Revista IBERC
v. 4, n. 2, p. 131-145, maio/ago. 2021
www.responsabilidadecivil.org/revista-iberc
DOI: https://doi.org/10.37963/iberc.v3i2.172

ENVIRONMENTAL TORTS AND CIVIL PUNISHMENT: A VIEW FROM THE UNITED STATES

ILÍCITOS AMBIENTAIS E PUNIÇÃO CIVIL: UMA VISÃO ESTADUNIDENSE

Andrew R. Klein [i]

ABSTRACT: This article presents, in its first part, a general expositive overview regarding responsibility for environmental damages on US law, outlining its key guidelines, as well as a brief parallel regarding its differences with Brazilian law. In the second part, the main aspects of punitive damages on US law are discussed, including a description of the circumstances under which states in the U.S. permit punitive damages. In both parts of the text the main jurisprudential cases that concern the topics discussed and that support the legal grounds of the responsibilities that fall upon the defendant are indicated. The approach taken is inductive, according to US common law.

Keywords: civil liability; environmental law; civil punishment; compensation for damages; damage.

RESUMO: Este artigo apresenta, na primeira parte, um panorama geral expositivo a respeito da responsabilidade por danos ambientais no direito estadunidense, traçando seus contornos fundamentais, bem como um breve paralelo quanto as suas diferenças frente ao direito brasileiro. Na segunda parte, são expostos os principais aspectos da indenização punitiva no direito dos EUA, inclusive com a descrição das circunstâncias sob as quais os estados nos EUA permitem a indenização punitiva. Nas duas partes do texto são indicados os principais casos jurisprudenciais que dizem respeito aos temas abordados e que respaldam os fundamentos jurídicos das responsabilidades que recaem sobre os imputados. O método de abordagem empregado é o indutivo, condizente com o sistema de *common law* dos EUA.

Palavras-chave: responsabilidade civil; direito ambiental; punição civil; indenização; dano.

[i] Dean & Paul E. Beam Professor of Law at Indiana University, Robert H. McKinney School of Law. From 2010-2013, served as Chief of Staff to the Office of the Chancellor and Associate Vice Chancellor for Academic Affairs at IUPUI. Before joining IU, he taught at Samford University's Cumberland School of Law and practiced with the Chicago firm of Sidley & Austin. Dean Klein earned a B.A. with distinction in journalism and economics from the University of Wisconsin and a J.D. with distinction from the Emory University School of Law, where he studied as a Robert W. Woodruff Fellow in Law and was editor-in-chief of the Emory Law Journal. Co-author of two casebooks, 'Toxic and Environmental Torts: Cases and Materials' (Thomson/West 2011) and 'Torts: Cases, Problems and Exercises' (Lexis/Nexis 4th ed. 2013), as well as a student-oriented textbook, 'Mastering Tort Law, 2nd Edition' (Carolina Academic Press 2016). E-mail: anrklein@iupui.edu / ORCID https://orcid.org/0000-0001-5256-1289

INTRODUCTION

My research and teaching area is tort law, and I have written on the intersection of tort law and environmental law. I should note, however, that this is a large field. At my school, I teach an entire course on the topic[1]. With that in mind, I will be providing only an overview of the subject.

To begin, what happens in my country when a person or company releases a toxic substance into the environment, and people are harmed as a result? In the U.S., there might be a *public law solution* – a state or federal statute that allows the government to impose a penalty on the responsible party. But the starting point, and the more typical response, is through a *private law remedy*.

I understand that this is much different in Brazil, as your country does not operate with a common law system. I also am aware that the Brazilian Constitution has an entire chapter that deals with environmental law (Chapter VI – Article 225). In the U.S., however, there is no constitutional protection for the environment. So a majority of my lecture will concern private law remedies designed to protect individual interests.

Of course, the U.S. *is* a common law system. This means that private law recourse comes through a set of actions brought by individuals harmed by environmental exposures. Common law typically develops within each state. So the principles I discuss are necessarily general in nature.

That said, tort law causes of action in the U.S. are broadly organized in a consistent fashion. Typically, this is done based on a level of culpability, or "fault," on the part of a defendant. Some claims require a plaintiff to prove that a defendant acted with intent – proof that the defendant invaded the plaintiff's protected interest on *purpose* or with knowledge to a degree of substantial certainty that the invasion would take place. Some claims require only proof of negligence – that the defendant was *careless* in causing harm to the plaintiff's interest. Other claims allow a plaintiff to succeed even if the defendant acted without fault. In these situations, a plaintiff can recover damages even if the defendant acted with due care. We call these *strict liability* causes of action.

There are uses for each of these different claims in cases involving environmental harm, and I will discuss several examples of each. After I cover these private law claims, I will spend some time discussing public law remedies that overlap with tort law theories. Following that, I will shift to a discussion of how courts in the U.S. address especially egregious conduct through the possible award of punitive damages.

[1] On this topic, the following texts are indicated to the reader for further research: CRAIG, Robin Kundis, GREEN, Michael D., KLEIN, Andrew R., SANDERS, Joseph. *Toxic and Environmental Torts: Cases and Materials* (West 2011); RABIN, Robert, *Environmental Liability and the Tort System*, 24 Houston L. Rev. 29 (1987); EGGEN, Jean Macchiaroli. *Toxic Torts in a Nutshell* (West 3rd ed. 2005); WEAVER, Russel L.; BAUMAN, John H.; CROSS, John T.; KLEIN, Andrew R.; MARTIN, Edward C.; II ZWIER, Paul J. *Torts: cases, problems, and exercises*. 5. Ed. Carolina Academic Press, 2018.

1. NOTES ON ENVIRONMENTAL TORTS UNDER US LAW

1.1. Private Law

1.1.1 Trespass to Land

I begin with private law, and within that realm, with the intentional tort of trespass to land. Trespass to land originally focused on the protection of individual ownership rights, more so than protecting the use of land or compensating for personal injury. For example, if my neighbor built a fence on my side of the property line, I could sue for the tort of trespass to land and compel him to move his fence. I have protected my *possessory* interest in land. The intentional tort of trespass to land, however, is increasingly used in the U.S. to obtain actual damages when a defendant causes an environmental invasion of another's land.

I should pause to define "intent." This means that the plaintiff must demonstrate that the defendant had a purpose or was substantially certain that his activity would lead to the interference. Allow me to provide an example. In a famous case from the state of Oregon called Martin v. Reynolds[2], decided in 1959, the defendant operated an aluminum manufacturing plant. The plant emitted airborne chemicals during its manufacturing process, and the plant's operators knew that these chemicals would settle on neighboring property. The plaintiffs owned land nearby, where they raised cattle. The chemicals contaminated the grass and water that the cattle consumed, causing the animals to become ill and die. The plaintiffs sued the defendants for trespass to land, and won the lawsuit. Using the definitions, I previously provided, the defendant was "substantially certain" that its activity would cause an entry of substances onto the defendant's land, and the defendants were entitled to use the trespass action to recover damages for harm to the cattle.

U.S. law, however, has developed in a way that prevents the imposition of liability for "transitory" interference. If we allowed every landowner who had dust or particles from a factory settle on his or her land to successfully maintain a tort action, we would risk shutting down business throughout our country, something that is obviously not feasible.

A famous case from the state of Washington, Bradley v. American Smelting[3], decided in 1985, makes this very point. The facts of Bradley are similar to the Martin case, in that a property owner sued a factory owner for emitting airborne particulates that entered his land. Once again, the requirement of intent was satisfied. The company was "substantially certain" this would happen. Here, however, the particulates dissipated quickly, and were not perceptible to normal senses of sight, touch or smell – let

[2] The case *Martin v. Reynolds* can be accessed through the following link: https://law.justia.com/cases/federal/district-courts/FSupp/224/978/1558433/.
[3] The case *Bradley v. American Smelting* can be accessed through the following link: https://law.justia.com/cases/washington/supreme-court/1985/51094-6-1.html.

alone causing damage to cattle as in the Martin case. In Bradley, the court refused to allow the plaintiff to succeed in a trespass action, and the factory did not need to pay damages to the plaintiff.

1.1.2 Nuisance Law

By discussing trespass, I have introduced an intentional tort law action, originally used to prevent an invasion of possessory interests in land. There also are tort law actions overlapping with environmental law that directly protect an individual's "use and enjoyment" of land, even without a physical invasion. These are nuisance actions. U.S. law permits two types of nuisance actions – private and public. I will discuss them in turn.

The definition of private nuisance is conduct that causes a substantial and unreasonable interference with another's use and enjoyment of land. Note that *substantial* is part of the definition. In most cases, this means that something significant is being done to the condition of the land -- for example, vibration from a nearby factory. It also could be something more transitory, like an offensive odor from a nearby factory or a neighbor's howling dog. It is *not* necessary to have a physical invasion. This means that intangible invasions (noise, smells, bright lights, etc.) can be sufficient. The standard also includes reasonableness. So, for example, noise that bothers a person's unusually sensitive ears would not be a nuisance.

One of the most important aspects of private nuisance is the potential remedy. A plaintiff in a private nuisance case can seek monetary damages. However, a plaintiff also can seek an injunction. That is, she can ask a court to compel the defendant stop its activities. This can be a drastic remedy, and it is not guaranteed. U.S. courts typically balance the equities between the parties in making a decision about whether to issue an injunction.

One of the most famous U.S. cases in this area is from the state of New York. The case is Boomer v. Atlantic Cement Co.[4], decided in 1970. In Boomer, landowners with property next to a cement plant sued, arguing that dirt, smoke, and vibrations from the plant constituted a nuisance. A trial court agreed and awarded money damages, but rejected a request for an injunction that would prevent the plant from operating. The Boomer court noted that the plant's owner had invested millions of dollars in its operation and employed hundreds of people. If the damages were so high that they exceeded this economic value, the plant owner would voluntarily cease operations. Otherwise, the court believed that the owner would continue operations and choose between compensating the neighbors for their loss or purchasing land at a premium on market value. Note the court's explicit use of economic principles here. In a sense, the court said that if the defendant's activity was more valuable than the neighbor's land, the defendant could buy the neighbors out.

The other branch of nuisance law is public nuisance. Public nuisance refers to conduct that causes harm to the public in general -- for example, dumping of toxic chemicals into a common water

[4] The case *Boomer v. Atlantic Cement Co.* can be accessed through the following link: https://www.nycourts.gov/reporter/archives/boomer_atlantic.htm.

supply. These matters are normally dealt with as a matter of criminal law, with the public's interest represented by a state prosecutor.

Sometimes, however, a private citizen can maintain an individual tort action for public nuisance. As a general rule, a private plaintiff can do so only when she suffers injury of a different nature than the rest of the general public. For example, if a defendant is dumping toxic chemicals into a river that feeds into your private lake where you raise fish for a living, you might be able to maintain a public nuisance action. The general public is concerned about its health. You are additionally concerned about harm to your livelihood.

1.1.3 Negligence and Strict Liability

So far, I have covered trespass – an intentional tort that focuses on possessory interests in land. I also discussed nuisance law – an action that protects the use and enjoyment of land. I will now talk more directly about physical harm, where someone is exposed to an environmental toxin and becomes ill. In terms of private law, most claims would proceed under a negligence theory. The plaintiff would need to show that she was exposed to the toxin due to the defendant's careless conduct. U.S. courts generally measure this by determining whether the defendant acted as a "reasonably prudent person" under the same or similar circumstances.

In some instances, however, U.S. courts allow recovery even where the defendant has behaved with all due care. These are what I referred to in my introduction as "strict liability" causes of action. This may be familiar to you, as strict liability does in a sense exist in Brazil given that polluters can be directly or indirectly responsible for activities that cause environmental degradation. I also am aware that your Constitution provides that activities harmful to the environment can be subject to criminal and administrative sanctions.

In the U.S., however, strict liability actions are quite limited. In general, courts define an activity as abnormally dangerous only if the activity has three attributes. First, the activity must be incapable of being conducted except with high risk. That is to say, it cannot be made safe. There is something about the activity that, no matter how hard one works, we can foresee residual risk of significant proportion. Second, if harm does occur, the harm is likely to be severe. The activity is one that not only is hard to make safe, it is an activity that portends serious injury. Third, the activity must be uncommon or atypical in the community where it takes place.

The most famous common law case in this area is an old decision from England called Rylands v. Fletcher[5], decided by the House of Lords in 1868. Most U.S. textbooks still use the case to introduce new students to these principles, and particularly to emphasize the notion that the activity must be unusual in the area where it was being conducted.

[5] The case can be accessed through the following link: https://www.informea.org/sites/default/files/court-decisions/Rylands%20vs%20Fletcher.pdf.

In Rylands, the plaintiff owned underground coal mines on land adjacent to the defendant's property. The defendant owned a mill and chose to build a reservoir to supply water to that mill. In the course of building the reservoir, employees learned that it was being constructed on top of abandoned underground coal mine shafts. Despite the clear risks, they continued, and the reservoir collapsed the shafts, flooding the plaintiff's active coal mines. The court found that the defendant was strictly liable for the harm. It focused on the fact that building a reservoir in a coal mining region was "atypical" for the area, and given that the activity could cause great damage (as it did), the defendant should be responsible, even if its employees carefully built the reservoir.

In more modern times, this cause of action is often used where a defendant engages in some highly dangerous activity that can lead to damage or environmental harm – dynamite blasting, or the use of highly toxic chemicals in a manufacturing process.

1.1.4 Causation

Before I conclude my discussion of private law, it is important to note that, regardless of the cause of action, U.S. law places the burden on plaintiffs to prove (by a preponderance of the evidence) that the defendant's conduct *caused* her injury. The typical standard provides that a plaintiff must prove her harm would not have occurred "but for" the defendant's conduct. This is a complex topic, and in the course that I teach, I spend weeks discussing it. For now, I simply will highlight *why* this is important, and particularly so in cases that involve personal injury.

In most personal injury cases, causation is easy to prove. For example, if I hit you while driving my car and you break a leg, it is easy to prove that your leg would not be broken "but for" my bad driving. But harm – usually illness – caused by exposure to a toxic substance in the environment normally will not manifest for years. Say, for example, that my company negligently released chemicals into a drinking water supply. Years later, some people who drank the water are diagnosed with cancer. These individuals might be able to show that the company was negligent. They might be able to claim that the company engaged in an abnormally dangerous activity. But how does a plaintiff prove causation? Using the typical standard, how does a plaintiff prove that she would not have contracted cancer "but for" that exposure?

At one level, a plaintiff needs to prove "general causation" – that the substance itself is capable of causing disease. The plaintiff, however, also needs to prove "specific causation" – that *her* disease was related to the exposure. When the latency period between exposure and harm is years, even decades, this is remarkably difficult. People can contract disease from a variety of sources over time, or disease can occur from genetic predisposition. To overcome this hurdle, American courts are increasingly open to the use of scientific evidence to help make a determination.

The scientific disciplines involved include toxicology, where one might extrapolate from animal studies or even from chemical reactions in test tubes. Some litigants utilize epidemiology studies, which extrapolate from population studies done over a long period of time. Today, courts even allow evidence

about whether a particular individual was genetically predisposed – or not – to a particular disease. Each of these require expert testimony, and the admissibility of this evidence is a hotly contested topic in the U.S.[6]

1.2 Public Law: CERCLA

So far, my lecture has been about private law – the intersection of tort law and environmental law in claims where the plaintiff is an injured individual. My lecture would not be complete, however, if I failed to note that there is one major public law in the U.S. that operates at the intersection of environmental and tort law. This is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). CERCLA is a federal law, though individual states have similar counterparts. CERCLA is designed to deal with the problem of funding cleanup at sites where companies have disposed of hazardous waste over many years, and where the existence of waste threatens further harm -- for example, by leaching into groundwater, traveling, and contaminating soil or sources of water throughout communities.

CERCLA developed, in part, in response to a major tragedy in the U.S. where a neighborhood in New York was developed on the site of an old hazardous waste site, leading to discovery in the 1970s of many illnesses. I understand that Brazil faced a similar situation in Cubatão in the 1980, which helped spur your National Policy on Environmental Protection.

In CERCLA, the U.S. Congress identified "potentially responsible parties" (PRP) that could be sued by the government, or in some cases individuals, on a *strict liability* theory. This means that if the statute defines a defendant as a PRP, the defendant is responsible for property clean-up costs regardless of whether it acted with care at the time of the disposal. The categories of PRPs include producers of waste, transporters of wastes, waste site owners or operators.

Liability under CERCLA also is "joint and several." This means that any individual PRP can be responsible for the full amount of the cleanup. The statute does allow PRPs to sue one another for contribution after the government initiates suit. In addition, liability under the statute is also retroactive. This has been especially controversial since companies may have conformed with "state of the art" standards at the time of the waste's disposal.

Sometimes people in the U.S. refer to CERCLA as the "Superfund" law, because it was originally designed to generate funds that would create a pool of money sufficient to allow large amounts of clean up. The task, however, has proven quite challenging over the years. For purposes of this lecture, the important thing is understand is that the federal government in the U.S. has created a statute that borrows heavily from private law in its response to a major public health issue.[7]

---

[6] On this topic, the following text is indicated to the reader, for further research: SANDERS, Joseph; GREEN, Michael D., *Do Courts Engage in a Sufficiency Analysis When Making Daubert Rulings in Toxic Tort Cases?*, 50 Conn. L. Rev. 387 (2018).

[7] On this topic, the following text is indicated to the reader, for further research: *CERCLA Superfund Orientation Manual: Scholar's Choice* (United States Environmental Protection Agency 2015).

2. BRIEF NOTES ON PUNITIVE DAMAGES IN THE USA

In the previous section, I discussed potential liability for harm caused by the dispersal of toxins in the environment. In this section, I turn my attention to the issue of how damages are awarded. In particular, I will focus on punitive damages, which are an interesting and controversial topic in the U.S.

I will begin this section with an overview of how successful plaintiffs in tort actions receive compensation in the U.S., focusing on broad categories of damages. Then, I will describe the circumstances under which states in the U.S. permit punitive damages – awards that are not designed to compensate a plaintiff, but instead to punish the defendant and deter egregious conduct. Finally, I will explain how punitive damage awards have been constrained in my country by relatively recent federal law developments based on the U.S. Constitution. I also briefly will describe some limitations that individual states have developed.[8]

2.1 Compensatory Damages

2.1.1 Pecuniary

As I have discussed, the U.S. is a common law system. This means that private recourse in tort comes through a set of actions that have developed by judicial precedent within each state. Some principles, however, are effectively universal. For example, all states allow "pecuniary," or economic, damages. These are damages capable of calculation, set on market-based measures. The simplest example concerns property damage. If I carelessly drive my car over your bicycle and destroy it, I will have to pay you the market value of the bicycle. Although not exactly the same, this is similar to the right of compensation that is found in Article 5, Item X of the Brazilian Constitution.

More common in the U.S., however, are cases involving personal injury. Here pecuniary damages have two components – the value of medical expenses that result from a tortious injury, along with any wages that a plaintiff loses as a result of that injury. Again, a simplistic example. Say that I carelessly drive my car, and hit you as you cross the street. I break your leg. In the U.S., I will have to pay for the cost of any medical care you receive. I also will have to pay for any income that you lose as a result of missing time at work. I should point out that courts calculate pecuniary damages on a "past and future" basis. Therefore, in my example, I would be responsible for past and future medical expenses, as well as past and future lost income.[9]

[8] On the topic of punitive damages, the following texts are indicated to the reader for further research: ZIPURSKY, Benjamin C., *A Theory of Punitive Damages*, 84 Texas L. Rev. (2005); ROMERO, Leo M., *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 Conn. L. Rev. 109 (2008); ZUBRZYCKI, Carleen M., *Punitive Damages in an Era of Consolidated Power*, 98 N.C. L. Rev. 315 (2020).

2.1.2 Non pecuniary

U.S. courts also allow plaintiffs in tort cases to recover "non-pecuniary" damages. These are compensatory damages not easily capable of calculation. A typical example is recovery for emotional harm, or pain and suffering, in a personal injury case. While not a perfect parallel, this is similar to what is covered as moral damages under Article 5 of the Brazilian Constitution. I should emphasize, however, that non-pecuniary damages in the U.S. are designated as *compensatory*. In other words, they are designed to make the plaintiff whole, replacing what has been lost due to the defendant's tortious behavior.

2.2 Punitive Damages

2.2.1 Foundations

Punitive damages – the focus of this lecture - are quite different. The purpose of punitive damages is not compensatory. Instead, the purpose is to punish the defendant and to deter future wrongful conduct. In that sense, the function of punitive damages overlaps with criminal law sanctions, although the awards come through private law actions between individual citizens.

The concept of punitive damages in civil actions has deep roots in many legal systems. Some legal scholars trace it back to the Code of Hammurabi in approximately 2000 B.C. In the common law system, as developed in England, the practice of awarding exemplary damages in excess of compensation was firmly established by the 18th century, and the practice was adopted in the early years of the United States' history. Punitive damages in the U.S., however, are restricted to limited circumstances. The most important limitation is that a jury must conclude that the defendant behaved in in a particularly egregious fashion; proving mere negligence is insufficient. Instead, most states require a plaintiff to demonstrate that the defendant acted with "gross negligence," with "malice," "willfully," or with "reckless disregard" that her conduct would cause harm to another person.

Punitive damages are awarded in a variety of contexts – from property damage cases to personal injury cases to cases involving reputational harm or economic loss. Frequently in the U.S. we see punitive damages imposed where defendants have reaped financial profit from tortious activity. One well-known example comes from the 1999 Florida decision of Owens-Corning v. Ballard[10]. In that case, the plaintiffs suffered from a form of cancer after workplace exposure to asbestos, a substance widely used in the U.S. in the mid-20th century as insulation material. The plaintiffs introduced evidence showing that the manufacturers of asbestos (including the defendant in the case) concealed the dangers of the product for more than 30 years. The plaintiffs received $1.8 million in compensatory damages and $31

[10] The case can be accessed through the following link: https://caselaw.findlaw.com/fl-district-court-of-appeal/1247337.html

million in punitive damages. The Florida Supreme Court upheld the award, specifically noting that it was designed to punish the defendant manufacturer and deter others from engaging in similar behavior.

Let me pause to emphasize several things. First, keep in mind that U.S. courts only allow punitive damages when the defendant's behavior is found to be particularly reprehensible – malicious, reckless, grossly negligent, willful, or intentional. This was certainly true in the Owens-Corning case. Recall also that the purpose of punitive damages is not compensatory. They are designed to punish the defendant and to deter future reprehensible conduct. Finally, note that the amount of punitive damages can vary widely, and the variance can relate to the defendant's wealth. This connects to the purposes of the awards. One-hundred dollars, for example, would not punish or deter a large international company (like Owens-Corning in the Florida case). An award of millions of dollars, however, might do just that.

2.2.2 Constitutional Limitations

Allow me to shift the focus of my lecture. Punitive damage awards have become increasingly controversial in the U.S., particularly as the size of those awards grown in some cases. Generalizing a bit, one of the major arguments that critics (often people who represent major corporate interests) have raised is that large punitive damage awards are unfair because a defendant needs fair notice of the scale of punishment. According to the critics, if punitive damages are quasi-criminal in nature, then the contours of those damages should be similar to criminal fines. When legislatures enact criminal laws, we know the scale of the punishment, as a statute specifies the size of a fine. Why should the same not be true if punishment is meted out in civil litigation?

In the latter part of the 20th century, opponents of punitive damages began to frame this argument as a question of "due process". The Fifth Amendment to the U.S. Constitution guarantees due process to all citizens: "No one shall be deprived of life, liberty or property without *due process* of law." The 14th Amendment to the U.S. Constitution applies this guarantee against the actions of individual states. This means that if a state activity, even through a civil lawsuit, violates due process, the outcome is impermissible. In the U.S., the federal constitution is the supreme law of the land, and supersedes state law. In addition, the ultimate interpreter of the federal constitution is the U.S. Supreme Court.

In 1996, the U.S. Supreme Court decided a landmark case, BMW v. Gore[11], ruling for the first time that a state law punitive damage award could violate the U.S. Constitution's Due Process clause. This is a very important decision in our system. Let me tell you about it.

In BMW v. Gore, the plaintiff bought a new BMW automobile, and later learned that BMW had repainted the vehicle before he purchased it. BMW, however, did not disclose this fact before the purchase. Indeed, BMW had instituted a policy of not disclosing "minor" blemishes to vehicles that occurred during shipping. The plaintiff filed a tort claim in the state of Alabama for misrepresentation

[11] The case *BMW v. Gore* can be accessed through the following link: https://supreme.justia.com/cases/federal/us/517/559/case.pdf

and sought compensatory damages for diminished property value of $4,000. A jury in Alabama awarded him this amount – but also awarded him $4 million in punitive damages because of BMW's "fraudulent" conduct in implementing its non-disclosure policy about repainted cars.

The case was appealed through the Alabama state court system, and ultimately to the U.S. Supreme Court, where BMW argued that the amount of punitive damages violated the U.S. Constitution's due process clause. In effect, BMW argued that the size of the award was far in excess of any amount that a legislature would permit in a criminal action, and did not serve the state's legitimate interest in punishment and deterrence. The U.S. Supreme Court agreed and, for the first time, articulated standards that state courts must apply to ensure that punitive damage awards are consistent with the federal constitution's requirement that defendants receive due process.

The three factors articulated by the Supreme Court in the BMW case are as follows: (1) The reprehensibility of the defendant's conduct. (2) Any disparity between the plaintiff's actual harm and the size of the punitive damage award. This is measured by the ratio between actual damages and punitive damages, though the Court was careful to state that it was not setting a maximum ratio. (3) The difference between the punitive damage awards and other penalties established by law, with the best example being a criminal fine for similar activity.

I want to emphasize the importance of this case in the U.S. The concept of federalism – the balance of power between individual states and federal law – is enormously important to the American system of government. Having the U.S. Supreme Court rule that the *federal* Constitution limits the ability of *state* courts to impose civil damages is no minor matter. But the BMW case now compels *every* state to evaluate punitive damage awards against the factors noted above.

The U.S. Supreme Court's involvement in punitive damages did not end with BMW v. Gore. In 2003, the Court decided another landmark case: State Farm Mutual Insurance Co. v. Campbell[12]. In this case, which took place in the state of Utah, the plaintiffs proved that State Farm, an insurance company, had implemented a policy whereby its agents routinely lied to clients and denied justifiable claims. The plaintiff's actual damages (the amount that State Farm should have paid them) was $185,000. The Utah Supreme Court, however, upheld a punitive damage award of $145 million dollars, designed to punish the company for its actions that affected thousands of policyholders and to deter similar conduct.

Once again, the case worked its way to the U.S. Supreme Court, which concluded that the award violated the due process clause of the U.S. Constitution. The Court focused on the second factor articulated in BMW v. Gore – the ratio between actual damages and punitive damages. The Court continued to state that it would not set a ratio beyond which an award would be permissible. It did state that, however, that punitive damages usually should not exceed a "single-digit multiplier" (e.g., 9-1). As a practical matter, it has been very hard since this decision for any plaintiff to have an award with a higher ratio approved as consistent with the due process clause of the U.S. Constitution.

[12] The case can be accessed through the following link: https://supreme.justia.com/cases/federal/us/538/408/case.pdf

The Campbell case has been subject to quite a bit of criticism. Perhaps the most valid critique is that the emphasis on ratio might restrict the ability of punitive damages to serve their traditional purposes of punishment and deterrence. As I discussed earlier, a small amount of money might not do an adequate job of punishing a large corporation, or even a wealthy individual. In addition, if defendants know the limits of a potential punitive damage award in advance, they might be able to plan for it – even accept it as a cost of doing business if a cost/benefit analysis suggests that it would be more profitable to harm others even at the price of a punitive damage award.

2.2.3 State-Specific Limitations

I would like to cover one last topic before I conclude. Even though federal law today constrains the award of punitive damages in the U.S., state legislatures also have acted throughout my country, and impose a number of limitations on punitive damage awards. Allow me to provide two categories of examples.

The most common form of limitation is a cap on the amount of punitive damages. States typically base caps on a multiple of actual damages (both pecuniary and non-pecuniary) or a dollar figure. In my state of Indiana, for example, the amount of punitive damages are capped at the greater of three times the amount of compensatory damages or $50,000. For example, if a plaintiff recovered $20,000 in a tort action, and if that plaintiff proved that the defendant's conduct was egregious, the plaintiff could recover no more than $60,000 in punitive damages – three times the amount of actual damages.

Some people are highly critical of punitive damage caps. These critics raise the same points that I discussed earlier. A smaller amount of money might not adequately punish wealthy defendants. Again, if companies or people know the limits of a potential punitive damage award in advance, they might be able to plan for it – and even accept it as a cost of doing business

Another other limitation imposed by some states is, perhaps, more interesting, though less common. These are "split recovery" statutes, where a plaintiff shares a punitive damage award with the state. The theory behind these statutes is that plaintiffs should not seek punitive damages as a financial "windfall," and that these awards are more similar to a criminal fine that the state ordinarily would collect. Again, my home state of Indiana is among those that have enacted this type of legislation. Under an Indiana statute, 75% of each punitive damage award goes to the state. Indiana has committed to using these funds as part of a broader program that helps support victims of violent crime.

Again, these statutes are controversial. Opponents argue that reducing the plaintiff's personal recovery reduces the incentives for individuals to pursue claims against wrongdoers, thereby diminishing the deterrence function of punitive damages in tort law.

3. CONCLUSIONS

The conclusion of this text is divided into two parts, which correspond to the topics covered in these lectures.

3.1. Environmental torts

First, I explained that most of the intersection of environmental and tort law in the U.S. comes through private law. This is almost always state-by-state and organized around “fault” – did the defendant intentionally cause harm; was the defendant negligent; or do circumstances allow for the imposition of strict liability?

Second, I discussed the primary causes of action that are used in these cases – trespass to land, nuisance law, negligence, and strict liability, where an actor engages in an abnormally dangerous activity.

Third, with each of these actions, a plaintiff bears the burden of proving causation – that the plaintiff’s injury would not have occurred “but for” the defendant’s activity. This is very difficult in cases involving toxic exposures because of the latency period before disease manifests. U.S. courts are open to the use of scientific evidence to establish causation in such cases.

Finally, I wanted you to be aware of at least one public law response to environmental harm that is based on tort-like principles. This is CERCLA, where a defined group of potentially responsible parties (PRPs) are strictly liable under a federal statue for cleanup costs at hazardous waste sites.

3.2. Punitive Damages

In this section, I began by providing an overview of compensatory damages in U.S. tort law cases, noting that the U.S. permits recovery for both pecuniary and non-pecuniary harm. I then explained that each state in the U.S. does permit the award of punitive damages – awards that are not designed to compensate, but instead that are designed to punish a defendant who has behaved in an egregious fashion, and to deter similar future conduct.

The law of punitive damages has increasingly become federal in the U.S., even though tort law normally develops through state law precedent. In particular, I mentioned two landmark U.S. Supreme Court cases concluding that large punitive damage laws can violate the U.S. Constitution’s Due Process clause. The U.S. Supreme Court has established certain guidelines that state courts must apply to ensure that punitive damage awards are consistent with Due Process – including a strong suggestion that punitive damages be no more than nine times compensatory damages in the case at hand.

Finally, I covered some common state law reforms to punitive damages, including caps and the possibility of split recovery, where the state retains a percentage of a punitive damage award.

BIBLIOGRAPHY

BOOKS AND ARTICLES

CERCLA Superfund Orientation Manual: Scholar's Choice: United States Environmental Protection Agency 2015. Creative Media Partners, 2015.

CRAIG, Robin Kundis, GREEN, Michael D., KLEIN, Andrew R., SANDERS, Joseph. *Toxic and Environmental Torts: Cases and Materials.* Minnesota: West, 2011.

EGGEN, Jean Macchiaroli. *Toxic Torts in a Nutshell*. 3rd ed. Minnesota: West, 2005.

RABIN, Robert, *Environmental Liability and the Tort System*, 24 Houston L. Rev. 29 (1987).

ROMERO, Leo M., *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 Conn. L. Rev. 109 (2008).

SANDERS, Joseph; GREEN, Michael D. *Do Courts Engage in a Sufficiency Analysis When Making Daubert Rulings in Toxic Tort Cases?*, 50 Conn. L. Rev. 387 (2018).

WEAVER, Russel L.; BAUMAN, John H.; CROSS, John T.; KLEIN, Andrew R.; MARTIN, Edward C.; II ZWIER, Paul J. *Torts: cases, problems, and exercises*. 5. Ed. Carolina Academic Press, 2018.

ZIPURSKY, Benjamin C., *A Theory of Punitive Damages*, 84 Texas L. Rev. (2005).

ZUBRZYCKI, Carleen M., *Punitive Damages in an Era of Consolidated Power*, 98 N.C. L. Rev. 315 (2020).

CASES

BMW of N. Am. v. Gore. 701 So. 2d 507 (Ala. 1997).

Boomer v. Atlantic Cement Co. 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970).

Bradley v. American Smelting and Refining Co. **104 Wn.2d 677 709 P.2d 782. (1985).**

Martin v. Reynolds Metals Company. 224 F. Supp. 978 (D. Or. 1963).

Owens-Corning Fiberglas Corp. v. Ballard. 749 So. 2d 483 (Fla. 1999).

Rylands v. Fletcher. House of Lords. L.R. 3 H.L. 330 (1868).

State Farm Mutual Auto. Insurance Co. v. Campbell. 538 U.S. 408, 123 S. Ct. 1513 (2003).

Recebido: 02.06.2021

Aprovado: 23.06.2021

Como citar: KLEIN, Andrew R. Environmental torts and civil punishment: a view from the United States. **Revista IBERC**, Belo Horizonte, v. 4, n. 2, p. 131-145, maio/ago. 2021.

Editor's note:
This article condenses the considerations expounded by Prof. Andrew R. Klein in two lectures given in the Postgraduate Program in Law at the Pontifical Catholic University of Rio Grande do Sul, on November 6, 2018.

Nota do Editor:
Este artigo condensa as ponderações expostas pelo Prof. Andrew R. Klein em duas palestras proferidas no Programa de Pós-Graduação em Direito na Pontifícia Universidade Católica do Rio Grande do Sul, em seis de novembro de 2018.