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Transnational Punitive and Compensatory Damages: Villains or Role Models?

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TRANSNATIONAL PUNITIVE AND COMPENSATORY DAMAGES: VILLAINS OR ROLE MODELS?

Are We Still in Kansas, Toto?

BY ATTILIO COSTABEL*

I. INTRODUCTION

In the last decade, there has been an explosion of interest for comparative studies on punitive damages. Books and scholarly articles are found, as well as a great number of Internet blogs, touching upon the laws of distant countries, such as Argentina, South Africa, Korea, Thailand, Japan, and China. The materials are interesting, not so much for their critical review of "American" punitive damages, but for signaling possible trends of change in the way punitive damages are seen and reappraised at an international level.

While checking if a fresh, positive approach to the often-misunderstood punitive damages is at all possible, it appears that compensatory damages also need a deeper review. As this Article tries to show, the major criticism of punitive damages is that they are "excessive" and beyond the normal function of tort remedies, said to belong to compensatory damages only. A deeper attention shows that compensatory damages are also not free of the same criticism currently used for punitive damages.

This Article concludes that the purpose and the scale of the American punitive damages and compensatory damages alike should not be disparaged as excesses of a society spoiled by exaggerated wealth; instead, they should be seen as a model for valuing the universal integrity of human life, while not depending on technicalities of international forum shopping.

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II. ONLY IN THE U.S.A.

Both the general public and the business sector see punitive damages through the lenses of two stereotypes: (1) that punitive damages are outrageous and unpredictable (thus damaging both the general public and business), and (2) that they "happen" only in the United States.

Both stereotypes need to be revisited in the wider context of comparative law and transnational litigation. The result may surprise many and would reshape the two undeserved stereotypes, making us look at our own policy of punitive damages with more respect, and even pride.

These stereotypes flow from the broad generalization that there are two "laws" in the world: (1) the systems of "civil law," where punitive damages cannot even ideally exist, and (2) the laws of the United States, where punitive damages are rampant and outrageous.

Assuming that the legal systems of the world may be grossly divided into "civil" and "common" law, the stereotypes forget that the "common law" world is wider than the U.S.[1]

In 2012, a multi-author book gave an extensive comparative study of punitive damages in common law and in civil law countries, as well as an analysis of the function of punitive damages in specific areas of the law, such as contracts, family law, patents, insurance bad faith claims, cartels, human rights, and so on.[2]

Another good compendium is found in the Columbia Journal of Transnational Law (the "Journal"), outlining the status of punitive damages in the jurisdictions of common law,[3] showing that the United States is in the good company of the United Kingdom, Australia, New Zealand, and the provinces and territories of Canada that have adopted the common law system.

The same Journal then published yet another compendium by the same author outlining punitive damages in "civil law" countries, listing France, Germany, Spain, and the European Union at large.[4]

The author, Professor Gotanda, reports developments outside the United States,[5] concluding that "[t]hese developments may signal a change in the way other countries view American awards of punitive

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[1] For the purposes of this Article, it is preferable to divide the legal world into jurisdictions that allow and award punitive damages, and jurisdictions that do not (although the comparative exercise will prime most on common law versus civil law countries).

[2] *See* THE POWER OF PUNITIVE DAMAGES: IS EUROPE MISSING OUT? 337–53 (Lotte Meurkens & Emily Nordin, eds., Cambridge: Intersentia, 2012).

[3] *See* John Y. Gotanda, Punitive Damages: A Comparative Analysis, 42 COLUM. J. TRANSNAT'L L. 391 (2004).

[4] *See* John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is The Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507 (2007).

[5] *See id.* (discussing proposed revisions to the civil code in France, court decisions in Australia, Canada, and Spain enforcing American awards of punitive damages).

damages and may ultimately lead to greater enforcement of these damages."[6] The prophecy of Professor Gotanda turned out to be true.

III. THE LONG WAY TO THE REST OF THE WORLD

A. By Migration – A Bridge Too Far?

In the same writing, Professor Gotanda explains how the civil law system is clearly different and at the antipodes of the common law system because "[c]ivil law legal systems generally limit recovery of damages in private actions to an amount that restores a party to its pre-injury condition.[7] Accordingly, punitive relief is not available.

In France, Germany, and Switzerland, for example, damages for tort and contract claims are limited to restoring the parties to the position they would have been in had the damaging event not occurred, or placing the parties into the position they would have been in had the contract been properly performed.

These countries allow recovery for non-pecuniary loss, which includes damages for pain and suffering, emotional distress, and moral harm, as well as reimbursement for legal fees. Such non-pecuniary damages, however, are not considered to be punitive in nature, because these damages are not imposed to deter or punish the wrongdoer, but rather to fully compensate the victim.

In most civil law countries, sanctions that are penal in nature may be awarded only in criminal proceedings.

How then could "American punitive damages" migrate into legal territories so inimical to them, and why? There are two possible answers: (1) civil law jurisdictions adopting "American-like" punitive damages, and awarding them in their domestic litigations; or (2) recognizing into jurisdictions of civil law awards given by courts of the U.S. The migration started both ways, but most visibly and famously with attempted recognitions of American verdicts containing punitive damages.

i. If at First You Don't Succeed . . .

The long road to recognition started with famous failures. In the 1992 *John Doe* case, the Supreme Court of Germany, Bundesgerichtshof (the "BGH"), denied recognition of a judgment of a California court against a sex offender, who moved to Germany after the fact.

The judgment contained one for compensatory damages and one for punitive damages. The BGH granted recognition of the part of the judgment that awarded compensatory damages but denied recognition of the

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[6] *Id.* at 507.

[7] *See* Gotanda, *supra* note 3, at 391.

punitive damages.[8] The court held that punitive damages were contrary to the constitutional principle of reasonable compensation of damages and "contrary to the 'penal monopoly of the State' to impose punitive sanctions."[9]

The second famous case comes from Italy. In the 2002 case *Parrott v. Fimez*,[10] the Court of Appeal of Venice denied recognition of a judgment of an Alabama court that awarded punitive damages for a product liability/wrongful death caused by a defective motorcycle helmet manufactured by the Italian company Fimez.

The Venice court could not understand if the Alabama award was for compensatory or punitive damages,[11] but found punitive damages more likely, and thus contrary to the public policy of Italian law. The court explained: "punitive damages, because of their criminal law connotation, are to be considered as private exercise of public authority, and therefore are clearly at odds with public policy."[12] The Italian Supreme Court affirmed.

ii. . . . Try, Try Again

Before and after Professor Gotanda wrote his second article, more developments transpired.

Among the most significant were three decisions of the Supreme Courts of Spain, France, and Italy in connection with recognition of United States judgments containing awards of punitive damages.

In 2001, the Spanish Supreme Court (Tribunal Supremo) enforced a U.S. judgment for punitive damages in a case of infringement of intellectual property rights (falsified labels of trademarks registered in Spain).

While repeating the basic civil law rule that compensation is the standard remedy for injuries as international public policy under Spanish law, the court held that sanctions are not uncommon in Spanish substantive law, such as contract law and procedure.

Punitive mechanisms in private law serve to compensate the shortcomings of criminal law, which is held to a principle of minimum intervention.[13]

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[8] *Id.* at 518.

[9] *Id.*

[10] *See* Lucas Ostoni, *Italian Rejection of Punitive Damages in a U.S. Judgment*, 24 J.L. & COM. 245, 251-63 (2005).

[11] *See* Savannah & Memphis R.R. Co. v. Shearer, 58 Ala. 672 (Ala. 1877) (explaining Alabama law bars compensatory damages in wrongful death claims); *see also* Ostoni, *supra* note 10, at 251 (noting that the Venice court was unaware of this little known exception in the laws on the United States).

[12] Alessandro Barzaghi, *Recognition and Enforcement of United States Judgments in Italy*, 18 N.Y. INT'L L. REV. 61, 121 (2005) (citing with translation to the Venice court).

[13] Cedric Vanleenhove, *A Normative Framework for The Enforcement of U.S. Punitive Damages in*

The Spanish Supreme Court added that the safeguard of intellectual property rights is not just a local matter but "is shared universally by nations with similar underlying judicial, social, and economic values. The common desire to protect the interests at stake justified awarding twice the amount of compensatory damages on top of the compensation granted."[14]

In the 2010 *Fountaine Pajot* case, the French Supreme Court (Cour de Cassation) denied enforcement of an American award of punitive damages for misrepresentation of prior accident in the sale transaction of a catamaran.[15] However, the reasons for denial were revolutionary. Reversing itself,[16] the French Supreme Court affirmed the decision of the French Court of Appeal to deny recognition, writing:

> *But whereas the principle of a punitive damages award is not, in itself, contrary to public policy, it is otherwise where the amount awarded is disproportionate in the light of the damage suffered and the shortcomings in contractual obligations of the debtor;*
>
> *in the present case, the judgment states that the foreign decision granted to the purchaser, in addition to the reimbursement of the price of the boat and the amount of the repairs, an indemnity which greatly exceeds this sum;*
>
> *that the Court of Appeal was able to deduce that the amount of the damages was manifestly disproportionate with regard to the prejudice suffered and the breach of the contractual obligations so that the foreign judgment could not be recognized in France.*[17]

Therefore, the current position of punitive damages in French law is that punitive damages are not contrary to public policy per se, but violate public policy when they are awarded in a measure disproportionate to the award of compensatory damages.[18]

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the European Union: Transforming the Traditional '¡No Pasarán!', 41 VT. L. REV. 347, 361–62 (2016).

[14] *Id.* at 365.

[15] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. II, No. 1090 (Fr.).

[16] *See* Ron Soffer et al., *The Recognition of Punitive Damages by French Courts: The End of the "Punitive Damage War"?*, SOFFERAVOCATS, https://www.nysba.org/Sections/International/Seasonal_Meetings/Vienna_2014/Coursebook/Panel_24/Panel_24_Soffer_paper.html (last visited May 27, 2020).

[17] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. II, No. 1090 (Fr.).

[18] *See* Gilles Cuniberti, *French Supreme Court Rules on Punitive Damages*, CONFLICTS OF LAWS.NET (Dec. 8, 2010), http://conflictoflaws.net/2010/french-supreme-court-rules-on-punitive-damages/; *see also* Georges A. J. Cavalier & Jean-Sebastian Queguiner, *Punitive Damages and*

Finally, the Italian Supreme Court (Cassazione) followed suit in 2017, granting recognition of a judgment rendered by a Florida court in a litigation for personal injuries caused by a defective motorcycle helmet, manufactured by the Italian company Axo, distributed by Helmet House, and resold by the Florida company NOSA.[19]

This case is curious. In fact, the Florida judgment did not contain any explicit reference to a specific item of punitive damages.

In the three-way litigation, the distributor reached a lump-sum settlement with the plaintiff, on all the plaintiff's counts of compensatory and punitive damages. The seller, NOSA, agreed to that settlement, and the court granted NOSA the right of redress against the manufacturer Axo.

When NOSA filed with the Court of Venice for recognition of the judgment, Axo argued that the settlement included punitive damages and, therefore, could not be recognized on the grounds of Italian precedents that did not allow recognition of punitive damages.[20]

Both the Court of Venice and the Cassazione found that the Florida judgment was not an explicit award of punitive damages and, therefore, there was no impediment to recognition. In the words of the Court: "in no way could the award at issue be regarded as having a 'punitive' character; and such character cannot be inferred from the mere fact that the judgment, or rather the underlying settlement ratified by the court, failed to clearly categorize the award's different components."[21]

The great importance of this decision is in the additional reasons given by the Italian Supreme Court. After finding that the money amount of the Florida judgment was, in any case, not excessive, the Court found the need of adding a new rule of law, revolutionizing the whole approach to punitive damages under Italian law.

> *In the current legal system, the purpose of civil liability law is not just to make the victim of a tort whole again, since the functions of deterrence and punishment are also inherent in the system.*
>
> *The American doctrine of punitive damages is therefore not ontologically contrary to the Italian legal system.*
>
> *However, the recognition of a foreign judgment awarding such damages is subject to the condition that the judgment has been rendered in accordance with some legal provisions of the*

French Public Policy (Nov. 15, 2007), https://ssrn.com/abstract=1174363 or http://dx.doi.org/10.2139/ssrn.1174363.

[19] *See* Cass., sez. un., 5 luglio 2017, n.16601 (It.).

[20] *See* Cass., sez. tre., 19 gennaio 2007, n.1183 (It.); *see also* Cass., sez. un., 8 febbraio 2012, n. 1781 (It).

[21] Cass., sez. un., 5 luglio 2017, n.16601 (It.).

foreign law guaranteeing the standardization of cases in which they may be awarded (tipicità), their predictability, and their outer quantitative limits.

The enforcing court must focus solely on the effects of the foreign judgment and on their compatibility with public policy.[22]

Although some commentators considered this passage as dictum,[23] the general consensus is that the Italian approach to punitive damages is, today, open to awards rendered in a jurisdiction that not only has punitive damages, but also a legal structure of control.[24]

May we add that this decision is admirably efficient, being based on thorough and far-sighted research, citing with approval to the famous decision of the United States Supreme Court in *Exxon v. Baker*,[25] that issued the recommended guidance of awarding punitive damages in the ratio of "one-to-one" to compensatory damages.

B. By Osmosis or Infection

After the 1992 *John Doe* case,[26] no other case of attempted recognition in Germany of punitive damages can be found in the media. However, something was brewing at home.

The movement began with cases involving violation of rights to privacy and personality of celebrities. In 1973, the German Constitutional Court (Bundesverfassungsgericht—BVerfG), upheld the constitutionality of an award of "immaterial damages" in a case of violation of personality, committed by a weekly newspaper publishing fake interviews with Princess Soraya, the former wife of the Shah of Iran.[27]

Twenty years later, an almost identical case was brought by Princess Caroline of Monaco for untrue press reports. The trial court and the court of appeals of Hamburg awarded the Princess the sum of 30,000 Deutsche Mark ("DM") in damages for violation of rights of personality.[28]

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[22] *Id.* (emphasis added).

[23] *See* Letizia Coppo, *The Grand Chamber's Stand on the Punitive Damages Dilemma*, 3 ITALIAN L.J. No. 2 593, 606–07, 621 (2017).

[24] *See* Angelo Vecchiarutti, *The Recognition of Punitive Damages in Italy: A Commentary On Cass Sez Un 5 July 2017, 16601, Axo Sport, Spa V Nosa Inc.*, J. EUR. TORT L. 104, 104–22 (May 7, 2018), https://www.degruyter.com/view/j/jetl.2018.9.issue-1/jetl-2018-0105/jetl-2018-0105.xml#; *see also* Patrizia Franceschina, *Supreme Court Recognizes Punitive Damages*, JACOBACCI (Aug. 2, 2017), https://www.jacobacci.com/en/publications/p-iam-supreme-court-recognises-punitive-damages.

[25] *See* Cass., sez. un., 5 luglio 2017, n. 16601 (It.) (citing Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008)).

[26] *See* Gotanda, *supra* note 4, at 518.

[27] *See* Bundesverfassungsgericht [BverfG][Federal Constitutional Court] Feb. 14, 1973, 1 BvR, 112/65 (Ger.).

[28] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 15, 1994, BGHZ 128, 1 (Ger.).

The BHG, on appeal, held that the amount was not sufficient, not just as a compensation under the statutory Section 847 BGB (damages for pain and suffering), but because monetary compensation had to serve the aim of prevention. On remand, the court of appeals of Hamburg raised compensation to 180,000 DM (six times the compensatory damages awarded in the lower court).[29]

In France, a Project of Reform of sections of the Civil Code, presented in 2005, and going under the name of "Avant-Projet De Réforme Du Droit Des Obligations," or Project Catala (from the name of its presenter),[30] has a new Article 1371 dedicated explicitly to punitive damages. It reads as follows:

> *A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the judge may in his or her discretion allocate to the Public Treasury. A judge's decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance.*

Even in Greece, there are signs that punitive damages are not seen with hostility. In a 1992 decision, the Greek Supreme Court found that a Texas award of punitive damages did not conflict with the public policy of Greece, but denied recognition for reasons of excessiveness.[31]

A multi-author essay on punitive damages in the law of the European Community[32] reports a negative approach taken by the Commission. Its June 11, 2013 Recommendation, whose Art. 31 reads that "punitive damages leading to overcompensation in favor of the claimant party of the damage suffered should be prohibited."[33]

The authors conclude by noting that the Recommendation is "unfortunate" because the European nations are showing signs of accepting the functions of punitive damages.

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[29] *See* Cedric Vanleenhove & Jan De Bruyne, *Redefining the Public Policy Exception in the Context of Punitive Damages*, 4 STRATHCLYDE L. REV. 1, 15 (2018).

[30] Avant-Projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil), (Report to Pascal Clement, Minister of Justice), art. 1371 (Sep. 22, 2005), http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf.

[31] *See* Georgios Georgiades, *Punitive Damages in Europe and the USA: Doctrinal Differences and Practical Convergence*, ÉTUDES, http://scholar.uoa.gr/ggeorgiades/publications/punitive-damages-europe-and-usa-doctrinal-differences-and-practical (last visited May 27, 2020).

[32] *See* Erdem Büyüksagis et al., *Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism*, 27 EUR. BUS. L. REV. 137 (2016).

[33] 2013 O.J. (L 201) 60.

If we add the holdings of the Supreme Courts of Italy and Spain, finding no conflict of punitive damages with their Nations' public policy, Europe seems to be able, and willing, to start its own domestic breed of punitive damages.

IV. FROM EUROPE . . .

In addition to developments seen above in Germany, France, Spain, Italy, and Greece, a Note is found about Switzerland and Austria.[34] For Switzerland, Art. 43(1) Law of Obligations Act, provides that the amounts of damages must be assessed, taking into account the circumstances of the case and the degree of fault. This rule bears affinity to punitive damages in addressing a deterrence function of tort law.[35]

In Austria, a draft proposal of amendment of Section 292(1) of the Civil Code also recognizes the deterrence function of tort damages.[36]

V. . . . AND BEYOND

A. SOUTH AMERICA

i. Argentina

A noteworthy article by Professor Irigoyen-Testa provides a deep report on the status of punitive damages in Argentina.[37]

Free from hostile prejudice, punitive damages are allowed in Argentina and have history and function. Professor Irigoyen-Testa suggests that "modern Argentine interpretation of punitive damages can serve as a good example and guide for other countries."[38]

In fact, the author says that only four developing countries are known to allow punitive damages. In addition to Argentina, Professor Irigoyen-Testa lists South Africa, India, and the People's Republic of China.[39]

The article contains a thorough analysis of damages using the so called "Hand Formula,"[40] complete with mathematic equations, and proudly concludes that "Argentina, a developing country in Latin America, is the first and only country with a pure continental-civil law system

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[34] *See* Gerard Wagner, Note, *Punitive Damages in European Private Law in* HANDBOOK OF EUROPEAN PRIVATE LAW (Jürgem Basedown, Klaus J. Hopt & Reinhard Zimmermann, eds., 2011) (forthcoming).

[35] *Id.*

[36] *Id.*

[37] *See* Matías Irigoyen-Testa, *Punitive Damages in Developing Countries: The Argentine Case*, 1 LATIN AM. & IBERIAN J.L. & ECON. 79, 80 (2015).

[38] *Id.*

[39] *See id.* at 79.

[40] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (establishing the "Hand Formula," a formula using cost-benefit analysis to determine a party's negligence).

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that successfully overcame the prejudice and suspicion against punitive damages, and that admitted them."[41]

ii. Brazil

A 2017 online issue of *Insuranceday* has an article on "Moral Versus Punitive Damages Exposure in Latin America."[42] The article reports that, in Brazil, punitive damages are not a remedy of their own, but are a component of awards of "moral damages," the approximate counterpart of the common law non-pecuniary damages. Moral damages, in Brazil, have the treble function of compensating, punishing, and deterring.[43]

iii. Mexico

The same article reports that punitive damages are found in Mexico pretty much along the same lines as in Brazil; that is, being a component of "moral damages." In this case, the article is even more precise reporting that in Mexico, the awards of "moral damages" are in the region of 20,000 to 200,000 U.S. Dollars.

The authors, however, also comment about an award for the wrongful death of two persons who were electrocuted because they stepped into electrified water, with moral damages to the tune of 2.4 million U.S. Dollars.[44]

The article implies that the punitive nature of awards of this kind allows to consider them alike to punitive damages. An article featured in *Loyola of Los Angeles International and Comparative Law Review*[45] disagrees on the punitive function of Mexican moral damages, although admitting that "some scholars believe that moral damages recovery is the equivalent of punitive damages in American law."[46] According to the author, in Mexico, punitive damages are awarded only in criminal proceedings.[47]

This article, however, was written long before the $2.4 million award cited above, that prompted studies on the "transplant" of punitive damages from the United States to Mexico. A recent essay featured in the *Hastings International and Comparative Law Review*[48] noted that

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[41] Irigoyen-Testa, *supra* note 37, at 88.

[42] *See* Hermes Marangos, Tom Rotherham & Adriano Stagni, *Moral Versus Punitive Damages Exposure in Latin America*, INSURANCEDAY (Aug. 9, 2017), https://insuranceday.maritimeintelligence.informa.com/ID054257/Moral-versus-punitive-damages-exposure-in-Latin-America.

[43] *Id.*

[44] *See id.*

[45] Edith Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. L.A. INT'L & COMP. L. REV. 235 (1986).

[46] *Id.* at 262.

[47] *See id.* at 263.

[48] Edgardo Munoz & Rodolfo Vázquez-Cabello, *New Punitive Damages in Mexican Law – Or the*

Mexico's Supreme Court decision of February 26, 2014, called "punitive" a part of its verdict for compensatory "moral damages." More precisely, based upon Article 1916 of the Mexico City Civil Code and human rights principles of fair indemnity, the Mexican Supreme Court held that punitive damages may be awarded by courts under the rubric of moral damages.[49]

The author suggests that this looks like a "transplant" of punitive damages from the United States to Mexico, but post-transplant adjustments may be necessary for the Mexican punitive damages to have the same beneficial effects that they have in the United States.[50]

However, the essay continues by stating that the Supreme Court "was explicit about the American origin of the punitive damage notion that it adopted. The Court [even] cited American scholars to explain the punitive and deterrent nature that the punitive award has on the defendant."[51]

B. FAR EAST

i. China

Effective July 1, 2010, China's Standing Committee of National People's Congress has promulgated a new tort law, whose Art. 47 introduces punitive damages for product liability, calling it by name. Art. 47 reads: *"[w]here any producer or seller knowingly produces or sells defective products, causing death or serious damage to the health of others, the injured party may request appropriate punitive damages."*[52]

A recent article published by Oxford Academic, *Chinese Journal of Comparative Law*, addresses vagueness gaps in the new Chinese law, especially the definition of "consumer."[53] The same new law also introduced punitive damages for infringement of intellectual property rights.[54]

Chronicle of a Failed Legal Transplant Foretold?, 42 HASTINGS INT'L & COMP. L. REV. 203 (2019).

[49] *See id.* at 204.

[50] *See id.* at 207.

[51] *Id.* at 214 n.65.

[52] Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS L. IN CHINA 321, 339 (2014) (informing that punitive damages under the new law have not been awarded yet anyway) (emphasis supplied); Helmut Koziol, *Chinese Punitive Damages Seen in a Comparative Perspective*, 9 FRONTIERS L. IN CHINA 308 (2014) (evaluating the various points that have been argued for and against punitive damages).

[53] *See* Kristie Thomas, *Analyzing the Notion of 'Consumer' in China's Consumer Protection Law*, 6 CHINESE J. COMP. L. 294 (2018).**Error! Hyperlink reference not valid.**

[54] *See* Xinhua, *China Introduces Punitive Damages for IPR Infringement*, CHINADAILY (Dec. 24, 2018), https://www.chinadaily.com.cn/a/201812/24/WS5c207344a3107d4c3a0027a3.html; *see also A Look at China's Proposed Introduction of Punitive Damages Against Intellectual Property Infringement*, INTABULLETIN (Feb. 15, 2019), https://www.inta.org/INTABulletin/Pages/china_update_7403.aspx.

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ii. Japan

In 1999, a comparative essay of punitive damages in Japan concluded that Japan has followed the pattern of Germany in refusing to recognize a United States judgment containing punitive damages.[55] The essay underscores the similarities between the German and Japanese legal and procedural systems, leading to negate to "civil law" the authority to grant remedies that properly belong to criminal law. Updated information on latest trends in Japan is not readily available, but many blogs concisely repeat that punitive damages are not allowed in Japan.[56]

iii. India

A recent internet blog by LexOrbis, a New Delhi IP law firm, supplies a detailed and broad chronicle of a number of decisions in Indian courts that awarded punitive damages.[57] The decisions reported are all about punitive damages for infringements of intellectual properties, such as trademarks, patents, copyrights, and designs, awarded to famous names like Honeywell TM,[58] Cartier,[59] Yahoo,[60] and NOKIA.[61] What is interesting is not only the generally low amount of the awards, but the history of the Indian case law on punitive damages.

We read that the Delhi High Court, in the seminal case *Time Incorporated v. Lokesh Srivastava and Anr.*,[62] ruled that in cases of infringement of trademarks, copyrights, patents, and others of the kind, punitive damages had to be awarded together with compensatory damages. The essay informs that this principle had been applied routinely until overruled by a Division of the Delhi High Court in the 2014, *Hindustan Unilever Ltd. v. Reckitt Benckiser India Ltd.*[63]

The Delhi Court directed that punitive damages should be awarded not automatically to the mentioned infringements, but only after a finding of "oppressive, arbitrary, or unconstitutional action" of wrongful conduct

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[55] *See* Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285 (1999).

[56] *See, e.g.*, *Japan: Product Liability 2019*, ICLG (May 28, 2019), https://iclg.com/practice-areas/product-liability-laws-and-regulations/japan; *see also Commercial Contracts*, GETTING THE DEAL TROUGH (Aug. 2019), https://gettingthedealthrough.com/area/88/jurisdiction/36/commercial-contracts-japan/; *Product Liability*, GETTING THE DEAL THROUGH (July 2019), https://gettingthedealthrough.com/area/30/jurisdiction/36/product-liability-japan/.

[57] *See* Lexorbis, *Evolving Principles for Award of Punitive and Compensatory Damages in India*, LEXORBIS, July 2019, at 4–5.

[58] *See id.* at 6.

[59] *See id.*

[60] *Id.* at 7.

[61] *Id.*

[62] *See* Time Inc. v. Lokesh Srivastava and Anr., (2005) 30 PTC 3 (India).

[63] *See* Hindustan Unilever Ltd. v. Reckitt Benckiser India Ltd., (2014) ILR 2 (Del.)1288 (India).

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calculated by the tortfeasor and whenever authorized by statute. The Delhi Court also disagreed that the previous rule was predicated on a civil alternative to an overloaded criminal justice system.[64]

iv. Korea

In Korea, punitive damages are statutorily allowed for infringements of intellectual property rights and product liability damages. The Product Liability Act No. 1609 was passed on January 12, 2000, effective July 1, 2002, and partially amended twice, on May 22, 2013, No. 11813, effective the same day, and on April 18, 2018, No. 14764, effective April 19, 2018.[65]

Until this latter Amendment, the Civil Code of Korea provided only for compensatory damages, but the 2017 Amendment introduced treble punitive damages, even supplying statutory guidelines on how to award punitive damages.[66]

Recently, a 2018 blog reported on a series of fires emitting from BMW cars that raised national concern, due to the fact that even under the latest Amendment a manufacturer could not be charged with punitive damages if the defect caused damages only to the vehicles themselves and not to third parties.[67] The blog informs that, because of the concern for the BMW series of fires, the Korean Ministry of Land, Infrastructure,

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[64] *Id.*

[65] *See* Product Liability Act, Act No. 14764, Apr. 18, 2017, (S. Kor.), *translated in* Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=43265; *see also* Sung Jin Kim et al., *Product Liability and Safety in South Korea: Overview*, KIM & CHANG (June 1, 2019), https://www.kimchang.com/en/insights/detail.kc?sch_section=5&idx=19870.

[66] *See* Product Liability Act, Act No. 14764 Apr. 18, 2017, art. 3(2) (S.Kor.) *translated in* Korea Law Translation Center, https://elaw.klri.re.kr/eng_service/lawView.do?lang=ENG&hseq=43265.

> [T]he court shall consider the following factors when determining damages: <Newly Inserted by Act No. 14764, Apr. 18, 2017> 1.Degree of intentionality; 2.Severity of damage caused due to the defect of the relevant product; 3.Financial gains obtained by the manufacturer from supplying the relevant product; 4.severity of criminal punishment or administrative disposition; 5.Period during which the relevant product is supplied and supply volume; 6.Financial status of the manufacturer; 7.Efforts made by the manufacturer to repair the damage.

Id.

[67] *See id.* at art. 3(1) ("A manufacturer shall compensate for damages to the life, body or property of a person caused by a defect of a product (excluding damages inflicted only to the relevant product)."); *see also* Michael Herh, *A Punitive Damages System May Triple BMW's Damages to Korean BMW Owners*, BUSINESSKOREA (Aug. 8, 2018), http://www.businesskorea.co.kr/news/articleView.html?idxno=24173 ("[T]he Korean Ministry of Land, Infrastructure and Transport will expand the coverage of the punitive damages system under the Product Liability Act in consultation with the Fair Trade Commission."); *Gov't Mulls Adopting Punitive Damages System Amid BMW Recall Debacle,* KBS WORLD RADIO (Aug. 7, 2018, 1:09 PM), http://world.kbs.co.kr/service/news_vod_view.htm?lang=e&menu_cate=videonews&id=&Seq_Code=138418 ("While the current product liability act contains a clause on punitive damages, it only pertains to serious physical injury, and does not apply to cases involving property damage.").

and Transport was considering expanding the coverage of the punitive damages system under the Product Liability Act in consultation with the Fair-Trade Commission. A follow up is not readily available at this time.[68]

The "Patent Act" and "Unfair Competition Prevention and Trade Secret Protection Act" got major amendments on December 7, 2018, by the Korean National Assembly. The Amendment, effective June 2019, introduced a "punitive damages system for infringement of patent and trade secrets" by adding two paragraphs on punitive damages to Article 128 of the Act.[69] Paragraph 8 provides that "the court may award damages up to three times the amount of damages determined pursuant to paragraphs 2 to 7, if the activity infringing the patent right or the exclusive license right is found to be willful."[70]

Paragraph 9 lists eight factors that the court has to take into account for deciding on punitive damages, namely:

> *i) whether the infringer has a dominant position; ii) whether the infringer knew the act of infringement would cause harm to a patent owner; iii) the significance of any such damages; iv) the economic benefits to the infringer from the infringement; v) how frequently and how long the infringing activity was committed; vi) the criminal penalty for the infringing activity; vii) the infringer's financial status; and viii) what efforts the infringer has made to reduce the harm to the patent owner.*[71]

The author makes a proper comparative review of the eight Korean factors with the nine American factors announced in *Read Corp. v Portec Inc.*,[72] and supplies valuable information on practical issues, like burden of proof, obligations to describe the working acts, submission of materials, and more.[73] More blogs are available on the issue of punitive damages in intellectual property litigation in Korea.[74]

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[68] *Gov't Mulls Adopting Punitive Damages System Amid BMW Recall Debacle*, *supra* note 67.

[69] Sungpil Hwang, *Punitive Damages System in Korea*, FICPI (Feb. 18, 2019), https://ficpi.org/news/punitive-damages-system-in-korea.

[70] *Id.*

[71] Min Son, *South Korea: Patent Holders Can Now Seek Punitive Damages in Korea*, MANAGING INTELL. PROP. (Sept. 18, 2019), https://www.managingip.com/Article/3894824/South-Korea-Patent-holders-can-now-seek-punitive-damages-in-Korea.html?ArticleId=3894824 (stating eight distinct factors for a court to consider for a claim for compensation for damages).

[72] *See* Read Corp. v. Portec, Inc., 970 F.2d 816, 826–27 (Fed. Cir. 1992) (explaining the factors considered "in determining when an infringer 'acted in [such] bad faith as to merit an increase in damages awarded against him'").

[73] *See* Son, *supra* note 71.

[74] *See, e.g.*, *Introduction of Punitive Damages for Patent and Trade Secret Willful Infringement in Korea – Effective as of June, 2019*, YOU ME PAT. & L. FIRM, http://en.youme.com/sub_news/ip-boardopen.aspx?idx=917 (last visited May 27, 2020) (evaluating how an award for punitive damages is given and how the law in Korea has changed); *see also* Un Ho Kim & Sun Chang, *Korea*

Finally, a blog found on *Mondaq*,[75] written by Yulchon, LLC, informs that for the first time, a Korean court had imposed punitive damages against a worker-dispatch agency and the company using the dispatched workers for discrimination prohibited under the Dispatched Worker Protection Act.[76]

v. Thailand

A noteworthydissertation of a University of Illinois student supplies information on punitive damages in Thailand, as part of a broad comparative study of punitive damages in the United States, United Kingdom, and the common law European and Far East jurisdictions.[77]

The essay informs that in Thailand, punitive damages have been authorized by Section 42 of the Civil Procedure for Consumer Cases Act B.E. 2551 (2008), and by "the Liability for Damages Caused by the Unsafe Goods Act (Product Liability Act) B.E. 2551 (2008), particularly Section 11 which allows the courts to determine punitive damages in addition to compensatory damages."[78]

The essay enlarges on "extensions" of punitive damages in Thailand (such as in medical malpractice litigation and environmental liabilities), is full of statistical information, and is remarkable for its broad and in-depth legal and comparative analysis.

The author concludes by expecting an increasing trend of awarding punitive damages in Thailand; especially because "the many caps and limited multipliers of compensatory damages for calculating punitive damages that the law contains will make judges, especially younger judges, more receptive to applying the new laws."[79]

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strengthens protection against IP infringement and unfair competition (Amendment of the Patent Act and the Unfair Competition Prevention Act), IFLR1000 (Jan. 16, 2019), https://www.iflr1000.com/NewsAndAnalysis/Korea-strengthens-protection-against-IP-infringement-and-unfair-competition-Amen/Index/9145 (elaborating on how Korea has adopted a punitive damages system by trying to alleviate the burden of proof and impose harsher punishments).

[75] *See generally About Mondaq*, MONDAQ, http://www.mondaq.com/Home/About (last visited May 27, 2020) (supplying free online resources of professionals' expertise and knowledge, as well as opinions and commentaries on legal, regulatory, and financial topics across the continents).

[76] *See* Yulchon LLC, *South Korea: The Seoul Administrative Court Has Upheld an Award of Punitive Damages Against both a Worker-Dispatch Agency and the Company Using the Workers*, MONDAQ, http://www.mondaq.com/x/561002/employee+rights+labour+relations/The+Seoul+Administrative+Court+Has+Upheld+An+Award+Of+Punitive+Damages+Against+Both+A+WorkerDispatch+Agency+And+The+Company+Using+The+Workers (last updated Jan. 18, 2017).

[77] *See* Saisiri Siriviriyakul, The Imposition of Punitive Damages: A Comparative Analysis (June 6, 2012) (unpublished Doctor of the Science of Law dissertation, University of Illinois at Urbana-Champaign) (on file with Ideals: Illinois Digital Environment for Access to Learning and Scholarship).

[78] *Id.* at 58.

[79] *Id.* at 2, 146.

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VI. WHO IS THE VILLAIN ANYWAY?

The excursus above shows that punitive damages are getting momentum worldwide, but still suffer from a bad reputation. Those who criticize punitive damages use, disparagingly, the word "excessive." A noun from the verb to "exceed," the word has two semantic meanings: (1) one of a quantity that, by itself, boggles the mind; and (2) one "relational," of a quantity that raises over and above a generally accepted standard.

In the criticism, punitive damages are accused of surpassing the standard of the amount of compensatory damages. Under this stance, compensatory damages are deemed "normal" and punitive damages excessive.

It is now the turn of compensatory damages to be checked for normality.

Compensatory damages are, after all, one pillar of tort law: duty, breach, damages, and causation; thus, automatically a candidate to be a standard, holier-than-the-villain punitive damages.

The trouble, both at home and internationally, is the American compensatory damages are also maligned as excessive. It is easy to check this predicament. A website carries statistics of the top 100 highest verdicts state-by-state and year-by-year. Looking just at California and Florida for the year 2018, we see results that qualify for the two semantics of "excessive" – at the same time mind-boggling and relationally excessive.

The highest award reported for California in 2018[80] is $289,253,209 which includes a punitive damages award of $250 million, exceeding six times the amount of compensatory damages. The California Court exercised *remittitur*, reducing punitive damages to the same amount of compensatory damages, still the jury's own feeling is revealing.

In Florida, one of the highest awards was for pain and suffering of a female crewmember brutally raped by a fellow crew member, leaving her in fear for her life.[81] The $70 million award for past and future pain and suffering was issued against the employer, who was vicariously liable, and contained no punitive damages, probably for lack of the requirements of a punitive damages count. Thus, the award is, by itself, a revealing attitude toward the amount of real compensation. Yet, to the mind of many, $70 million may sound boggling, even making allowance for the undeniably extreme seriousness of the injury.

The conclusion from the California and Florida awards is that compensatory damages could be subject to the same criticism as punitive

[80] *See* Johnson v. Monsanto Co., No. 1808240023, 2018 WL 4079194 (Cal. Super. Aug. 10, 2018) (Verdict and Settlement Summary).
[81] *See* Baca v. Island Girl, Ltd., No. 1810160053, 2018 WL 5024667 (Fla. Cir. Ct. Jan. 29, 2018) (Verdict and Settlement Summary).

damages, but there is a difference. Punitive damages can be seen as relationally excessive compared to a compensatory damages standard, but the question is whether there is another standard that compensatory damages are not expected to surpass.

Domestically, American compensatory damages have been, and still are, highly debated. The needs (or shall we say desires) of industries, businesses, and professions are taken into account. The result is "workmen's comp" legislations, caps on malpractice lawsuits, and the like. Additionally, tort reform remains on the agenda.

However, when free from regulation, high verdicts keep populating the top 100 list on the web. As the proverb says: "if it looks like a duck, swims like a duck, and quacks like a duck, then it is probably a duck." Likewise, compensatory damages in America are what they look like: generous and a sign of a culture that sees undercompensating as demeaning. In other words, the standard of compensation, in America, is very high.

A. A Comparative Analysis

Here is where a comparative analysis of American compensatory damages with the same damages in the rest of the world is illuminating. A full comparative analysis is way beyond the scope of this Article, but significant data is readily available and convincing, even by a superficial search level.

An excellent essay by Professor Stephen D. Sugarman supplies a broad and comprehensive comparative review of pain and suffering awards. The review is first arranged by types of injuries that caused pain and suffering; then by results in European Nations; and, finally, by cross-national award size between United States and European "medians."[82]

The essay reveals a significant variation not only between Europe and United States, but also within Europe itself. These remarkable differences are confirmed by many essays, one of which is made by a major insurance carrier, Gen Re.[83]

There is, however, a counterpoint. Outside the United States, it is not rare to find awards that are exceedingly low. Scholars and media get involved and inspired by the "excessive" awards of the United States, but give little, if no attention or significance, to the latter.

For example, a Government Arbitration Chamber of the Philippines, in the case of a seaman injured by fire (thirty-five percent of the body

[82] *See* Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399 (2006).

[83] *See* Lorenzo Vismara, *The Landmark Ruling on Punitive Damages in Italy – What Now?*, GEN RE (Dec. 2018), http://www.genre.com/knowledge/publications/cfpc1812-en.html.

burned with crippling consequences) awarded the seaman the insignificant amount of $1800.[84] Many explanations and reasons could be found for this finding, yet the stark contrast invites reflections. The victims of both the Florida and Philippines cases were crewmembers. Both injuries were of a major, though not equal, magnitude. How could a spread from $70 million to $1800 (the first being almost 40 thousand times the latter) be justified?

Is the life of an American citizen so disproportionally higher than that of a Philippine national? Or do values differ depending on the jurisdiction, the judge, and the levels of advancement and economy of society? Or is it simply on the currency rate of exchange?

It is realistic to conclude that that a uniform value of human life and personal integrity may never exist worldwide, and that forum shopping will perpetuate this situation. However, what forum shopping takes away, choice of law may bring back.

B. Let's Try a Hypothetical

An Italian citizen has surgery in Chicago. The surgeon commits malpractice with reckless negligence and the injured patient sues the doctor in an Italian court, claiming compensatory and punitive damages. The court retains jurisdiction and finds that the dispute is governed by the laws of Illinois.

The Italian judge knows the precedent of the United States Supreme Court which recognized a Florida award of punitive damages, holding that punitive damages awarded under the laws of a legal system that allows and regulates them, are not contrary to Italian public policy.[85]

The Italian judge is now requested to do it himself; that is, to decide if, and how much, he should award under the foreign applicable law. Being fluent in the English language and familiar with the American legal system, the judge logs in to Westlaw and finds an Illinois verdict on a factual pattern totally identical to the one under his review. The judge's exultation, however, is short-lived, as the figures of the verdict appear: $57 million in compensatory damages joined by an equal amount in punitive damages.

The Italian jurisprudence has developed a trend of using tables of predetermined amounts to calculate injury and death damages. These tables are made by the insurance industry and are consistently followed by the courts of Milan, hence their name "Milan Tables" (the "Tables"). The Tables work about the same way as workmen's compensation and allow

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[84] *See* Asignacion v. Schiffahrts, Nos. 13–0607, 13–2409, 2014 WL 632177 (E.D. La. Feb. 10, 2014).

[85] *See* Cass., sez. un., 5 luglio 2017, n.16601 (It.).

the judge to double the pre-determined values in case of particularly serious circumstances.

Still, even double, the damages calculated with these guidelines may easily be undercompensating. Thus, the Italian Supreme Court established that the Tables should not be used "as a ceiling," but as a fairness tool to secure that minor injuries (dubbed "micro-lesions") do not go unrewarded. Under the Italian Supreme Court's latest guidelines, a judge has freedom to depart from the Tables as upwards as equity demands.[86]

Our hypothetical judge does not remember seeing an Italian upward award to the magnitude of the Illinois one, and embarrassment begins to brew in the mind of the judge who is called to step into the shoes and wear the hat of a foreign judge. If the judge were to assess damages as accustomed to do in his own legal system, why should his fellow citizen be punished for choosing Italian jurisdiction rather than American?

Does the foreign law that the judge is called to apply include application of standards of damages, or is there a difference between liability (to be done under strict legal standards) and calculation of remedies (to be done under the habit culture of the forum)?

There is no sure answer to our hypothetical. Realistically, it is fair to think that our hypothetical judge will not apply the same amount of damages awarded by the Illinois court and that his fellow judges never will either.

However, the unexpected encounter of two cultures may have some effect, and the judge's departure from the Tables may be higher than it used to be. Judges may go back to an honest, unbiased assessment of the "standard" value of a human life; the integrity of a human being; and the compassion for pain and suffering that is human value under an objective human rights analysis, not under relative measures.

The hypothetical Italian judge may now wonder whether the injustice is from the different standard of Judges rather than the standard of human value.

VII.CONCLUSION

The review supplied above shows that the use of punitive damages is gaining momentum worldwide. Many of the essays found on the topic are evaluations of punitive damages in the countries of the authors, compared to punitive damages as administered in the United States; a sign that the fresh approach in those countries may not be an autochthonous, spontaneous creation, but the product of inspiration, if not imitation, of the United States model.

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[86] Cass., sez. tre., 27 maggio 2019, n. 14364 (It.).

This slow evolution is more important than it appears at first look: it brings in a cultural change of the basic functions of the law of torts. The inveterate concept of the civil law tradition that "civil justice," opposed to "criminal justice," does not allow civil judges to impose penalties is revolutionized.

Like the American model, civil justice worldwide is beginning to be seen as also having social functions of retribution and deterrence, and as a healthy complementary aid to a criminal justice system that may not have the resources, nor the capacity, to find and address situations that the private citizens would be better able to spot and address in a civil court. A high compensatory award has the same deterrent effect, if not more, than a "punishment" award. A trivial compensatory award, instead, would encourage the tortfeasor to repeat the outrageous wrong, that has produced substantial economic advantage in exchange for ridiculous damage consequences.

Unfortunately, while the evolution of punitive damages is a healthy move towards making the world society free of outrageous and inexcusable torts, the world remains greatly divided on issues of compensatory damages. The learned theories of compensation as a healthy foundation of the "making whole" function of torts appear to be shaken, and the objections against punitive damages lose a good deal of credibility for being outrageous compared to compensatory damages.

In fact, while punitive damages are slowly giving the world healthy, new ideas of social goals, the prevailing world cultures of low compensatory damages invite rushing escapes from United States jurisdictions. The world offers a paradise of forum shopping.

Sadly, there appears to be no world standard for compensatory damages, and, maybe, the American culture of all awards should be taken more seriously as a model. A deeper search and review would be the welcome sequel of this Article.

The final conclusion is that the United States has a lot of public policy to offer the world, and should not be ashamed of its awards, whether compensatory or punitive or combined.

The United States is a healthy model, to be proud of, for an evolution in quest of a fairer and dignified worldwide justice.