence of transfer mechanisms or distribution of economic risks raises discussions about incentives for the adoption of preventive measures. In certain circumstances, the costs associated with compensations can be incorporated into the financial planning of economic activities, influencing decisions related to investments in safety, quality and prevention.

This possibility, however, does not allow us to conclude that strict liability or security mechanisms necessarily produce the reduction of economic agents' commitment to harm prevention. The relationship between accountability, risk distribution and business behavior depends on factors such as regulatory structure, inspection mechanisms, contractual characteristics and economic incentives present in each activity.

From this perspective, the preventive function can contribute to the discussion about the adoption of legal mechanisms capable of stimulating behaviors compatible with security duties, diligence and protection of legally protected interests.

The analysis of these issues highlights the importance of considering prevention and reparation as potentially complementary dimensions of civil liability, avoiding the attribution of absolute superiority to one of them without the corresponding legal and scientific basis.

4.4 The preventive and pedagogical dimension of compensation for moral damages

The preventive function of civil liability can be examined from two temporal perspectives. The first corresponds to the action prior to the occurrence of the damage, through instruments intended to prevent the realization of harmful conducts. The second relates to the possible deterrent effects of legal measures adopted after the occurrence of the illicit.

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In the first perspective, we highlight the mechanisms of inhibitory protection, the obligations to do and not to do and other measures aimed at preventing the practice, continuity or repetition of illicit conduct. In the second, it examines the possibility that civil liability produces effects on the future behavior of the agent causing damage and other members of the community.

The pedagogical dimension of compensation is associated with this second perspective, insofar as the legal response to illicit can contribute to awareness about the consequences resulting from violation of rights. However, the existence of pedagogical effects does not necessarily imply the recognition of an autonomous punitive function of compensation.

The legal doctrine presents different positions about the possibility of assigning punitive purpose to off-balance sheet reparation. While certain approaches recognize the relevance of the deterrent effects of conviction, others highlight the need to preserve the autonomy of the compensatory function and the normative limits of civil liability (Souza; Silva, 2022; Amaral, 2024).

In consumer relations, this discussion assumes particular relevance in view of the possibility of repetition of harmful practices and the need for consumer protection. The attribution of preventive and pedagogical effects to indemnity should, however, be examined in line with the legal foundations of reparation, avoiding automatic equating between the Brazilian system and the institute of punitive damages developed in Anglo-American Law (Nascimento; Sordi; Amaral, 2023; Nunes; Oliveira, 2024).

Thus, the preventive dimension of civil liability is a field of investigation that involves the articulation between the protection of rights, risk management, compensation for damages and possible discouragement of repetition of illicit conduct. The effectiveness of these mechanisms, however, cannot be presumed exclusively from their theoretical foundations, demanding empirical investigations that allow to evaluate its repercussions on the behavior of agents and reducing the incidence of damages.

5. Punitive function

The punitive function aims to punish the one who committed the offense, through the payment of sufficient compensation to demonstrate that the unlawful act practiced is not tolerated by justice. It presents itself as an indispensable function to discourage new infractions, considering that the impunity of the injured agent can convey the idea of an advantage obtained in the illicit. Clayton Reis states in this sense:

> The compensation paid to the victim has a punitive meaning for the wrongdoer, who sees the financial penalty as a reduction in their material assets resulting from their harmful act. This confrontation of forces, with the victim assuaging their desire for revenge through the compensation received on one side and the wrongdoer paying

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> punitively for their reckless acts on the other, is a way for the State to act to achieve a balance between opposing forces. (REIS,1995, p.90).

The application of indemnifications with punitive purpose remains controversial in Brazil, especially regarding its compatibility with the legal grounds for civil reparation (Amaral, 2024). The quantification of compensation should observe the extent of damage and the reasoning of the circumstances of the case, avoiding arbitrariness (Brasil, 2002; Brasil, 2019).

> PROVISION OF SERVICES. ACTION FOR COMPENSATION. DEBT PAID. WRONGFUL CREDIT RESTRICTION. DISTRESS. MORAL DAMAGES. JUDGMENT UPHELD. APPEAL DISMISSED IN THIS RESPECT. The duty to compensate for moral damages must be recognized because of the distress and inconvenience caused by the defendant's arbitrary conduct in collecting a debt that had already been paid and registering the claimant's name with credit restriction agencies. PROVISION OF SERVICES. COMPENSATION FOR MORAL DAMAGES. WRONGFUL CREDIT RESTRICTION. MORAL DAMAGES SET AT TEN (10) MINIMUM WAGES. THE AMOUNT OF MORAL DAMAGES CANNOT RESULT IN ENRICHMENT. APPEAL ALLOWED IN THIS RESPECT. An award of compensation for moral damages equivalent to 10 minimum wages to the claimant is considered reasonable, taking into account the repercussions she suffered from the credit restriction. (TJ-SP - APL: 12122850201182601 00 SP 0121228-50.2011.8.26.0100, Reporting Judge: Armando Toledo, Judgment Date: 27/11/2012, 31st Private Law Chamber, Publication Date: 29/11/2012). (emphasis added).

Another factor that hinders the use of punitive function would be the fact that the Brazilian legal system makes a separation between civil law and criminal law. According to some scholars, the orientation of criminal law by the principle of legality removes punitive claims in spite of civil liability, as there is no legislation regarding the punishment of causes of extra-patrimonial damage. Since criminal law aims to punish and repress crimes, civil law seeks reparation to a state prior to the harmful act that causes damage to the victim.

On the other hand, Talamini (2001, p. 178- 179) is positioned in the sense that there is no incoherence between the criminal and civil system with regard to punishment in occurrences of extra-patrimonial damage, as observed in the stretch below:

> The negative retributive sanction (punitive), constituted by imposing a disadvantage on the person who violates a rule, is also called a penalty. An adverse consequence is imposed on the sanctioned person, or they are deprived of a benefit, in disapproval of the unlawful conduct. Punitive sanctions do not operate solely in the criminal sphere, although the term "penalty" is generally reserved for the consequence of conduct legally classified as a crime. There are therefore also civil punitive sanctions. What unifies all these punishments, civil and criminal, is their afflictive purpose: punishment expresses disapproval of the unlawful act, rather than primarily seeking to obtain a situation equivalent to that which would exist without the violation.

We agree with Talamini in this sense, because we believe it is not possible to achieve a fair interpretation of the size of the damage caused without taking into account that the perpetrator of the damage is punished for his practice, making clear the reprobability of his conduct before the judiciary and, consequently, society. In addition to considering that there is no application of the right only the intention to punish for punishing, without a repressive purpose to harmful conduct.

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6. Punitive damages

The punitive function of moral damage finds its greatest support in American law under the name of Punitive Damages or Exemplar Damages. This institute is based on the idea of punishing the offender for the damage caused so that the fact in question does not occur again, thus serving as an example for the others.

There is much discussion among Brazilian scholars about the possible adoption of punitive damages by the national legal system, in the North American molds. Some authors argue that the application of the theory of discouragement affronts art. 5, V and X of the Federal Constitution that only allows compensation for material and moral damage, in the measure of injury caused, does not allow punitive compensation, which could undergo an unintended enrichment of the victim providing values that exceed the compensation for the damage experienced. Rodrigo Delgado's position is an example of this sense:

> Therefore, the constitutional provision permits compensation for moral or material damages, both of which may be awarded cumulatively, as Precedent No. 37 of the Superior Court of Justice (STJ) permits this accumulation. However, the constitutional authorization never mentions an amount to be awarded as punitive or exemplary damages, because this would seriously violate the Republican Constitution of 1988. In Brazil, this theory is therefore unworkable. Its implementation would require drafting a new Constitution. Otherwise, any such claim is unconstitutional from the outset because it is incompatible with the constitutional system in force. Moreover, as already stated, the deterrent-value theory creates an unlawful hybrid system by combining criminal law and civil law. (Delgado, 2011, p.316).

In the opposite direction, there are indoctritors who are favorable to the institute of punitive damages because they believe that they are a fairer way out for a civil liability of the cause of the illicit act, so that it influences the reduction of their assets in order to really repress new acts of the type. The jurist Carlos Alberto Bittar points out that:

> With financial compensation adopted, which is in fact the general practice in view of the circumstances described, an approach has been taking shape in Brazilian case law that has long dominated compensation under American and English law. It involves setting an amount that deters further harmful acts, consistent with the spirit of punitive or exemplary damages in the case law of those countries. In accordance with this approach, compensation for moral damages must be an amount that warns the wrongdoer and society that the conduct or resulting harmful event is unacceptable. It therefore consists of a sum commensurate with the magnitude of the conflicting interests, significantly affecting the wrongdoer's assets so that they actually feel the legal system's response to the harmful outcome produced. Accordingly, it must be an economically significant amount in light of the wrongdoer's financial resources. (Bittar, 1999, p.232-233)

The incorporation of punitive-pedagogical criteria does not necessarily mean the adoption of autonomous punitive compensation. Nunes and Oliveira (2024) examine this distinction in the context of judgment of the Court of Justice of Rio Grande do Sul.

Some judges, even with some difficulty, seek to apply the American institute of origin. Using the argument of the need to observe the preventive and punitive functions of civil liability. We bring as an example the following judgment:

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> CIVIL LIABILITY. ACTION FOR COMPENSATION. MORAL DAMAGES. COMMERCIAL BILL. WRONGFUL PROTEST. ENDORSEMENT FOR COLLECTION. LIABILITY OF THE ENDORSER. PRECEDENT. ARTICLE 1.313 OF THE CIVIL CODE. RIGHT OF RECOURSE. RESERVATION. AMOUNT OF COMPENSATION. APPLICATION OF THE LAW TO THE CASE. APPEAL ALLOWED.
>
> I – In accordance with this Court's approach, in an endorsement for collection, because ownership of the instrument is not transferred, the principal is liable for acts performed on its instructions by the endorsee bank.
>
> II – Moreover, the endorser's liability also follows from its failure to prevent the bank responsible for collection from protesting the instrument, according to the facts recorded in the judgment.
>
> III – Compensation for the wrongful protest of a negotiable instrument must punish the person who improperly initiated the act and provide effective reparation to the affected party.
>
> IV – However, the endorser's right of recourse against the endorsee is reserved, pursuant to Article 1.313 of the Civil Code.
>
> V – The wrongful protest of a commercial bill gives rise to compensation for moral damages without requiring proof of loss. (STJ - REsp: 835638 RS 2006/0073432-0, Reporting Justice: Minister JORGE SCARTEZZINI, Judgment Date: 06/06/2006, T4 - FOURTH PANEL, Publication Date: DJ 01/08/2006 p. 453).

The exaltation of the idea of warning against encouraging new similar conduct justifies the application of the institute under analysis. In fact, the vengeful aspect observed by some legal scholars does not exist when analyzing its structure with care. The decision to pay a higher value is nothing more than a firm attitude on the part of the Judiciary in the search for social peace.

7. Profit through harm to consumers

In consumer relations, prevention and effective repair of damages constitute basic consumer rights (Brasil, 1990, art. 6º, VI). Nascimento, Sordi and Amaral (2023) discuss the insufficiency of discouragement in the face of repeated abusive practices and the incidence of mere boredom theory.

Recurrent concern in the doctrine and jurisprudence regarding the application of moral damage in Brazilian law is the arbitrage of exorbitant damages. The fear of increasing disproportionate values raises a set of decisions that do not satisfy all the purposes of civil liability. This factor is the main reason for not effective use of punitive moral damage at the time of fixing indemnification values.

Adding to this, there is the idea that high values can foster an industry or commodification of moral damage and consequently the trivialization of the institute. It is also argued that values that do not have with the damage caused can cause enrichment without cause or illicit of the victim.

There is still a lot of caution in the admission of values that effectively exercise the punitive purpose. However, this reluctance for the institute proves to be without foundation. For the reason that in the Brazilian legal system, the same decision can be reviewed more than

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once, preventing values from persisting beyond common sense. In addition, as long as the arbitrated value is duly substantiated by the judicial authority, one cannot speak of enrichment without cause of the injured person, since he was the victim of damage.

In addition, decisions are usually based on the principles of proportionality and reasonableness, except for rare exceptions. The judges, for the most part, argue the importance of balance and moderation in quantifying value as compensation.

Certainly such criteria are imperative in the quantification of moral damage and in some cases, such as American judgments, correctors of disproportionate compensation.

However, in the field of consumer law, it is also necessary to take into account, in the specific case, the economic scope of the company responsible for the damage. To avoid the risk of reiteration of the fact, the value of punitive compensation should be high in the case of demands involving large companies. On the other hand, a company that does not have sufficient financial resources, if condemned to excessive amounts, could fail.

Despite decisions based on the need to punish those responsible for the damage, judges do not impute sufficient amounts to enforce the objective of punitive function. On the contrary, small amounts provide a notion of impunity and intensify abusive practices by the notion of impunity provided.

In theoretical terms, when the expected cost of accountability is lower than the economic benefit of abusive conduct, there may be an incentive to its repetition. This hypothesis, related to the debate of Nascimento, Sordi and Amaral (2023), does not demonstrate by itself the frequency of such practices or their causal efficacy.

Therefore, it is important to focus on eliminating the profit generated at the expense of the damage suffered by the consumer. The provocateur of the damage should not be unpunished, because this type of situation does not generate damage only to the consumer in the concrete case, in fact, all society loses in the sense that impunity only generates a repetitive behavior of the causes of the damage.

One way to stop this constant disrespect for consumers would be a more combative performance of the Brazilian Judiciary, through the imposition of damages against harmful behaviors in order to have the punitive character inserted in its quantum. Through this, companies would be aware of the risks that the lack of care with consumer rights could cause, thus improving the provision of services and supply of products.

The fundamental proposal of the punitive function and use of the institute of punitive damages would be, in view of the above, the search for balance in consumer relations. Without impunity caused by the modest damages, the relationships that would have the market with the consumer would raise in a fairer and more egalitarian character.

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8. Final considerations

The doctrinal analysis indicates that compensation for moral damage can contribute to the discouragement of harmful practices, but the adoption of an autonomous civil sanction remains controversial. In consumer relations, prevention requires the articulation between proportional reparation and consumer protection instruments. The concrete effectiveness of these measures cannot be demonstrated without specific empirical research, constituting a possibility for future research.

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