The Polyfunctional Role of Punitive Damages and the Conundrum of their Insurability: an Italian Perspective[1]

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1 This article draws inspiration from some lessons given as Visiting Professor at the University of Zurich (academic year 2017-2018).

1 Introduction: Conflicting Trends in Italian Tort Law

The contemporary Italian legal system seems to reveal two different and conflicting trends in tort law. The first one coincides with the introduction of legal provisions directed to cut the costs of litigation and to decrease the level of the damages recoverable in case of conflicts: this goal is mainly pursued in the sector of motor liability and medical malpractice, where - being the Italian level of litigation extremely significant and the recoverable damages for non-patrimonial losses among the highest in Europe[2]- the Italian legislator has introduced mandatory *barèmes* (both for physical – "*danno biologico*" - and moral damages) as per Law 24/2017, with reference to healthcare professionals, and Law 27/2012 on motor liability.[3] In addition, the duty to claimant party to first address an Alternative Dispute Resolution system, together with the introduction of rigorous procedural rules on the burden of the proof, should contribute, according to the policy makers, to reduce the level of recoverable damages while speeding the process of compensation.[4]

If this is one side of the medal – which shows a revitalized impact of law and economics considerations in the dynamics of compensation for damages - the other side seems to lean in the opposite direction. This last result is obtained, outside the field of medical malpractice and motor liability, thanks to the introduction of internal laws strengthening the role of civil sanctions and *astreintes.*[5] A further element which, in the future to come, may significantly modify the entities of recoverable damages in tort law is the fact that the decision no.16601/2017 by the Joint sessions of the Italian Supreme Court opened the door to the enforcement of foreign decisions granting punitive damages awards.[6]

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2 For a comparison on the level of personal damages awards, *cf.* B. Thorson, *Fatal accidents in the European Union,* in Journal of personal injury law, 1/2016.

3 According to these provisions, the damages recoverable from the side of the victims towards the liable party *and* the insurer are limited to the amount identified by further regulation. For specific comments to new rules on the limits to personal damages in disputes arising from motor liability and medical malpractice *see* M. Gerbi – C. Lancioni, *Il risarcimento del danno alla persona nella R.c.a.*, in *Danno e responsabilità*, 12/2013, 1158-1168; M. Bona, *La nuova r.c.a. dopo la legge 27/2012 (danno biologico per lesioni di lieve entità)*, San Marino, 2013; D. Cerini, *Il danno alla persona: tendenze e interferenze con l'assicurazione per la r.c.a. in prospettiva comparata,* in *Danno alla persona*, Landini- Venchiarutti – Ziviz eds., 2016, p. 37 ff.; A. Scarso – M. Foglia, *Italy,* in B. A. Koch (ed.), *Medical liability in Europe: a comparison of selected jurisdiction*, p.352.

4 L. 24 February 2017 – so called "*Gelli*" Law, on civil and criminal liability of healthcare professionals - makes mandatory the request of conciliation in front of an extrajudicial board before bringing a claim in court; as a consequence any judicial proceeding prior to the conciliation attempt is declared inadmissible. The duty to take part to the mandatory conciliation also applies to the insurance company of the defendant party.

5 *See*, for examples of civil sanctions and punitive awards by law in the internal legislation, *infra* at paragraph 2 (b).

6 The Supreme Court delivered its decisions after the internal order dated 16 may 2016, no. 9978 requested in order to solve the conflicting precedents between sessions of the same judiciary The text of the internal order can be read in the review *Danno e responsabilità*, 2016, with comment by P.G. Monateri (*La delibabilità delle sentenze straniere comminatorie di danni punitivi finalmente al vaglio delle Sezioni Unite*, in *Danno resp.*,

This paper will mainly concentrate on possible consequences of this important ruling. As it will be later considered in more details, the decision 16601/2017 is a real punch to the traditional rule followed by the same Court that has strenuously identified the sole function of civil liability in the need to compensate the victims of a damage, refusing any explicit ground for deterrence and punishment.

In the light of the big impact of this decision, the paper will first focus on the process that has progressively unveiled the polyfunctional role of civil liability in Italy (paragraph 2); the Court of Cassation's stand and the specific limits identified for the admissibility of punitive damages awards will then be discussed (paragraph 3). Finally, the question of whether the Italian legal system allows or not an insurability of punitive damages will be shortly considered (paragraph 4).

In order to better analyze the above described topics, let us clarify, from a methodological point of view, the terminology used: the terms "punitive damages" are generally literally translated in the Italian legal language as *danni punitivi.* Nevertheless, the word *danno* (damage) should strictly refer to a loss on the side of a victim; a damage (being the effect and result of a wrong or contract breach) is then restored via a compensation, in Italian translated as *risarcimento*. Accordingly, some Italian authors suggest that it would be consequently more correct to talk about "*risarcimenti punitivi*".[7] Nevertheless, as this distinction is not always reflected in the English and American legal terminology, this paper will make indifferently reference to punitive damages in order to (improperly) identify the compensation, including all components of the amount to be paid in a civil court in addition to the compensatory award.[8]

2016, p.831-836) and G. Ponzanelli (p.836-838). For comments on the previous trend by the court *see* G. Broggini, *Compatibilità di sentenze statunitensi di condanna al risarcimento di punitive damages con il diritto europeo della responsabilità civile*, in *Europa e dir. priv.*, 1999, 479; P. Pardolesi; in *Riv. dir. internaz.*, 2007, 894; in *Giur. it.*, 2007, 2724, con nota di V. Tomarchio; in *Foro it.*, 2007, I, 1498, con nota di G. Ponzanelli; infine *I danni punitivi nel sistema italiano: riflessioni a margine di Cass. Civ. sez III, 19 gennaio 2007, n. 1183*, con nota di D. Cerini, in *Dir.Ec. Ass*., 2008, 2, p.467 ff..

7 Castronovo, *Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di* chance, *danni punitivi, danno c.d. esistenziale*, in *Europa dir. priv.*, 2008, p.326-342.

8 For a more complete analysis of the polysemy of the word "*danno" cf.* L. Cosso, *The Grand Chambers' Stand on the Punitive damages dilemma,* in *The Italian Law Journal*, Vol.3/no.2, p.605.

2 The Polyfunctional Role of Civil Liability…. and the Polyfunctional Role of Punitive Damages

2.1 The Decline of the Orthodox View: a Critic of the Mono-function of Civil Damages Awards

In order to better understand why punitive damages have been considered for long as contrary to the Italian public order and, consequently, banned one should first start from a preliminary question: what are the goals of tort law?

Answers have changed through history and according to the geographical coordinates where you are. In extremely short notes, it is possible to remember that back in the ancient times, the majority of the legal systems in Europe did not set a clear distinction between criminal and civil wrongs. The judicial (state) Courts only intervened in most severe cases and situation where general good could be in danger. This was true both in the ancient Roman law, as well as some centuries later in the traditional English common law.[9]

Throughout the centuries, in Italy and other European continental countries, the goals of civil law - and tort law in particular - changed and the distinction between civil and criminal consequences of wrongful actions became clearer. In fact, local civil courts started to be involved in cases where compensation of the victim was assumed as the main purpose of an action in tort: the goal to punish the tortfeasors or to deter others from committing similar acts did not disappeared, but it became more and more ancillary. Later on in time (XIX and XX Centuries), the process was stressed and acerbated by the introduction and spreading of liability insurances, which transferred the risk of payment from the liable party to the professional insurer. In addition, the increasing number of strict liability rules, objectivizing the relevant behavior of the liable party, had progressively relegated the role of punishing for wrongs in a corner. In Italy, for example, the deterrent and punitive functions of civil liability became a pale element in the decisional process of civil torts, especially under the condition, later assumed in the Civil Code of 1942, that the subjective state of mind and condition of the tortfeasor (dolus, fault or the absence of fault) was indifferent in order to determine the quantum of the compensation due. The only deviation from that rule is considered to be art.2059 cod. civ., providing that non pecuniary damages for pain and loss can be awarded – always under the strict proof of their existence - only in specific cases set by law, i.e. in those situations where the act also has a criminal relevance. Besides, even if the letter of the Civil Code has remained unchanged over the decades, judicial interpretation has applied art.2059 cod. civ. in a pantographic way, allowing moral damages in all cases of violation of fundamental rights.

Under this assumption, the Italian framework on civil liability has been for decades based on the proclaimed "only child" role of compensatory damages, which are intended to be a restoration for the losses (actual or future), injuries or harms suffered as a result of the behavior of the wrongdoer in order to recreate

9 *See* P. Monateri, *La responsabilità civile*, *Trattato dir. da R. Sacco*, Torino, 1998, *passim*; P. Gallo, *Pene private e responsabilità civile*, Milano, 1996.

the patrimonial integrity of the injured subject.[10] The eco of the old "*tout le dommage, rien que le dommage"* can be heard…

Because punitive damages, on the contrary, traditionally are said to ensure the injured party a financial advantage that exceeds what is necessary to compensate the suffered patrimonial loss, and since such money is mainly intended to punish the conduct of the wrongdoer, well-established case law formally excludes the possibility of claiming punitive damages under Italian law. The orthodox view expressed by large part of the legal scholars and judicial rules is that the purpose to punish the defendant may be better and exclusively achieved in criminal courts and under the strict constitutional rule of legality, according to which a criminal sanction has to be predetermined in its general terms and in its minimum and maximum entity by the State legislator.

So far, being absent any internal provision of law expressly mentioning punitive damages awards, the same ostracism was then applied by the Italian courts when considering the risk to transplant them from abroad: according to settled case law, foreign decisions granting punitive damages to an injured party were considered, until 2017, against public order or policy (in Italian *ordine pubblico*) on the assumption that they are not compliant with the basic principles grounding damage compensation under Italian law; hence, such foreign decisions, as a consequence, could not be held enforceable in Italy.[11]

A quite commented case where the rule was recently confirmed is the "Fimez case"[12] (2007): here the Court of Cassation refused to grant *exequatur* to a USA decision providing for a partial punitive damage award.[13] The precedent was

10 *See* the extremely punctual analisys and critical view in S. Rodota', *Il problema della responsabilità civile*, Milan, 1964, *passim*; P. PerlingeriI, *Le funzioni della responsabilità civile*, in *Rassegna di diritto civile*, 2011, p.115-12; G. Ponzanelli, *I punitive damages nell'esperienza nordamericana*, in Riv. dir. *civ.*, 1983, I, 435 ff.

11 On the notion of public order in Italian law *cf.* G.B. Ferri, *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970; A. Guarneri, *L'ordine pubblico e il problema delle definizioni*, p.11 ff., in the volume Scritti Scelti, ESI, 2017, and more extensively his paper *Ordine Pubblico (voce), Digesto, Disc. Priv.*, 1995, p.154 ff..

12 Cass. Civ., sez. III, 19.1.2007 no. 1183. *See* P. Pardolesi, *Danni punitivi all'indice?*, in Danno e responsabilità, n.11/2007, pp.1126-1130; P. Fava, *Punitive damages e ordine pubblico: la cassazione blocca lo sbarco*, in Corriere giur., n.4/2007, p.498-505; Rossetti, *Parce sepolto, ovvero come porre fine all'industria del lutto*, in Quotidiano giuridico, 26-2-2007, in www.dottrinaediritto.it; F. Quarta, *Recognition and enforcement of U.S. Punitive Damages in Continental Europe: the Italian Supreme Court's Veto*, in 31 Hastings Int'l & Comp. L. Rev. 753, p. Allow also to quote D. Cerini, *I danni punitivi nel sistema italiano: riflessioni a margine di Cass. Civ. sez. III, 19 gennaio 2007, n.1183*, in Diritto ed economia dell'assicurazione, 2-3/2008, p.467 ff., ISSN 1125-9302. In line with the decision, *see* previous cases: Cass.no.10024/1997, Cass. no.12767/1998, e Cass. no.1633/2000; on the trend by the Italian court *cf.* also A. Musy, *Punitive damages e resistenza temeraria in giudizio: regole definizioni e modelli istituzionali a confronto*, in Danno e Responsabilità, n. 11/2000, pp. 1121 – 1127.

13 It is important to remember that in Italy the enforcement of foreign decisions is subject to a procedure of prior authorization in front of the Court of Appeal of the place where the decision is then to be executed; this is provided by Regulation no. 1215/2012, with reference to decisions issued by other EU states; for decisions of non EU countries, a similar provision is set by the Law on international private law (that is to say Law no. 218/1995), even if in

once again confirmed in 2012, notwithstanding the rising criticism by the more recent legal doctrine's comments.[14] Curiously enough, the Fimez case has a number of common elements with the overruling decision of 2017 which will be later examined. In fact: according to an Alabama court, Fimez (a company producing helmets in the North of Italy and then delivered worldwide) had sold a defective item in the USA. The helmet in question was used by a young man, who died in a motorbike accident; the Alabama court judged Fimez jointly liable for the tragic loss, together with the car driver having caused the accident, and then condemned the Italian producer to pay a relevant (but not exorbitant!) sum, presumably including a punitive damage. As the Italian company refused to spontaneously give execution to the foreign decision, the family of the victim asked for an *exequatur* in Italy: the Court of Cassation refused to grant it nullifying the USA decision, under the assumption that the amount to be paid included punitive damages, which were not only – assumed the Court – "exogenous" to the Italian system of civil liability, but so abnormal to violate fundamental values and consequently in a contrast to public order:[15] quoting the Court, "*the only recoverable damage in an Italian court is that necessary to compensate of a loss, being absolutely absent the possible scope of punishment and deterrence of the civil liability*".[16]

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this case the authorization is submitted to a verification of compatibility with internal rules and principles of public order and fundamental principles of the State.

14 *See* Cass. Civ., Sez. I, 8.2.2012 no.1781.

15 More specifically, the case concerned a decision of the Alabama Court on a case of product liability for a presumptive defective helmet. The court in Alabama delivered a decision condemning the Italian company to pay a little more than one million dollar for the contribution to the death of the plaintiff's son. The accident, as the trial confirmed, was due to the fault of the driver of another car, but the defect of the helmet had contributed to aggravate the consequences of the crash. No precise judgement on the gross negligence nor fraud of the Italian producer was ascertained during the trial, but the final award for the family, without clearly specifying in which apportionment, made a general reference to a cumulating between compensatory and punitive damages. The plaintiffs consequently, under the refuse of Fimez to pay, asked the Court of Appeal of Venice – being that the territorial competent court in first instance - to grant execution. The said court noted that "l'iter processuale e il tessuto argomentativi della pronuncia non consentono di risalire ai criteri che il giudice dell'Alabama adottò per qualificare il danno e quindi quantificarlo, di stabilire se la quantificazione tenne conto della corresponsabilità dei precedenti convenuti e della somma eventualmente corrisposta da costoro riconosciuta alla querelante"; according to the same court, the amount of the recovery set by the American judge "(…) lascia presupporre che la condanna della convenuta rappresenta una vera e propria sanzione, comminata per finalità meramente afflittive e deterrenti, estranea ai principi della nostra giurisdizione". After denial of the said court to grand execution, the family of the victim addressed to the Italian Court of Cassation for a retrial; the Supreme Court, nevertheless, confirmed the verdict.

16 More extensively, *see* the Italian original text of the principle pronounced by the Court referring to the contrast of punitive damages to public order: *"Nel vigente ordinamento l'idea della punizione e della sanzione è estranea al* risarcimento del danno, così come è indifferente la condotta del danneggiante. Alla responsabilità civile è assegnato il compito precipuo di restaurare la sfera patrimoniale del soggetto che ha subito la lesione mediante il pagamento di una somma di denaro che tenda a eliminare le conseguenze del danno arrecato. E ciò vale per qualsiasi tipo di danno compreso il danno non patrimoniale o morale, per il cui risarcimento, proprie perché non possono ad esso riconoscersi finalità punitive, non solo sono irrilevanti lo stato di bisogno del danneggiato e la capacità patrimoniale dell'obbligato, ma

2.2 Reasonable Doubt: the Deconstruction of the Monolithic Function of Civil Liability and the Possible Presence of Punitive Damages Solution in Italian Case Law and Legislation

Notwithstanding the words of the Court of Cassation in the Fimez decision of 2007 - stating that in civil liability there is no ground for a punitive function – some academics observed that the reality of the law in action is quite different from the orthodox description[17] and a possible lack of coherence between internal legal formants can be traced.

In fact, there is no doubt that many rules of the Italian legislation have gradually recognized the right to obtain payment for sums which, inevitably, seem to exceed the mere compensation of the victim for the loss or damage suffered.

These provisions relate to very different areas of the law. Just to make some examples, in a first instance, the Code of Industrial Property (Legislative Decree dated 10 February 2005, no. 30) provides that in an infringement right procedure, the judge can impose the payment of a pecuniary amount to be determined in relation to the violation of the intellectual property right in question and the delay in the execution of the relevant judicial orders. In addition the same law provides the duty to pay back revenues obtained by using illicitly the right of other persons or subjects.[18] The legislator does not mention "punitive damages", nor it can be inferred that there is complete equivalence between the measures of recovery here established and the notion of punitive damages;[19] nevertheless, the application of the doctrine of disgorgement allows some criticism on the real compensatory nature of the recovery.

Another reasonable doubt about the possible presence of punitive elements in Italian tort law refers to liabilities deriving from the publishing of newspaper and books or the exercise of the profession of journalism for felonies and defamation realized through the press: in this case the court can assess damages to be determined taking into consideration the severity of the offence (with specific reference to the state of mind of the liable party) and the extent of dissemination of the press at issue.

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occorre altresì la prova dell'esistenza della sofferenza determinata dall'illecito, mediante allegazione di concrete circostanze di fatto da cui presumerlo, restando escluso che la prova possa considerarsi in re ipsa".

17 This is the common problem described by R. Sacco, *La massima mentitoria*, in La giurisprudenza per massime e il valore del precedente: con particolare riguardo alla responsabilità civile. Atti di Convegno, 11-12-marzo 19*88*, 1988, p.51-58, where the Scholar remembers that, according to the doctrine of legal formants, that the coherence of a legal system and between the internal legal formants is not to be taken as granted.

18 This last remedy is similar to "disgorgement damages": a remedy or penalty used in U.S. legal system, designed to deter future violations and also to deprive defendants of the gain of their wrongful conduct. *See* E.A. Farnsworth, *Your loss or my gain? The dilemma of the disgorgement principle in breach of contract*, 94 Yale L. J. 1339 (1985).

19 A. MontanariI, *La resistibile ascesa del risarcimento punitivo nell'ordinamento italiano (a proposito dell'ordinanza n. 9978/2016 della Corte di Cassazione)*, Anno IV, numero I, gennaio/marzo 2017.

More recently, the Italian Workers' Charter (*Statuto dei Lavoratori*) provides that, in the event of an employee's wrongful dismissal, which is later recognized to be null, the judge can set a pecuniary sanction not lower than the amount of the remuneration of five months.

Also procedural rules seems to open the ground to punitive elements. In fact, art. 96 of the Italian Code of Civil Procedure empowers the judge to order the party liable of taking part in the court proceeding with bad faith or aggrieved fault (so called *lite temeraria*) to compensate the other party, upon request of the latter; the amount of the compensation is intended as a pecuniary sanction, thus aiming at sanctioning and deterring the abuse of process.[20]

In addition to these important legislative references, those who are more familiar with everyday court life have pointed out that in the day by day judicial process, the level of recovery often allowed to the victim is not truly neutral with respect to the state of mind of the liable party and to the depth of the pocket of the said party. This is mainly true if one looks at the level of moral damages assigned to the parties: in fact moral damages, as identified by art.2059 cod. civ, are a compensation for the pain and suffering, so in principle they should be neutral with reference to the behavior of the liable party being determined only with reference to the position of the victim. Nevertheless, in concrete terms they are often quantified according to the moral reproach to the defendant.[21]

Is that enough to consider that the orthodox reason assumed by the Supreme Court in 2007, denying a room for punitive damages in the Italian legal system, was ready to be once again questioned?

2.3 The Decision of the Court of Cassation 5 July 2017 no.16601: the Trojan Horse (or ship?) for Punitive Damages or Just a False Alarm?

The incoherence of the internal legal formants were revealed in the hot summer of 2017, the Joint Divisions of the Italian Court of Cassation[22] not only ruled –

20 *See* also Corte Appello di Milano, 12.01.2012, which can be read in "www.Judicium.it"; *see* also P. Porreca, *L'art.96, 3 comma c.p.c., tra ristoro e sanzione,* in Foro it., 2010, 2237 ff.

21 *See*, for example, Tribunale di Milano, Sez. X, 3 September 2012: in this case the Court of Appeal of Milan – one of the major second degree courts in Italy – condemned the insurers of a public hospital sued for a medical malpractice liability to pay an incredibly high amount of money for moral damages (damages for pain and suffering) in favor of the parents of a child who died after misconduct of the paramedic personnel in charge. The insurers, in this case, were condemned to pay such a high recovery as the court assessed that they delayed the payment with vicious procedural tactics. The judge considered that behavior as scandalous, especially in the light of the position of the poor parents of the victim obliged to take part to a long proceeding where the liability was quite evident, as well as the relevant liability coverage.

22 The Corte di Cassazione - Court of Cassation or Supreme Court – is organized into sessions, internally divided between criminal and civil cases. Decisions are normally issued within each session by a panel of five judges. In special cases, concerning compounded matters of statutory interpretation or issues of a particular importance where a contrast between precedents of the same Court have emerged, an extended panel of nine judges decides, in the form of "Joint Sessions". Decision by the Joint sessions are consequently of a particular importance, even if Italy is a civil law country not formally submitted to the binding

in an appeal proceeding for *exequatur*, in favor of the enforceability in Italy of foreign decisions (*i.e.*, judgment issued by courts in other Member States and at supranational European level) granting the payment of so-called punitive damages, but also affirmed in black letter that "In the current legal system, the purpose of civil liability law is not just to make a victim of a tort whole again, since the functions of deterrence and punishment are also inherent in the system".[23]

Facts of the case once again related to a defective helmet, sold by Axo spa, an Italian producer, to Nosa, a USA import company. And, once again, because of the defective helmet and the consequent damages suffered by the severely injured user, Nosa, after a settlement with the original plaintiff, asked to the Italian courts to grant exequatur against AXO. As the instance was rejected by the first degree judge (once again, the Venice Court of Appeal!), the Court of Cassation was vested of the case. The Court could, at that time, simply follow the Fimez rule, being it a strong precedent confirmed by some further judgments. There had been, in fact, a prior decision of the Supreme judges, in a case of directors' liability, where the court raised some doubts about the inconsistency of punitive awards with the general principles of the Italian legal system, but this was a mere *obiter* .[24]

Nevertheless the competent Chamber of the Court initially vested by Nosa (the Third Civil Chamber) suspended, quite strategically, the judgment and involved of the matter the joint sessions, soliciting a strong ruling which could solve the existing conflicts and inconsistency of the law.

The decision 16601/2017, in fact, not only gave an answer to the specific controversy according to the rule of law: following the model of the so called "*sentenze di principio*" – which reveals a certain approach of the judicial to express general rules[25] – the highest Court took the chance to give a clear message to the public, clarifying that the Italian tort law system is not (anymore!) merely confined to the compensatory function of the victims, but it entrenches much wider roles. This was in fact the revolution: not the ruling in itself, but the slap to the orthodox path (formally) followed by the previous decisions and often declared as the only viable one.

The Court of Cassation nevertheless did not open a absolute door to the instinctive entry of punitive damages in the legal system as a general rule. In fact the judges of the United Chambers identified crucial limits for the admissibility of punitive damages. In short terms, these can be summarized as follows.

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precedent rule. The recently issued decision on punitive damages is consequently quite a forceful precedent, which lower courts and subsequent judgments are likely to abide.

23 For a translation of the full text in English, which is also here often recalled, *see* F. Quarta, in The Italian Law Journal, Vol.3.2, pp.593-604.

24 *See* Corte Cass., SS. UU., no.9100/2015.

25 *Cf.* for critical comments G.M. Berruti, *La dottrina delle Corti*, in La giurisprudenza fra autorità e autorevolezza, in Foro It., 2013, V, c.181 ff; F. Busnelli, *La "dottrina delle Corti" e il risarcimento del danno alla persona, in Danno e responsabilità*, 5/2014, p. 461.

(a) Punitive damages can have a place in the Italian legal system – and consequently foreign decision can be applied in Italy - only if they respect the principle of legality (*principio di legalità*): in other words, punitive damages have to find their roots in a law provision. In practical terms, this means that a foreign ruling providing the payment of punitive damages may be executed in Italy only where the foreign legislative provisions (or sources with a similar relevance in the original legal system) grant the competent judge with the power to award punitive damages based on typical and predictable circumstances. The Court nevertheless suggests that the typicality test is to be made according to the relevant law applicable to the case, so i.e. it could be, with reference to common law jurisdictions, even case law where there allowed.

(b) Secondly, the decision of the Court of Cassation leads to the conclusion that punitive damages can be allowed only in specific circumstances and within limits provided by the law (*principio di tipicità*); this condition is considered necessary, for the Court, in order to allow predictability and respect provisions of articles 23-25 of the Italian Constitution;[26] this anchorage to a specific provision is an important deviation from the general principle of non-typicality that governs tort law.

(c) Finally, the admissibility of punitive damages lays ancillary to the test of *reasonableness* and *proportionality*. The respect of the requirement of a reasonable amount for the punitive damages assessment may not be easy to determine and leaves the door open to a number of conundrums. In fact, the concrete application of this principle, as it was suggested, "*entails an appraisal of the circumstances of each actual case and therefore, in practice, each individual court would be responsible for considering whether punitive damages could be allowed*".[27]

It should now be clear that Italy will not become soon the "new paradise" for litigation plaintiff lawyers seeking for punitive damages awards: precautions and limits for future *exequaturs,* as seen, have been clearly set by the Court of Cassation, quite conscious of the revolutionary impact of its determining. Nevertheless, one the fence is open, it is easy to foresee a prudent but progressive increase in the application of punitive damages, also in the light of the equally

26 *See* Italian Constitution, Art. 23: "No obligation of a personal or financial nature may be imposed on any person except by law"; Art. 25: "No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for as provided by law" (Official translation, available at www.senato.it).

27 *See* also the short comments by practitioners , as in M. Frittella, *Italy: Punitive damages - Risks and precautions when operating in the U.S.A.*, ADVOC Website, News Section, 23/5/2017 commenting on the order no. 9978 of 16 May 2016 by the Supreme Court, Civil I Section, calling the Court in full session to rule on whether foreign judgments for punitive damages can be executed in Italy and to decide whether a contrast to the Italian public policy exists or not.

fundamental principle that damaged parties cannot be treated in different ways.[28] One can consequently expect further chapters of the story, which will enlarge the application of punitive damages in Italy.

Nevertheless, it should also be remembered that a more critical reading of the decision by the Italian Supreme court requires to focus on the fact that such an opening to the "punitive damages clause" seems to be also motivated by the fact that the actual use of punitive damages in the USA, and in particular the condemnation in the decision seeking for exequatur, reveals a softer reference to a sole and unique use of punitive damages as a sanction for fraudulent and evil behaviors.

In fact, if the essence of punitive damages continues to lay in the punitive function (mostly as a tantamount of *criminal behavior)* so that they are awarded in case of intentional wrong, malicious behaviors, evil motive attitudes on the side of the liable party,[29] not occationally courts give grounds to punitive damages also in a number of situations where a mere deterrence function exists, in order to discourage the market towards certain strategies, or even with the sole goal to raise the level of the recovery in order to strengthen the protection of the victims, especially in case of deep pockets liable parties: this multi-function of punitive awards is clearly demonstrated by the fact that punitives are given for *reckless behaviors*, *gross negligence*, *wanton cases* if not under the mere presumption of such attitudes.[30]

Here the punitive damage is a judicial tool to reach full compensation, providing a money reserve to cover legal expenses and eventual non patrimonial damages which remain on the charge of the victim[31]. In addition punitive damages play a strategic goal in order to lead the plaintiff party to better (extrajudicial) negotiations, always in cases where there would be no legal ground for punitives.[32]

In conclusion, we can actually talk not only above a polyfunctional role of tort law as a whole, but also about a polyfunctional use of punitive damages, shifting from punishment, deterrence, in part also compensation as well a social

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28 *See* A. Pisani, *Fattispecie speciali di «risarcimento» ultracompensativo*, in I danni punitivi dopo la sentenza n. 16601/17 delle Sezioni Unite della Corte di Cassazione, edited by Cerini-Pisani *et alii*, Rimini, under publication. *See* also A. Pisani, *L'obbligazione è ancora* iuris vinculum*? Sull'accidentato cammino dell'ancor giovane* astreinte *all'italiana*, in Corriere giur., n. 11/2017, § 6, p. 1431 ff.

29 *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964); "*The misconduct we have in mind is intentional or malicious wrongdoing*….". Especially *see Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

30 *Mazza v. Medical Mut. Ins. Co. of N.C.*, 319 S.E.2d 217 (N.C. 1984). *Cf.* D.G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Villanova Law Review, 1994, pp.363-413.

31 M. Cappelletti, *Punitive damages and the public/private distinction: a comparison between the United States and Italy*, in Arizona Journal of International and Comparative Law, Vol.32, No.3, p. 799-845 and specifically at p. 814 ff.

32 C. M. Sharkey, *Punitive Damages as Societal Damages*, Yale Law Journal, Vol. 113, 2003, available at SSRN: "ssrn.com/abstract=407080", specifically p.357 ff.

function to redistribute part of the revenues or gains of the liable party (this happens where the punitive damage is not awarded solely to the victim but also to other entities, such as no profit organization or associations defending the same rights of the violated ones, or even the state).

This actual polysemy of punitive damage, so different from the "original" one, is not always understood in the local nor in the Continental debates.

This was true, for example, also in the recent discussion concerning the introduction of *dommages punitifs* in the French civil code, where the punitives were inevitably linked to the *faute dolosive* of the liable party, ending to be replaced by the more "civilian" notion of *amende civile* which appears to be more in line with the taxonomy of the French legal system.[33]

This clarification has to be taken into serious consideration when discussing about the possible insurability of punitive damages according to Italian law.

3 The Conundrums of Insurers towards Punitive Damages: to Cover or not to Cover?

Believe or not in the opportunity to support a transplant – even partial – of punitive damages solutions, there is no doubt that once the legal system opens the ground for their admissibility and compliance with the general principles of the law and public order, like it recently happened in Italy provided the limits here above mentioned, some criticalities and harsh points remain unsolved. One of them – and not a secondary one - is the insurability issue. In fact, even if punitive damages will continue to be admitted under very strict conditions in the Italian legal system, the business may be deeply involved with reference to liability insurance contracts stipulated by companies and businessmen having activities abroad and, consequently, facing the risk of being called to answer for punitive damages awards.

For understandable reasons, the question of whether the insurance policy may provide cover for punitive damages has not been widely addressed in the Italian legal system until now, while it has been debated with conflicting results in other foreign jurisdictions, specifically in the United States.[34] The possibility to cover them or not quite often distinguish the cases where punitive awards are based on vicarious liability or depend on direct liability, as well as to the state of mind of the defendant, proving the polyfunctional nature of punitive damages already here discussed (*supra*, paragraph 2). In addition, the Economic Analysis of Law scholars have similarly expressed their favor for the insurability of punitive

33 *Projet de réforme du droit de la responsabilité civile présenté le 13 mars 2017 par J.J. Urvoas, garde des sceaux, consultation publique avril-juillet 2016, in www.justice.gouv.fr. ;* D. Cerini, *Il progetto di riforma della responsabilità civile francese: l'attenzione per danno alla persona e componente punitiva del risarcimento,* in Annuario di diritto comparato e studi legislativi, vol. 2017, ISSN 2039-9871, vol. 2017, p.685-708.

34 The issue is not a new one: *see* Logan, *Liability insurance protection from punitive damages, in The case against punitive damages*, 23 (Def. Research Inst. 1969); R.C. Burell – M.S. Young, *Insurability of punitive damages*, Marquette Law Review, Vol.62, 1978, no.1; K.S. Abraham, *Insurance law and regulation*, 1995, p.80-88.

damages, even if under different reasons.[35] As a result, the USA system is now a puzzled one, where twenty-two states allow this type of insurance, eighteen bar it, and four have not yet resolved this issue.

In Italy, liability policies on the market generally exclude the coverage of punitive damages on a contractual basis in case of an insured party having her business abroad; the exclusion is sometimes even more radical, generally leaving apart – if not specifically negotiated - coverage of accidents occurred in specific markets (USA, Canada and even China) where punitive damages are more often awarded and for very high amounts. The increase on the demand of coverage for punitive civil sanctions may become more relevant in the future and may expand to many more legal systems than those until here identified. Will the parties be free to determine the possible coverage of punitive damages, provided they reach an agreement on terms and premiums to be paid?

In Italy there is no specific provisions referring directly to punitive damages coverage in the law. Recourse to other more general rules can be helpful to solve the matter.

In this direction, one can remember that liability insurance is to be considered part of insurance against damages.[36] This clarification is not merely theoretical as it indicates that the rules provided by the Civil Code for non-life contracts are applicable to liability insurance, here included the impossibility to cover fraudulent activities. In fact art. 1900 C.C. establishes a lack of coverage in case of events caused by fraud or gross negligence of the insured – provided that, between the two, only gross negligence may eventually be covered by an express contract term, as art. 1900 C.C. can only be partially derogated.

The prohibition of insurance in case of events caused by fraud is considered a rule of public order. The rule is repeated in the specific article dedicated to liability insurance; the first comma of Article 1917 CC gives a definition of liability insurance: "*In liability insurance the insurer is obliged to indemnify the insured for damages which he is obliged to pay because of the events occurred during the insured period and resulting in the liability covered by the insurance contract.* Damages deriving from fraudulent acts are excluded" (Article 1917, CC, I comma).

In fact, liability insurance covers the insured's interest to be indemnified for the sums he/she is obliged to pay for liability towards third parties. The limits and extents of the liability covered are identified in the insurance agreement and with reference to the applicable law, so that the risk covered by each single contract is strictly connected with the legal bases of the liability in question (both

35 The economic analysis of law, as known, does not reach a univocal solution on the insurability of punitive damages, even if large part of the scholars seem to lean towards the admissibility of the coverage: *see* A. M. Polinsky - S. Shavell, *Punitive Damages: An Economic Analysis,* Harvard Law Review, Vol. 111, No. 4. (Feb.), 1998, pp. 869-962. For a puntual analysis of the different reasons expressed by the M. I. Testa, *Non-insurability of punitive damages in Argentina: an Economic Analysis of Law explanation*, in *Revista para ed analisis del derecho* – In Dret 3/2011, 2011, to which some figures and data hereafter mentioned refer.

36. M. Rossetti, *Commento Art. 1932 C.C.*, in *Le assicurazioni. L'assicurazione nei codici. Le assicurazioni obbligatorie*, La Torre (ed.), Milan, p.389.

liability in tort or contractual liabilities), with the exception of damages – and liabilities- deriving from fraudulent acts. In addition, the limits of the covered risk relate to the insured person(s) as identified in the contract and to the kind of activities performed by the insured. Further limits are set in the policies with reference to the types of damage recoverable. According to the recalled rule, one may conclude that, following the combination of art. 1900 C.C. and art.1917 C.C., punitives cannot be insured where they are based on fraudulent behavior of the insured. In addition, one has to mention article 12 of the Code of private insurances, which identifies "*Prohibited operations*", that is to say activities and coverages not allowed. Art. 12 provides that tontines or associations of subscribers set up with a view to jointly capitalizing their contributions and subsequently distributing the assets thus accumulated among the survivors or among the beneficiaries of the deceased, as well as insurance having the object of transferring the risk of payment of administrative penalties and those regarding the payment of ransom money in case of kidnapping shall be prohibited. In the event of a breach of that prohibition the contract shall be void.[37]

Under this basic rule, it could be argued quite easily that the coverage of punitive damages is excluded because, similarly to administrative penalties, they tend to punish the tortfeasor and not to compensate victims.[38] Their insurability would consequently fall under the ban of art.12 of the Code of Private Insurances here above mentioned.

In conclusion, the rational of a plain solution – providing for a sort of automatic legal impossibility to cover punitive damages by contract as the result of the application of mandatory rules – may not be the only possible one. In fact, if and where punitive damages are not expressly excluded by contract terms, one should consider whether they have been awarded, in the relevant jurisdiction and the specific case in question, as the result of a fraudulent activity of the insured or on other grounds where the *dolus* is not the subjective relevant status of mind of the party liable in tort: as it was previously recalled (supra, paragraph 3), punitive damages perform today a multifunctional role, as they may be awarded also in cases of gross negligence or, merely, in order to increase the level of compensation of the victims or. Once again, the burden to pay punitives may be attributed on the ground of vicarious liability. In these cases, the theoretical possibility to insure totally or partially punitive damages should find a place also in the Italian legal system, as it would not necessarily fall into the contrast with public order. This would lead to a simple result at least in some cases: if not

37 The article, at comma 2, provides that "The setting up on the territory of the Italian Republic of companies which have as their exclusive object the pursuit of insurance business abroad shall be prohibited". In addition the rule here recalled is more specifically identified in IVASS Regulation no.29 dated 16 march 2009, at art.4, paragraph 3.

38 Following this last interpretation the position of the victim would not be influenced as Italian law does not provide a general rule for a direct action of the victims against the insurer of the liable party. *See* D. Cerini, *Compulsory liability insurance. Italy*, in A. Fenyves, C. Kissling, S. Perner, D. Rubin (Eds.), Compulsory Liability Insurance from a European Perspective, Wien, ISBN 978-3-11-048469-4, pp.189-215.

expressly excluded by the insurance contract, and being not necessarily contrary to public order and to specific rules of law (art.12 Code of Private Insurances and the other mentioned relevant rules of the Civil Code) they may be covered. The decision for the existence of a valid and proper coverage for punitive damages would then be assigned according to the rules of construction of the contract.

There is not enough space to go further in the analysis of this quite crucial problem. The case for the insurability of punitive damages, remains fascinating and debatable.

4 Final Remarks: the Role of Liability Insurance in Society

There is no doubt that a businessman or company playing a role in the international scenario can see many complexities deriving from the system of adjudicating in foreign tort legal systems. These uncertainty has a direct impact on liability insurance. From an economic point of view, liability insurance only accounts for a small part of the premiums collected in the European market. Notwithstanding the relatively minor economic importance of the sector in terms of collected premiums, there is no doubt that liability insurance plays a much greater role for the insured parties, i.e. for enterprises, professionals and consumers who stipulate a policy: in fact, when a liability insurance exists, the insured parties can better plan their future activities including their economic commitments and, consequently, realize a better management of the risk. In addition to economic considerations, one has to focus on the social impact of liability insurances in various markets: it is common perception that liability coverage plays an essential role in facilitating exchanges between the economic players in EU markets. The importance of liability insurance is evident also in respect of both the policyholder and third parties: where voluntary, liability insurance has the main function of protecting the insured policyholder; where compulsory, the policy objective is to protect the victim in the first place. All in all, the significance of liability insurance is much greater than it may appear on the basis of the sole premium revenue of European insurers derived from this branch of insurance.[39]

Nevertheless, liability insurance is an extremely complex matter. This complexity is the result of many and heterogeneous factors: first, liability insurance generally involves more than two parties (policyholder, insured and potentially liable parties, beneficiaries, victims, etc.); second, a number of rules and provisions concern both the insurance contract and the contractual and extra-contractual liability in question; third, there is a specific connection with the local legislation relating to the liability risk covered.

The complexity of the matter emerges from two specific topics: the intersection of rules on liability insurance and the conflict of laws, and the delineation of insurance contract law and general liability law.

39 *Final report of the Expert Group on insurance contract law*, DG Justice, EU, 2014, www.commission.eu, in particular Chapter 5, Section 1, 72 ff.

The case of punitive damages, as a possible component of the recovery, as well as the specific rules that could allow, in a given legal system, the insurability of punitive (or their non insurability), adds further complexity.

It is true, nevertheless, that if Italian courts are to be called more frequently to decide and eventually allow the admissibility of condemnation to pay punitive damages, following the pronunciation of the Court of Cassation of 2017, the insurance business will have to determine if, and at which costs, policies may be designed in order to answer to the need of the market, especially with reference to product liability and D&O insurance contracts.