Hard Cases

The Grand Chamber's Stand on the Punitive Damages Dilemma

Letizia Coppo*

Abstract

It is a truth universally acknowledged that corrective justice is the pillar on which the whole system of remedies rests in principle and modern tort liability revolves around the idea of compensation. Deeply anchored to that conception, Italian case law has been impervious to punitive damages, on the grounds of their alleged inconsistency with public policy, until its latest developments. Starting from the recent judgment by the Italian Grand Chamber on the punitive damages dilemma, this article provides some food for thought about such evolution and the criticalities left unsolved.

***

Corte di Cassazione 5 July 2017 no 16601**

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 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.

SUMMARY OF FACTS

NOSA Corporation, headquartered in Florida (USA), obtained from the Venice Court of Appeal[1] a judgment allowing the recognition and enforcement in Italy of three

* PhD candidate in 'Law, Person and Market', University of Turin.

** Translated by Francesco Quarta, Assistant Professor of Private Law, University of Bologna. The most sincere gratitude goes to Duncan Fairgrieve (Associate Professor, Paris IX University) and to Roxana Vatanparast (PhD student, University of Turin) for their exquisite willingness to provide learned comments and suggestions. The same gratitude extends to Gabriele Gioi, student in Business and Economics, Bocconi University, for his quality assistance at an earlier stage of the translation, despite an exceptionally hot summer. The translator remains the sole responsible for any error.

[1] In Italy, courts of appeal act as first instance courts in *exequatur* cases.

 DOI 10.23815/2421-2156.ITALJ ISSN 2421-2156

final decisions rendered in the United States:

- The final judgment of 23 September 2008, handed down by the Circuit Court of the 17th Judicial Circuit for Broward County (Florida), confirmed on appeal on 11 August 2010 by the District Court of Appeal of the State of Florida, condemning the Italian company AXO Sport spa to pay the amount of US $1,436,136.87 at an annual interest rate of 11%;

- The judgment of 14 January 2009, whereby the same Court awarded the plaintiff $106,500.00 as compensation for costs, attorney's fees, and 8% annual interest;

- The judgment of 13 October 2010, awarding an additional sum of US $9,000.00 as compensation for costs, attorney's fees, and 6% annual interest in relation to the proceedings on appeal.

With these judgments, the US courts granted NOSA's request to be indemnified by AXO for the payment of one million euros resulting from a settlement reached with the plaintiff, a motorcyclist who had suffered personal injuries in an accident which occurred during a motocross race as a consequence of an alleged defect of the helmet manufactured by AXO, distributed by Helmet House and resold by NOSA.

Pending the proceedings, which the injured had brought also against the importer and distributor of the helmet (Helmet House), NOSA had agreed on the settlement proposed by the motorcyclist, and the American court subsequently held that NOSA was entitled to seek indemnity from AXO for any payment in connection thereto.

NOSA obtained the recognition of the abovementioned judgments by the Venice Court of Appeal (on 3 January 2014), pursuant to Art 64 of legge 31 May 1995 no 218 (Italian rules of private international law), on the grounds that AXO had accepted the foreign jurisdiction.

AXO appealed to the Supreme Court, on the basis of three reasons, opposed by NOSA. The parties submitted recapitulative briefs.

The case was first heard by the First Division of the Supreme Court, which decided, by ordinanza no 9978/16, to stay proceedings and refer the matter to the First President, for its assignment to the Joint Divisions, calling for a reconsideration of the issue concerning the recognition and enforcement of foreign judgments awarding punitive damages.

Further briefs were submitted by the parties before the final oral arguments.

REASONS FOR THE DECISION

…omissis…

4) The third plea of the applicant alleges infringement of Art 64 of legge no 218/95 and defective reasoning on the part of the Venetian Court, which purportedly failed to ascertain that the award issued by the US court in favor of the injured party accounted also for punitive damages, without providing any specific reasoning as to the nature of the injuries forming the basis of compensation. The settlement proposed by NOSA and accepted by the motorcyclist provided, in fact, for a comprehensive amount 'in full

satisfaction of all damages claims raised by Mr. D., including those for punitive damages'.

AXO's assertion, concerning the incompatibility of the US judgment with public policy, was rejected by the Court of Appeal, on the basis of three convergent arguments that can be summarized as follows: a) the foreign judgment did not elaborate on the different types of damages that were indemnified because it simply reflected 'the amount of the settlement entered into with the injured party', b) it is not necessary to examine the nature of such damages, since AXO has benefitted from the settlement; c) there is no evidence that such (punitive) damages were actually accounted for; the settlement, on closer scrutiny, seems to have been construed otherwise.

While reiterating the same claims made before the first instance court, AXO stresses that the Court of Appeal overlooked the fact that the wording of the settlement proposal expressly allocated 'the settlement payment' also to 'punitive damages'.

The appellant further contends that, since the US judgment did not contain any indication as to the nature of the damages awarded, such lack of reasoning amounted to a violation of law, which would constitute sufficient ground for the Court to refuse its recognition, especially because 'the *quantum* of the award was abnormal'. In that respect, the applicant refers to the Supreme Court precedents no 1781/12 and no 1183/07. These rulings were addressed also in the First Division's ordinanza no 9978/16, advocating for a reconsideration, by the Joint Divisions, of the Supreme Court's traditional position about the compatibility of punitive damages with Italian public policy.

4.1) The applicant's plea is inadmissible, since it is based on the false assumption that the amount charged to the guarantor included an award of punitive damages in favor of the accident victim.

On this issue, the decision of the Court of Appeal is not vitiated by a failure to take into account material or decisive facts, under the meaning of reformed Art 360 of the Code of Civil Procedure.

First of all, it is worth recalling that, according to the case law of this Court (Joint Divisions' judgment no 8053/14), when examining the grounds of a decision the mere 'insufficiency' of its reasoning is not enough for its annulment; what actually counts is the failure to consider an historical fact, either major or minor, mentioned in the judgment itself and discussed between the parties, which is key to the decision to be taken.

We refuse to uphold the applicant's assertion that the lower court has 'totally disregarded the fact that the settlement proposal' – accepted by NOSA and constituting the basis for the decision against the guarantor – also covered the victim's claim for punitive damages.

In the last sentence of page 21 of the judgment, the Court of Appeal clearly considered that the issue of punitive damages had been discussed between the parties. It found, however, that the agreement did not entail any assessment of punitive damages or their acknowledgment, but 'only that NOSA Inc. had asked for a waiver also for the issue of punitive damages, hence seeking a conclusive settlement concerning all pending issues between the parties'. This unequivocal explanation, conveying the interpretation of the

US judgment in the light of the underlying settlement, is therefore not vitiated by the kind of omission alleged by the applicant. The settlement agreement was taken into consideration by the court, and the greater or lesser plausibility of the findings regarding its scope is not subject to scrutiny at the current stage of proceedings (with regard to the limited control over the first instance judge's findings concerning the contents of a foreign judgment, see Supreme Court ruling no 1183/07, citing rulings no 1266/1972, no 3709/1983, and no 3881/1969, and explaining that such factual analysis falls within the exclusive competence of the first court). In light of the above, the applicant's complaint is therefore inadmissible.

4.2) The second argument of the applicant's plea is also inadmissible. It states that the US judgment would be a vehicle for a liquidation of punitive damages, on the assumption of the abnormality of compensation granted to the injured party. This assumption, representing the essential premise of the thesis according to which the recognition of the so called punitive damages in our legal systems is banned by Art 64, is groundless.

It is worth recalling that, whilst it is for the judge to investigate, also on his own motion (Corte di Cassazione no 13662/04), the existence of the prerequisites for the recognition of a foreign judgment pursuant to Art 67 of legge 31 May 1995 no 218, such investigation cannot overcome the results of the fact-finding process based on the parties' burdens of proof.

In the instant case, which involves substantial personal injuries (even though the applicant's pleadings were purposely silent on this issue, the counter-pleadings were very detailed in describing the cranial injuries and the disabling after-effects suffered by the victim of the accident), the one million euro settlement (or two million, considering also a similar settlement entered into by Helmet, as pointed out in the party's pleadings) cannot, in itself, be considered abnormal.

The fact-checking done on this issue by the Venice Court of Appeal cannot be scrutinized at this stage of the proceedings, considering that the lower court valued the circumstance that the US Court had weighed the reasonableness of the settlement amount and pointed out, as a closing remark, that an additional sum had been paid on top of that amount pursuant to a direct settlement between AXO and the motorcyclist. In view of this, a new assessment of the alleged abnormal *effects* (emphasis in original) of the US judgment in the Italian legal system is not allowed (this being the scope of review entrusted to the Supreme Court, which is not entitled to evaluate the correctness of the foreign decision in the light of either foreign or Italian laws: see Corte di Cassazione no 9483/2013, and also, perceptively, Corte di Cassazione no 10215/07).

There is no room for review especially because the applicant has not provided any evidence in support of the alleged award of punitive damages, eg, any indication as to the apportionment of economic, moral and, possibly, punitive damages, and their respective legal grounds in the system of origin; any objections raised by the parties on this issue in the proceedings before the US court, etc.

Equally groundless is the applicant's assertion that given the lack of any indication as to the rules and/or criteria actually followed in the quantification of damages in the judgment, part of the settlement amount should be presumed to be punitive in nature. This line of argument, which recalls the unworkable 'lack of reasoning' challenge, already rejected by this Court, is contradicted by the applicant's admission (page 13 of the 2016 brief) that the Di Salvo affidavit, on top of US $335,000.00 for medical expenses, had estimated the plaintiff's loss of earning capacity alone to be in the range of two to three million dollars.

It is pointless, moreover, to adduce that the motorcyclist's attorney had initially informed the Florida jury that the value of demanded damages ranged between ten and thirty million dollars. This defensive approach, which could have been regarded as containing an abnormal and grossly vindictive request, was eventually abandoned in the settlement agreement, the amount thereof having been set well below the level of the purely economic damages originally sought.

In light of this, 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. The applicant endorses a 'radical' interpretation of precedents, which were based on the 'insufficient argumentation' rationale (see, in particular, Corte di Cassazione no 1781/12). However, in the opinion of the Joint Divisions, such rationale is no longer applicable, with the consequence that, in order to successfully challenge an exequatur decision, a claimant has to specify, unequivocally, which legal norms have been allegedly violated by the enforcing court.

5) The dismissal of all three pleas submitted by the applicant results in the rejection of the appeal. However, the inadmissibility of the third plea allows the Joint Divisions to rule on the subject matter thereof pursuant to Art 363 para 3 of the Civil Procedure Code, which may be interpreted in the sense that, even if the appeal is to be rejected in its entirety, the Supreme Court may nonetheless express the relevant principle of law governing the matter, provided that it is one of particular importance. In the instant case, the statement of a principle of law is justified in consideration of the extended scholarly debate which has for some time urged an overruling intervention by this Court, as well as in pursuit of the First Division's order of remittance, prompted by the parties' sagacious arguments.

5.1) In 2007, the Supreme Court denied the recognition and enforcement of a judgment, on a similar subject matter, on the assumption that the idea of punishment and sanction did not pertain to civil liability law and that 'the tortfeasor's conduct' was to be considered irrelevant. The Court thus construed civil liability as having a mono-functional nature, by characterizing its purpose as merely 'restorative of the economic conditions' of the injured party. Though immediately criticized by the majority of scholars, highlighting the inconsistency of these statements *vis-à-vis* the evolution of the notion of

civil liability in the past decades, the principle expressed in ruling no 1183/2007 was confirmed by a Supreme Court judgment a few years later. In ruling no 1781/2012 the exclusion of any punitive purpose from the law of civil liability was more explicitly associated with the need to 'control the compatibility of the foreign damages award with the Italian legal system'.

It is the Joint Divisions' belief that this reasoning is outdated and can no longer constitute, in these terms, a suitable filter for the assessment at hand. For some years already, the Joint Divisions of the Supreme Court (see ruling no 9100/2015 on the issue of directors liability) have highlighted that the idea of a punitive function associated to a damages award is no longer 'incompatible with the general principles of our legal system, as it was in the past, in view of the fact that here and there, in the last decades, the legislator has introduced several provisions pursuing, in a broad sense, a punitive goal'.

The Joint Divisions have, however, pointed out that such punitive function is attainable only where 'it is clearly set forth by some provision of law, in accordance with the principle which can be deduced from Art 25 para 2 of the Constitution, as well as from Art 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms'.

Similar concerns, in combination with the equally meaningful reference to Art 23 of the Constitution, explain why, even in the same timeframe, some judgments continued to repudiate any punitive or deterrent foundation to the law of civil liability (the most significant example is Joint Divisions' ruling no 15350/15). Such denials, even if at times expressed as mere reinforcing arguments, pursued the goal of fencing off any attempt to expand the range of available damages beyond the boundaries set by law, in situations not provided with adequate normative coverage.

However, this does not obliterate the trajectory developed by the law of civil liability in the last decades and what resulted therefrom. In brief, it can be said that beside the primary and predominant compensatory-restorative function (which inevitably comes close to deterrence) a multi-functional nature has emerged (one scholar identified more than ten functions), extending to different areas, the most relevant of which are prevention (or deterrence-dissuasion) and sanction-punishment.

5.2) The ongoing evolution of the legislative environment provides the necessary confirmation of the above description. It is, on the one hand, linked with the legislator's determination to resort to the remedies of civil liability to respond to emerging needs; on the other, prompted by its dynamism *(of civil liability law)*, it shows the inadequacy of a line of thought unavailable to accept any remedies not precisely fitting in the *(compensatory)* 'category'.

The studies carried out by the *Ufficio del Massimario* of this Court, the remitting ordinanza no 9978/16 by the First Division, and ruling no 7163/15 (which ascertained the compatibility of Belgian *astreintes* with Italian public policy) have altogether contributed to draw up a list of such *(extra-compensatory)* remedies.

In the latter decision, the Supreme Court set forth the following examples: 'in the field of patents and trademarks, Art 86 of regio decreto 29 June 1939 no 1127 and Art 66 of regio decreto 21 June 1942 no 929, repealed by decreto legislativo 10 February 2005 no 30, setting forth to this aim the provisions of Art 124, para 2, and Art 131, para 2; Art 206 and Art 140, para 7, of decreto legislativo 6 September 2005, known as the consumers code, weighing the 'gravity of conduct', and, according to some, Art 709-*ter*, paras 2 and 3, of the Civil Procedure Code introduced by legge 8 February 2006 no 54 for breach of the obligations related to child custody; Art 614-*bis* of the Civil Procedure Code, introduced by Art 49 of legge 18 June 2009 no 69, endowing the judiciary with the power to impose a monetary fine for any additional breach or delay in complying with a court's order, 'considering the value of the dispute, the nature of the activity to be performed, the assessed or foreseeable damages and any other circumstance which may be relevant'; Art 114 of legge 2 July 2010 no 104 which, following the latter provision, endows administrative courts with a similar power.

Moreover, the Supreme Court made reference to 'cases where the tortfeasor's punishment is directly determined by the law: such as – besides the provisions of Arts 388 and 650 of the Penal Code – Art 18, para 14, of the Workers' Statute, setting forth an additional sanction as a deterrent for failure to reinstate an unjustly dismissed worker; Art 31, para 2, of legge 27 July 1978 no 392, providing a monetary fine for the tenant/lessor if the reason stated for withdrawing from the lease subsequently proves to be unfounded; Art 709-*ter*, para 4, of the Civil Procedure Code, empowering courts to apply an additional monetary sanction for infringements concerning child custody; and also Art 4 of decreto legge 22 September 2006 no 259, converted into legge 20 November 2006 no 281, on dissemination of illegally wiretapped conversations.

Ordinanza no 9978/16 mentioned among others:

- Art 158 of legge 22 April 1941 no 633, and, above all, Art 125 of decreto legislativo 10 February 2005 no 30 (industrial property), although subject to the limitations set forth by recital 26 of the EC Directive 29 April 2004 (on the enforcement of intellectual property rights), implemented in Italy by decreto legislativo 16 March 2006 no 140 (see Art 158), and the 'partially sanctioning nature' (albeit not punitive) recognized by the Supreme Court in ruling no 8730 of 2011;

- Art 187-*undecies*, para 2, of decreto legislativo 24 February 1998 no 58 (on financial intermediation);

- decreto legislativo 15 January 2016 no 16 (Arts 3-5), which de-criminalized several offenses against the public faith, the individual honor or property; if committed willfully, such torts now trigger the application of a monetary civil sanction for the purposes of punishing and deterring the misconduct, in addition to compensation for any losses suffered by the injured party'.

Both judgments stressed the importance of Art 12 of legge 8 February 1948 no 47, providing in favor of a victim of defamation a 'reparatory amount' in addition to actual damages; as well as of Art 96, para 3, of the Civil Procedure Code, recently introduced, allowing civil courts to enter against the unsuccessful party at trial the payment of an

'equitably determined sum' with the function of punishing the abuse of process (for proceedings before administrative courts see Art 26, para 2, of decreto legislativo 2 July 2010 no 104).

It is also worth mentioning Art 28 of decreto legislativo no 150/2011 which, in discrimination disputes, allows courts when assessing the *quantum* of damages to take into account whether the discriminatory act or conduct was moved by a retaliatory motive against a legal action or other initiatives previously undertaken by the discriminated person with a view to defending the principle of equal treatment.

Further, consider Art 18, para 2, of the Workers' Statute, stating that in no event shall the indemnity awarded to an unjustly dismissed employee be less than five months' gross salary; Art 28, para 2, of decreto legislativo no 81/2015 on the protection of fix-term employees, and the previous rule set forth in Arts 32, paras 5, 60 and 70 of legge no 183 of 2010, which, in cases of conversion of a labor contract into a permanent one due to the unlawful imposition of a term, provides the award of a lump sum compensation in favor of the worker.

The list of 'sanctions', ranging from the matter of condominium property (Art 70 of the implementing provisions of the Civil Code) to the rules on sub-contracting (Art 3, para 3 of legge 192/98), to the provisions on late payments in commercial transactions (Arts 2 and 5 of decreto legislativo 231/02), is still long. It is not necessary to scrutinize here every single example to reconcile the differences between those who push such cases outside the scope of civil liability law and those, including the Joint Divisions of the Supreme Court, who recognize in them a sign of the multiplicity of functions characterizing this controversial institution.

5.3) The Constitutional Court's jurisprudence provides a number of particularly meaningful hints. In ruling no 303 of 2011, the Constitutional Court clarified that the above-mentioned labor legislation (legge 183 of 2010) was 'intended to introduce simpler, clearer and more homogeneous criteria for the liquidation of damages', having 'the effect of approximating the indemnity in question with the losses potentially suffered from the date on which a formal contestation was brought up to the employer until the case is decided by a judge', without deduction of gains otherwise obtained by the employee; such a comprehensive indemnity was depicted as having 'a clear sanctioning nature'.

In ruling no 152 of 2016, the Constitutional Court held that the nature of Art 96 of the Civil Procedure Code, as well as of the former Art 385 of the same Code, is 'not compensatory (or at least not exclusively compensatory) but mainly punitive, with a dissuasive purpose'.

The multi-functionality of civil liability in the present legal system is hence confirmed at the constitutional level, with the primary purpose of fostering effectiveness in the protection of rights (see Corte costituzionale no 238/2014 and Corte di Cassazione no 21255/13) which otherwise, in many cases examined by scholars, would be sacrificed by a mono-functionalistic approach.

Lastly, it should be recalled that the national legislator might introduce 'punitive

damages' to prevent the violation of EU law, as acknowledged in ruling 15 March 2016 no 5072, by the Joint Divisions of the Supreme Court.

All this does not entail that the Aquilian institution has altered its own essence, nor that the observed tendency toward the goals of punishment and deterrence will henceforth give Italian judges indefinite leeway to increase the amount of damages at their discretion in contractual or extra-contractual liability cases.

Any imposition of fines requires statutory intermediation pursuant to the *riserva di legge* principle set forth in Art 23 of the Constitution (in connection with Arts 24 and 25), which requires that certain fields be regulated only by statute, thus preventing uncontrolled judicial subjectivism.

6) The above overview sheds light on the issue of the compatibility of foreign punitive damages awards with public policy.

The definition of international public policy provided by the First Division's ordinanza no 9978/16 (at page 21) – 'as a complex of fundamental principles characterizing the domestic legal system in a given historical period, but also satisfying the goal of protecting fundamental human rights that are common to various systems and, above all, can be primarily drawn from legal sources that are higher in rank than statutory law' –, may lead to think that 'the importance of the public policy filter has decreased'.

Surely, the notion of 'public policy', representing a limit to the application of a foreign law, has undergone substantial changes. Originally intended as 'the array of fundamental principles characterizing the socio-ethical structure of the national community in a given historical period and the mandatory principles inherent in the major legal institutions' (see Supreme Court ruling no 1680/84), it has evolved into the sum of 'safeguards set forth by higher-level sources (higher than primary legislation), thus requiring reference to be made to the Constitution and, after the Treaty of Lisbon, to the protections accorded to fundamental rights by the Charter of Nice, having the same authority as the founding Treaties of the European Union by way of Art 6 of the TEU (see Supreme Court ruling no 1302/13)'.

Scholars have explained that the main effect of the reception and internalization of supranational law is not that of a diminished control over the accessibility of foreign rules or judgments that may 'undermine the internal coherence' of the legal system. As already mentioned, this historical function of public policy has been complemented, after the establishment and consolidation of the European Union, by the function of promoting shared values, with a view to harmonizing the observance of such values, which are essential to the existence and growth of the Union.

It has convincingly been observed that the relationship between EU public policy and national public policy does not entail substitution, but rather autonomy and coexistence.

According to the Joint Divisions, evidence of this can be derived from Art 67 of the Treaty on the Functioning of the European Union (TFEU), stating that 'the Union shall constitute an area of freedom, security and justice with respect for fundamental rights

and the different legal systems and traditions of the Member States'.

A mere comparison with how the courts of other Member States reacted to innovations coming from a third State or from another Member State cannot be employed as a decisive parameter; similarly, a 'possibilist' statement such as that contained in Recital no 32 of EC Regulation no 864 of 11 July 2007 with regard to non-compensatory damages, is not sufficient either.

A foreign judgment which makes application of a legal institution not regulated by domestic law, even if not outlawed by the European rules, shall always have to be weighed against the principles of the Constitution and those laws that, like sensitive nerves, fibers of a sensorial system and vital parts of an organism, serve to reinforce the constitutional order.

With regard to 'procedural' public policy, without prejudice to the protection of the fundamental rights of defense, a less stringent scrutiny has been accepted by this Court, in order to facilitate the circulation of international legal products. The same approach cannot, however, be maintained with regard to 'substantive' public policy.

Whilst the harmonization process, propped up by supranational Charters, may bring in some innovative effects, the existing differences in national Constitutions and legal traditions still represent living limits: no longer characterized by a self-centered stance, but made more complex by the intricacies of the international framework into which the State is integrated.

Henceforth, in matters such as labor law (see Supreme Court ruling no 10070/13), which are subject to a set of systemic rules enacting the core values of the Republic, the control over their compatibility with the fundamental principles of the *lex fori* cannot be loosened.

Meanwhile, a scrutiny of full consistency between foreign institutions and Italian institutions should not constitute a shield to be used in all cases. It would be pointless to investigate if the deterrent function of civil liability pursued in our system relies on an identical rationale as that of the jurisdiction generating punitive damages awards.

The only question is the following: whether the institution that is knocking on the door is in patent conflict with the pattern of values and rules that need to be taken into account in an *exequatur* proceeding.

7) Such considerations pave the way to the conclusions that are to be drawn with regard to the recognition and enforcement of judgments awarding punitive damages. Simply stated, having removed the obstacle connected with the nature of the damages award, the scrutiny must be focused on the requirements that such award must satisfy in order to be imported into our national legal system without infringing the underlying values of the matter, which can be derived from Arts 23 to 25 of the Constitution.

Since, as previously mentioned (see § 5.2), the imposition of economic fines for purposes of punishment or deterrence by Italian courts is not permitted unless expressly provided for by law, the same applies with regard to foreign judgments. Which means that in the foreign legal system (not necessarily in the Italian system, whose role is

confined to verifying the foreign judgment's compatibility) there must be a normative anchoring for an award of punitive damages.

The principle of legality requires that a foreign punitive damages award be grounded on a recognizable normative source, that is to say that the *a quo* court's decision must bear an adequate legal basis, satisfying the requirements of subject-specificity (*tipicità*) and predictability (*prevedibilità*). In sum, there must be a statute, or a similar source, having regulated the matter 'according to principles and solutions' of that country, whose effects should not be in conflict with the Italian legal system.

The facts subject to punishment must therefore be precisely pre-identified (*tipicità*) and limits must be set as to the damages that may be awarded (*prevedibilità*). It is then for each national system, depending on whether it focuses more on the tortfeasor's or the offended party's side, to shape the contours of punitive damages, thus emphasizing their sanctioning rather than their compensatory aims, presumably also by taking into consideration the differences between merely negligent and willful misconduct.

The fundamental principle guiding the analysis is in any case to be inferred from Art 49 of the Charter of Fundamental Rights of the Union, concerning the 'Principles of legality and proportionality of crimes and penalties'. As emphasized by scholars, its application requires that the control carried out by the Courts of Appeal[2] be directed to check the proportionality between restorative-compensatory damages and punitive damages and between the latter and the wrongful conduct, in order to shed light on the nature of the sanction/punishment inflicted.

Proportionality of damages, whatever their nature may be, even beyond this legal provision, remains a core element of civil liability law.

7.1) At this point of the analysis it is worth mentioning that in the North American system, which gave rise to many of the damages awards with which European courts have been concerned regarding their recognition, a rapid evolution has taken place, reducing the risk of the so-called grossly excessive damages.

In 1996 the US Supreme Court (in *BMW*, ruling no 20-051996), with only two dissenting opinions, addressed this particular aspect of punitive damages. Twelve years later the process was almost completed. While most States have regulated punitive damages by statute, thus fencing them off from unpredictable jury verdicts (whose original function was to ensure that the wrongdoers were tried by their peers), the US Supreme Court (in *Philip Morris*, ruling no 20-022007) held that, in the US legal system, an award of punitive damages based on the potential harm to persons who were not party to the lawsuit constituted an infringement of the Due Process Clause set forth in the 14th Amendment of the Federal Constitution. Finally, in the *Exxon* ruling (US Supreme Court, 25 June 2008), it went as far as indicating a maximum ratio of one to one between the amounts awarded for compensatory and punitive damages.

By way of example, it may be worth considering that the current legislation of Florida (Florida Statute) – the State in which the judgments were handed down in the

[2] The exequatur courts in Italy: n 1 above.

instant case – introduced limits to the multiple liability phenomenon. Such limits operate through the application of the *ne bis in idem* principle, the provision of alternative caps depending on the nature of the liability at issue, and the implementation of an articulated process with an initial verification of liability and a subsequent phase for the possible award of punitive damages (a mini-trial, quite significant in the perspective of our legal system, insofar as it strengthens the procedural guarantees pursuant to Art 24 of the Italian Constitution).

The jurisprudential *revirement* that is being accomplished by the Joint Divisions of the Supreme Court brings about new possibilities that are not purely theoretical. The instant case, which does not even involve punitive damages, is not the appropriate context for further investigation, which is to be delegated to future case law. What counts is to reiterate that the recognition of a punitive damages award is always subject to an evaluation of the effects that the foreign decision may have in Italy. Such evaluation needs to be carried out extensively, as required when at stake is the reception of a foreign judgment containing an institution which is unknown to our system but, in general, is not incompatible with it.

8) The following principle of law can, therefore, be laid down:

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 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.

Omissis

The costs of this grade of proceedings are to be entirely set off, considering the novelty and complexity of the issues examined.

The Court, in plenary session, rejects the appeal (…) .
So decided on 7 February 2017
Deposited at the clerk's office on 5 July 2017

***

I. Introductory Reflections

In a legal system like the Italian one, where the very vocabulary of tort liability mirrors a necessary equivalence between the *quantum* awarded to the victim and the loss suffered, the mere expression 'punitive damages' sounds like a living oxymoron.[3] The polysemy of the word '*danno*' is revealing: the same term refers to the amount due by the tortfeasor, as well as to the infringement of a certain right (*danno evento*) and to the consequential pecuniary or moral losses (*danno conseguenza*). Furthermore, Italian language terms the payment of damages '*risarcimento*', an expression whose Latin etymology deals with mending clothes and thus conveys the idea of a reparatory function.[4]

Both the historical evolution and the existing legal framework follow that conception. The functional perimeter designed for tort law is based on an essentially bilateral and monetary logic, according to which liability is conceived as a relationship between the wrongdoer and the victim, with no place for society, and damages are the pecuniary equivalent for the loss suffered.[5] In this context, compensation and punishment seem to be antithetical concepts. Since under the Italian Civil Code liability does not entail any consequences other than the obligation to pay damages and damages are compensatory by definition, then liability cannot have a punitive function. All of the arguments against the general admissibility of punitive damages awards in Italian law revolve around this simple syllogism.

This issue acquired a transnational dimension with the increasing globalisation of legal relationships, which called upon Italian courts to enforce foreign decisions awarding punitive damages. Given that under Italian private international law rules, foreign judgments can be recognised only on condition of their compliance with public order, it has become crucial to investigate whether punitive damages

[3] On the definition of liability see S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964). Italian scholars have highlighted several times that 'punitive damages result in a sort of upside down enrichment to the benefit of the injured party'. See C. Castronovo, 'Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di chances, danni punitivi, danno c.d. esistenziale' *Europa e diritto privato*, 326 (2008).

[4] On the different functions of tort liability, see, for all, P. Perlingieri, 'Le funzioni della responsabilità civile' *Rassegna di diritto civile*, 115-123 (2011). For a reconstruction in English of the main theories on the function of tort liability and punitive damages from a comparative perspective, see M. Cappelletti, 'Punitive Damages and the Public/Private Distinction: A Comparison between the United States and Italy' 32 *Arizona Journal of International and Comparative Law*, 799, 848 (2015).

[5] This has been masterfully observed by C. Salvi, *Il danno extracontrattuale* (Napoli: Jovene, 1985), 292, who, in his renowned book, underlines the intrinsic limits of tort liability, after having identified the main steps that lead it to play a replacing function with regards to other tools for reaction against damages and protection of rights. The author specifies that tort liability cannot go beyond such functional perimeter, despite its being 'the most suitable container, in the tool-box of civil remedies, for the reception of the claims aimed, on one hand, at the generalised compensation of damages, on the other hand, at granting protection to new rights'.

meet that requirement.[6]

The answer of the few precedents[7] had been negative until 2016, when the Italian Corte di Cassazione challenged the assumption and referred the question, as a matter of particular importance, to the Grand Chamber.[8] One year later came the long-awaited judgment, which welcomed the suggested *revirement* by holding that punitive damages are not ontologically inconsistent with the Italian system and that international public order does not prevent the recognition of foreign judgments awarding them.[9]

Whether such (prospective) overruling,[10] which had long been advocated by scholarship, represents a real turning point for the Italian system of tort

[6] See legge 31 May 1995 no 218, art 64.

[7] Corte di Cassazione 19 January 2007 no 1183, with a commentary by G. Ponzanelli, 'Danni punitivi: no grazie' *Foro italiano*, I, 1460 (2007); V. Tomarchio, 'Anche la Cassazione esclude il risarcimento dei danni punitivi' *Giurisprudenza italiana*, 2724 (2007); R. Pardolesi, 'Danni punitivi all'indice?' *Danno e responsabilità*, 1125 (2007); L. Ciaroni, 'Il paradigma della responsabilità civile tra tradizione e prospettive di riforma' *Responsabilità civile e previdenza*, 1890 (2007); S. Oliari, 'I danni punitivi bussano alla porta: la Cassazione non apre' *Nuova giurisprudenza civile commentata*, I, 981 (2007); P. Fava, 'Punitive damages e ordine pubblico: la Cassazione blocca lo sbarco' *Corriere giuridico*, 497 (2007). For further comments, see F. Quarta, 'Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto' 31 *Hastings International and Comparative Law Review*, 753, 782 (2008); E. D'Alessandro, 'Pronunce americane di condanna al pagamento di *punitive damages* e problemi di riconoscimento in Italia' *Rivista di diritto civile*, I, 383 (2007). More recently, Corte di Cassazione 8 February 2012 no 1781, with a commentary by P. Pardolesi, 'La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!' *Corriere giuridico*, 1068 (2012); G. Ponzanelli, 'La Cassazione bloccata dalla paura di un risarcimento non riparatorio' *Danno e responsabilità*, 608 (2012).

[8] Corte di Cassazione ordinanza 16 May 2016 no 9978, with a commentary by A. Di Majo, 'Riparazione e punizione nella responsabilità civile' *Giurisprudenza italiana*, 1854 (2016); G. Ponzanelli, 'La delibabilità delle sentenze straniere comminatorie di danni punitivi finalmente al vaglio delle Sezioni Unite – Possibile intervento delle Sezioni Unite sui danni punitivi' *Danno e responsabilità*, 8-9, 827 (2016); L. Nivarra, 'Brevi considerazioni a margine dell'ordinanza di rimessione alle Sezioni Unite sui 'danni punitivi' ' *Diritto civile contemporaneo*, 30 January 2017; M. Grondona, 'L'auspicabile 'via libera' ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamenti e giurisdizioni)' *Diritto civile contemporaneo*, 31 July 2016.

[9] Corte di Cassazione – Sezioni Unite 5 July 2017 no 16601, the English translation of which (by F. Quarta) is published in this Journal. The judgment has been the object of a lively debate among scholars that converged in *Contratto e Impresa/Europa* (2017). For a comparative perspective, see A. Janssen, 'The Recognition and Enforceability of US-American Punitive Damages Awards in Germany and Italy: Forever Divided?' *Contratto e Impresa/Europa*, 43 (2017); M.I. Felìu Rey, 'La silenziosa "*civilización*" dei danni punitivi in Spagna' *Contratto e Impresa/Europa*, 28 (2017); and G. Cattalano-Cloarec, 'Lo stato dell'arte del risarcimento punitivo nel diritto francese' *Contratto e Impresa/Europa*, 12 (2017). For a more national perspective, see M. Tescaro, 'Revirement "moderato" sui *punitive damages*' *Contratto e Impresa/Europa*, 52 (2017).

[10] According to A. Ciatti Caìmi, 'I danni punitivi e quello che non vorremmo sentirci dire dalle corti di common law' *Contratto e Impresa/Europa*, 1 (2017), the overruling is only prospective. In fact, the principle held by the Grand Chamber is an *obiter dictum*, in the sense that it is irrelevant for the decision of the case at stake. The Court (Corte di Cassazione-Sezioni Unite 5 July 2017 no 16601 n 7 above) clarified, however, that it is allowed to take a stand on a matter of particular importance even when it rejects the application as inadmissible.

liability or just a glimmer of hope, it would be premature to say.[11] Therefore, the purpose of this article is to provide a first comment on the latest developments of Italian case law on punitive damages, focusing on the aspects that may be more relevant for foreign observers, and suggest some food for thought about the unsolved criticalities.

II. In Search of a Definition: Is All that Overcompensates Punitive?

In simple terms, punitive damages can be defined as a monetary award, consequential to a tort, where the *quantum* is much higher than the value of the loss suffered by the injured person. Despite its simplicity, this definition is useful to identify the first characteristic of punitive damages: their amount is necessarily over-compensatory.[12] Once that is acknowledged, it is a matter of ascertaining whether over-compensation is enough to qualify damages as punitive, or other requirements must be fulfilled; in other words, whether the measure of damages necessarily reflects the function of liability.[13]

This question remained at the background of both the judgments prior to 2016 and of the referral to the Grand Chamber, but the latter did not expressly address the question; nevertheless, some quick remarks may be helpful in understanding the scope of the punitive damages dilemma. In the Italian Civil Code there are examples of awards that might turn out to be over-compensatory in practice but the majority of scholars would not consider as punitive. The most paradigmatic ones concern non-pecuniary damages and the equitable assessment provided by Art 1226 of the Civil Code, for whenever the loss is hard to prove in its exact amount.[14]

This latter provision is referred to by Art 140-*bis*, para 12, of the Italian

[11] Among the several scholars who have favoured an opening of the Italian system towards punitive damages, see F.D. Busnelli, 'Deterrenza, responsabilità, fatto illecito, danni punitivi' *Europa e diritto privato*, 925 (2009); G. Ponzanelli, 'Non riconoscimento dei danni punitivi nell'ordinamento italiano: una nuova vicenda (nota a App. Trento, 16 agosto 2008)' *Danno e responsabilità*, 92 (2009); C. Scognamiglio, 'Danno morale e funzione deterrente della responsabilità civile' *Responsabilità civile e previdenza*, 2490 (2007); P. Sirena, *La funzione deterrente della responsabilità civile* (Milano: Giuffrè, 2011); and, with a particular reference to class action, F. Galgano, 'Prefazione', in C. Consolo and B. Zuffi eds, *L'azione di classe ex art. 140-bis* (Padova: CEDAM, 2012). For a more general reflection on a possible rethinking of tort liability regarding its structure and its function, see M. Barcellona, 'Funzione e struttura della responsabilità civile: considerazioni preliminari sul "concetto" di danno aquiliano' *Rivista critica di diritto privato*, 211 (2004).

[12] For a more exhaustive definition of punitive damages in the North American system, see F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013), Chapter 4, para 32.

[13] For a recollection of over-compensatory remedies in common law systems, see ibid Chapter 4.

[14] See G. Arnone, N. Calcagno and P.G. Monateri, *Il dolo, la colpa e i risarcimenti aggravati dalla condotta* (Torino: Giappichelli, 2014).

Consumer Code, by virtue of which opting-in-consumers waive their right to an individual action and damages are assessed on an equitable basis or through the establishment of homogeneous criteria for liquidation. The fact that the provision under examination does not expressly subject the equitable assessment to any evidentiary challenge induced some scholars to fear a breach in the equivalence between the *quantum* and the loss and a consequential clear path for punitive damages.[15]

Roughly speaking, these examples all share the following feature: damages are assessed approximately, therefore they reflect an imperfect correspondence between the *quantum* awarded and the loss suffered by the victim.[16] As some scholarship hassuggested, such flexible (and rather inaccurate) methods for assessing damages are not aimed at increasing the *quantum*, but, rather, their purpose is to grant even small value and hard-to-prove claims access to court.[17]

The difference between the aforementioned techniques and punitive damages is quite patent and lies in the policy pursued as well as in the interests protected. In the first case, the principle of strict equivalence between the damage and the loss is balanced with the need for granting wider access to justice, the risk of overcompensation is merely potential, and the *quantum* has its parameter in the loss. In the case of punitive damages, the aforementioned principle is balanced with the need for deterrence, over-compensation is certain, and the *quantum*

[15] For detailed references on the topic, see E. Ferrante, *L'azione di classe nel diritto italiano. Profili sostanziali* (Padova: CEDAM, 2015), esp 253.

[16] Non-pecuniary damages are liquidated on the basis of percentages that are pre-fixed by *ad hoc* table of values and apply to similar classes of losses rather than to the single loss at stake. The very referral to the Grand Chamber (Corte di Cassazione 16 May 2016 no 9978 n 6 above) reads that such standardisation blurs the borders between compensation and sanction. The Court, however, does not reach the conclusion that non-pecuniary damages are punitive. Some scholars, on the other hand, go further in that direction. See, for instance, F.D. Busnelli, 'Deterrenza, responsabilità civile, fatto illecito e danni punitivi' *Europa e diritto privato*, 909 (2009); G. Ponzanelli, 'Novità per i danni esemplari?' *Contratto e impresa*, 1195 (2015). A rather complete reconstruction can be found in C. Scognamiglio, n 9 above. Scholars object that the abovementioned table of values are at least meant to be compensative. Whether they truly are is unclear because, as already mentioned, the moral consequences of a tort are hard to calculate and to prove, so it is impossible to draw a comparison between the value of the loss suffered and the *quantum* awarded. See P.G. Monateri, 'La delibabilità delle sentenze straniere comminatorie di danni punitivi finalmente al vaglio delle Sezioni Unite – Il commento' *Danno e responsabilità*, 827, 840 (2016). On the equitable assessment of damages, see See G. Bonilini, *Il danno non patrimoniale* (Milano: Giuffrè, 1983), 296. For an exhaustive criticism of the author's view see C. Castronovo, 'Del non risarcibile aquiliano' n 1 above, 340. About class action, see E. Ferrante, n 13 above, 253, who underlines that an equitable assessment of mass damages simply means attaching an average value to the infringement of homogeneous interests, but has no admonitory component. This component in the American version of the class action, but there, courts take as the basis of the damages award the loss suffered by the plaintiff and multiply it for all the members of the class. On that point, see, more recently, F. Quarta, 'Foreign Punitive Damages Decisions and Class Actions in Italy', in D. Fairgrieve and E. Lein eds, *Extraterritoriality and Collective Redress* (Oxford: Oxford University Press, 2012), 269-284.

[17] See E. Ferrante, n 13 above, 253.

has its parameter in different factors linked to the wrongdoer.

According to a prominent American scholar, compensatory damages and punitive damages serve different purposes, focus on the interests of different persons, and consider relevant time periods differently. Compensatory damages aim at restoring the injured party to the pre-tortuous condition (loss-oriented), while punitive damages perform an admonitory function (wrong-oriented).[18] With regard to the person on which the remedy is focused, compensatory damages are victim-oriented, while punitive damages are tort feasor and society-oriented.[19] Moreover, regarding the relevant time period to be examined, when dealing with compensatory damages 'the only prospective element, which focuses on the person of the victim, is the future damages of the wrongful act that may be compensated in advance', whereas in punitive damages such element is more important as it is related to deterrence.[20]

Taking the above listed differences into account, it seems reasonable to reach, as a first step, the following conclusions. First, all that overcompensates is not punitive. Secondly, damages can receive that qualification only when over-compensation is intentional, rather than merely potential, and related to circumstances like the seriousness of the offence, rather than to the loss suffered. Third, reading between the lines of case law, it appears that those are the very features composing the identikit of punitive damages, as impliedly conceived by courts.[21]

[18] See V. Behr, 'Punitive Damages in American and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts' 78 (1) *Chicago-Kent Law Review (Symposium: Private Law, Punishment, and Disgorgement)*, 3, 109 (2003).

[19] The idea of a 'societal reading' of punitive damages was developed by C.M. Sharkey, 'Punitive Damages as Societal Damages' 113 *Yale Law Journal*, 347, 454 (2003), following, among others, Judge G. Calabresi's concurring opinion in the case *Ciraolo* v *City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) and the more recent case State Farm Mutual Automobile *Insurance Co.* v *Campbell*, 123 S. Ct. 1513 (2003). Sharkey identified a submerged rationale for punitive damages which is not grounded on admonition but on compensation for harms inflicted upon individuals beyond the plaintiffs named in the complaint. According to Sharkey, those latter harms can be divided into two categories: 'specific harms to other identifiable members of society, and more diffuse or generalized harms to groups or society as a whole'. This new function of punitive damages turns them into an alternative remedy in class actions or at least, in her words, 'might be understood as a doctrinal substitute for (or complement to) the class action mechanism'. More specifically, the aforementioned article envisages the possibility of an *ex post* or 'back-end class action' devoted to the assessment and distribution of the societal damages ascertained in the course of an individual claim. As suggested in the article, this tactic may be useful to remedy the traditional shortcomings that class actions show when 'specifically harmed individuals are not readily identifiable, or when the harms inflicted are too diffuse'.

[20] V. Behr, n 16 above, 109.

[21] These conclusions call for a quick reference to one peculiar hypothesis of equitable assessment concerning tort liability matters: Art 2056 of the Civil Code. By virtue of this provision, courts are allowed to calculate damages through an equitable assessment of the 'circumstances of the case'. Some scholars have suggested including among those circumstances the wrongdoer's malice or the offensiveness of his conduct and to interpret the provision as a green light for punitive damages. A more precise label would be 'damages aggravated by the conduct'. Those

III. Punitive Damages and the Four Degrees of Public Order

Once the borders of the punitive damages dilemma have been arrowed, the next step is to investigate whether such a remedy is consistent with the Italian system of tort liability. The Grand Chamber addressed the question through a unitary approach, but the problem is actually double-sided. On one hand, it is a matter of understanding whether the system is permitted to recognise punitive damages awards (ie to recognise foreign decisions awarding them). On the other hand, it is a matter of ascertaining whether the system is permitted to apply them (ie to award them directly as an internal remedy).[22]

Several rationales have been ascribed to punitive damages,[23] but in a nutshell it can be claimed that their goals are to show the court's and the jury's deprecation about serious intentional or grossly negligent offences, on behalf of society, and to prevent the wrongdoer from committing further torts.[24] Those are undoubtedly worthy purposes responding to a concrete need of efficiency. Yet, on the other side of the coin is the need for freedom of trade and the demand of market players not to be entrapped by excessively severe liability rules, which would encourage risk-averse behaviours and lead to a general paralysis.[25] The

are undoubtedly interesting hints, but the assumption has not been verified by any concrete applications yet, so the question still remains open. For more general reflections, see G. Arnone et al, n 12 above.

[22] The distinction between the recognition and the application of punitive damages is highlighted by L. Nivarra, 'Brevi considerazioni a margine dell'ordinanza di rimessione alle Sezioni Unite sui «danni punitivi»' *Diritto civile contemporaneo*, 2, 30 January 2017.

[23] According to D.D. Ellis Jr., 'Fairness and Efficiency in the Law of Punitive Damages' 56 *Southern California Law Review* 1, 12-20 (1982), punitive damages have the following purposes: (1) punishing the wrongdoer; (2) deterring the wrongdoer and others from committing similar offenses; (3) preserving the peace; (4) inducing private law enforcement; (5) compensating victims for an otherwise non-compensable loss; and (6) paying the plaintiff's attorneys' fees.

[24] According to C. Morris, 'Punitive Damages in Tort Cases' 44 *Harvard Law Review*, 1173, 1209 (1931), 'Justifications of the practice of allowing punitive damages fall into two classes: (1) The doctrine of punitive damages makes it worthwhile for plaintiffs to sue some defendants whom it is desirable to admonish. Because of the inconsequence of the injury which the plaintiff has suffered, these defendants would not be impleaded if compensatory damages were the only measure of tort verdicts. (2) The doctrine of punitive damages makes the admonitory function of torts more effective than it would be if money judgments were always limited to reparation'. More precisely, in their home country, England, punitive damages were originally applied only in case of an oppressive, arbitrary and unconstitutional conduct by the 'servant of the government' or when the tort itself would provide the wrongdoer with a profit overcoming the amount of merely compensative damages or when required by legislation. Those were the rules established by one of the leading cases on punitive damages in English law: *Rookes* v *Barnard* [1964] UKHL 1, (1964) AC 1129 and All ER 367. For a more detailed reconstruction, see R. Pardolesi, 'Danni punitivi' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 2007), Agg, 445. In the same direction, see S. Patti, 'Pene private' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 2004), XIII, 351. For a broad-spectrum analysis, see M.G. Baratella, *Le pene private* (Milano: Giuffrè, 2006), *passim*.

[25] On the potential risks of over-deterrence in American tort liability, see V.P. Goldberg, 'Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint' 20 *The Journal of Legal Studies*, 249 (1991).

bilateral and monetary logic mentioned at the beginning of the article have created a divergence between the individual-focused structure of tort liability and the collective dimension that the underlying conflicts often end up acquiring.[26]

Those might be the hidden policy reasons why Italian courts have been reluctant towards punitive damages and why they, until recently, have been repeating as a *mantra* that punitive damages are against public policy. Comparing and contrasting those judgments in light of the Grand Chamber's holding, it emerges that the alleged inconsistency with such parameters is not a unitary concept. One could identify at least four grounds for denying recognition to the remedy in question:

(1) non-compliance with the fair trial standards;
(2) inconsistency with the rationale for tort liability;
(3) breach of the principle 'no punishment without law'; or
(4) non-compliance with the principle of proportionality.

The first ground apparently deals with the so-called procedural public order, and therefore is valuable as the paramount criterion in the recognition of any judgment, while the other three belong to the concept of substantive public policy. When listed as such, the four grounds are clearly distinct, but, in practice, courts often overlap them. Moreover, as will be shown, the Grand Chamber makes no exception. The result of such overlapping is a monolithic approach to the punitive damages dilemma that heightens the imperviousness of the Italian legal system towards the remedy in question. In fact, public policy as a whole is a huge barrier against punitive damages, whereas a fragmentation of the concept may facilitate the challenging and rebuttal of the single obstacles.

IV. Due Process Concerns: Substantive Public Policy in Disguise

A first sign of overlap among the different grounds of public policy lies in the recurring claim that the lack of reasons on the method used to assess damages is neither enough to deny recognition nor neutral in such respects. More precisely, according to past case law, that defect allows courts to 'presume' that the foreign decision under exam contains a punitive damages awar.[27] It is not straightforward, though, how the 'presumption' can be rebutted: does the injured person, who pleads for recognition, bear the burden of proving that the *quantum* is not over-compensatory? Can that be ascertained *ex officio*? Is that enough to deny recognition or is it also necessary to prove that the amount is grossly disproportionate?

Given that among the fair trial safeguards there is no duty to provide reasons for a certain decision and the crucial unsolved problems concern the burden as well as the object of proof, the matter turns out to be substantive. Yet, the courts

[26] See C. Salvi, *Il danno extracontrattuale* n 3 above, 292.
[27] See Corte di Cassazione 8 February 2012 no 1781 n 5 above.

prefer to disguise it as procedural. The underlying reason is probably that the courts' main concern is to forestall the risk of arbitrary proceedings leading to equally arbitrary decisions. This latter risk appears to be increased by the fact that in the United States punitive damages awards are usually decided by a jury. Reputable scholars view this as a positive limit to the judges' margin of discretion: peer-judgments would be the best antidote against disproportionate awards as they carry an intrinsic sense of fairness.[28]

While that assumption might be true in theory – as jury verdicts 'may reflect the sense of the community about the egregious character of defendants' actions' – practice soon proved it to be false.[29] The difficulty of translating such a societal judgment – widely shared but still of a moral (ie non-pecuniary) nature – into a money scale has gradually lead to 'erratic' and 'capricious' awards.[30] Collateral effects – far from going unnoticed among US scholars – have been as severe as unequal treatment for the wrongdoer depending on the jury composition as well as on the state in which the trial is held,[31] and risk-averse behaviour,

[28] See P.G. Monateri, 'La delibabilità delle sentenze straniere comminatorie di danni punitivi' n 14 above, who observes that if the system recognises jury verdicts in criminal cases, it shall *a fortiori* accept and enforce them when dealing with punitive damages. American scholars highlight a significant difference between jury trials in criminal law and in punitive damages lawsuits: in the first case juries only decide whether the defendant is liable or not, while questions of punishment are committed to the judges and subject to guidelines and constraints. On this point, see C.R. Sunstein et al, 'Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)' 107 *The Yale Law Journal*, 2071, 2078 (1998), who argue that here 'the civil justice system should be brought more closely in line with the criminal justice system'.

[29] C.R. Sunstein et al, 'Assessing Punitive Damages' n 26 above, 2078.

[30] ibid 2075. According to the authors (see ibid 2077-2078), the main reasons can be summarised as follows: '(1) People have a remarkably high degree of moral consensus on the degrees of outrage and punishment that are appropriate for punitive damage cases. At least in the products liability cases we offer, this moral consensus, on what might be called outrage and punitive intent, cuts across differences in gender, race, income, age, and education. For example, our study shows that all white, all black, all Hispanic, all female, all male, all poor, all wealthy, all old, and all young juries are likely to come to similar conclusions about how to rank a range of cases. (2) This consensus fractures when the legal system uses dollars as the vehicle to measure moral outrage. Even when there is a consensus on punitive intent, there is no consensus about how much in the way of dollars is necessary to produce appropriate suffering in a defendant. Under existing law, widely shared and reasonably predictable judgments about punitive intent become highly erratic judgments about appropriate dollar punishment. A basic source of arbitrariness within the existing system of punitive damages (and a problem not limited to the area of punitive damages) is the use of an unbounded dollar scale. (3) A modest degree of additional arbitrariness is created by the fact that juries have a hard time making appropriate distinctions among cases when they are not comparing them directly. When one case is seen apart from other cases, people show a general tendency to place it toward the midpoint of any bounded scale. It is therefore less likely that sensible discriminations will be made among diverse cases. In producing arbitrary awards, however, this effect is far less important than the difficulty of translating shared moral judgments into dollar values'.

[31] See S. Daniels and J. Martin, 'Myth and Reality in Punitive Damages' 75 *Minnesota Law Review* 1, 31-32 (1990), who report the results of a study taking into account forty-seven counties in eleven states over a several-year period. According to the authors, the results of the study showed that in some counties punitive damages were awarded in nearly twenty-five percent of

especially by corporations.[32]

Yet, those effects, as the Grand Chamber acknowledged, have progressively been mitigated by both legislation and case law, through the establishment of several criteria aimed at fixing a maximum threshold for punitive damages awards and providing other procedural safeguards. Such acknowledgement cannot be called revolutionary but has the virtue of leading the problem back to its proper dimension of substantive law, and rebutting procedural arguments against the recognition of punitive damages.

Here is the first *acquis* of the current reflection: no presumption of 'punitiveness' can be drawn from the lack of reasons in the foreign judgment, nor does the consequential 'arguments shortage' in the domestic decision allow the parties to bring the case before the Corte di Cassazione. Moreover, fair trial concerns are no longer a ground for denying recognition, at least when the decision at stake comes from the United States.[33]

V. The Alleged Inconsistency with the Role of Tort Liability

Free from procedural concerns, punitive damages must face another obstacle as courts have always rejected them for being inconsistent with the function of tort liability. Before attempting to challenge the assumption, one remark is needed. The Grand Chamber expressly disagreed with this and replied instead that tort liability has gradually acquired, through legislative evolution, a multi-functional dimension. Thus punitive damages are not ontologically inconsistent with the system.

Such a declaration appears more grandiose than it really is. While reference to national public policy would have been enough to justify the assumption, the Court was more cautious. In fact, the Grand Chamber felt the need to invoke a concept of public policy wider than the national one and deemed to apply to private international law matter.[34] In particular, the Court suggested an evolutionary interpretation of public policy as an obstacle to the recognition of foreign awards only when constitutional values are threatened.[35] In light of such constitutional

the successful verdicts, while in some other counties they were not awarded at all; and average verdicts ranged from less than ten thousand dollars to two thousand and four thousand dollars. For an illustration of the sources of such arbitrariness and an analysis of the behavioural reasons which lie behind it, see C.R. Sunstein et al, 'Assessing Punitive Damages' n 26 above, passim.

[32] On the topic of risk-averseness see, in general, K.R. Maccrimmon and D.A. Wehrung, *Taking Risks. The Management of Uncertainty* (New York: Free Press, 1986), passim.

[33] In fact, we are not sure that other states provide the same safeguards. Would the decision have been the same if the judgment came from another country?

[34] See C. Irti, 'Digressioni attorno al mutevole "concetto" di ordine pubblico' *Nuova giurisprudenza civile commentata*, II, 481, 489-492 (2016).

[35] Such a constitutional reading of the concept of public policy is even more clearly outlined in the referral to the Grand Chamber (Corte di Cassazione ordinanza 16 May 2016 no 9978 n 6 above), as observed by G. Ponzanelli, 'La delibabilità delle sentenze straniere comminatorie di

and international reading, a mere lack of correspondence between foreign remedies and domestic ones is not enough for denying recognition on the grounds of public policy.

To claim that the natural function of tort liability is compensation is one thing; to claim that tort liability cannot have any further function is another. Provided that this latter principle exists, it does not belong to the public order for several reasons. What lies behind it is the alleged repulsion of the system towards the idea that penalties, which pertain to criminal law and follow from a public wrong, could be inflicted in a private law matter and in favour of an individual rather than the state. Repulsion, though, is not enough to qualify a principle as public policy.[36] As the Corte di Cassazione remarked in the referral to the Grand Chamber, an upgrade of that kind is legitimate only when there is evidence that the principle at stake bears constitutional significance as an essential and indispensible value, untouchable even by the legislator.[37]

Fathoming the Constitution, it seems that no trace of what is depicted above can be found. One might object that principles are so because they are not incorporated in single provisions but result from the system as a whole. This is undoubtedly true; nevertheless, norms are the sentinels of principles. Whenever a hidden link exists between a certain set of norms scattered in the civil code or in another statute, there lies a principle; whenever such principle taps into the fundamental rights and freedoms established by the Constitution or the founding values of a certain matter, there lies public policy.[38] Here, norms simply tell the interpreter that compensation is the natural purpose of tort liability, not that it is the only one.

Moreover, though deeply rooted in case law, such conception of liability as

danni punitivi' n 6 above. For further comments, see M. Grondona, 'L'auspicabile "via libera" ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamenti e giurisdizioni)' *Diritto civile contemporaneo*, 31 July 2016, who reflects upon the transformation of public policy into an inclusive concept, an opening towards legal transplants, provided that it widens the scope of fundamental rights and a consequential improvement in their protection.

[36] It is worth remarking that in 2016 the Corte Costituzionale, in relation to Art 96, para 3, of the Civil Procedure Code, openly endorsed the statutory destination of an extra-compensatory award to the plaintiff. See Corte Costituzionale 23 June 2016 no 152, *Foro italiano*, I, 2639 (2016), with a comment by E. D'Alessandro. On the topic, see F. Quarta, 'Illecito civile, danni punitivi e ordine pubblico' *Responsabilità civile e previdenza*, 1159-1172, 1162, fn 14 (2016).

[37] Corte di Cassazione ordinanza 16 May 2016 no 9978 n 6 above. The judgment states: 'it should be demonstrated that the function of damages, currently restricted to mere compensation, amounts to an essential and indispensible constitutional value for our system, in whose respect (…) even an ordinary legisaltive derogation would not be allowed (…)'.

[38] For a more wide-ranging reflection, see P. Perlingieri, *L'ordinamento vigente e i suoi valori* (Napoli: Edizioni Scientifiche Italiane 2006), and Id, 'Constitutional Norms and Civil Law Relationships' 1(1) *The Italian Law Journal*, 17-49 (2015) (originally 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 95-122 (1980)). Similar conclusive remarks can be found in F. Quarta, n 14 above.

exclusively compensatory is far from being immemorial.[39] It is actually the relatively recent product of a libertarian society and the industrialisation process, which multiplied the risk of damages and underlying interests, thus calling upon liability to play the role of mediator between freedom of entrepreneurship and individual security.[40] In this context, fault is objectified as the violation of socially accepted precautionary rules and liability is read as a risk allocation tool.

In addition, a multi-functional approach to tort liability appears to be in line with the current European trend. Just to mention some examples, consider, first of all, the overruling of the French *Cour de Cassation*, which in 2010, similarly to the Italian Grand Chamber, held that punitive damages are compatible with public order, provided that their amount is not disproportionate to the concrete loss suffered by the victim.[41] More recently, the Court of Justice of the European Union held that Directive 56/2006/EC (requiring equal treatment of men and women in matters of employment and occupation),

> 'allows, but does not require, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex'.[42]

[39] Under the 1865 Code, the framework was different. Damages were still proportional to the loss suffered but this feature coexisted with an admonitory conception of liability. This latter was considered as a sanction for blameworthy actions and therefore required, in addition to the infringement of a right and a consequential loss, the fault (or malice) of the wrongdoer. Fault was perceived in its subjective dimension as an ethical concept, and liability was strictly personal. For a more detailed reconstruction, see C. Salvi, 'Responsabilità extracontrattuale (diritto vigente)' *Enciclopedia del diritto* (Milano: Giuffrè, 1988), XXXIX, 1192-1194. But the punitive function was not associated with overcompensation. It was, instead, in classical Roman times where the deepest roots of tort liability lie. In that system, private wrongs, labelled as *delicta* or *maleficia*, shared a common core with criminal law. In fact, the money award to which the tort entitled was conceived as a real penalty: expiation for the wrongdoer and a fulfilled vendetta for the victim.[39] In that perspective, the main criterion for calculating damages was the seriousness of the offence, rather than the mere loss. For instance, if a person was accused of stealing and sued with an *actio furti*, the base penalty was double the value of the stolen goods and could be tripled or quadrupled depending on a series of circumstances related to the wrongdoer's attitude. All those 'aggravating circumstances' were expressly established by legislation for single torts. On the topic see, for all, S. Lazzarini, 'Responsabilità extracontrattuale nel diritto romano' *Digesto delle discipline privatistiche* (Torino: UTET, 1998), 289.

[40] C. Salvi, 'Responsabilità extracontrattuale (diritto vigente)' n 37 above. On the relationship between freedom of entrepreneurship and liability, see S. Rodotà, *Il problema della responsabilità civile* n 1 above, passim; P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), 34. For more general reflections, see G. Calabresi, *The Costs of Accidents* (New Haven: Yale University Press, 1970).

[41] Cour de Cassation, 1 December 2010, 4 *Journal de droit international*, 1230 (2010). For a more systematic reconstruction of the French system's attitude towards punitive damages, see G. Cattalano-Cloarec, 'Lo stato dell'arte del risarcimento punitivo nel diritto francese' n 7 above.

[42] Case C-407/14 *María Auxiliadora Arjona Camacho* v *Securitas Seguridad España*, Judgment of 17 December 2015, available at https://tinyurl.com/ybj7wf4f (last visited 25 November 2017).

From this latter decision it can be impliedly inferred that punitive damages are not *per se* inconsistent with the European legal system.

The first and more direct consequence of the reasoning above is that party autonomy can provide for punitive damages. A transaction in which one party agrees to pay punitive damages in order to prevent or settle a tort liability case would not be considered void on the ground that it is against either international or domestic public policy.[43] Nor could that contract be avoided by the wrongdoer on the grounds of an alleged disproportion between the *quantum* and the loss. In fact, Art 1970 of the civil code expressly forecloses such possibility.

The answer would be different if the parties to a contract agreed upon a penalty clause including punitive damages for potential torts committed in the course of their relationship. In this case, regardless of the label 'punitive damages', Art 1384 of the civil code would apply, allowing the judge to reduce *ex officio* the grossly disproportionate penalty clause.

VI. Punitive Damages and the *Ex Post Facto* Clause

The Grand Chamber mentioned the principle of legality as an inevitable requirement for the recognition of punitive damages awards, in relation to both Art 23 and Art 25 of the Italian Constitution.[44] Here lies the first criticality in the Court's approach. The reference to this latter article, which recovers the ancient formula *nullum crimen nulla poena sine lege*, seems to be quite a-technical: it is in fact unquestioned that such provision exclusively applies to criminal law in its strict meaning, whereas punitive damages are a private penalty rather than a public one.[45]

The suitable provision is instead Art 23 of the Constitution, which states that no personal or pecuniary performance shall be imposed without a legal basis. This appears to be the real impregnable limit to punitive damages, both on a domestic and on an international scale. Such limit, though, could (and should) be interpreted in a more or less restrictive way, depending on which of the two dimensions is at stake. While it is well established in Italian law that the legality requirement is fulfilled only when personal or pecuniary performances are imposed by a statute promulgated by the Parliament (*legge ordinaria*), it would be complicated and somehow unreasonable to apply such a strict interpretation

[43] On this issue, see the debate about the punitive nature of the damages awarded by the Turin Tribunal in the renowned case Thyssenkrupp, as recalled, among others, by R. Di Raimo, 'Note minime su responsabilità civile e funzione di «costruzione del sistema»', in Id et al eds, *Percorsi di diritto civile. Studi 2009/2011* (Napoli: Edizioni Scientifiche Italiane, 2011).

[44] On the principle of legality see, P. Perlingieri, 'Il principio di legalità' *Rassegna di diritto civile*, 164 (2010).

[45] The criminal nature of punitive damages has always been a highly disputed issue among American scholars. For a more detailed reference, especially on Supreme Court precedents, see F. Quarta, *Risarcimento e sanzione nell'illecito civile* n 10 above, 268-271.

to judgments coming from countries where statutes are not a primary source of law.[46]

The reference to the principle at stake should then be read in a broader and more modern perspective, taking into account the increasing complexity by which the legal system is characterised, due to the sources pluralism and the constant interaction with common law systems, where case law plays a paramount role.[47] The trans-national dimension of the matter demands the adoption of this latter approach and the need for uniformity may suggest drawing inspiration from the European Convention of Human Rights, whose art 7 states the principle 'no punishment without law'.

The very use of the word 'law' (*droit*, in the French version), instead of the word 'legislation', heralds a broader interpretation of the principle at stake. And the European Court of Human Rights (ECHR) has confirmed this interpretation on several occasions. In particular, not only does the concept of 'law' encompass statutes, but also enactments of lower rank and case law, provided that they meet the requirements of accessibility and foresee ability.[48] If such a broad interpretation applies to criminal law, it should *a fortiori* be applicable to civil law remedies, like punitive damages.[49]

[46] In fact, the Grand Chamber itself specified that the principle of legality is met whenever the foreign judgment awarding punitive damages is rendered on the basis of a statute or a similar source capable of granting foresee ability and standardisation (tipicità). See Corte di Cassazione 5 July 2017 no 16601 n 7 above.

[47] For an in-depth reflection on the complexity of the sources of law, see, above all, P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006); and Id, 'Complessità e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile,* 188-214 (2005). Moreover, see N. Lipari, 'On Abuse of Rights and Judicial Creativity' 3 *The Italian Law Journal* 1, 55-74 (2017), who expressly suggested overcoming the distinction between common law and civil law, emphasising the prevailing role of the interpreter in creating the law in action on a case-by-case basis.

[48] See, for all, Eur. Court H.R. Grand Chamber, *Del Río Prada* v *Spain*, Judgment of 21 October 2016, § 91, available at https://tinyurl.com/y9lgywss (last visited 25 November 2017); and Eur. Court H.R. Grand Chamber, *S.W.* v *The United Kingdom*, Judgment of 22 November 1995, § 35, available at https://tinyurl.com/y9zwre2y (last visited 25 November 2017). With specific reference to enactments of a lower rank than statutes, see prison rules in Eur. Court H.R. Grand Chamber, *Kafkaris* v *Cyprus*, Judgment of 12 February 2008, §§ 145-146, available at https://tinyurl.com/yd6ppy2v (last visited 25 November 2017). On the other hand, the ECHR clarified that state practice inconsistent with the written law in force and capable of depriving it of its substance cannot be qualified as 'law' under art 7 of the Convention. In these respects see, for instance, Eur. Court H.R. Grand Chamber, *Streletz, Kessler and Krenz* v *Germany*, Judgment of 22 March 2001, §§ 67-87, available at https://tinyurl.com/y977d605 (last visited 25 November 2017), about the border-policing practice of the German Democratic Republic; and Eur. Court H.R., *Polednová* v *the Czech Republic* (dec.), Judgment of 21 June 2011, available at https://tinyurl.com/y8ehfb33 (last visited 25 November 2017), about the practice of eliminating political opponents through death penalties imposed after summary trials.

[49] The EU Convention on Human Rights adopts an autonomous conception of penalty in the sense that the Court has the power to assess, case by case, whether a certain measure imposed by one of the Member States can be qualified as such. First, the Court ascertains whether the measure was ordered in consequence of a conviction for a 'criminal offence'. Then the Court

The emphasis given by the Grand Chamber to the principle of legality, and the focus on the requirements of foreseeability and accessibility rather than on the legislative rank of the source, suggests considering the risk of awards which are only formally compensatory, but punitive in nature. Especially over the past few years, some judgments by the Italian Supreme Court[50] – later contradicted

might consider other factors, such as the nature and the purpose of the measure, its qualification under domestic law, the procedures for its adoption and execution and its severity (see Eur. Court H.R., *Welch* v *the United Kingdom*, Judgment of 9 February 1995, § 28, available at http://www.hudoc.echr.coe.it; and *Del Río Prada* v *Spain* n 46 above, § (82). This latter factor, though, cannot be decisive *per se*, as there are several non-criminal preventive measures which can nevertheless have a substantial impact on the person concerned (see *Van der Velden* v *the Netherlands*, Judgment of 31 July 2012, available at http://www.hudoc.echr.coe.it).

[50] Two paradigmatic examples of this trend are wrongful birth cases and what Italian Courts have baptised as 'thanatological damage'. Regarding wrongful birth, one isolated but inappealable judgment by the Corte di Cassazione held that the persons entitled to claim damages for the failure of the doctor to diagnose in advance the foetus' malformations are, in addition to the parents, the brothers and sisters of the undesired child and this latter himself. Corte di Cassazione 2 October 2012 no 16754, *Foro italiano*, I, 204 (2013); P. Frati et al, 'Quanta informazione a fine diagnostico prenatale? La Suprema Corte statuisce che sia completa, determinante e funzionale alle richieste ed alle scelte materne' *Responsabilità civile e previdenza*, II, 124, 334 (2013); P.G. Monateri, 'Il danno al nascituro e la lesione della maternità cosciente e responsabile' *Corriere giuridico*, 45 (2013); D. Carusi, '*Revirement* in alto mare: il «danno da procreazione» si propaga al procreato?' *Giurisprudenza italiana*, 809 (2013); G. Cricenti, 'Il concepito e il diritto di non nascere' *Giurisprudenza italiana*, 796 (2013); L. Coppo, 'Doveri informativi e natura dell'obbligo di diagnosi prenatale' *Giurisprudenza italiana*, 1052 (2013); E. Giacobbe, 'Sul miserabile ruolo del diritto ... non altro. Non oltre. Ovvero degli itinerari della giurisprudenza normativa' *Diritto di famiglia e delle persone*, I, 79-139 (2013); S. Cacace, 'Il giudice "rottamatore" e l'*enfant préjudice*' *Danno e responsabilità*, 155, (2013); E. Palmerini, 'Nascite indesiderate e responsabilità civile: il ripensamento della Cassazione' *Nuova giurisprudenza civile commentata*, 198 (2013). The Court identified the loss suffered by the brothers and sisters with the 'reduced availability of the parents towards them', due to all the cures required by the wrongfully born child, and with the 'reduced chance to benefit of a parental relationship constantly characterised by serenity and detent'. The loss suffered by the child was, instead, detected in the very fact of a 'disabled existence'. Regarding the so-called 'thanatological damage', before 2014, Courts were unanimous in claiming that, in the event of a mortal tort, the victim herself is entitled to damages only when death occurred after a significant period of time and during that time she was conscious. To begin with the most ancient and authoritative precedent, see Corte di Cassazione-Sezioni Unite 22 December 1925 no 3475, *Foro italiano*, I, 328 (1926). In the same direction, see the following judgment of the Italian Constitutional Court: Corte Costituzionale 27 October 1994 no 372, with a commentary by G. Ponzanelli, 'La Corte costituzionale e il danno da morte' *Foro italiano*, I, 3297 (1994). For more recent precedents see, *ex multis*, Corte di Cassazione 11 October 2012 no 17320, *La responsabilità civile*, 832 (2012); Corte di Cassazione 24 March 2011 no 6754, *Corriere giuridico*, 1091 (2011); Corte di Cassazione 27 May 2009 no 12326, *Diritto e pratica del lavoro*, 567 (2010); and Corte di Cassazione 13 January 2009 no 458, *La responsabilità civile*, 11 (2010). Those damages, labelled as terminal or catastrophal, aim at compensating the victim both for the physical suffering and for the moral pain following the awareness of an imminent death. In 2014, again, one single judgment by the Corte di Cassazione held that even the immediate loss of life is in itself a damage (thanatological damage) and entitles the victim to compensation. Corte di Cassazione 23 January 2014 no 1361, with a commentary by A. Palmieri and R. Pardolesi, 'Di bianco o di nero: la «querelle» sul danno da morte' *Foro italiano*, I, 759-760 (2014); R. Simone, 'Il danno per la perdita della vita: «*die hard*» 2.0' *Foro italiano*, I, 766 (2014); R. Caso, 'Il bene della vita e la struttura della responsabilità civile' *Foro italiano*, I, 769-

by the Grand Chamber[51] – have attempted to increase the *quantum* awarded to the victim either by creating new figures of damages or by widening the range of the persons entitled to them. One could object that here damages are not punitive, because they are loss-oriented and victim-oriented. This is true only from a formal viewpoint. Actually, it could be argued that almost any punitive damage may turn into an apparent compensatory damage if linked to a loss that had never been identified before.[52]

VII. Conclusive Remarks: Punitive Damages and the Principle of Proportionality

Besides being provided by accessible and foreseeable law, punitive damages, according to the Italian Supreme Court, must comply with the principle of proportionality enounced in Artb49 of the Charter of Fundamental Rights of the European Union (Charter).

At first glance, the concept of 'disproportioned' seems very close to the one of 'grossly excessive', which allows judges to reduce *ex officio* penalty clauses

771 (2014); C. Medici, 'Danno da morte, responsabilità civile e ingegneria sociale' *Foro italiano*, I, 720 (2014); G. Ponzanelli, R. Roffa, R. Pardolesi and R. Simone, 'La sentenza "Scarano" sul danno da perdita della vita: verso un nuovo statuto di danno risarcibile?' *Danno e responsabilità*, 363 (2014). The overruling at stake had already been suggested, though in *obiter*, by Corte di Cassazione 12 July 2006 no 15760, *Corriere giuridico*, 1375 (2006). On thanatological damage, see also A. Malomo, 'Perdita della vita e riparazione integrale' *Diritto delle successioni e della famiglia*, 383-417 (2015).

[51] As far as wrongful birth is concerned, see Corte di Cassazione-Sezioni Unite 22 December 2015 no 25767, *Diritto di famiglia e delle persone*, 760 (2016); C. Bona, 'Sul diritto a non nascere e sulla sua lezione' *Foro italiano*, I, 494 (2016); F. Piraino, '«Nomina sunt consequentia rerum» anche nella controversia sul danno al concepito per malformazioni genetiche. Il punto dopo le Sezioni unite 22 dicembre 2015 n. 25767' *Diritto civile contemporaneo*, 6 gennaio 2016; M. Gorgoni, 'Una sobria decisione di "sistema" sul danno da nascita indesiderata' *La responsabilità civile*, 162 (2016). As far as thanatological damage is concerned, see Corte di Cassazione-Sezioni Unite 22 July 2015 no 15350, with a commentary by A. Palmieri and R. Pardolesi, 'Danno da morte: l'arrocco delle sezioni unite e le regole (civilistiche) del delitto perfetto' *Foro italiano*, I, 2690 (2015); R. Caso, 'Le sezioni unite negano il danno da perdita della vita: giorni di un futuro passato' *Foro italiano*, I, 2698 (2015); R. Simone, 'La livella e il (mancato) riconoscimento del danno da perdita della vita: le sezioni unite tra principio di inerzia e buchi neri nei danni non compensatori' *Foro italiano*, I, 2705 (2015); F.D. Busnelli, 'Tanto tuonò, che ... non piovve. Le Sezioni Unite sigillano il "sistema" ' *Corriere giuridico*, 1203 (2015); M. Bona, 'Sezioni Unite 2015: no alla «loss of life», ma la saga sul danno non patrimoniale continua' *Responsabilità civile e previdenza*, 1530 (2015); V. Carbone, 'Valori personali ed economici della vita umana' *Responsabilità civile e previdenza*, 889 (2015); M. Franzoni, 'Danno tanatologico, meglio di no ...' *Responsabilità civile e previdenza*, 899 (2015); R. Pardolesi and R. Simone, 'Danno da morte e *stare decisis*: la versione di Bartleby' *Responsabilità civile e previdenza*, 905 (2015); G. Ponzanelli, 'Le Sezioni Unite sul danno tanatologico' *Danno e responsabilità*, 889 (2015).

[52] Significantly, the first argument used by the Grand Chamber to reject the idea of a thanatological damage is the non-punitive nature of tort liability. See Corte di Cassazione-Sezioni Unite 22 July 2015 no 15350 n 49 above.

under Art 1384 of the Civil Code.[53] Perhaps the analogy with penalty clauses could be taken so far as to conceive the reduction of grossly disproportionate punitive damages awards. It is certainly daring perspective, but it would represent a third way to the raw alternative between the recognition of the foreign award and a radical rejection of the injured party's claim.[54]

The Grand Chamber did not mention penalty clauses but claimed that proportionality should be linked on one hand to the seriousness of the tort, and on the other hand to the amount of compensatory damages. Regarding the first criterion, the approach adopted by Art 49 of the Charter seems to be the right one. To further refine such a concept, useful tips may be drawn from the recent decriminalisation launched on decreto legislativo 15 January 2016 no 7, which introduced, as a punishment for formerly criminal conduct, in addition to compensatory damages, the so-called civil pecuniary sanctions. Among the guiding principles of the reform are the following: the provision must ensure that the sanctions are proportioned to the seriousness of the offence, the reiteration of the wrong, the enrichment of the wrongdoer, the attempt of the latter to mitigate the loss, and his personality as well as his economic wealth.

Unlike the seriousness of the tort, the further parameter added by the Grand Chamber, perhaps influenced by the new trends of US law[55] – proportionality to compensatory damages – is not grounded in any domestic or uniform international law provision, but is instead drawn from the Italian system of tort liability as a whole. This seems to be a sign of the persistent resistance or mistrust towards the idea of a punitive function of tort liability, which shall never prevail over the reparatory one. In other words, in this perspective, punitive damages are inconsistent with the system if they pre-empt the compensatory function typical of Italian tort liability.

This leads to some practical corollaries of utmost importance on an international scale. First, if the amount of foreign punitive damages awards is far higher than the compensatory damages award, there is a strong risk that the decision will not be recognised, even though the penalty was provided by the law and the *quantum* is proportional to the seriousness of the tort. Second, it might be difficult or even impossible for Italian judges – who cannot rely on facts and evidence others than the ones mentioned by the foreign judgment – to

[53] It is true that such provision only applies to contractual liability and specifically links the disproportion to the interest of the creditor to receive the due performance from the debtor, but, nevertheless, its interpretation by case law may prove to be interesting.

[54] The need for a 'third way' was articulated in F. Quarta, 'Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto' 31 *Hastings International and Comparative Law Review*, 752 (2008).

[55] Since the 2008 holding of the US Supreme Court establishing that the proportion between punitive damages and compensatory damages must be one to one in order not to violate the Due Process Clause, it seems that statutes tend to provide the requirement of proportion for the purpose of limiting the courts' and juries' discretion in assessing punitive damages. See *Exxon Shipping Co.* v *Baker*, 554 U.S. 471 (United States Supreme Court, 2008).

autonomously assess the amount of compensatory damages. Thus, if the foreign judgment to be recognised does not clearly distinguish the compensatory and the punitive components of the damages awarded, the proportionality test will be of no use and the risk of a discretional decision will be heightened.[56]

Yet, rather surprisingly, there is no trace of the principle of proportionality in the holding. In fact, the holding only reads that the foreign judgment must rely on a normative basis, capable of granting the typicality of the cases in which such award applies as well as its predictability and its maximum amount. Besides the fact that the holding does not mention the principle at stake, the reference to a maximum amount appears to be contradictory. In fact, the pre-determination of a threshold for punitive damages does not assure their proportionality to compensatory damages or to the seriousness of the tort. Considering these factors, the rest of the holding sounds rather inaccurate in its formulation.

On one hand, the Court pleads open towards punitive damages by claiming that multi-functionality belongs to the system of tort liability. On the other hand, the same Court does not draw from it the conclusion that they should be applied by the system, perhaps because this would have transcended the scope of the referral. According to the Court, the remedy is simply 'not ontologically inconsistent' with the legal system and, thus, it is worth being recognised. Moreover, the Grand Chamber set a series of limits the borders of which can be indefinite and changeable. Only a post-Grand Chamber application of such principles by case law will tell how much such decision will change the approach of the system towards punitive damages.

[56] For further observations, see C. De Menech, 'Verso la decisione delle Sezioni Unite sulla questione dei danni punitivi: ostacoli apparenti e reali criticità, il riconoscimento dei danni punitivi?' *Persona e Mercato*, 3-14, 11 (2017).