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DISTRIBUTIVE JUSTICE AND CHARITY IN TORT LAW ADJUDICATION¹

Abstract. A common claim in tort scholarship has been to argue that, generally, there is no place for distributive justice or charity considerations in tort law. This article discusses this claim. It is first shown that the thesis according to which there is no place for distributive justice considerations in tort law is doubtful. It is then argued that tort adjudication is a form of distributive justice, utilizing the framework of tort adjudication as a means of distributing justice between the parties. And finally, the example of the reduction of damages rule (art. 10:401 PETL) will be analyzed as an illustration of the thesis about tort adjudication.

Keywords: distributive justice, charity, tort law, adjudication, reduction of damages

SPRAWIEDLIWOŚĆ DYSTRYBUTYWNA I MIŁOSIĘRZDZIE A ODPOWIEDZIALNOŚĆ DELIKTOWA

Streszczenie. W odniesieniu do orzekania o odpowiedzialności deliktowej powszechnie przyjmuje się tezę, że w prawie deliktów co do zasady nie ma miejsca na rozważania dotyczące sprawiedliwości dystrybtywnej ani miłosierdzia. Niniejsze twierdzenie, jest w tym artykule krytycznie rozważone. Po pierwsze, argumentuję, że teza, zgodnie z którą w prawie deliktów nie ma miejsca na rozważania dotyczące sprawiedliwości dystrybtywnej, jest wątpliwa. Następnie rozważam tezę, że orzekanie w sprawach deliktowych stanowi formę sprawiedliwości dystrybtywnej, wykorzystując ramy postępowania w sprawach deliktowych, jako środek rozdzielania sprawiedliwości między stronami. Wreszcie analizuję przykład zasady redukcji odszkodowania (art. 10:401 PETL), ilustrujący tezę dotyczącą orzekania w sprawach deliktowych.

Słowa kluczowe: sprawiedliwość dystrybtywna, miłosierdzie, odpowiedzialność deliktowa, orzekanie, redukcja odszkodowania

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1. INTRODUCTION: NO PLACE FOR CHARITY IN TORT LAW

The Chilean Supreme Court recently held that “the judge does not have to practice charity with the responsible party, not even at the expense of a very wealthy victim. ‘Rich and poor alike have the right to equal reparation, which includes all harm’” (Supreme Court, Rol No. 31.064, of March 21, 2016). Certainly, a common claim in tort scholarship has been to argue that, generally, there is no place for distributive justice nor charity considerations in tort law. I wish to discuss this claim. Assuming that the duty of charity can be traced back to the demands of distributive justice, I will show that there are good reasons to reconsider this framework for tort law at least. For the present purposes, I understand charity as an act performed solely for the benefit of another, without any prior duty to repay or a special relationship with the beneficiary (Lichtenberg 2009, 17).

This article will first analyze the general thesis that distributive justice has no role to play in tort law. It will be shown that this thesis is unconvincing, or at least doubtful. The following section will argue in favor of assigning relevance to distributive justice considerations within the process of adjudication in tort law, using the framework of adjudication as a form of distributive justice between the parties. And finally, the fourth section will briefly analyze the contours of the reduction of damages rule that many jurisdictions have established, including the Principles of European Tort Law (PETL), as a case study of the claim about tort adjudication. The rule is clearly based on distributive justice considerations, allowing courts (in exceptional cases) to practice charity with a defendant who is liable in tort. Some concluding remarks are included at the end.

2. NO PLACE FOR DISTRIBUTIVE JUSTICE IN TORT LAW?

Orthodox tort scholarship typically asserts that tort law focuses on corrective justice rather than distributive justice. The definitional feature of this thesis is epitomised by Weinrib’s claim, according to which both forms of justice “are categorically different and mutually irreducible” (Weinrib 2012, 74). He holds that if corrective justice depends on the initial entitlements determined by distributive justice, then “corrective justice would become a species of distributive justice” (Weinrib 2012, 79). According to Weinrib, it follows that the relationship of private law must be understood in terms of corrective justice rather than distributive justice: “Admixing distributive considerations into the corrective framework of private law precludes the relationship from attaining the coherence of either corrective or distributive justice” (Weinrib 2012, 74).

Let us examine the argument in more detail. The core of Weinrib’s thesis is that, following Aristotle, corrective justice involves a different type of operation than distributive justice, for it “looks only to the distinctive character of the injury,

and treats the parties as equal” (Aristotle 2009, V.4, 1132a4-5). Other scholars share this view, arguing that this is a necessary feature of corrective justice. For instance, Waluchow argues that the distinctive function of corrective justice is to rectify the imbalance produced by the defendant’s action “who has seized an advantage (...) at the plaintiff’s expense” (Waluchow 1987, 156). Accordingly, he claims that the rectifying operation of corrective justice excludes all distributive considerations, such as the relative merit of the parties or the greater need for the good acquired. Similarly, Wright argues that what provides a substantive content to the principle of corrective justice is the fact that it excludes considerations of virtue, merit or any other distributive comparative criterion to rectify the injustice (Wright 1992, 701).

Indeed, Aristotle’s depiction of corrective justice fits with the standard practice of courts dealing with tort cases, which usually do not consider, for example, the wealth of injurers and defendants. At least, courts do not explicitly consider these aspects in their judgments. I will address this issue later. But there is a more general question to answer here: Should courts always look to the distinctive character of the injury only? Weinrib seems to come close to defending such a position when he argues that corrective justice secures that private law is a “purely juridical and completely non-political” activity (Weinrib 2012, 214). For, according to him, corrective justice does not need to make a political choice of an extrinsic goal to operate. Under this framework, distributive justice appears to be associated with legislative bodies, whereas corrective justice is linked exclusively to the adjudication of private disputes. But the truth is that in many cases, courts *do* take into account the virtues and vices of the parties involved in a private dispute. Take family law. I assume it would not be difficult to justify considering the personal character of a father when deciding whether he should have custody of his son or not. Weinrib could respond either that family law is not private law or that this practice is wrong. Both responses seem unsatisfactory to me. Why should we treat the case of family law differently? Not taking into account the character of the parties in family law for the sake of coherence does not look promising.² How can we justify, then, the practice of courts in the case of tort law, and Aristotle’s formulation of corrective justice?

Let us unpack Aristotle’s notion of “the distinctive character of the injury.” The character of the injury appears to be in contrast to the character of the parties. In this sense, corrective justice seems to mandate that courts should not take into account the character of the parties at all. There is some truth here for tort law. Defendants will generally not be allowed to argue that they are virtuous persons. For instance, “I have always been a cautious driver” will not constitute

² Keren-Paz makes a similar point: “it is hard to understand why the rulings of courts in public law litigation which is based (in part) on considerations of equality is deemed legitimate, while similar rulings in the context of private law litigation are not” (Keren-Paz 2007, 25).

a successful defence in a tort suit. The reparative aim of corrective justice justifies this: its objective is not to distribute gains and losses according to the merit of the parties or some other criteria; rather, it seeks to repair the losses suffered by the victim as a consequence of a wrongful interaction. Hence, Aristotle's formulation of corrective justice adequately captures an important truth about the practice of tort law, namely, that tort adjudication, in contrast with, for instance, criminal law, is not about judging character; it is about repairing wrongful losses.

However, this characterisation of tort law needs to be hedged in at least three senses. First, as civil recourse theorists have vigorously argued, it is important to publicly hold wrongdoers responsible or accountable for the wrongs they commit (Goldberg, Zipursky 2020, 137–146). Following this idea, it might well be argued that tort law is, in essence, a judgment of character after all: holding a defendant liable for a wrong does not necessarily indicate whether she is a good or bad person, but rather that she committed a wrong and is accountable for it. Indeed, this fact does not make tort law indistinguishable from criminal law, but it cannot be denied that it makes them more similar, as Duff has recently pointed out (Duff 2014, 229).³ Weinrib's response might be that this feature of tort law is a positive side effect. Accordingly, tort aims to undo the injustice caused by the wrong and nothing else. If, in the process of undoing the injustice, wrongdoers are held responsible and accountable, that fact should not lead us to abandon the way in which courts deal with tort cases, looking only to the distinctive aspect of the injuries. That might well be the case for an explanatory theory of tort law. But in a justificatory inquiry, the response is less attractive. Why should we disregard justifying the existence of tort systems based on the importance of holding wrongdoers officially responsible for the wrong they have committed?

Secondly, tort law usually considers the defendant's behaviour in order to allow a victim to bring an action against her. In some cases, it is irrelevant whether the defendant committed the wrong negligently or intentionally, such as in the case of most proprietary torts. It is irrelevant whether the defendant did not know that she was trespassing on the claimant's land; what is relevant in these cases is only that the defendant infringed a claimant's proprietary right. However, in other cases, the defendant's behaviour is taken into account. The tort of negligence is a paradigmatic example of this. If courts should only look to the distinctive character of the parties, then why should courts determine whether the defendant was negligent or not? Weinrib holds that the standard of negligence is compatible with corrective justice, since the "conception of reasonable care gives expression to the idea of agency that underlies" it (Weinrib 2012, 151). Hence, under this

³ Arguing that "civil recourse is much more like the criminal process than its proponents seem to allow: in both cases, someone who is alleged to have committed a wrong is called to account for it in a court of law; in both cases, if he is held liable for that wrong, he is liable, also, to suffer the imposition of a legal consequence (a civil remedy, a criminal punishment) that is essentially punitive in its meaning."

framework, determining whether the defendant was negligent or not can be part of looking to the “distinctive character of the injury.” For, the injury, in this case, would be defined in terms of imposing “a risk that no reasonable person would impose upon others” (Weinrib 2012, 147). Weinrib may be right on this. It is possible that negligence is indeed compatible with corrective justice.

Weinrib’s argument, however, cannot explain why some torts distinguish between negligence and malicious or reckless wrongdoing to determine whether a defendant is liable. Intentional torts such as battery, assault, and false imprisonment are good examples of torts in which mere negligence is not enough; in these torts, a claimant will need to show that the defendant acted with the intention of unlawfully touching, assaulting or confining the victim against her will.⁴ Another example is the tort of the intentional infliction of emotional distress in the United States, which imposes liability on subjects who “by extreme and outrageous conduct *intentionally or recklessly* causes severe emotional distress to another.”⁵ Finally, another example is the role that intention plays in cases of nuisance, for in some cases it has been argued that malice is relevant to determine whether the defendant’s activity is wrongful or not.⁶

And thirdly, in many cases, courts do take the defendant’s conduct into account to determine the adequate remedy. Exemplary and aggravated damages are the most obvious examples, as the reprehensibility of the defendant’s conduct will be a crucial factor in determining whether a court will grant an exemplary or aggravated award.⁷ Disgorgement damages are another example, which courts have awarded in many cases of intentional wrongs, such as in the torts of trespass, conversion, and inducing breach of contract.⁸ The examples are problematic for Aristotle’s mandate of looking only to the “distinctive character of the injury,” since in these cases, courts will have to consider whether the defendant’s conduct was intentional or merely negligent, awarding this type of remedy only in the former case.

In my view, the key to solving the problem is to interpret Aristotle’s mandate of looking only to the “distinctive character of the injury” in a different sense. *Pace* Weinrib and Wright, what distinguishes corrective justice from distributive

⁴ Even though in some of these cases the conduct might still be actionable by the tort of negligence.

⁵ American Institute of Law, Restatement (Second) of Torts, § 46(1).

⁶ *Christie v Davey* [1893] 1 Ch 316 (arguing that “what was done by the Defendant was done only for the purpose of annoyance and in my opinion, it was not a legitimate use of the Defendant’s house to use it for the purpose of vexing and annoying his neighbours” [326-7 (North J)]). See also *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468.

⁷ “[I]t is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff.” *Rookes v Barnard* [1964] AC 1129 (HL), 1221 (Lord Devlin).

⁸ The cases are summarised in Edelman (2002, 136–145).

justice is not excluding considerations based on merit, virtue, or wealth, but rather the aim of repairing the injury. Under this framework, looking to the “distinctive aspect of the injury” means that courts indeed will usually disregard distributive considerations. However, it does not exclude the possibility of considering these factors in order to perform the task of repairing the injury. I will explore this argument in the following sections.

3. DISTRIBUTIVE JUSTICE IN TORT ADJUDICATION

Following the famous expression coined by Perry (1996), it is possible to appreciate a shift or “distributive turn” in tort theories. It could be said that this turn has two main aspects. The first relates to the assessment of tort systems’ performance in light of distributive justice criteria. Under these parameters, the question posed is whether tort systems meet the demands of distributive justice. Keren-Paz (2007) argues that they don’t, claiming that these systems have regressive effects on wealth distribution. This diagnosis is relevant not only because it confirms the well-known fact that tort law is indifferent to or maintains the substantive inequalities in which the parties find themselves, but also because it reveals that these systems exacerbate or increase these inequalities. Others, such as Cane (2001), have emphasized that tort systems have distributive consequences that must be justified if the practice is to be considered a desirable institution. To this end, he proposes a division of labor between corrective and distributive justice. While the latter is concerned with determining the rules that regulate the requirements and limits of tort liability, the former is concerned with applying these rules in individual cases. Thus, distributive justice could explain the regulation of tort liability, whereas corrective justice could explain the adjudication in particular cases.

Some authors have developed a different account of distributive justice in tort law from the perspective of adjudication. In this sense, Finnis has argued that the act of adjudication itself has a distributive nature, for according to him, “the submission of an issue to the judge itself creates a kind of *common* subject matter, (...) which must be allocated between the parties” (Finnis 2011, 179). In the same vein, Cane holds that “a court presented with a tort dispute (for instance) cannot avoid or evade the distributive decision involved in choosing or making a rule of liability to resolve the dispute” (Cane 2001, 420).

Gardner has developed the notion of localized distributive justice, which he refers to as “distributive justice between the parties” (Gardner 2014, 346–350). Perry once called this feature as a form of “localized distributive justice,” dealing with the problem of distributing the burden of an injury among a group of persons (Perry 1992, 461). For Perry, however, this localized nature of distributive justice was unjustified: there are no reasons to limit the potential bearers of the loss

to victims and injurers only (Perry 1992, 461). By contrast, Gardner holds that the localized nature of this type of distributive justice is justified based on corrective justice: the reasons that support restricting the potential bearers of the burden of the injury to victims and injurers alone are “reasons to do (and to support the doing of) corrective justice” (Gardner 2014, 348). Applying this idea more concretely, Gardner argues that certain tort doctrines – such as mitigation and remoteness of damages, as well as contributory negligence – aim to distribute the losses between plaintiffs and defendants. According to him, therefore, they lack a “corrective-justice rationale” (Gardner 2014, 349). In a similar way, Sheinman claims that corrective justice can only adequately explain tort doctrines such as proximate cause, contributory negligence, and mitigation of damages if it is conceived as a form of distributive justice. For these “doctrines are sensitive to the relative contribution of the parties to the production of the wrongful interaction or its consequences” (Sheinman 2014, 376). More recently, Jaffey argues that it is possible to articulate a notion of distributive justice within a “standpoint limitation,” suggesting that distributive justice considerations can play a role in adjudicating private law conflicts, as long as the decision achieves “a just resolution of the dispute between the parties” (Jaffey, 2023, 85).

In my view, tort adjudication is – at least in some sense – a distributive task. Take Lord Denning’s opinion in the English classical case *Miller v Jackson* [1977] 1 QB 966 (Court of Appeal). The claimants were the owners of a property located next to a cricket ground. They sued the cricket club for negligence and nuisance, claiming damages and an injunction to restrain the club from playing cricket without taking adequate steps to prevent balls being struck out of the ground onto the claimant’s house or garden. In this case, the Court of Appeal had to make a choice: either to grant the injunction to the claimant, restraining the practice of cricket in that ground (which had been practiced there for about 70 years), or to refuse the injunction, allowing the practice of cricket and its interference with the enjoyment of the neighbouring properties when cricket is being played. On the face of it, it seems to me that a judge cannot rely on property law to solve this problem. At first sight, the solution seems to point in favour of the claimant, since the defendant’s activity is interfering with the claimant’s enjoyment of their land. However, for Lord Denning, the law should also consider the beneficial effects on the general public for each of the possible solutions. This means balancing “the interest of the public at large” with the “interest of a private individual”:

The public interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The private interest lies in securing the privacy of his home and garden without intrusion or interference by anyone... As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. ([1977] 1 QB 981-982)

Lord Denning's approach is controversial, and I do not wish to defend it here. However, his approach shows that courts also share this view of tort law as a distributive mechanism. By contrast, corrective justice scholars usually criticise *Miller*. For instance, Beever argues that the decision is unjust because it confiscated the claimant's property rights "on the basis of interests possessed by the public (...) that have no proper legal status whatsoever" (Beever 2013, 148). From an exclusively doctrinal point of view, Beever's claim has weakened after the English Supreme Court's more recent decision in *Coventry v Lawrence* [2014] UKSC 13, [2014] AC 822, in which the Court firmly established that the public interest must be taken into account to decide whether to grant an injunction in cases of nuisance.⁹ But Beever claims that the decision in *Miller* was not only doctrinally wrong, but also *unjust*. Why? The reason seems to be that courts should not be allowed to make this type of decision. Again, the argument is that the role of judges should be restricted to implementing corrective justice with its correlative or bilateral structure, whereas distributive decisions should be confined to legislative bodies, in which public interest concerns can be properly taken into account. But as was seen above, it is questionable to argue that this is a requirement of corrective justice, and it is also very doubtful that such division of labour between courts and legislative bodies is feasible.

But my view does not need to rely on *Miller* to show that tort adjudication involves, in some sense, a distributive task. *Donoghue v Stevenson* [1932] AC 562 (HL) is, for instance, an uncontroversial example. The famous case had an apparent distributive effect: the losses associated with defective products were transferred from consumers to manufacturers. Accordingly, the decision redistributed the burden of these losses from consumers to manufacturers. As Stapleton points out, "*Donoghue's* case shows us the redistributive potential of changes in the law" (Stapleton 1995, 837). Cardozo J's decision in *MacPherson v Buick Motor Co*, 111 NE 1050 (NY 1916) is another example. *MacPherson* overruled the old "privity" rule, according to which victims injured by defective products or negligently provided services could not make a tort claim if they were not the immediate purchaser of the product or service.¹⁰ Abolishing the privity rule leads to the same result as was in *Donoghue*: losses were redistributed from one class of individuals (consumers) to another (manufacturers or service providers).

⁹ "As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor (...) The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood." [2014] UKSC 13, [2014] AC 822, [124] (Lord Neuberger).

¹⁰ The rule was originally established in *Winterbottom v Wright* 152 Eng Rep 402 (Ex 1842).

Interestingly, some legislatures have made an explicit reference to distributive concerns in the tort adjudication process. I shall signal two of these references here. Both references are consistent with the approaches that stress the role of distributive justice in tort adjudication, but without altering the bilateral structure of private law. The first rule to mention is § 829 of the German Civil Code, establishing that:

§ 829 Liability in damages for reasons of equity

A person who, for reasons cited in §§ 827 and 828, is not responsible for damage he caused in the instances specified in §§ 823 to 826 must nonetheless make compensation for the damage, unless damage compensation can be obtained from a third party with a duty of supervision, to the extent that in the circumstances, including without limitation the circumstances of the parties involved, equity requires indemnification and he is not deprived of the resources needed for reasonable maintenance and to discharge his statutory maintenance duties (Dannemann, Schulze 2020, 1627).

The rule allows courts to impose liability based on reasons of equity in cases where victims will not be compensated through tort law, for the defendant lacks the capacity to be held liable. It is a mechanism to correct any possible unfair situations that may arise for victims. In my view, the rule cannot be explained in terms of corrective justice but is consistent with the bilateral structure of private law. Only considerations of distributive justice could justify the court's intervention in these cases, because the assessment of damages will clearly not be based on the "distinctive character of the injury," but rather on the circumstances of the case, taking especially into account the economic situation of the parties: "The equity judgment must take into account all relevant circumstances, in particular the economic situation of both parties. Compensation can only be awarded if there is a great economic imbalance in favour of the actor" (Dannemann, Schulze 2020, 1629). In the same vein, it has been argued that this rule poses "a question of distributive justice arising within the framework of principles of corrective justice" (Jansen 2021, 107). Thus, the rule can be interpreted as an instance of distributive justice with the "standpoint limitation" (Jaffey 2023, 84–86).

A second clear reference to distributive justice and charity is the reduction of damages rule in many jurisdictions but including the harmonization projects of tort law in Europe. This clause can be seen as a reverse rule of § 829, allowing courts to reduce the amount of the award of damages based on some equitable considerations like the German rule. Notably, however, the German Civil Code does not endorse this rule.

4. A CASE STUDY: THE REDUCTION OF DAMAGES RULE

Article 10:401 of the Principles of European Tort Law (PETL) provides:

Art. 10:401. Reduction of damages

In an exceptional case, if in light of the financial situation of the parties, full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Article 1:101), the scope of the protection of the interest (Article 2:102) and the magnitude of the damage have to be taken into account in particular (European Group on Tort Law 2005, 10).

The rule was much discussed within the Working Group, since the most influential jurisdictions in Europe – namely England, France, and Germany – do not have such a rule. However, the rule ultimately remained in the text, largely due to the influence of Scandinavian jurisdictions, as well as other systems that include the rule within their Civil Codes (e.g., Portugal, Switzerland, and the Netherlands). Surprisingly, the rule has begun to be seen in other legal systems far from Europe, such as Brazil or Argentina. It must be noted, however, that the rule remains controversial among different jurisdictions (von Bar 2009, 971). Interestingly, both harmonization projects in Europe (PETL and von Bar's Principles) on this matter have adopted it, especially considering that the typically influential European legal systems, such as England, France, and Germany, do not adopt it.

The systems that do adopt the rule formulate it in various ways. Some mention it as a mechanism that allows for a 'reduction of the defendant's liability' (for example, PETL, von Bar's Principles, and the Swiss Federal Code of Obligations). Others allow for a reduction or limitation of the duty to compensate (for instance, Poland and Finland) or of the amount of compensation (as in the case of the Netherlands). In the area where there appears to be a wide variety is in determining the factors that influence the possibility of reducing compensation. First, the codes explicitly state that this is a rule of an exceptional nature and is not intended to be applied in most cases. This is expressly highlighted in the PETL, which states at the outset of the rule that the mechanism operates in "exceptional cases." Other ways to express it include the requirement that the compensation must be "disproportionate" or "excessively burdensome" for the defendant. The Swiss Federal Code of Obligations is particularly emphatic on this point, stipulating that the defendant must be in a "state of emergency when paying compensation."

The key issue is to determine which exceptional circumstances make the rule applicable. A widespread criterion in various formulations relates to the defendant's economic capacity. Therefore, for the reduction to be justified, it would be necessary for the compensation to be disproportionate or excessive considering the defendant's economic situation. However, most codes also invite us to consider the victim's economic situation. In this aspect, the Polish

Civil Code provision is very interesting, referring to the “principles of social coexistence.” While the economic situation is not the only criterion for the rule to apply, it is the primary element that must be present for the reduction to be justified. Therefore, in my opinion, the economic situation of the parties should be proven during litigation. Otherwise, it would be mere intuitions or speculations by the court regarding the economic situation of the parties. At the very least, the defendant should have presented some evidence in court to demonstrate the disproportionality or excessively burdensome nature of potential compensation on their personal assets.

Another requirement for the rule to apply is that the defendant did not act with intent or maliciously. Some jurisdictions explicitly mention this condition, while others refer to it indirectly by stating that the seriousness of the defendant’s conduct must be considered or by referring to “other criteria,” among which could be regarded as the wrongfulness of the defendant’s conduct. The Swiss Federal Code of Obligations goes even further by also excluding cases of gross negligence. The general principles of tort law justify the restriction regarding intent or malicious behavior. It represents a benefit that a defendant acting with negligence could obtain, but which is forfeited as soon as intent is established.

On its face, the rule is based on charity or distributive justice, since the reason to reduce the sum of damages is based on the “financial situation of the parties.” Interestingly, however, the rule is not always articulated in Civil Codes based on the financial situation of the parties. For instance, art. 6:202 of the PEL/von Bar Principles endorses a similar rule, but it does not mention the financial situation of the parties. This is also the case in Article 944 of the Brazilian Civil Code.¹¹ It is also worth noting that most jurisdictions that do have the rule are not particularly unequal. At least according to the Gini index (or coefficient), which measures inequality, the trend appears to indicate that legal systems with these types of rules do not necessarily correspond to particularly unequal countries. Taking the example of Poland (27.0), Finland (26.6), Sweden (29.5), Switzerland (31.1), and Portugal (33.7), these are countries with relatively low levels of inequality that also have the rule in place. Among countries with relatively high levels of inequality, Brazil stands out (52.0).¹² However, apart from Brazil, it does not appear to be a determining factor that a country must have high levels of inequality to integrate the rule.

The PETL indicate that the rule serves a dual function: first, to “clarify an obscure and often unidentified judicial practice” (European Group on Tort Law 2005, 180). It is interesting to formulate the rule as an explicit statement of covert judicial practices. In civil law jurisdictions, it is common for courts

¹¹ Even though scholars do mention these distributive considerations in their commentaries to the rule. See e.g. Braga Netto and Rosenvald (2024, 482).

¹² Source: <https://datosmacro.expansion.com/demografia/indice-gini> (accessed: 6.07.2024).

to introduce retributive considerations in non-pecuniary damages cases (Pereira Fredes 2015). Elsewhere, I have argued that courts often consider the defendant's economic capacity when determining damages to be paid, both to increase or decrease compensation (Pino Emhart 2018). The expression of such a rule could therefore compel courts, in some cases, to explicitly state their reasons for reducing compensation that may be deemed excessively burdensome for the defendant. The existence of the rule allows for this practice to be carried out in a regulated manner, rather than capriciously or arbitrarily, with courts required to justify their decisions based on the rule's parameters.

The PETL add that in some systems, the rule may aim to "the official recognition of an infringement rather than full compensation, which may be an oppressive burden to the defendant in some cases" (European Group on Tort Law 2005, 180–181). These are situations where the judgment allows the victim to criminally prosecute the defendant, as in some jurisdictions, a civil action for damages will secure that the defendant is criminally prosecuted. Von Bar's project, on the other hand, offers as a justification that the rule could serve as a mechanism to control civil liability in light of "considerations of justice and equity." This point emphasizes a different aspect and is equally interesting as a rationale for the rule. It is particularly highlighted in Brazilian law, where the rule could be applied to moderate the disproportion that may arise between the seriousness or culpability of the conduct and the amount of compensation that the defendant is obligated to pay (Netto, Rosensvald 2024, 477–478). Unlike in criminal law, there is little sensitivity regarding the seriousness of the defendant's conduct, which can be morally criticized in the realm of tort liability. Von Bar's project also argues that the rule could fulfill a function analogous to foreseeability in contract law.

It has been argued that the existence of this rule introduces an element of uncertainty and unpredictability into tort law. Additionally, it has been claimed that the principle of equality is arguably infringed, as the rule would potentially provide different treatment to victims who suffer the same type of harm. In my opinion, this criticism is exaggerated. The judicial criterion indeed introduces some degree of uncertainty in determining compensation amounts. However, it is primarily a mechanism of an exceptional nature, as highlighted in the norms that establish it, which either explicitly state that it applies in exceptional cases or uses special criteria such as "excessive disproportion," "emergency situation," or "clearly unacceptable outcomes." Moreover, tort liability already encompasses sufficiently uncertain elements such as causation, fault, or foreseeability of harm, not to mention the inherent uncertainty in compensating non-pecuniary damages.

In my view, the rule does not violate the principle of equality, if judges apply the rule reasonably and consistently. Any case meeting the established circumstances would be treated in the same manner. It could be argued that a victim might receive differential treatment simply because the defendant is in a financially disadvantaged position. However, this also occurs in cases of compensation for

loss of earnings, where some victims receive more or less, depending on the income level they would have had had the wrongful act not occurred. Moreover, if the defendant is indeed in a financially unfavorable situation, the chances for the victim to obtain real compensation during the execution of the judgment will be slim.

Additionally, critics have pointed out that the defendant's potential insolvency should not be a concern of tort law but rather an issue belonging solely to bankruptcy law. This debate resembles discussions about the role that distributive justice can (and should) play in tort liability. Are these concerns that tort law should address, or do they fall within the purview of other legal disciplines such as tax law, administrative law, social security law, or constitutional law? And of course, it is the same argument that is usually run against assigning a role to distributive justice in tort law.

Another possible criticism of the rule is whether alternative normative criteria within tort law, which may be less controversial, could be used to provide an equitable solution to such cases. For instance, causation or the criterion of the significance or severity of the damage could be considered. These concepts also provide some degree of flexibility to trial judges, allowing them to potentially use these tools to resolve cases involving defendants under these economic hardships. However, it is not entirely satisfactory to invoke these doctrines for factual scenarios different from those they are intended to regulate. An explicit rule addressing disproportionality towards the defendant from this perspective appears more transparent in determining the amount of compensation, thereby avoiding argumentative manipulation of tools meant for regulating other types of scenarios.

In sum, despite the abundant criticisms, especially those suggesting that other doctrines within tort law could address the issue more effectively, the rule serves to explicitly clarify and encourage a more transparent application of a criterion that may already be applied covertly by courts. It remains to be seen whether the rule is necessary for a tort system and which of these normative justifications should prevail. However, it seems that its establishment would not entail an intolerable violation of the general principles that typically govern systems of tort law, especially considering that it is a rule of a highly exceptional nature. For the same reasons, the rule is consistent with Jaffey's "standpoint limitation" for distributive justice considerations in private law. The rule enables a more precise delineation of when and how a reduction in compensation might be justified, thereby avoiding arbitrary decisions and ensuring more consistent judicial outcomes. Nonetheless, further debate and analysis are needed to fully justify its existence and determine whether it effectively balances fairness and legal certainty in tort law contexts. However, it certainly challenges the general claim that judges in tort law should not engage in charity.

5. CONCLUDING REMARKS

I hope to have shown that the orthodox thesis, according to which there is no role for distributive justice or charity in tort law, is at least doubtful. There is an array of scholarship and doctrines posing critiques to this traditional view of tort law. More concretely, this claim has been discussed using the reduction of damages rule, which allows the judge, in some cases, to exercise discretion in partially discharging the defendant from their duty to pay damages. It is not an uncontroversial rule in European tort law, but it has also been observed in other non-European jurisdictions, such as Argentina and Brazil. There is much to discuss about this prerogative of courts. However, it is my contention that the orthodox view regarding the connection of tort law with distributive justice has hindered a proper discussion of mechanisms like these. It is expected, therefore, that once this orthodox view is abandoned, more debates will follow regarding these issues.

BIBLIOGRAPHY

- Aristotle. 2009. *The Nicomachean Ethics*. Edited by David Ross. Translated by Leslie Brown. Oxford: Oxford University Press.
- Beever, Allan. 2013. *The Law of Private Nuisance*. Oxford: Hart Publishing.
- Cane, Peter. 2001. "Distributive Justice and Tort Law." *New Zealand Law Review* 4: 401–420.
- Dannemann, Gerhard. Reiner Schulze. 2020. *German Civil Code. Bürgerliches Gesetzbuch (BGB)*. Baden-Baden: Nomos. <https://doi.org/10.17104/9783406765773>
- Duff, R. Anthony. 2014. "Repairing Harms and Answering Wrongs." In *Philosophical Foundations of the Law of Torts*. Edited by John Oberdiek. 212–230. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198701385.003.0011>
- Edelman, James. 2002. *Gain-Based Damages. Contract, Tort, Equity and Intellectual Property*. Oxford: Hart Publishing.
- European Group of Tort Law. 2005.
- Finnis, John. 2011. *Natural Law and Natural Rights*. 2nd edition. Oxford: Oxford University Press.
- Gardner, John. 2014. "What is Tort Law For? Part 2: The Place of Distributive Justice." In *Philosophical Foundations of the Law of Torts*. Edited by John Oberdiek. 335–353. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198701385.003.0017>
- Goldberg, John C.P. Benjamin C. Zipursky. 2020. *Recognizing Wrongs*. Cambridge, MA: Belknap Press. <https://doi.org/10.4159/9780674246546>
- Jaffey, Peter. 2023. *Justice in Private Law*. Oxford: Hart Publishing. <https://doi.org/10.5040/9781509953912>
- Jansen, Nils. 2020. *The Structure of Tort Law*. Translated by Sandy Steel. Oxford: Oxford University Press. <https://doi.org/10.1093/oso/9780198705055.001.0001>
- Keren-Paz, Tsachi. 2007. *Torts, Egalitarianism, and Distributive Justice*. Aldershot: Ashgate.
- Lichtenberg, Judith. 2009. "What is Charity?" *Philosophy & Public Policy Quarterly* 29(3/4): 16–20. <https://doi.org/10.13021/G8PPPQ.292009.106>
- Netto, Felipe Braga. Nelson Rosenvald. 2024. *Responsabilidade Civil. Teoria Geral*. São Paulo: Foco.

- Pereira Fredes, Esteban. 2015. "Un alegato a favor de las consideraciones punitivas en el Derecho privado." *Revista de Derecho, Escuela de Postgrado* 7: 61–78. <https://doi.org/10.5354/0719-5516.2015.37264>
- Perry, Stephen R. 1992. "The Moral Foundations of Tort Law." *Iowa Law Review* 77: 449–514.
- Perry, Stephen R. 1996. "The Distributive Turn: Mischief, Misfortune and Tort Law." *Quarterly Law Review* 16: 315–338.
- Pino Emhart, Alberto. 2018. "La situación económica de las partes y la evaluación del daño moral. Al rescate de una vieja tesis." In *Estudios de Derecho Civil XIII*. Edited by Claudia Bahamondes Oyarzún, Leonor Etcheberry Court, Carlos Pizarro Wilson. Santiago de Chile: Thomson Reuters.
- Sheinman, Hanoch. 2014. "Tort Law and Distributive Justice." In *Philosophical Foundations of the Law of Torts*. Edited by John Oberdiek. 354–384. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198701385.003.0018>
- Stapleton, Jane. 1995. "Tort, Insurance and Ideology." *The Modern Law Review* 58: 820–845. <https://doi.org/10.1111/j.1468-2230.1995.tb02054.x>
- Von Bar, Christian. 2009. *Non-Contractual Liability Arising out of Damage Caused to Another. Principles of European Law*. Munich: Sellier European Law Publishers. <https://doi.org/10.1515/9783866538658>
- Waluchow, Wilfrid J. 1987. "Professor Weinrib on Corrective Justice." In *Justice, Law and Method in Plato and Aristotle*. Edited by Spiro Panagiotou. 153–158. Edmonton: Academic Printing & Publishing. <https://doi.org/10.2307/j.ctv10kmg0f.14>
- Weinrib, Ernest J. 2012. *The Idea of Private Law*. Revised edition. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199665815.001.0001>
- Wright, Richard W. 1992. "Substantive Corrective Justice." *Iowa Law Review* 77: 625–711.