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## New Punitive Damages in Mexican Law – Or the Chronicle of a Failed Legal Transplant Foretold?

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## **New Punitive Damages in Mexican Law – or the Chronicle of a Failed Legal Transplant Foretold?**

BY EDGARDO MUÑOZ<sup>1</sup> AND RODOLFO VÁZQUEZ-CABELLO<sup>2</sup>

### ABSTRACT

In February 2014, the Supreme Court of Mexico, referring to some American cases and scholarly articles, held that punitive damages must be awarded to a tort plaintiff as part of the indemnity afforded by Mexican law under the head of moral damages (*daños morales*). Before this landmark decision, punitive damages were unknown to the Mexican legal system. The authors submit that the legal transplant carried out in Mexico has a few problems, which concern both the incorrect understanding of the adopted rule and the incompatibility of the host legal system. As a consequence, punitive damages, as they stand now in Mexico, will not properly accomplish the function that punitive damages have in the United States, *i.e.*, to effectively and fairly punish tortfeasors and dissuade potential ones, unless some post-transplant adjustment is implemented. In order to demonstrate their hypothesis, the authors apply the functional method of comparative law and the theory of legal transplants, including the criteria developed by prominent comparatists, to determine the likelihood of success transplanting punitive damages in Mexico.

Keywords: Mexico, Punitive Damages, Comparative Law, Legal Transplants, Functional Method.

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### Table of Contents

1.	Introduction .....	2
2.	The Supreme Court of Mexico's Decision of February 26, 2014 .....	4
2.1	The Facts .....	5
2.2	The First Instance and Appeal Proceedings.....	5
2.3	Constitutional claims .....	7
2.4	The Supreme Court's rulings.....	8
2.5	The calculation of indemnity for moral damages .....	9
3.	The transplant of punitive damages into Mexican law .....	11
4.	The criteria to assess a legal transplant effectiveness.....	19
5.	The forecasted results of the transplantation of punitive damages in Mexico.....	25
5.1	Assessing comparability of punitive damages in the United States and Mexico .....	26
5.2	Socio-political differences of the receptor legal system as an obstacle for successful transplantation .....	31
5.3	Establishing the demand for punitive damages in Mexico .....	33
5.4	How good law are current punitive damages in Mexico compared to those from the United States.....	37
6.	The required fine-tuning for Mexican punitive damages .....	48
7.	Conclusion .....	53

### 1. Introduction

On February 26, 2014, the Supreme Court of Mexico held that punitive damages must be awarded to a tort victim as part of the compensation afforded by Mexican law under the head of so-called moral damages (*daños morales*).<sup>3</sup> Before such a landmark decision, punitive damages were unknown to the Mexican legal system.<sup>4</sup> Punitive damages, also called

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3. Supreme Court of Mexico, First Chamber, Feb. 26, 2014, *Amparo Directo* 30/2013, <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=15359>

5. Prior to the aforementioned decision, despite the statutory enactment of class actions in 2011 in Mexico, it is regrettable that the Federal Congress decided not to

exemplary damages, are part of the torts law in some common law jurisdictions, especially, in most states of the United States.<sup>5</sup> Their purpose is to punish the tortfeasor for outrageous misconduct and to deter him and others from similar misconduct in the future.<sup>6</sup> Under common law, they are non-compensatory damages in that they do not intend to compensate a plaintiff for the actual financial or emotional losses suffered due to the harm caused by the defendant.<sup>7</sup>

Punitive damages have been subject to criticism in the United States and other common law jurisdictions, in particular, regarding the occurrence of large amount of indemnities granted in some cases,<sup>8</sup> the view that it is anomalous when the plaintiff recovers a financial windfall, or that any award imposed by means of punishment should be paid to the State.<sup>9</sup> In spite of such criticism, there are many benefits that this legal concept could bring to the Mexican society. Punitive damages could help reduce the low

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incorporate punitive damages into Mexico's legal framework or even in matters dealing with environmental law. See Rodrigo González-Camarena, *Punitive Damages and Their Alternatives in Mexican Environmental Law*, 6 MEXICAN L. REV. 45, 47 (2013).

5. Punitive damages may be awarded in all States of the United States with some restrictions in Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington. Louisiana is a Civil Code jurisdiction that refused to recognize punitive damages, except as statutorily authorized. Nebraska and New Hampshire are common law jurisdictions that refused to adopt the remedy of punitive damages entirely. Massachusetts and Washington are common law jurisdictions that do not recognize punitive damages except as may be recovered under specific statutory authorization. See ANTHONY J. SEBOK, *Punitive Damages in the United States*, PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, 155 (Helmut Koziol & Vanessa Wilcox eds., 2009).

6. Henry Brooke, *A Brief Introduction: The Origins of Punitive Damages*, PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 1 (Helmut Koziol & Vanessa Wilcox eds., 2009); ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 394 (Pearson 5th ed. 2008); Joni Hersch & W. Kip Viscusi, *Punitive Damages by Numbers: Exxon Shipping Co. v. Baker*, 18 S. Ct. ECON. REV. 262 (2010), citing *Exxon Shipping Co.*, 554 U.S. at 481; Bradley Raboin, *PUNISH THE CROWN, BUT PROTECT THE GOVERNMENT: A COMPARATIVE ANALYSIS OF STATE TORT LIABILITY FOR EXEMPLARY DAMAGES IN ENGLAND AND PUNITIVE DAMAGES IN THE UNITED STATES*, 24 CARDOZO J. INT'L & COMP. L. 262 (2016).

7. JASON TALIADOROS, *THE ROOTS OF PUNITIVE DAMAGES AT COMMON LAW: A LONGER HISTORY*, 64 CLEV. ST. L. REV. 253 (2016); Hersch & Viscusi, *id.* at 262 (citing *Exxon Shipping Co.*, 554 U.S. at 482); Brooke, *id.* at 1; COOTER & ULEN, *id.* at 394; SEBOK, *supra* note 5, at 155.

8. Acknowledging criticism of punitive damages, see *Exxon Shipping Co.*, 554 U.S. at 497.

9. These were part of the opinions expressed by opponents to exemplary damages during the Opinion Consultation carried out by the English Law Commission in 1995. See Brooke, *supra* note 6, at 2. See also Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 371 (2003).

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safety standards that are at the origin of government corruption,<sup>10</sup> corporate negligence<sup>11</sup> and a social culture that worries little about the consequences of accidents to other people<sup>12</sup> or the harm to the environment.<sup>13</sup>

In light of their foreign origin, the suitability of the Mexican Supreme Court's adoption of punitive damages must be analyzed under some methods of comparative law. In particular, we use the functional method to determine whether punitive damages under the American legal system are even comparable to those that were just introduced into Mexico, and which ones fulfill their function better.<sup>14</sup> We also frame our analysis within the theory of legal transplants, the metaphor that comparatists use to explain the movement of legal rules from one legal system to another.<sup>15</sup> We conclude that the legal transplant carried out in Mexico has a few problems that concern both the incorrect understanding of the adopted rule

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10. We do not submit that punitive damages should be awarded against the State, but corruption has encouraged citizens and companies to breach safety regulations that led to accidents and damages to victims and that could have been detected by government agents. For example, wrongful construction of a building that gets the final occupational government permit through bribes.

11. In Mexico, negligence practices among corporations are frequent due to the possibility of operating without being detected by law enforcement agencies.

12. To some extent, one may say that such is a characteristic of Mexican culture. Mexican society gives to physical danger and death less importance than other cultures do. Mexican poet Octavio Paz once said that "[t]he Mexican ... is familiar with death, jokes about it, caresses it, sleeps with it, celebrates it. True, there is as much fear in his attitude as in that of others, but at least death is not hidden away: he looks at it face to face, with impatience, disdain or irony: If they are going to kill me tomorrow do it now." OCTAVIO PAZ, *EL LABERINTO DE LA SOLEDAD Y POSTADA* 22 § 8 (Fondo de Cultura Económica, 1992).

13. In the United States, punitive damages are often considered by some scholars as a signal virtue of the American tort system and a necessary and unique mechanism to protect its citizenry, especially against the risk of corporate malfeasance. See T. KOENIG & M. RUSTAD, *IN DEFENSE OF TORT LAW* 69 ff (NYU Press 2003).

14. RALF MICHAELS, *The Functional Method of Comparative Law*, *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 342 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

15. In Section 3 below we argue that irrespective of whether the Supreme Court of Mexico has created new law in contravention to its judicial role and the division of powers clause in the Mexican Constitution or whether it was simply uncovering old Mexican law by means of a new interpretation on the scope of moral damages, it has, as a matter of fact, imported into Mexican law a new legal institution of foreign origin, thus, performing a legal transplantation in the way Alan Watson explained it in its work *Legal Transplants: An Approach To Comparative Law*: legal transplants is the phenomenon of "moving of a rule...from one country to another." See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (U. of Ga. Press 1993).

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and the incompatibility of the host legal system. Punitive damages, as they stand now in Mexico, may not properly accomplish the function that punitive damages have in the United States, i.e., to effectively and fairly punish tortfeasors and dissuade potential ones,<sup>16</sup> unless there is some post-transplant adjustments.

The Mexican Supreme Court's decision is already a great step forward in this field, but regrettably insufficient. The limited role of judicial precedents in Mexico, that is, the Court's task to interpret the law only and the constitutional restriction to create new law,<sup>17</sup> means that it would take many years before Courts in Mexico develop proper guidelines for the adequate and complete transplantation of punitive damages. This article aims at contributing to the scholarly discussion on the correct understanding and adoption of punitive damages in Mexico.

The following section summarizes the facts, procedural history, and rulings of the Supreme Court's decision on February 26, 2014 that awarded punitive damages for the first time in Mexico. Section Three discusses why the aforementioned decision amounts to a legal transplant irrespective of whether the Supreme Court intended to create a new law or simply to uncover old Mexican law by interpreting the scope of moral damages. Section Four reviews the criteria to determine the degree of success of a legal transplant. Section Five highlights specific problems and forecasts the results of the transplantation of punitive damages in Mexico. Section Six proposes some changes and adjustments to the Mexican punitive damages. Section 7 concludes.

## **2. The Supreme Court of Mexico's Decision of Feb. 26, 2014**

A summary of the facts of this decision is essential to understand the types of tort claims that the Supreme Court of Mexico purported to address with the award of punitive damages. A brief overview of the procedural history and rulings of this case will also allow the readers who are unfamiliar with Mexico's legal system to understand the components of civil liability and indemnity of which the new punitive damages are now a part of.

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16. Brooke, *supra* note 6, at 1; COOTER & ULEN *supra* note 6, at 394; Hersch & Viscusi, *supra* note 6, at 262, citing Exxon Shipping Co., 128 S. Ct. at 2615.

17. See Section 3 below.

## 2.1 The Facts

In September 2010, the victim, a young man, traveled to the Mexican beach city of Acapulco to stay at the Mayan Palace Resort (the “Hotel”) and celebrate the Mexican Independence Day.<sup>18</sup> The victim and three of his friends were kayaking in the Hotel’s artificial lake, and their kayak capsized.<sup>19</sup> Unfortunately, an underwater water pump that had not received proper maintenance for years had caused the artificial lake to become electrified.<sup>20</sup> Approximately twenty-five minutes passed before the Hotel staff could shut down the electricity to allow for the victim to be rescued from the water.<sup>21</sup> The Hotel had no emergency protocols for this type of case.<sup>22</sup> The lifeguards had to wait until the victim’s girlfriend and her companion were on shore to rescue the victim and his friends.<sup>23</sup> Other guests at the hotel administered first aid to the victim.<sup>24</sup> It took the staff some twenty minutes to take the victim to the Hotel clinic after being pulled out from the water.<sup>25</sup> The Hotel had no ambulance, so it took extra forty minutes for an ambulance to finally pick up the victim.<sup>26</sup> Unfortunately, by the time the ambulance finally took the victim to a hospital, he had no vital signs.<sup>27</sup>

## 2.2 The First Instance and Appellate Proceedings

On February 21, 2011, the victim’s parents sued the Hotel before the Superior Tribunal of Mexico City, seeking compensation for moral damages pursuant to Article 1916 of the Mexico’s City Civil Code.<sup>28</sup> The concept of moral damages is a specific type of injury to one’s self-esteem, affections, relationships, etcetera, and shares some similarities to the concept of pain and suffering under the common law system. Like pain the suffering, the indemnity for moral damages is also compensatory by

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18. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 116.

19. *Id.*

20. *Id.*

21. *Id.* at 117.

22. *Id.* at 116.

23. *Id.* at 117.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. This provision has adopted Article 1916 of the Federal Civil Code that serves as a model for all other States Civil Codes. The Federal Civil Code supplements various Federal laws, including the Code of Commerce that applies to all trade transactions in Mexico.

nature.<sup>29</sup> On August 9, 2012, the Superior Tribunal of Justice of Mexico City awarded eight million Mexican pesos to the victim's parents as moral damages.<sup>30</sup> Both parties appealed and the matter was turned over to the Appeals Chamber of the Superior Tribunal of Justice of Mexico City. The victim's parents requested, among other things, to be compensated in addition to the moral damages of eight million Mexican pesos, to distinguish the indemnity granted for the actual physical loss from moral damages, as well as a revision of the criteria considered in calculating the moral damages.<sup>31</sup> On the Hotel's side, it argued that the trial court had infringed several evidence rules and that, in any event, the victim's parents had not demonstrated that the Hotel had any duty to the victim nor had it breached any legal provision or duty of care applicable in the present case.<sup>32</sup> In addition, the Hotel also requested a clearer distinction between actual physical loss and moral damages, and challenged the trial court's calculation of the moral damages which was based on the victim's "life expectations" and the money invested by his parents up to the time of his death.<sup>33</sup> Finally, the Hotel argued that the trial court should have applied the law of the State of Guerrero<sup>34</sup> where the tort conduct took place and thus, the amount of moral damages should not be higher than one-third the amount awarded for actual physical loss,<sup>35</sup> or in the alternative, the amount of moral damages should be calculated pursuant to the rules on indemnity in the Federal Labor Law.<sup>36</sup>

On November 28, 2012, the Appeals Chamber of the Superior Tribunal of Justice of Mexico City issued its decision, and reduced the amount of indemnity for moral damages to one million Mexican pesos. The Appeals Chamber found that in spite of the high degree of liability proved against

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29. See Section 5 below and JORGE A. VARGAS, MEXICAN LAW FOR THE AMERICAN LAWYER 411 (Carolina Academic Press 2009); Jorge A. Vargas, *Moral Damages under the Civil Law of Mexico - Are These Damages Equivalent to U.S. Punitive Damages?*, 35 U. OF MIAMI INTER-AM. L. REV. 266 (2004).

30. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 2.

31. *Id.* at 16-17.

32. *Id.* at 18-21.

33. *Id.* at 22-24.

34. In particular, the Hotel referred to Article 1768 of the Civil Code of the State of Guerrero.

35. This conflict of laws argument was brought to the trial court, but the court did not address it in its decision.

36. In particular, Articles 500-502 of the Mexico Federal Labor Law stipulate some rules on the amount of compensation that employers are required to pay to employees for accidents that take place in the context and during their labor activities.

the Hotel, it was unreasonable to award an indemnity that was fifteen times the value of its share capital. The Appeals Chamber also held that moral damages were not intended to compensate “life expectations” under Mexican law, which should not have been considered by the trial court in determining the amount of indemnity.<sup>37</sup>

### 2.3 Constitutional Claims

Unhappy with the Appeals Chamber’s decision, the victim’s parents filed an *amparo directo* suit to overturn it.<sup>38</sup> More specifically, the victim’s parents sought a declaration that parts of Article 1916 of the Mexico City’s Civil Code were unconstitutional.<sup>39</sup> The victim’s parents argued that the criterion of the “victim’s financial situation” set forth in such a provision to determine the amount of indemnity for moral damages infringed the constitutional rights of equal treatment and non-discrimination.<sup>40</sup> The victim’s parents contended that the relevant criterion to determine the amount of compensation was the actual loss actually caused to the intangible elements of moral damages such as feelings, beliefs, honor and physical appearance.<sup>41</sup>

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37. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 29-30.

38. *Amparo* is a remedy for infringement of constitutional rights. There are two types: *Amparo Directo* and *amparo indirecto*. The differences between the two concern procedures and jurisdiction. The authority responsible in *Amparo Directo* suits is the Collegiate Circuit Court and, exceptionally, the Supreme Court of Justice. *Amparo Directo* may be brought to assert one person’s constitutional right to judiciary protection against a decision of any Mexican court at any level. In *amparo indirecto*, the suit starts at the district court level and the decision of the later may be revised by a Collegiate Circuit Court or the Supreme Court of Justice. *Amparo indirecto* regards the challenge of legislation and administrative decisions that affect the general population. See STEPHEN ZAMORA ET AL., MEXICAN LAW 26667 (Oxford U. Press 2004).

39. Article 1916 of the Mexico City’s Civil Code reads: “El monto de la indemnización lo determinará el juez tomando en cuenta los derechos lesionados, el grado de responsabilidad, la situación económica del responsable, Y LA DE LA VÍCTIMA, así como las demás circunstancias del caso” (emphasis added). We translate here as the following: “The amount of indemnity is to be determined by the judge taking into account the rights infringed, the degree of duty, the financial situation of the tortfeasor, AND OF THE VICTIM, as well as other circumstances of the case” (emphasis added).

40. As explained by the Supreme Court of Mexico in the decision at stake, the right to equal treatment and nondiscrimination is found in Article 1 of the Mexico Constitution, Articles 1 and 2 of the Universal Declaration of Human Rights, the Preamble and Article II of the Inter-American Declaration of the Rights and Duties of Man, and Articles 1.1 and 24 of the Inter-American Convention on Human Rights. See Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 102.

41. *Id.* at 33-34.

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The *amparo directo* claim was first registered in the First Circuit with the Second Collegiate Tribunal under docket number 30/2013. However, in light of the importance of determining whether Article 1916 of the Mexico's City Civil Code was discriminatory, considering that the victim's financial situation should be taken into account for calculating the amount of indemnity, on March 1, 2013, the victim's parents requested the Supreme Court of Mexico to exercise its *certiorari* power to decide the *amparo directo* claim.<sup>42</sup> On March 29, 2013, the First Chamber of the Supreme Court of Mexico agreed to exercise its *certiorari* power to decide the case.<sup>43</sup>

#### 2.4 The Supreme Court's Rulings

The Supreme Court of Mexico started the ruling part of its decision by providing the legal framework where moral damages operate, as well as their definition. On the former, the Court explained that moral damages are part of the compensation, together with actual physical losses, afforded for both contract and tort<sup>44</sup> injuries.<sup>45</sup> With regard to their definition, the Court refer to Article 1916 of the Mexico's City Civil Code which states that "moral damages are any loss caused to a person's feelings, affections, beliefs, decorum, honor, reputation, privacy, and other physical aspects or self-esteem".<sup>46</sup> Then, the Court explained that the notion of moral damages focuses on non-physical or spiritual interests that must be protected, including anguish, afflictions, humiliation, suffering, or psychological pain.<sup>47</sup>

The Supreme Court of Mexico also explained that there are three subspecies of moral damages. First there is the loss of honor, which includes damage to someone's personal image and privacy.<sup>48</sup> Second, there is the cosmetic loss, which reflects in the mortification of the victim as a

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42. In Mexico, the writ of certiorari is known as *facultad de atracción*, whereby the Supreme Court may decide to review a lower court decision, in lieu of leaving a Collegiate Circuit Court with original jurisdiction to decide the *Amparo Directo* claims. This prerogative of the Supreme Court of Mexico is found in Article 107(v), last paragraph of the Mexico Constitution.

43. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 4.

44. In the words of the Supreme Court of Mexico as "the legal duty not to harm other." Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 38

45. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 38-39.

46. *Id.* at 42.

47. *Id.* at 43.

48. *Id.* at 44.

consequence of harm to her own body.<sup>49</sup> Third, there is the harm to feelings, causing affliction to the victim.<sup>50</sup>

In addition, the Supreme Court developed that indemnity for moral damages redresses both the pecuniary consequences or loss that may be calculated with some certainty and the non-pecuniary consequence or loss that cannot be quantified with exactness but is certain that occurred. The first category includes missing revenues as a consequence of the slowdown of work activities caused by depression.<sup>51</sup> The second category regards, for example, the misery caused by the breach of a transport contract that ruins the victim's holiday or honeymoon. The Court also confirmed that the indemnity granted for moral damages may cover both present and future losses,<sup>52</sup> and that the right to moral damages is autonomous to the right to actual physical damages.<sup>53</sup>

### 2.5 The Calculation of Indemnity For Moral Damages

The Supreme Court of Mexico pointed out that the amount of indemnity to be granted by courts for moral damages was discretionary,<sup>54</sup> but subject to the criteria in Article 1916 of the Mexico City Civil Code<sup>55</sup> and the right to a "fair indemnity" in Article 1 of the Constitution of Mexico and other human rights treaties.<sup>56</sup> With regard to criteria in Article 1916 of the Mexico City Civil Code, the Court explained that in the calculation of moral damages, regard is to be had of the rights infringed, the degree of liability and financial situation of the tortfeasor, and the victim, and other surrounding circumstances of the case. In relation to the criterion of financial situation of the victim, which was the basis of the victim's parents *amparo directo* claim, the Court decided that it was unconstitutional to consider the economic situation of the victim in order to calculate the non-pecuniary consequences of moral damages, but constitutional to consider the economic situation of the victim in order to determine the amount of the pecuniary consequences of moral damages.<sup>57</sup>

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49. *Id.* at 45.

50. *Id.* at 46.

51. *Id.* (citing RAMÓN D. PIZARRO, DAÑO MORAL. PREVENCIÓN. REPARACIÓN. PUNICIÓN. EL DAÑO MORAL EN LAS DIVERSAS RAMAS DEL DERECHO 35 (Hammurabi 2d ed. 2004)).

52. *Id.* at 47.

53. *Id.* at 47-49.

54. *Id.* at 92.

55. *Id.* at 93.

56. *Id.* at 85 ff.

57. *Id.* at 106-09, 112.

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What came next in the Supreme Court's decision was not part of the arguments raised by the victim's parents, but an important holding by the Court which not only had effects on the amount of damages finally awarded in this specific case, but also in the scope of moral damages under Mexican law. The Supreme Court held that, on the basis of the criterion of "degree of liability and financial situation of the tortfeasor" in Article 1916 of the Mexico City Civil Code and the human rights principle of fair indemnity, punitive damages may be awarded by courts under the head of moral damages.

In relation to Article 1916 of the Mexico City Civil Code, the Supreme Court of Mexico explained that the express mandate of this provision considers the degree of liability and financial situation of the tortfeasor in the calculation of moral damages, coupled with its legislative history, that treats damages not only as a means to redress any pain but also to punish the tortfeasor, should lead to a conclusion that the amount of indemnity awarded to compensate a victim's losses shall be enough to redress such loss and to condemn the tortfeasor's conduct.<sup>58</sup> In particular, the Court considered that the statement "tort compensation does not only redress the victim and punish the tortfeasor" in the legislative records that led to the latest changes to Article 1916 on December 31, 1982, meant that the indemnity was not capped by the actual loss but that the amount may be affected by other aggravating elements, i.e., the tortfeasor's conduct and his/her financial situation.<sup>59</sup> However, it is worth noting that the Supreme Court used the phrase "compensate the damages caused to the victim,"<sup>60</sup> which is important for the analysis that we advance in Section Five below.

With regard to the right to a fair compensation in Article 1 of Mexico's Constitution and Article 63.1 of the Inter-American Convention on Human Rights, the Supreme Court of Mexico first cited the decision of the Inter-American Court of Human Rights in *Cantonal Benavides v. Peru*, endorsing the view that the victim's right to adequate compensation is, as a second facet, "sending a message of official disapproval for the violations of the human rights in question and the commitment that they will not happen again."<sup>61</sup> Relying on this decision and the statement of the Argentinean scholar RAMÓN D. Pizarro, the Supreme Court of Mexico concluded that damages compensation is a social expression of disapproval

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58. *Id.* at 89-91.

59. *Id.* at 89-91.

60. *Id.* at 91.

61. *Id.* at 86, n.121 (citing *Cantonal Benavides vs. Perú*, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 53 (Dec. 3, 2001).

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of any legal wrong, and if punishment is not granted, the expressed disapproval practically disappears.<sup>62</sup>

The Supreme Court of Mexico did not clarify whether punitive damages were to be awarded for the pecuniary consequences of moral damages or only for the non-pecuniary consequences of moral damages. We understand this as an oversight of the Court rather than a mistake in the ruling. From the logic of this decision, we submit that punitive damages could only be part of the non-pecuniary consequences of moral damages since the amount of indemnity for the pecuniary consequences are limited to the spiritual loss that may be calculated with certainty, thus, its quantum may not be affected by other aggravating elements, such as the degree of liability or financial situation of the tortfeasor.

As a consequence, the Supreme Court of Mexico awarded over 30 million Mexican pesos in moral damages to the victim's parents in light of the gross infringement of the victim's rights, the high degree of liability, and financial situation of the defendant.<sup>63</sup> It also redesigned the scope of civil liability (tort and contractual)<sup>64</sup> by adding punitive damages under the head of moral damages as the diagram in Chart Number One (Mexico) summarizes at the bottom of this article.

### 3. The Transplant of Punitive Damages Into Mexican Law

In the February 2014 decision, the Supreme Court of Mexico was explicit about the American origin of the punitive damage notion that it adopted. The Court cited American scholars to explain the punitive and deterrent nature that the punitive award has on the defendant.<sup>65</sup> It also referred to Pizarro to assert that "damages compensation is a social

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62. *Id.* at 88, n.128 (citing PIZARRO, *supra* note 51, at 532).

63. *Id.* at 124.

64. Moral damages may also be granted in contract law claims under Mexican law, and the Supreme Court of Mexico did not limit the availability of punitive damages to tort claims. However, in Section 6 we submit that part of the changes in the adoption of punitive damages should be to limit their awards to tort law claims.

65. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 87, nn.125-26. The Supreme Court of Mexico relied on the following American journal articles (somehow old for the case): David W. Owen, *Punitive damages in products liability litigation*, 74 MICH. L. REV. 1279 (1976); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1988); Fred W. Morgan, *The Evolution of Punitive Damages in Product Liability Litigation for Unprincipled Marketing Behavior*, 8 J. OF PUB. POL'Y & MARKETING 279 (1989); Nanette A. O'Donnell, *Punitive damages in Florida negligence cases: How much negligence is enough?*, 24 U. OF MIAMI L. REV. 803 (1988).

expression of disapproval of any legal wrong, and if punishment is not granted, the expressed disapproval practically disappears.”<sup>66</sup> However, in that instance, it is doubtful whether Pizarro was referring to punitive damages in the context of the common law legal systems or, rather, to a general effect that compensating the actual loss may have over a tortfeasor. In fact, Argentinean law does not recognize punitive damages. The draft bill for the new Argentinean Civil and Commercial Code, which entered into effect on August 1, 2014, contemplated the award of punitive damages in Article 1714.<sup>67</sup> However, this proposal was rejected in its final bill.<sup>68</sup> The Anglo-American background of the punitive damages awarded by the Supreme Court of Mexico is also evidenced in the Concurrent Opinion issued along with the commented decision.<sup>69</sup> In Justice Cossío Díaz’ concurrent opinion, he recommended to look at American scholarship and cases from the Supreme Court of the United States to determine the just amount of punitive damages in relation to the actual physical damage awarded to a victim.<sup>70</sup>

But why exactly did the Supreme Court of Mexico apply a common law legal institution for the first time as part of Mexican law? This case had no relation or contacts with any foreign law or jurisdiction. The plaintiff in the *amparo directo* claim did not bring any theory regarding the relevance of punitive damages as part of the indemnity under a common law system that may be applicable to, for example, the holding company of the Hotel. It was the Supreme Court of Mexico, on its own motion and pursuant to its *iura novit curia* power,<sup>71</sup> that decided to award punitive damages in this case under Mexican law.

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66. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 88, n.128 (citing PIZARRO, *supra* note 51, at 532).

67. See Natalia Soledad Colarusso, Daños punitivos en el nuevo Código Civil y Comercial. La Inclusión Que No Fue § 2017 (Editorial Jurídica ed., UTSAPRA 2015), [http://server1.utsupra.com/site1?ID=articulos\\_utsupra\\_02A00393369773](http://server1.utsupra.com/site1?ID=articulos_utsupra_02A00393369773).

68. *See id.*

69. Supreme Court of Mexico, First Chamber, *Voto Concurrente* (“Concurring Vote”) by Justice José Ramón Cossío Díaz, A.D. 30/2013, *supra* note 3, at 9-10, nn.5-7.

70. *Id.* The Concurrent Opinion made reference to *Pacific Mut. Life Ins. Co. v. Cleopatra Haslip Eta Al.* 499 U.S. 1 (1991) and *Exxon Shipping Co.*, 554 U.S. 471 (2008), and cited Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational?*, 26 J. LEGAL STUD. U. OF CHI. (1997).

71. *Iura novit curia* is a legal principle in most civil law jurisdictions, including Mexico, pursuant to which “the court knows the law”, i.e., that the parties to a legal dispute do not need to plead or prove the law that applies to their case. *See* Maria do Carmo Henriques Salido, et al., *El Principio Procesal Iura Novit Curia En La Jurisprudencia Del Tribunal Supremo*, 64 REVISTA DE LENGUA I DRET, J. LANGUAGE & L. 1, 3 (2015) (Spain).

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For a common law jurist, what the Supreme Court of Mexico did was simply to expand the law on torts by adding punitive damages to the scope of indemnity afforded to victims under some circumstances. In other words, a common law jurist, from his own perspective, could consider, and rightly so, that the Supreme Court of Mexico created new rules on tort damages. The background of this view is that the law of torts in the United Kingdom and the United States has historically been considered a judge-made law—or common law in its narrow sense.<sup>72</sup> Judge-made law is developed from judgments handed down in courts and is most often used to make decisions in areas that have not been legislated by the legislative branch.<sup>73</sup> Judge-made law can be both creation of new rules and interpretation of existing ones.<sup>74</sup> The origins of the tort law particularly illustrates the creation of law by courts. Tort law, as a part of the common law, evolved as a reflection of the customs and practices of the local communities in Anglo-Saxon and Norman regions that were upheld in the decisions made by the royal courts of England.<sup>75</sup>

The origins of punitive damages, as part of tort law, are not different. Sir Henry Brooke reported that punitive damages made their appearance in England in the 1760s, during a series of cases in which “[i]ndividuals suffered wrongful interference with their liberty at the hands of public officials and, in the absence of a code, the English common law judges awarded non-compensatory damages – or told juries that they might award such damages—if the defendant’s behaviour seemed bad enough, without troubling too much to classify these damages under any particular heading.”<sup>76</sup> Similar awards followed over the next 200 years and transited

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72. Ronald W. Eades, *Attempts To Federalize And Codify Tort Law*, 36 TORT & INS. L.J. 1, 527-28 (2000).

73. William Minor Lile, *Judge-Made Law*, 15 VA. L. REV. 527-28, 530 (1929).

74. John Barker Waite, *Judge-Made Law And The Education Of Lawyers*, 30 A.B.A. J. 253, 253 (1944).

75. During the early years of the development of tort law in the United Kingdom and the United States, it would have been hard to imagine it as anything other than decisions on a case-by-case basis. In this regard, the ability of tort law to grow and change with the times arose by virtue of two important factors: tort law is court-created common law, and tort law is local law. Tort law is not bound by lengthy, complex, unbending legislation, since courts could review cases and make decisions based upon concepts of justice. As the tort rules developed, they could be reviewed, revised, overruled, and improved with each new case. See Eades, *supra* note 72, at 1-2.

76. Brooke, *supra* note 6, at 1. One of those cases was *Wilkes v. Wood*, 98 Eng. Rep. 489, 489 (1763), where Mr. Wilkes’s house was the subject of a search under a general warrant of arrest, and he brought an action of trespass against the official who executed the search. His counsel asked for “large and exemplary damages,” since trivial damages would

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to the English colonies including the United States; not only in different types of intentional and unintentional tort cases including assault, false imprisonment, defamation, seduction, and malicious prosecution, but also in cases of trespass to lands, and eventually trespass to goods. Finally, in 1964, the House of Lords decided in *Rookes v. Barnard* that such damages were specifically identified as “punitive” or “exemplary.”<sup>77</sup>

Contrary to the role of common law courts, Mexican courts have no power to create new rules but only to interpret the provisions of statutes.<sup>78</sup> Article 49 of Mexico’s Constitution establishes that the Federal Government is divided into three branches through which it exercises its powers: legislative, executive, and judicial. The same provision states that two or more of these powers may not be performed by one individual person or corporation, nor may the legislative power alone be assigned to one individual.<sup>79</sup> This division of powers clause means that the task to create or derogate the law is exclusively assigned to the legislative branch of the government<sup>80</sup> and that the courts, through which the judicial branch exercises its own power,<sup>81</sup> may not interfere in such a task.<sup>82</sup> In addition, Article 94, paragraph 10, of Mexico’s Constitution explicitly states, “the law (which obviously means the Congress created law as the only form of law that may exist according to the division of powers clause in Article 49 above) will set forth the criteria to determine the binding case law

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not put a stop to such proceedings. Lord Chief Justice Pratt instructed the jury that “[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.” See Taliadoros, *supra* note 7, at 258.

77. *Rookes v. Barnard*, 1 All England Law Reports 367 (1967), cited in VANESSA WILCOX, *Punitive Damages in England*, PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 7 (Helmut Koziol & Vanessa Wilcox eds., 2009); see also Taliadoros, *supra* note 7, at 255.

78. ZAMORA ET AL., *supra* note 38, at 82.

79. Except in cases of war or national security where the Executive power through the President may temporality limit or suspend the rights and warranties of the population pursuant to Article 29 of the Mexico Constitution or when the Executive power legislates on import or export tariffs and taxes in order to govern international trade of goods and the national economy stability pursuant to Article 131 of the Mexico Constitution.

80. “Codification is thought to be consistent with democratic principles in that it assigns the task of creating law to legislators”, ZAMORA, ET AL., *supra* note 38, at 83.

81. Article 94 states that the Federal Judicial Power is exercised through a Supreme Court, the Electoral Court, the Collegiate and Unitary Circuit Courts and the District Courts.

82. “Norms in a code have legal validity because they have been adopted by the legislature ... In applying code provisions to specific cases, judges are to decide cases in accordance to the will of the legislature,” ZAMORA, ET AL., *supra* note 38, at 82.

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(*'jurisprudencia obligatoria'*) issued by Federal Courts on the INTERPRETATION of the Constitution and general norms” (emphasis added).<sup>83</sup> The principle that Courts may only interpret legislatively-enacted laws is also reinforced by the due process clause in Article 14 of Mexico’s Constitution that provides that “in any civil proceedings, the final decision shall be in accordance with the text or judicial INTERPRETATION of the law” (emphasis added). In both cases, Mexico’s Constitution clearly addresses the interpretation rather than the creation of the law.<sup>84</sup> This division of powers maxim has also been adopted by the local Constitutions of 32 Mexican states, which means that local state courts are also limited in their judicial roles to only interpret local laws.

The above explains why the Supreme Court of Mexico could not have created a new law in the way common law courts have been doing for many centuries, with regard to tort law and punitive damages. In its goal to redesign the compensation rules for victims in tort cases, the Supreme Court of Mexico had recently decided the unconstitutionality of some federal statutory provisions, which, for example, placed a cap on the compensation of damages.<sup>85</sup> But with regard to punitive damages, it seems that the Supreme Court of Mexico had no choice but to perform the transplantation of a foreign legal institution into a system of tort indemnity that has been, historically, compensatory in nature. Did the Supreme Court of Mexico breach the separation of powers clause in Article 49 of Mexico’s Constitution with the application of punitive damages? The answer may be no. The Supreme Court did not incorporate punitive damages as a distinct type of damages, independent from compensatory damages. The interpretative role of courts in many civil law jurisdictions forced the Supreme Court of Mexico to simply construe that punitive damages were part of the compensation afforded by the statutory law under the head of moral damages. In Section Five of this article, we submit that this will represent a problem for the proper functioning of punitive damages in Mexico.

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83. *Id.* at 84: “In a civil law country such as Mexico, the creation of binding judicial precedent, not being part of the legal tradition, must be established by legislation.”

84. *Id.* at 82: “Self-contained codes are expected to prevent judges and others from creating rules that would contradict the spirit of the code.”

85. See Supreme Court of Justice, First Chamber, *Amparo Directo* 1068/2011, Oct. 19, 2011. In the case at hand, Article 62 of the Civil Aviation Law provides that the indemnity for the damages incurred by passengers may not be three times higher than what is stipulated in Articles 500-502 of the Mexico Federal Labor Law, which set the rules on the amount of compensation that employers are required to pay employees for accidents that take place in the context and during their labor activities.

In spite of the whether the Supreme Court's move was too subtle to be considered the result of pure interpretation of statutory law rather than the breach of the division of power clause in Mexico's Constitution, the result is the adoption a foreign legal notion into Mexico's legal system. Scholarship has proposed different metaphors and concepts to describe and explain the effects of these adoption phenomena, the most known being legal transplants or transplantations. Explained for the first time in 1974 by Alan Watson, in his work *Legal Transplants: An Approach to Comparative Law*,<sup>86</sup> legal transplant is the phenomenon of "moving a rule... from one country to another."<sup>87</sup> In fact, this represents one of the most common means of legal change because legal actors tend to borrow what is needed from other legal systems to solve issues or fill gaps in the local legal system in a pursuit to create different or better laws.<sup>88</sup> Watson compared legal transplants to the transplants of human organs, suggesting that a successful legal transplant will "become part of that body just as the rule or institution would have continued to develop in its parent system," and grow in its new body.<sup>89</sup> This medical metaphor of legal transplants refers to the surgical understanding of transplant and is the most common metaphor.<sup>90</sup> It compares the process of moving the law from one place to another to the search for a compatible donor so as to provide hope to other systems of the world community.<sup>91</sup> Like a medical transplant, the success of the legal transplant depends on making the host system believe that the adopted rule already belonged to it. In the same line of thought, a legal transplant may fail because of the incompatibility of the host legal system's own condition with the inherent features of the rule received.<sup>92</sup>

The metaphor of medical transplants has its own limits in explaining what actually happens when a rule is moved from one legal system to

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86. Watson was not the first one to use the concept of legal transplant. Legal historian Frederik Parker Walton, in his article "*The Historical School of Jurisprudence and Transplantations of Law*," used the concept of "legal transplantation" in a critique to the then popular views of the historical school of jurisprudence. Walton, like Watson but a half century later, pointed to the regularity of occurrences of transplantation of law. See F. P. Walton, *The Historical School of Jurisprudence and Transplantations of Law*, 9 J. COMP. LEGIS. & INT'L L. 183, 183 (1927).

87. *Id.* at 21.

88. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L.J. 1, 2 (1974); BEATA KVIATEK, *EXPLAINING LEGAL TRANSPLANTS: TRANSPLANTATION OF EU LAW INTO CENTRAL EASTERN EUROPE* 31 (Wolf Legal Publishers 2015).

89. WATSON, *supra* note 15, at 27.

90. Kahn-Freund, *supra* note 88, at 5-6; KVIATEK, *supra* note 88, at 63.

91. KVIATEK, *supra* note 88, at 63.

92. *Id.*

another. As noted by one scholar, legal transplantations occurred not because of the contrasts between healthy and ailing legal systems, but because of the wider demand by some actors of a legal system that promotes change in their society.<sup>93</sup> In this regard, some assert that different metaphors, such as the botanical one, may be more suitable than the medical metaphor to illustrate what Watson had in mind. The transplants of plant species, for example, show that seeds may be planted and engrafted on foreign soil, where they wilt, vegetate or prosper.<sup>94</sup> Hans W. Baade explains that a successfully transplanted crop flourishes in both the original and the new environment.<sup>95</sup> Although there may be differences of color, size, or demand in the fruits of the transplanted seeds, the original land will still have its own crops, while the medical metaphor assumes that the donated organ is removed from the donor system.<sup>96</sup> Besides, in the botanical metaphor, there is always space for the adaptation or alteration in the recipient system—for example by installing greenhouses over the recipient land to achieve the proper temperature or humidity for successful growth—whereas the medical metaphor suggests that the recipient body will not change in essence.<sup>97</sup>

Other alternative concepts proposed to depict the legal transfer of one rule from one place to another.<sup>98</sup> The proponents of these alternatives to explain the same legal phenomena often consider that the original notion of legal transplants is imperfect because of the lack of flexibility in assuming that the outcome of legal transplantation is either a success or a failure, and its static meaning as opposed to the dynamic concepts that they advance.<sup>99</sup> Some see legal transplantation as the process of circulation of legal ideas because it refers to movement and continual flow of legal concepts and paradigms.<sup>100</sup> Others focus on the transformations that legal

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93. *Id.* at 64.

94. *Id.* (citing Hans W. Baade, *Transplants of Laws and of Lawyers*, JUSTICE IN PARTICULAR: FESTSCHRIFT IN HONOUR OF PROFESSOR P. J. KOZYRIS 2 (Phaedon J. Kozyris ed., 2007)).

95. *Id.*

96. KVIATEK, *supra* note 88, at 64.

97. *Id.* at 65.

98. Alternative terminology includes collective colonization, legal irritants, layered-law, hyphenated-law, and competition systems. Images such as contamination, inoculation, irritation, reception, imposed reception, concerted parallel development, and transposition. See Esin Örucü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205, 207 (2002).

99. KVIATEK, *supra* note 88, at 65.

100. Edward M. Wise, *The Transplant of Legal Patterns*, 38 AM. J. COMP. L. 1, 2 (1990).

ideas undergo when adopting a rule into a different legal system,<sup>101</sup> or on the irritation and unexpected events that are triggered when one foreign rule is imposed on a domestic legal culture.<sup>102</sup> Finally, some authors proposed to call it “legal diffusion,” because a lot of legal borrowing is voluntary,<sup>103</sup> or legal transposition as it is used in music where each note takes the same relative place on the scales; the transposition is done to suit the particular instrument or voice range of the singer.<sup>104</sup>

The references to the American law on punitive damages in the February 2014 decision and its two Concurrent Opinions, show that what the Supreme Court of Mexico did was to move a rule that exists in the United States legal system to the Mexican one. We favor the idea that this move should be understood through the lenses of the botanical metaphor of legal transplants rather than the medical one. The Supreme Court of Mexico’s intention was to plant the seeds of punitive damages into the Mexican soil, hoping to see them flourish there, just as they do in their original environment. Since the beginning, however, there have been doubts about whether the Mexican legal system was the proper terrain for growth of punitive damages. In the Concurrent Opinion issued by Justice Pardo Rebolledo, he asserts that if the Supreme Court of Mexico intended to import punitive damages from the United States, it needed to develop further its application parameters and distinguish them from the notion of “fair indemnity” because their goal is to punish rather than to compensate.<sup>105</sup> In this regard, the botanical metaphor suits this case because of the implied possibility to adapt the recipient system; as we anticipate should happen in Section Six, in light of the current problematic situation we describe in Section Five.

With regard to the alternative metaphors, we consider them as useful supplements to the botanical metaphor of legal transplants. At the end of the day, the Supreme Court of Mexico would not have come up with the idea of enlarging the scope of damages indemnity but for the circulation of

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101. Máximo Langer, *From Legal Transplants To Legal Translations: The Globalization Of Plea Bargaining And The Americanization Thesis In Criminal Procedure*, 45 HARV. INT’L L.J. 1, 4 (2004).

102. In other words, post-transplantation effects “unleash an evolutionary dynamic in which the external rules meaning will be reconstructed and the internal context will undergo fundamental change.” See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

103. KVIATEK, *supra* note 88, at 67.

104. Örücü, *supra* note 98, at 207.

105. Supreme Court of Mexico, *Voto Concurrente* by Justice Jorge Mario Pardo Rebolledo, A.D. 30/2013, *supra* note 3, at 4.

America legal ideas and paradigms that constantly flow from north to south.<sup>106</sup> We also agree that the result of legal transplants is not necessarily a failure nor a success but that adoption of a legal institution undergoes a transformation and triggers different post-transplantation effects, some of which are more desirable than the others. The insertion of the punitive damages into the Mexican legal system was voluntary. One could even say that the Supreme Court of Mexico was aware of the fact that the Mexican legal system, as a musical instrument, did not have the same scale of notes to apply punitive damages as a distinct type of damages to the compensatory ones and still decided to transpose them. Be that as it may, the legal transplant occurred because the Supreme Court of Mexico sought to implement changes in the law of damages that will as a consequence take the Mexican society toward a different direction. The next step is to determine what the chances of success in the receptor system are. In the next section, we revisit the criteria proposed by prominent comparativists to forecast the results of transplanted legal rules.

#### 4. The Criteria to Assess a Legal Transplant's Effectiveness

The simple act of borrowing a legal rule is a phenomenon with important social implications. Alan Watson asserts that there are four aspects of legal transplants, which are important to explain why reception of foreign law happens.<sup>107</sup> First, a jurist borrows a legal rule when such is economically efficient. This aspect is called practical utility; which appeals to those who have the task of legislating law because of the hard labor of thinking that it saves.<sup>108</sup> The second aspect is chance. Watson suggests that the fact that a specific foreign rule is incorporated into a host

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106. Geopolitical elements and economic integration have always played a role in Mexico's adoption of legal institutions from the United States, in particular in the field of trade law. See Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 L. & POL'Y IN INT'L BUS. 391, 392 ff (1993). Some private law legal institutions in Mexico, such as the trust (*fideicomiso*), came from the United States too. The first Mexican Trust provisions were enacted in 1924 and followed closely the Uniform Fiduciaries Act enacted in the United States in 1922. See CARLOS FELIPE DÁVALOS MEJÍA, *TÍTULOS Y OPERACIONES DE CRÉDITO* 541 (Oxford Univ. Press 2012). But the influence of United States Law is also clear in Mexican Constitutional Law. See generally WATSON SMITH, *Influences from the United States on the Mexican Constitution of 1824*, 4 ARIZONA AND THE WEST (1962).

107. Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 355 (1996).

108. *Id.*; C. J. MILHAUPT & K. PISTOR, *LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 210 (Univ. of Chi. Press 2008).

system responds to unexpected circumstances that make the materials or information about foreign law available at a particular time in the host system.<sup>109</sup> The third aspect that leads to reception of the law is difficulty of clear sight or misunderstanding of the foreign legal institution which is adopted.<sup>110</sup> This is similar to the aspect of chance; the foreign law is believed to be useful to the receptor system because it is highly regarded but its implementation is the result of a misunderstanding.<sup>111</sup> Finally, Watson explains that borrowing a rule from a foreign legal system often reflects the “need for authority” to justify the adoption of a solution that seems to be optimal for the host system.<sup>112</sup>

Watson’s aspects of reception of law describe the motivations and circumstances that lead to borrowing a legal rule. The adoption of punitive damages in Mexico may respond to similar circumstances. The Supreme Court of Mexico referred to the American notion of punitive damages, which has developed its contours and purpose through legal scholarship and case law over the years.<sup>113</sup> Its practical utility was thus an important aspect for the Court. Chance also played its own role. American legal materials and ideas were available to the Supreme Court Justices when drafting the decision.<sup>114</sup> In addition, the transplant of punitive damages into Mexico may not have happened but for the difficulty of clear sight of the Supreme Court regarding the whole legal framework of damages indemnity in the common law. Should the Court have had a clear understanding of the distinctive (punitive) nature that this type of damages has vis-à-vis compensatory damages, it may not have adopted them.<sup>115</sup>

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109. Watson, *supra* note 107, at 340 (1996).

110. *Id.* at 341-45.

111. *Id.*

112. *Id.* at 345-49.

113. See Supreme Court of Mexico, A.D. 30/2013, *supra* note 3, at 87, nn.13, and 125-26; *Voto Concurrente* by Justice José Ramón Cossío Díaz, *supra* note 3, at 9-10, nn.5-7; *Voto Concurrente* by Justice Jorge Mario Pardo Rebolledo, *supra* note 3, at 4.

114. The Supreme Court of Mexico had accessed to the following American journal articles (somehow old for the case): Owen, *Punitive damages in products liability litigation*, *supra* note 65; Owen, *The Moral Foundations of Punitive Damages*, *supra* note 65; Morgan, *supra* note 65, at, 279; and O’Donnell, *supra* note 65, at 803. See Supreme Court of Mexico, A.D. 30/2013, *supra* note 3, at 87, nn.125-26. Justice José Ramón Cossío Díaz had also cited to the following U.S. Supreme Court cases: *Pacific Mutual Life Insurance Company v. Cleopatra Haslip Eta Al*, 499 U.S. 1 (1991) and *Exxon Shipping Co.*, 554 U.S. 471 (2008). See *Voto Concurrente* by Justice José Ramón Cossío Díaz, A.D. 30/2013, *supra* note 3, at 13-14, nn.5-7.

115. Justice Jorge Mario Pardo Rebolledo was the only Justice from the Supreme Court of Mexico that suspected that there may be a misunderstanding about the function of

Finally, it was not a coincidence that the Supreme Court cited American scholars, as well as the case law of the Inter-American Court of Human Rights,<sup>116</sup> or a renowned civil law scholar such as Pizarro.<sup>117</sup> The Supreme Court of Mexico's choice of references reflects a need for authority, although we consider that in that case, the Court also misunderstood their real meaning (see Section 5.3 below).

The motivation or reason for a legal transplant is important because it affects the conduct of the legal community that subsequently interprets and enforces the law and this in turn affects the effectiveness of the legal transplant in the long term.<sup>118</sup> However, Watson's aspects are insufficient to determine the extent to which the transplant of a foreign law may be successful. Comparatists agree that legal transplants are not mechanical processes, and that there is a chance of rejection.<sup>119</sup> In this regard, scholars have submitted that certain conditions are necessary for optimal legal transplantation.<sup>120</sup> In this section, we revisit the criteria suggested by some leading works in this field.<sup>121</sup> The purpose of this review is to frame our analysis about the forecasted results in the transplant of punitive damages into the Mexican legal system.

Otto Kahn-Freund asserted that the merits of the imported law should not be evaluated in isolation; its impact on the broader legal system must be reviewed, including its institutional compatibility.<sup>122</sup> He argues that since *L'Esprit de Lois*,<sup>123</sup> Montesquieu had already warned us that the private and public laws of each nation must be unique for the people for which they were created and, thus, it would be a great coincidence that the laws of one nation could also work for another.<sup>124</sup> Under this view, legal

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punitive damages, which is different to the deterrence effect that compensatory damages could also have. See *Voto Concurrente* by Justice Jorge Mario Pardo Rebolledo, A.D. 30/2013, *supra* note 3, at 4.

116. Supreme Court of Mexico, A.D. 30/2013, *supra* note 3, at 86, n.121 (citing Cantoral Benavides vs. Perú, *supra* note 61, ¶ 53).

117. *Id.* at 88, n.128 (citing PIZARRO, *supra* note 51, at 532).

118. MILHAUPT & PISTOR, *supra* note 108, at 210.

119. See KVIATEK, *supra* note 88, at 72; Kahn-Freund, *supra* note 88, at 7.

120. KVIATEK, *supra* note 88, at 69.

121. These works are the following: Kahn-Freund, THE MODERN LAW JOURNAL (1974); MILHAUPT & PISTOR, *supra* note 108; Örüciü, *supra* note 98; and Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

122. Kahn-Freund, *supra* note 88, at 27.

123. For further reading about this key illustration times' work, see MONTESQUIEU, DE L'ESPRIT DES LOIS (Culture Commune 2013).

124. Kahn-Freund, *supra* note 88, at 6.

transplants could only be successful if the geography, demography, ethnicity, economy, society and political system of the donor country were alike in the recipient country.<sup>125</sup> He reckoned, however, that most of these elements, except for the political and social fit, have lost their importance as a key factor for successful transplantation.<sup>126</sup> He submitted that (already in the 1970s) industrialization, urbanization, and development of communications have greatly reduced the obstacles for transplantation, making the social, economic and environmental conditions more alike in most nations.<sup>127</sup> What remains important for successful legal transplants is to establish compatibility between the host legal system and the socio-political structure of the donor state.<sup>128</sup> Accordingly, the degree to which a rule, say on tort liability, can be transplanted depends on “how closely is [the recipient system] linked with the foreign power structure.”<sup>129</sup> The power structure may be “expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic state play a decisive role in the law making or decision making process.”<sup>130</sup> Kahn-Freund gives one interesting example that shows how variations in the organization of power between one country and another frustrate the transfer of legal institutions. In the early nineteenth century Germany and France attempted to introduced the jury in civil proceedings but failed because the legal profession; both lawyers and judges, rejected it.<sup>131</sup> It did not fit with the accustomed distribution of power between the courts and the bar; expressed in the inquisitorial trial style of these jurisdictions.<sup>132</sup> One may argue that this example shows the importance of the legal culture fit rather than the compatibility with the power structure. But Otto Kahn-Freund shows that in the past, similarly diverging rules have been adopted thanks to their acceptance by the power structure. In particular, the mixed labor courts of of England, which solve disputes between employers and employees, came from France in 1964, and were accepted there irrespective of the royal courts’ tradition.<sup>133</sup>

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125. *Id.* at 8.

126. *Id.*

127. *Id.* at 9.

128. *Id.* at 27.

129. *Id.* at 18.

130. *Id.*

131. *Id.* at 17-18.

132. *Id.*

133. *Id.* at 18.

In contrast, Berkowitz, Pistor, and Richard suggest that a legal transplant is effective if there is demand for the adopted law in the host system.<sup>134</sup> The adopted rule should be able to be used in practice and the legal actors responsible for developing the law need also to be responsive to this demand.<sup>135</sup> Demand will usually take place where the legal actors in the host country are familiar with the basic legal principles of the transplanted law or adaptation to the local conditions occurs.<sup>136</sup> Where these conditions are present the transplanted rule will function just as effectively as in its country of origin country. However, when the host legal system does not share the same basic legal principles of, or its population is not familiar with the transplanted law, the demand for using it will be weak.<sup>137</sup> Countries that receive the foreign legal concepts in this fashion suffer from the “transplant effect,” *i.e.* the mismatch between preexisting conditions and institutions and the transplanted law, which weakens its effectiveness.<sup>138</sup>

In a different work, Milhaupt and Pistor challenge the assumption that legal transplants will fail if they do not fit with the culture of the recipient state. Instead, they argue that demand for the transplanted law alone, and the process by which it is incorporated into the host country’s institutional structure is the key factor for determining how and whether the transplant will work.<sup>139</sup> With regard to the need of demand in the transplantation of a protective legal rule [such as punitive damages] from a decentralized legal system [like the United States in the field of tort law claims]<sup>140</sup> to a more centralized system [like Mexico],<sup>141</sup> the relevant issue is whether there are

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134. Berkowitz et al., *supra* note 121, at 167.

135. *Id.*

136. *Id.* at 168.

137. *Id.*

138. *Id.* at 171.

139. MILHAUPT & PISTOR, *supra* note 108, at 6: “that the nature of legal demand for the transplanted law and the process by which it is incorporated into the host country’s institutional structure significantly affect whether and how the transplant will function.”

140. Decentralized centralized systems allocate law-making and law enforcement activities to multiple agents, including private parties who may exercise extensive rights to initiate law enforcement and to participate in law-making processes. *See id.* In the United States citizen are in charge of redressing the consequences of tortious conducts before the courts, initiating law enforcement by their own. *See ZAMORA, ET AL.*, *supra* note 38, at 521.

141. Centralized systems typically vest law-making powers in the legislative or the executive branch and prefer centralized law enforcement mechanisms of the state. *See MILHAUPT & PISTOR*, *supra* note 108, at 6. In Mexico, individuals are less litigious; the

mechanisms in place to enforce the new rule.<sup>142</sup> Do plaintiffs and lawyers have incentives to bring suits that make use of the new rule? Are judges familiar with the underlying concept or doctrine? Are they inclined to side with the normative implications of the legal change? Demand sufficient to motivate this integrative activity by the local legal community is more likely to exist if the transplanted rule complements the political economy of the host country.<sup>143</sup> Milhaupt and Pistor call this the complementarity between the transplant and the political economy “macro-fit.” What is important is whether the foreign legal rule responds to an actual legal gap in the host country’s institutional structure that is not filled by other mechanisms and whether the rule is likely to be used.<sup>144</sup> Accordingly, the effectiveness of legal transplants will vary depending on how well the new rules adapt to local circumstances.<sup>145</sup> One of these adaptations is from the legal actors themselves: lawyers and judges must gain familiarity with the transplanted rule. Further adaptation may involve removing procedural obstacles to its enforcement in the host legal system and, in general, create the proper environment and incentives for applying the new law.<sup>146</sup> In conclusion, the existence of demand for the foreign rule also depends on the extent to which the changes are aligned with the conduct of local actors, including lawyers, judges, and bureaucrats in applying and enforcing the transplanted law.

In addition, Esin Örüçü stated that “tuning [of the transposed laws] that takes place after transposition by the appropriate actors of the recipient legal system is the key to success.”<sup>147</sup> According to this author, voluntary transplants increase their own receptivity when adjustments are made to foreign legal rule.<sup>148</sup> In this regard, the way in which a foreign rule is transplanted is a more important determinant of success than the source of supply and affinity of the systems involved.<sup>149</sup> For successful

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Executive power is often called to negotiate the compensation for victims of tortious conducts by big corporations. *See ZAMORA, ET AL.*, *supra* note 38, at 521.

142. MILHAUPT & PISTOR, *supra* note 108, at 210.

143. *Id.* at 210-11.

144. *Id.*

145. KVIATEK, *supra* note 88, at 72.

146. MILHAUPT & PISTOR, *supra* note 108, at 211.

147. Örüçü, *supra* note 98, at 207.

148. *Id.* at 208.

149. *Id.* In the same line, Berkowitz, et al., *supra* note 121, at 169: “provide statistical evidence showing that the “transplant effect” is a more important predictor of effective legal institutions than the supply of a particular family.”

transposition, tuning should be made by the host system and performed at all levels, including judges and legal educators.<sup>150</sup> Örüçü also explained that fine-tuning should not necessarily result in likeliness; rather harmony is what is needed for successful transposition.<sup>151</sup> The transfer of a legal rule and its reception will always be confronted by the idiosyncrasies of the legal community in the host system and face external resistance. In fact, legal transplants can occur between systems with socio-cultural and legal affinity, between systems with social and cultural similarity but legal cultural differences, and between systems that are both socio-culturally and legal culturally different.<sup>152</sup> In all these scenarios, successful transplantations may take time so that the local actors can fine-tune the foreign law.<sup>153</sup> In some cases, such as in those systems that are socio and/or legal culturally alike, transposition can happen very smoothly with the help of fine-tuning, whereas other times, in particular but not necessarily between socio and legal culturally very different systems, transposition is the result of a strong push from a ruling elite or the legal profession.<sup>154</sup> Örüçü refers to Turkey as an example where transposition of law has been one between socio-culturally and legal-culturally diverse societies. The modern Turkish private law is the result of transposing rules mainly from France, Germany and Switzerland.<sup>155</sup> Turkey reflects a sensitive tuning of law transposition in a country where some would claim dissimilar socio and legal cultures would prevent the transplant of the above-referred European laws.<sup>156</sup> One of the factors that facilitated transposition in this case was, however, the import of the complete legal structure and not just the isolated rules, which made the Turkish private law look very similar to the Swiss and German laws.<sup>157</sup> In spite of this, successful transposition was only possible because the divergent and unintended consequences of the massive legal transplant that Turkey underwent since the beginning of the nineteenth century, has been adjusted, tuned, and homogenized over time.<sup>158</sup> This was possible due to the support

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150. Örüçü, *supra* note 98, at 208.

151. *Id.* at 211.

152. *Id.* at 212-13.

153. KVIATEK, *supra* note 88, at 73.

154. Örüçü, *supra* note 98, at 212.

155. However, Berkowitz et al. characterizes Turkey as an unreceptive transplant. Berkowitz et al., *supra* note 121, at 199.

156. Örüçü, *supra* note 98, at 215-16.

157. *Id.* at 216.

158. *Id.*

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of educational institutions, proactive judges, and creative scholars in a Muslim country where there are always fears that the social and cultural systems and the imported legal system will not easily agree.<sup>159</sup>

##### 5. The Forecasted Results of the Transplantation of Punitive Damages In Mexico

We agree with the proposition that when a rule is borrowed from a foreign legal system, it becomes a different rule in the host legal system. The transplanted law inevitably is tropicalized by the local conditions, interpretation, and application by the local actors. In this regard, measuring the results of a legal transplant under the criteria reviewed in the last section may be superfluous unless we determine, first, whether the foreign law is comparable to the adopted law itself. To accomplish the determination of whether punitive damages under the American legal system are comparable to those just transplanted into Mexico, we will use the functional method in comparative law. This methodology has many functions.<sup>160</sup> One of them is to perform *tertium comparationis*: legal and non-legal rules, even doctrinally different ones, are comparable if they are functionally equivalent because they endeavor to accomplish or have the same function in their respective societies.<sup>161</sup>

A different function of the functional method of comparative law is that functionality can serve as an evaluative criterion. In that case, comparative law works as a criterion to determine which legal rule is better—American or Mexican punitive damages—because under the

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159. *Id.*

160. Michaels identifies seven functions of the Functional Method of Comparative Law: (1) the epistemological function of understanding legal rules and institutions, (2) the comparative function of achieving comparability, (3) the presumptive function of emphasizing similarity, (4) the formalizing function of system building, (5) the evaluative function of determining the better law, (6) the universalizing function of preparing legal unification, and (7) the critical function of providing tools for the critique of law. See Ralf Michaels, *The Functional Method of Comparative Law*, OXFORD HANDBOOK OF COMP. L. 342, 363 (2006).

161. Efstathios K. Banakas, *Some Thoughts on the Method of Comparative Law: The Concept of Law Revisited*, 67 RSP: ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE / ARCHIVES FOR PHIL. OF L. & SOC. PHIL. 289, 289 (1981); Michaels, *supra* note 160, 342; But see Julie De-Coninck, *The Functional Method of Comparative Law: "Quo Vadis"?*, RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHE UND INTERNATIONALES PRIVATRECHT / RABEL J. COMP. & INT'L PRIV. L. 323 (2010).

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functional method, “the better of several laws is that which fulfils its function better than the others.”<sup>162</sup>

This section will be divided as follows. In Subsection 5.1, we will perform a *tertium comparationis* between American and Mexican punitive damages in order to determine whether these are similar legal institutions and thus comparable ones. In Subsection 5.2, we will assess how socio-political differences of the receptor legal system, identified by Kahn-Freund as an important factor for successful legal transplants, may affect the correct transplantation of the American notion of punitive damages in Mexico. In Subsection 5.3, we will establish how much of Milhaupt and Pistor’s demand for the transplanted law there is in Mexican society and how well punitive damages have been incorporated into Mexico’s legal structure to meet such demand. And finally in Subsection 5.4, we will evaluate whether Mexico’s punitive damages are as good as the American punitive damages in accomplishing their function in the Mexican and American societies, respectively.

#### 5.1 Assessing Comparability of Punitive Damages in the United States and Mexico

Under the functional method of comparative law, two rules are comparable if they endeavor to accomplish or have the same function in their respective societies.<sup>163</sup> The function of a rule is not defined by the intended purpose assigned by the legislature or the dogmatic reflections attached to it, but on the actual problem it endeavors to address or effectively tackles.<sup>164</sup> The more specific the problem is, the less likely it is that there are rules in two or more systems whose function is the same.<sup>165</sup> But comparatists who do not find universality of a problem because of its high degree of specificity can always step down one level to compare those general needs shared by most societies from which the specific problem derives.<sup>166</sup> For example, we may agree that most societies have the need to solve the problems (damages) caused by tortious conducts and that tort law is there to fulfil this need. This is a universal problem. But from there

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162. Michaels, *supra* note 160, at 342.

163. Banakas, *supra* note 161, at 289; Michaels, *supra* note 160, at 342; *but see* De-Coninck, *supra* note 161, at 345, suggesting that empirically substantiated behavioral patterns should be the standard of comparison, so that legal comparatists can go beyond the reliance on mere constructed problems as a starting point for their inquiries.

164. Michaels, *supra* note 160, at 367.

165. Banakas, *supra* note 161, at 291.

166. Michaels, *supra* note 160, at 368.

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other specific needs derive and, thus, rules may be in place to fulfil them. Tort law may be there to provide compensation for the harm suffered by victims of wrongful conducts in most societies, but some societies may have the additional need to send clear signals of deterrence to avoid similar conducts in the future.

In addition, functional equivalents may not be known until they appear in the compared legal system.<sup>167</sup> Late appearance may reflect a lack of problem or necessity to be solved in the past or a voluntary or negligent omission by the legal actors of the legal system concerned. But the appearance of new rules allows the comparatist to identify the underlying problem and to recognize their function. Still, how do we know that the function of damages indemnity is to deter wrongdoings or to punish, and not to compensate or to effectuate certain societal values, or all of the above?<sup>168</sup> At the end of the day, “similarity of results to certain fact situation, regardless of the difference in doctrine, strongly suggest that the respective legal institutions can be different (but functionally equivalent) responses to a similar problem.”<sup>169</sup>

In light of the above, let us turn to the functions that punitive damages seek to accomplish in the American legal system. Owen, the same scholar cited by the Supreme Court of Mexico when it first introduced the concept of punitive damages in its decision,<sup>170</sup> noted that most courts in the United States refer to “punishment” and “deterrence” as rationales for such damages.<sup>171</sup> In addition, Section 908(1) of the Restatement (Second) of Torts of 1979 states: “Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”

In this line of thought, we may assert that the award of punitive damages serves the priority function of punishing tortious conducts. That function is difficult to understand since a modern legal system should not

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167. *Id.* at 369.

168. *Id.* at 368.

169. *Id.* at 369.

170. Supreme Court of Mexico, A.D. 30/2013, *supra* note 3, at. 87, nn.125-26 (citing Owen, *Punitive damages in products liability litigation*, *supra* note 65).

171. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373 (1994). *See also* Momioka Hironari, *Punitive Damages Revisited: A Statistical Analysis Of How Federal Circuit Courts Decide The Constitutionality of Such Awards*, 65 CLEV. ST. L. REV. 385, 385 (2017) (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)).

be based on private revenge. However, punishment serves two sub-functions that are easier to contextualize in modern societies, one of which is retribution. As Owen explains, “[it] is entirely appropriate for the law to allow a person injured by the wanton misconduct of another to vent his outrage by extracting from the wrongdoer a judicial fine.”<sup>172</sup> In this case, the function of punitive damages serves the protection of societal values of freedom and equality.<sup>173</sup> As in the crime of theft, punishment in tort claims serves to restore the equality of the victim in relation to the tortfeasor by diminishing the extra worth and freedom held illicitly by the latter that was stolen from the victim.<sup>174</sup> The other sub-function derived from punishment is law enforcement. As we mentioned before, punitive damages are often criticized because the plaintiff receives more windfall than the compensation to her actual loss (see Section One above). However, this criticism ignores that the very possibility of a windfall motivates victims who are reluctant to bring their claims against big corporations and therefore assists in enforcing the rules of law.<sup>175</sup> Accordingly, the profits from punishment have a vital procedural function of law enforcement that is the basis for achieving other functions.<sup>176</sup>

In addition, punitive damages in the United States serve the function of avoiding future damages by deterring the tortfeasor and anyone under similar circumstances from behaving in similar fashion.<sup>177</sup> But this function only works well in deterring gross misconduct when the law enforcers regularly catch and punish those that flagrantly infringe the rights of the other, and when potential offenders understand that the law censures and punishes their contemplated misbehavior.<sup>178</sup> Although it may be common knowledge that misconduct often goes undetected and unpunished, punitive damages serve to deter similar conduct by sensationalizing and making public the apprehension and punishment of tortfeasors.<sup>179</sup> This, in turn, serves the sub-function of educating the offenders and the society in general because it confirms the existence of legally protected rights and interests belong to the plaintiff and the

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172. *See* Owen, *supra* note 65, at 375.

173. *Id.*

174. *Id.* at 376.

175. *Id.* at 380.

176. *Id.*

177. *Id.* at 377; Brooke, *supra* note 6, at 1; COOTER & ULEN, *supra* note 6, at 394; Hersch & Viscusi, *supra* note 6, at 262, citing Exxon Shipping Co., 128 S. Ct. at 2615.

178. Owen, *supra* note 65, at 377.

179. *Id.*

corresponding condemnation that society attaches to its flagrant invitation by the kind of gross misconduct of the defendant.<sup>180</sup> Since punitive damages express society's disapproval of a conduct, we may say that punitive damages serve the function of effectuating the societal value of maintaining moral and legal standards of conduct.<sup>181</sup>

Let us turn to the functions that punitive damages have or endeavor to accomplish in Mexico's legal system. First, we must acknowledge that it has been four years since the Supreme Court of Mexico's decision, there have been neither cases reported from other Mexican courts, nor scholarship that may contribute to the understanding of punitive damages in Mexico.<sup>182</sup> All that has been stated, mainly by lawyers in the form of law firm notes or bulletins, is that the Supreme Court of Mexico awarded punitive damages for the first time in February 2014, changing the legal landscape for companies and victims in Mexico.<sup>183</sup> That being said, there are elements in the February 26, 2014 decision that can help us establish the functions that punitive damages pursue in Mexico. In particular, the Supreme Court of Mexico expressly stated that punitive damages had the function of punishing and deterring the defendant and others in general from similar tortious conduct.<sup>184</sup> The reference to American scholars in that specific passage of the decision confirms that the Supreme Court of Mexico had in mind a similar understanding of the function that punitive

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180. *Id.* at 374.

181. Sharkey, *supra* note 9, at 352; Owen, *supra* note 65, at 375.

182. Currently, there is only a recent Supreme Court of Mexico's decision where it was stated that punitive damages are part of moral damages but they were not awarded in that case and no further guidelines on this type of damages indemnity were provided with. See Supreme Court of Mexico, First Chamber, 26 February 2014, *Amparo Directo* 593/2015, ¶ 140, <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=176854>.

183. See e.g., Alejandro Osuna Gonzalez, *Mexican Supreme Court Recognizes Punitive Damages and Orders Mayan Palace To Pay \$2.4 Million Dollars In a Wrongful Death Case*, <http://www.osunalegal.com/articles/punitivedamagesmexico> (last visited Oct. 23, 2018); Salvador Fonseca-Gonzalez & Antonio Curiel Valtierra, *The New Concept of Punitive Damages In Mexico*, <https://www.lexology.com/library/detail.aspx?g=73e79ae2-9196-496a-ad29-ca267f2fda37> (last visited Oct. 23, 2018); Armando Quintana Freg, *Theory of Punitive Damages in Mexico*, <http://ccn-law.com/ccn-mexico-report/theory-of-punitive-damages-in-mexico-by-armando-quintana-freg/> (last visited Oct. 23, 2018).

184. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 87, nn.125-26.

damages play in the United States.<sup>185</sup> In addition, the Supreme Court also stated that punitive damages were part of the right to adequate compensation under the Mexican Constitution and the Inter-American Convention of Human Rights.<sup>186</sup> Although it mixed concepts pertaining to different legal traditions, the Supreme Court of Mexico concluded that “the amount of indemnity shall accomplish its purpose to compensate but also to dissuade”<sup>187</sup> giving to moral damages. This is for the purpose of not only the function of deterring, but also of compensating. Despite the clear line drawn between compensatory damages and punitive damages in the United States, some scholars have agreed that punitive damages may also serve the incidental function of compensating the victim.<sup>188</sup>

Moreover, the facts that led to this case are descriptive of the type of gross misconducts that punitive damages also address and discourage in the United States. The Hotel in the Mexican case was grossly negligent in providing first aid to the victim, since it did not have the emergency protocols required and it breached the law by failing to maintain the artificial lake’s equipment in proper conditions. Its careless conduct not only prevented the victim from receiving medical care in time, but also caused mortification to the victim’s friends and family, and hid crucial information about the victim’s death (see Subsection 2.1 above). Punitive damages have been awarded against other hotels in the United States for gross misconduct that led to less severe injuries.<sup>189</sup> Defendants who failed

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185. *Id.* The Supreme Court of Mexico relied on the following American journal articles (somehow old for the case): Owen, *supra* note 65; Morgan, *supra* note 61, at 279; and O'Donnell, *supra* note 61.

186. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 87-88.

187. *Id.* at 100.

188. Owen, *supra* note 65, at 378-79.

189. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 1199 (7th Cir. Oct. 21, 2003): In 2000, defendant’s clerks began issuing refunds to customers who complained about ticks and biting bugs in hotel rooms. The hotel’s manager then recommended closing the establishment while every room was sprayed, but a supervisor refused. The hotel continued to rent out rooms and moved guests who complained. Judge Posner who decided the appeal of this case wrote of one guests who was moved to three rooms to get away from bedbugs. With the problem reaching “farcical proportions,” the hotel desk clerks were told to call the bedbugs “ticks” on the theory that customers would be less alarmed, as Judge Posner noted. Judge Posner also noted that the hotel put rooms on “Do not rent, bugs in room” status but then rented them anyway. Two guests brought a suit alleging wanton and willful conduct, and asked for compensatory and punitive damages. The defendant hotel claimed that its conduct was, at most, negligent, and that punitive damages were not warranted. The jury awarded compensatory damages of approximately \$5,000 and punitive damages of \$186,000 per plaintiff.

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to test the safety of their products and comply with all applicable standards and regulations, evincing a lack of care or indifference as to the safety of its customers have also been condemned with punitive damages in the United States.<sup>190</sup>

In light of the above, the punitive damages transplanted in Mexico are comparable (yet still undeveloped) to those applied in the United States. Despite the dogmatic mistake that the Supreme Court of Mexico committed by considering punitive damages as part of moral damages, which nature is compensatory (*see* Subsection 5.3 below), the functions that they intend to serve are similar. We should now determine how well punitive damages will function in Mexico.

## 5.2 Socio-political Differences of the Receptor Legal System as an Obstacle for Successful Transplantation

Kahn-Freund suggests that a legal transplant increases its chances of success if the socio-political structure of the donor state and the host system are compatible (*see* Section Four above).<sup>191</sup> Under this view, the degree of acceptance of punitive damages depends on how closely connected the power structures of Mexico and the United States are.<sup>192</sup> The power structure may be “expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic state play a decisive role in the law making or decision making process.”<sup>193</sup> Against this background, the transplant of punitive damages in Mexico will not succeed unless the Supreme Court gets the firm support of the federal and state legislatures. In spite of the act that the Supreme Court of Mexico has been trying to modernize the law on damages, Mexico is a civil law jurisdiction where the exclusive power to create the law is constitutionally allocated to the legislative branch. This differs from the basic power structure in the United States where courts are empowered to create new rules on tort matters unless prevented by legislation (*see* Section 3 above). Now that punitive damages are part of

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190. *See e.g.*, *Aleo v. SLB Toys USA, Inc.*, Case No. SJC 11294 (MA Sup. Jud. Ct. Sep. 13, 2013): A young woman fractured two cervical vertebrae when she slid her head first down a defectively inflatable swimming pool, and stuck her head against the concrete deck of the pool when the bottom of the slide collapsed. The jury found that the seller Toys “R” Us liable for negligence, breach of warranty, and wrongful death, and awarded compensatory damages in the amount of \$2,640,000. The jury also found Toys “R” Us grossly negligent and awarded punitive damages in the amount of \$18,000,000.

191. Kahn-Freund, *supra* note 88, at 27.

192. *Id.* at 18.

193. *Id.*

the indemnity afforded under the head of moral damages, the support of the legislative branch may come in two forms. First, the federal and state legislatures may back up the interpretation of the Supreme Court of Mexico from any pressure by lobby groups demanding the enactment of legislation to reverse the Court's ruling.<sup>194</sup> Second, the Federal and State legislatures may enact better designed rules on punitive damages following the conclusions of comparative law studies like this one (see Subsection 5.3 below).

In addition, other legal actors in Mexico's power structure must also support the ruling of the Supreme Court of Mexico. It is worth noting that the interpretation of Article of the 1916 Mexico City Civil Code is not yet a binding precedent. To require other courts to follow its decision, the Supreme Court of Mexico should have decided the matter in a plenary session or resolved the issue having as background two contradictory rulings from its own Chambers or other Collegiate Circuit Courts.<sup>195</sup> The same principle applies at the state level. But the interpretation of Article 1916 could quickly become binding precedent if judges, including those in the Supreme Court of Mexico and Circuit Courts, consistently apply, interpret, or rule on the award of punitive damages in a series of five future cases, without interruption by any contradictory rulings.<sup>196</sup> For this to continue happening, lawyers must also cite the February 26, 2014 decision as a persuasive authority before other courts. Although it is difficult to establish binding precedents under the Mexican legal system, practice

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194. This already has occurred for better in some private law matters. For example, in 2011 the Federal Congress added Article 1464(V), Code of Commerce (Arbitration Statute), in order to repeal the decision of the Supreme Court of Mexico (Contradiction 51/2005, First Chamber of the Supreme Court of Mexico, 11 January 2006) whereby the challenge of arbitration agreements would fall within the purview of courts. The enactment of Article 1464(V) of the Code of Commerce in 2011 endorsed the principle of competence-competence of arbitral tribunals making clear that "all challenges—be it solely to arbitration agreements or contracts as a whole—are encompassed by the duty upon courts to refer to arbitration, and hence are within the jurisdiction of arbitral tribunals." See FRANCISCO GONZALEZ-DE-COSSIO, *Amendments to the Mexican Arbitration Statute*, 1 INTERNATIONAL COMMERCIAL ARBITRATION BRIEF 6 (2011).

195. See ZAMORA, ET AL., *supra* note 38, at 84. The decision on February 26, 2014 was rendered by the First Chamber of the Supreme Court of Mexico.

196. Before, there were five constant and consecutive judgments on a point of law, the individual decisions are called *tesis aisladas*. See *id.* at 85. Currently, there is a more recent Supreme Court of Mexico's decision where it stated that punitive damages are part of moral damages, nevertheless they were not awarded in that case. See Supreme Court of Mexico, A.D. 593/2015, *supra* note 182, at 70, ¶ 140.

shows that lower courts routinely adopt, follow, and consider themselves bound by prior judicial rulings.<sup>197</sup>

Accordingly, in order for the transplant of punitive damages to succeed in Mexico, members of its power structure such as legislators, judges, lawyers, and academics must promote their proper development and application in Mexico.

### 5.3 Establishing the Demand for Punitive Damages In Mexico

As previously mentioned, demand for the transplanted law and the way it is incorporated in the host country's institutional structure are also key factors for successful legal transplants (*see* Section Four above).<sup>198</sup> Punitive damages will respond to an actual need (demand to fill a legal gap),<sup>199</sup> to raise the safety standards in jobs, goods, services, and everyday activities with rules that will encourage citizens to help promote the mechanisms of justice and deter those usually undetected tortfeasors in Mexico.<sup>200</sup> There are no similar rules in place that are likely to be used to fulfill this demand. In part, this is due to the fact that Mexico is a centralized system that typically vests law-making powers in the legislative or the executive branch and that has historically favored centralized law enforcement mechanisms. The Mexican legal system reflects a rather paternalistic society where government agencies are expected to intervene when necessary to protect those who have been injured or disadvantaged by others.<sup>201</sup> For example, if a tragedy happens because of an oil leak in railway accident, the tort case is often settled out of court with the responsible party or its insurer paying moderate compensation upon the intervention of the state or federal government agencies.<sup>202</sup> This, in turn, highlights an important difference in the institutional structure of Mexico vis-à-vis the United States that may impact the actual demand for punitive damages. The United States is a decentralized system where law making and law enforcement activities are allocated to multiple agents, including

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197. *Id.* at 83.

198. MILHAUPT & PISTOR, *supra* note 108, at 208 (stating “that the nature of legal demand for the transplanted law and the process by which it is incorporated into the host country's institutional structure significantly affect whether and how the transplant will function”).

199. *Id.* at 210.

200. Keith E. Maskus et al., *Implications of Changes in Labor Standards: A Computational Analysis for Mexico*, 6 N. AM. J. ECON. & FIN. 172 (1995) (describing how weak is the enforcement of occupational safety and health standards in Mexico).

201. ZAMORA, ET AL., *supra* note 38, at 521.

202. *Id.*

private parties who may exercise extensive rights to initiate law enforcement. The United States legal system reflects a society that prizes individualism because citizens are encouraged to use self-help methods to preserve their rights to be free of interference and injury from others.<sup>203</sup>

But part of the reason why Mexicans do not rush to file lawsuits and are less confrontational in tort matters, is also the old limitations on the amount of damages that were recoverable in personal injury actions. The February 26, 2014 decision is an important signal of a new mechanism that may change Mexico's institutional structure towards a less centralized system, at least in civil justice. Now we may assert that plaintiffs and lawyers have incentives to bring suits under new rules and that judges will eventually become familiar with the concept or doctrine underlying them. Although there are no in-depth studies about the incorporation of punitive damages into Mexico's legal system yet, which makes punitive damages look like a sleeping giant, the notes and briefs that have been published by lawyers reflect that they side with the normative implications of the legal change.<sup>204</sup> In sum, there appears to be a sufficient demand to motivate integration of punitive damages in the political economy of Mexico.<sup>205</sup> While Mexico is a centralized legal system, Mexico's economic expansion also promotes and requires the adoption of foreign rules that endorse the rights of citizens in an open economy.<sup>206</sup>

That being said, there are a few mismatches with the preexisting conditions and legal institutions of the United States, that we anticipate may weaken the demand and, thus, effectiveness of punitive damages in Mexico, making the latter suffer a "transplant effect."<sup>207</sup> The first mismatch is a dogmatic one, with practical consequences. The common law legal tradition regards punitive damages as a type of damages that does not have a compensatory nature.<sup>208</sup> As commented above, their main function is to punish the tortfeasor for outrageous misconduct and to deter

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203. *Id.*

204. *See e.g.*, Alejandro Osuna Gonzalez, *supra* note 183; Salvador Fonseca-Gonzalez & Antonio Curiel Valtierra, *supra* note 183; Armando Quintana Freg, *supra* note 183.

205. MILHAUPT & PISTOR, *supra* note 108, at 210.

206. John S. Wilson & Tsunehiro Otsuki, *Food Safety and Trade: Winners and Losers in a Non-Harmonized World*, 18 J. ECON. INTEGRATION 282 (2003); Mark M. Hager, *Yankee Come Back? Occupational Safety and Health Reform in Mexico*, 32 U. OF MIAMI INTE-AM. L. REV. 222 et seq. (2001).

207. Berkowitz et al., *supra* note 121, at 171.

208. Exxon Shipping Co., 128 S. Ct. 2605, at 2620-21, n.8, and 2623.

it and others from similar misbehavior in the future.<sup>209</sup> This distinguishes punitive damages from the other types of damages that have a compensatory nature, i.e., those that aim at compensating for any actual loss. In the United States, compensatory damages also include losses that are difficult to quantify in monetary terms but necessary to compensate for the actual harm caused, such as damages based on loss of companionship, and pain and suffering, which are equivalent to what were considered as the moral damages (non-pecuniary consequences) in Mexico before the addition of punitive damages to the equation.<sup>210</sup>

Chart Number Two (United States) at the end of this article shows the basic classification of tort damages in the United States.

On the other hand, the Supreme Court of Mexico conceived punitive damages as part of moral damages.<sup>211</sup> The nature of moral damages under Mexican law and all civil law systems is compensatory.<sup>212</sup> Moral damages seek to place the victim or the injured party in the position it would have been in had the tort conduct never taken place, but also allowed, at the victim's choice, the compensation of loss of profits.<sup>213</sup> This type of damages regards non-physical or spiritual harm related to a person's emotional state of mind or social perception and includes, in the words of the Supreme Court of Mexico, loss of honor (reputation), harm to appearance (aesthetic), and harm to feelings.<sup>214</sup> It aims to redress the actual nonphysical or emotional harm by means of compensation, whose amount must place the victim, to the extent possible, in the position it had before

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209. *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595 (Canada); *Kuddus (AP) v. Chief Constable of Leicestershire Constabulary*, [2002] 2 A.C. 122 (H.L. 2001) (England).

210. VARGAS, *MEXICAN LAW FOR THE AMERICAN LAWYER*, *supra* note 29; Vargas, *Moral Damages under the Civil Law of Mexico - Are These Damages Equivalent to U.S. Punitive Damages?*, *supra* note 29.

211. As we mentioned in Section 3 above, the reason behind this mismatch is that Supreme Court of Mexico could not have created the institution of punitive damages as a new head of damages separated from compensatory damages. Its only option was, thus, to pretend that punitive damages had always been there as part of the old Mexican law on liability for tort conduct and breach of contracts.

212. Vargas, *Moral Damages under the Civil Law of Mexico - Are These Damages Equivalent to U.S. Punitive Damages?*, *supra* note 29, at 267 (providing a brief comparative law survey of moral damages in France, Germany, Italy, Spain and Switzerland). See also Cedric Vanleenhove, *A Normative Framework For The Enforcement Of U.S. Punitive Damages In The European Union: Transforming The Traditional '¡No Pasaran!'*, 41 VT. L. REV. 348, 349 (2016).

213. Article 1915 of the Mexico Federal Civil Code.

214. Supreme Court of Mexico, A.D. 30/2013, *supra* note 3, at 44-45.

the tort.<sup>215</sup> Moral damages encompass the pecuniary consequences that may be calculated with some certainty, such as the expenses of psychological or psychiatric therapies, as well as the non-pecuniary consequence or loss that cannot be quantified with certainty but is certain that occurred, for example, the harm caused by affliction or sadness.<sup>216</sup> The Supreme Court of Mexico “interpreted” moral damages to include punitive damages to redress their non-pecuniary consequences (*see* Subsection 2.4 above).

If we compare Chart Number One (Mexico) and Chart Number Two (United States), we see a clear mismatch in the nature of punitive damages in the United States and in Mexico. The Supreme Court of Mexico incorporated a foreign institution into Mexico’s legal system that does not match the place and nature that the institution has in its legal origin. The Province of Quebec, a civil law jurisdiction with regard to its private law background,<sup>217</sup> is well aware of the dogmatic difference between punitive damages and moral damages. Article 1621 of the Quebec’s Civil Code explicitly allows for punitive damages to be awarded where it is permitted by law and states a non-exhaustive list of criteria to be considered when evaluating the amount.<sup>218</sup> But Article 1611 of the Quebec’s Civil Code distinguishes them from moral damages (*préjudice moral* in French) that are part of compensatory damages.

We admit, however, that the relevant question is whether, under the functional method of comparative law, punitive damages in the “Mexican style” are “as good of a law as” punitive damages in the United States, irrespective of the dogmatic difference mentioned above. As we discuss in Subsection 5.4 below, the function of punitive damages will not be equally achieved in Mexico, since their compensatory nature will affect the method

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215. The Supreme Court of Mexico recognized the compensatory nature of moral damages in its own decision when stating “[a]sí, puede afirmarse que el régimen de ponderación del *QUANTUM COMPENSATORIO* depende de la conceptualización del derecho a una justa indemnización, de la visión que nuestra tradición jurídica adopta de la responsabilidad civil y, en particular, del deber de mitigar los efectos derivados del daño moral [emphasis added],” Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 93.

216. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 91-93.

217. Quebec is a civil law jurisdiction with regard to the law of property and civil rights only. The criminal law, public law, or any subject which belongs to federal government is influenced by the laws of England. *See* F. P. Walton, *The Legal System of Quebec*, 13 COLUM. L. REV. 215 (1913).

218. In Quebec, punitive damages were not awarded in private actions until 1991 when Quebec revised its civil code to include punitive damages. *See* John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. OF TRANSNAT’L L. 1, 46 (2003).

of calculating their amount and, as a consequence, their deterrence function.

A different mismatch is perceived at the procedural law level. Tort law in the United States is closely linked to the procedural tools that plaintiffs enjoy to redress their private rights.<sup>219</sup> There are two features of law of civil proceedings in the United States absent in the Mexican legal system that may upset the demand of punitive damages in Mexico: the procedural right to discovery<sup>220</sup> and the right to jury trials.<sup>221</sup> In the next subsection, we explain how the absence of these features of the law of civil proceedings in the United States may impair the proper functioning of punitive damages in Mexico.

#### 5.4 How Good Law Are Current Punitive Damages In Mexico Compared to Those From the United States

As mentioned above, one of the functions of the functional method of comparative law is to serve as a yardstick to determine the “better law.” In order to determine the “better law,” one must work under assumptions or hypothesis that one rule accomplishes its function better than another.<sup>222</sup> For example, in two rules that are comparable because they endeavor to have the function, the better law may be the one that, after evaluation, has a better doctrinal formulation and/or has showed better empirical results.<sup>223</sup> In this regard, a relative difference may determine superiority. But it is worth noting that any evaluation of functional equivalent rules is only valid with regard to the function scrutinized. One legal rule is not better than

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219. John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 611 (2005).

220. This element of the taking of evidence allows a party to obtain evidence from the other party or parties by means of a request for answers to interrogatories, request for production of documents, request for admissions and depositions, etc. *See* Fed. R. Civ. P. 26-37.

221. *See* the Seventh Amendment of the United States Constitution: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

222. Michaels, *supra* note 160, at 374; Ralf Michaels, *Explanation and Interpretation in Functional Comparative Law – a Response to Julie de Coninck*, 74 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT / RABEL J. COMP. & INT’L PRIV. L. 351, 358-59 (2010).

223. Michaels, *supra* note 160, at 374; *id.*

another in absolute terms, at best it may be better regarding a certain function.<sup>224</sup>

In the above sub-sections, we anticipated a few differences that may disadvantage Mexican punitive damages vis-à-vis their American counterpart. In this subsection, we will focus on the doctrinal construction of Mexican punitive damages as part of so-called moral damages. The differences at the level of procedural law will also be briefly addressed. Four years have passed since the single known Supreme Court case where punitive damages were awarded in Mexico.<sup>225</sup> Still, it is too early to provide an empirical analysis of the role that punitive damages have played in deterring gross misconducts in Mexico. However, we trust that this first theoretical evaluation will be the start for further empirical or theoretical analysis.

Mexican law considers moral damages as a type of indemnity aimed at compensating the victim in a tort case (see Subsection 2.4 above). However, the Supreme Court of Mexico considered that pursuant to the legislative history of article 1916 Mexico City Civil Code, the right to a fair indemnity in Article 1 Mexico Constitution and Article 63.1 of the Inter-American Convention on Human Rights, moral damages may encompass punitive damages which purport to punish the tortfeasor and to deter him and others from similar conduct (see Subsection 2.5 above). This construction of moral damages will influence the method of calculating punitive damages. If the Mexican judge is required to calculate an indemnity that at the same time that it deters, it also complies with the principle of full compensation, which in turn means granting no less and no more than the non-physical harm ensued (*see* Chart Number One, Mexico), the result cannot be an indemnity based on a rational correlation between compensatory damages and the percentage of harm cases that could go undetected<sup>226</sup>. The result cannot be an indemnity based on a rational

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224. Michaels, *supra* note 160, at 375.

225. Referring to the February 26, 2014 decision by the Supreme Court of Mexico, First Chamber, A.D. 593/2015, *supra* note 182.

226. *See* Supreme Court of Justice, 19 October 2011, *Amparo Directo en Revisión* 1068/2011, at 67-68: “the indemnity shall result neither in the enrichment nor the impoverishment of the victim” (citing *González y Otras (“Campo Algodonero”) vs. México*, Excepción Preliminar, Fondo, Reparaciones y Costas, Judgment Inter-Am. Ct. H.R. (ser. C) No. 205. ¶¶ 450-51 (Nov. 16, 2009)). As it is the case in the United States for the calculation of compensatory damages for pain and suffering. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 818 (1995).

correlation between compensatory damages and the percentage of harm cases that could go undetected.<sup>227</sup>

Indeed, the economic analysis of punitive damages in the United States suggests that these type of damages should be imposed only upon defendants who would otherwise escape liability through undetected tortious conduct.<sup>228</sup> If the tort system were perfect in detecting every single wrongful conduct that happens in a jurisdiction, there would be no reason for punitive damages because compensatory damages in the aggregate would compensate and also deter.<sup>229</sup> This premise results in a formula for calculating punitive damages whereby their amount should equal to the harm multiplied by the reciprocal of the defendant's chance of being found liable for wrongful activities.<sup>230</sup> Punitive damages so calculated would achieve their function of deterrence because they would cause defendants to internalize the full cost of all undetected wrongful activities.<sup>231</sup> Some critics of this standard formula argued that it fails to take into account other important variables in the tort and litigation system; they suggested that the standard formula should be completed with analysis of important factors affecting litigation behavior and valuation, for example, settlement.<sup>232</sup> Others said that more punishment can lead to less deterrence because,

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227. In spite of the proposal in the concurrent opinion by Justice Cossío Díaz. See Supreme Court of Mexico, First Chamber, *Voto Concurrente* by Justice José Ramón Cossío Díaz, A.D. 30/2013, *supra* note 3, at 10 (referring to Polinsky, J. OF LEGAL STUD., 675 (U. of Chicago Press 1997): "Let  $h$  be the magnitude of harm and  $p$  be the probability that the injurer will be detected and found liable. Then the proper level of total liability is  $h/p$ . This amount would be composed of a payment of  $h$  in compensatory damages and  $(h/p) - h$  in punitive damages. The punitive payment can be rewritten as  $[(1 - p)/p]h$ . In the example in the previous paragraph,  $h = \$100,000$  and  $p = .25$ , so punitive damages are, according to this formula,  $[(1 - .25)/.25]\$100,000 = \$300,000$ ."

228. Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 38 (2012). However, some submit that juries identify recklessness as an important consideration in the determination of punitive damages, and that argue that if people underestimate the effectiveness of care, then it may be optimal to grant large punitive damages even when there is no chance of escaping liability. See Bharat Bhole & Jeffrey Wagner, *Punitive Damages and The Recklessness Requirement With Uninformed Injurers*, 30 INT'L REV. L. & ECON. 253, 253-54 (2010).

229. Rhee, *supra* note 228, at 52.

230. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 889 (1998): "If  $H$  is the harm and  $P$  is the probability of being found liable, then the injurer should pay  $H \times 1/P$ —that is,  $H/P$ —when he is found liable. Thus, the injurer's expected damages will be  $P \times (H/P) = H$ ." See also Kristina Cyglakow, *Punitive Damages. Conditions, Limits, Proportionality* 4 (2016).

231. Rhee, *supra* note 228.

232. *Id.*

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although firms might increase safety expenditures to reduce expected liabilities, they might also reduce the amount of wealth or capital they expose to those liabilities.<sup>233</sup>

Be that as it may, the key point in the economic analysis is that the defendant must pay an indemnity in excess of the compensatory damages equal to the amount of the harm that it caused for which it would not otherwise pay. In this regard, considering the cases that go undetected in the calculation of punitive damages entails admitting evidence of presupposed harm that is unrelated to the actual physical and non-physical harm effectively caused to the victim. This possibility would infringe the principle of compensatory damages under Mexican law because the victim would be overcompensated beyond her actual loss.<sup>234</sup>

In spite of the above, the practice of juries and judges in the United States does not reflect a constant application of the calculation method described above.<sup>235</sup> Adjudicators have discretion in determining the amount of punitive damages insofar as their verdict complies with the “due process clause” in Section One of the Fourteenth Amendment of the United States Constitution.<sup>236</sup> The due process clause under the United States Constitution protects both substantive and procedural rights. Substantive due process directly limits the size of the punitive damages award when such is constitutionally excessive, as determined on the basis of the punitive-to-compensatory damages ratio.<sup>237</sup> Procedural due process limits the permissible range of evidence for awarding punitive damages.<sup>238</sup> The Supreme Court of the United States has provided some guidelines for punitive damages calculation that we will now briefly examine in order to

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233. James Boyd & Daniel E. Ingberman, *Do Punitive Damages Promote Deterrence?*, 19 INT'L REV. L. & ECON. 47, 48 (1999).

234. See Supreme Court of Justice, *Amparo Directo* 1068/2011, 19 October 2011, at 67-68: “the indemnity shall result neither in the enrichment nor the impoverishment of the victim” (citing *González y Otras (“Campo Algodonero”) vs. México*, *supra* note 226, ¶¶ 450-51).

235. Bhole & Wagner, *supra* note 228, at 253 (2010) (arguing that juries identify recklessness as an important consideration in the determination of punitive damages rather than chance of escaping liability). See also CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 26 (U. of Chicago Press 2002) (acknowledging that even when jurors are well intentioned, they do not seem to be capable to apply their understanding of deterrence to translating their decisions into predictable dollars awards).

236. Hironari, *supra* note 171, at 385 ff.

237. See *Philip Morris USA v. Williams (Philip Morris II)*, 549 U.S. at 353. See also Cyglakow, *supra* note 230, at 8.

238. See *Philip Morris II*, *supra* note 237.

determine whether they fit with the doctrinal formulation of punitive damages in Mexico.

In *Pacific Mutual Life Insurance Co. v. Haslip*, the Supreme Court of the United States affirmed an award consisting of USD 200,000 in compensatory damages and USD 840,000 in punitive damages (a four-to-one ratio), stating that “[w]e need not, and indeed we cannot, draw a mathematical bright line between the [substantive] constitutionally acceptable and the [substantive] constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”<sup>239</sup> In *TXO Production Corp. v. Alliance Resources Corp.*, the Supreme Court of the United States affirmed an award with a 526:1 punitive-to-compensatory damages ratio, stating that only “grossly excessive” awards could be struck down on substantive due process grounds.<sup>240</sup> The Court concluded that the punitive damages awarded were not excessive in light of the large amount of money at stake, the defendant’s bad faith, a larger pattern of fraud and deceit, and the defendant’s wealth.<sup>241</sup>

On the other hand, the Supreme Court in *BMW of North America, Inc. v. Gore*, on substantive due process grounds, reversed a lower court award with a 500:1 punitive-to-compensatory damages ratio. In that case, the Supreme Court of Alabama had endorsed the plaintiff’s methodology of punitive damages calculation that was also based on a rational correlation between compensatory damages and the percentage of harm cases that go undetected.<sup>242</sup> However, the Supreme Court of the United States found in that case that the USD 2 million award was grossly excessive under the substantive due process grounds and that lower courts should consider instead three elements when determining whether punitive damages awards

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239. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 4-6 (1991).

240. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993).

241. Commenting this decision Hironari, *supra* note 171, at 386.

242. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 564 (1996): “Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of \$4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had not been damaged or repaired. To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than \$300 per vehicle. Using the actual damage estimate of \$4,000 per vehicle, Dr. Gore argued that a punitive award of \$4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.”

are grossly excessive: 1) the level of reprehensibility of the defendant's conduct, 2) the punitive-to-compensatory damages ratio, and 3) the existence of comparable criminal or regulatory sanctions that would apply to similar acts.<sup>243</sup> The Court also held that the award of punitive damages cannot punish a defendant for conduct committed in another state, as such would breach the procedural due process principle.<sup>244</sup>

More interestingly, the Supreme Court of the United States in *State Farm Mut. Auto. Ins. Co. v. Campbell*, also reversed on procedural due process grounds a USD 145 million punitive damages award, because the state court had allowed evidence unrelated to the defendant's conduct in the particular state or with no nexus to the specific harm suffered by the plaintiff.<sup>245</sup> The Supreme Court also stated, *obiter dicta*, that "in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy (substantive) due process."<sup>246</sup> This has created a presumption that double-digit punitive-to-compensatory ratios may infringe the substantive due process right.

More recently, the Supreme Court of the United States in *Philip Morris USA v. Williams (Philip Morris II)*<sup>247</sup> vacated the judgment of the Supreme Court of Oregon in a five-to-four decision stating that punitive damages shall not be awarded to directly punish a defendant for harm caused to non-parties, as such amounted to a taking of private property without procedural due process of law.<sup>248</sup> The Supreme Court explained, nevertheless, that a jury could calculate punitive damages awards based on the risk that the defendant would cause future harm to the plaintiff, but not to non-parties, and that a jury could also infer from the risk of harm to non-parties that the defendant's conduct was particularly reprehensible, but such non-parties harm may not be taken as the basis of the equation for calculation.<sup>249</sup>

Similar limitations under the procedural due process clause in Mexico's Constitution would apply to the award of punitive damages in Mexico.<sup>250</sup> Non-parties' harm could not be considered as evidence when

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243. *Id.* at 574-75.

244. *Id.* at 572; *see Hironari, supra* note 171, at 387.

245. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

246. *Id.* at 425.

247. *Philip Morris II*, 549 U.S. 346 (2007).

248. *Id.* at 349.

249. *Id.* at 354-55.

250. Article 14 of the Mexico Constitution stipulates, in the authors' translation, that "Nobody may be deprived from his freedom, properties, possessions or rights, but through

calculating the amount of any type of damages. Moreover, with regard to substantive due process, the method and amount of punitive damages that may be awarded in Mexico become problematic in light of the doctrinal formulation that this type of damages have in Mexico. The United States' decisions above considered the punitive-to-compensatory damages ratio in the calculation of punitive damages. But if punitive damages in Mexico are part of compensatory damages, how could a judge calculate them on the basis of other similar type of damages? One may argue that the guidelines above could still be used if we fictionally consider Mexican punitive damages as something different than the rest of the compensatory damages. Under this approach, the actual physical harm and the pecuniary consequences of moral damages could work as the basis for calculating punitive damages (see Chart No. 1 Mexico). However, the Supreme Court of Mexico does not seem to have that in mind. In the February 26, 2014 decision, the victim's parents were not awarded the damage of 77,798.00 Mexican pesos claimed as actual physical harm due to lack of standing at the time of filing their lawsuit. The Supreme Court of Mexico did not specify what share of the over 30 million Mexican pesos awarded to the victim as moral damages intended to redress the pecuniary consequences of moral damages and what percentage was aimed at restoring to the non-pecuniary consequences of moral damages, where punitive damages now fall under.<sup>251</sup> Even if the Supreme Court of Mexico had considered a Mexican moral (including punitive) -to-compensatory damages ratio, we have to assume that the result of the equation would not lead to overcompensation of the victim's parents under the principle of Mexican law of full compensation in civil liability cases.

Given this background, the American punitive damages are functionally superior to the Mexican ones regarding the function of punishment and deterrence. The nature of American punitive damages, which matches their function, is the first parameter to calculate an amount of indemnity that creates better incentives to avoid grossly negligent conducts. On the other hand, Mexican punitive damages will not fulfill their function as well as their American counterpart because their compensatory nature places a cap on their calculation. From a law and

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Court proceedings pursuant to the basic procedural principles." The original text in Spanish states: "Nadie podrá ser privado de la libertad o de sus propiedades, posesiones o derechos, sino mediante juicio seguido ante los tribunales previamente establecidos, en el que se cumplan las formalidades esenciales del procedimiento."

251. This was also part of the criticism raised in the Concurrent Opinion by Justice Cossío Díaz. See Supreme Court of Mexico, First Chamber, *Voto Concurrente* by Justice José Ramón Cossío Díaz, A.D. 30/2013, *supra* note 3, at. 9.

economics perspective, the impossibility of calculating their amount on the basis of the harm multiplied by the defendant's chance of being found liable for the same wrongful activity disadvantage Mexican punitive damages. As one scholar puts it, "[a]fter all, economic analysis is in essence a refined functional method, one that measures legal rules not by their doctrinal consistency but by their ability to fulfill societal needs."<sup>252</sup>

In addition, the absence of pre-trial discovery in Mexico may also cause a lower demand for punitive damages in Mexico when compared with the United States. Pre-trial discovery is paramount in the gathering of evidence in order to meet the standard of gross misconduct in cases that deserve the award of punitive damages in the United States.<sup>253</sup> In the United States, punitive damages will not be awarded unless there is evidence that the defendant acted in "willful, wanton and/or malicious disregard of the rights of others" under existing common law.<sup>254</sup> This high judge-made standard has been adopted, though with different wording, in some state statutory provisions pursuant to which punitive damages will only be awarded "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."<sup>255</sup> In that regard, plaintiffs' attorneys need pre-trial discovery to obtain the production of evidence under the defendant's control. Such evidence may include information about the testing of a defective product,<sup>256</sup> internal memoranda concerning design changes and other recommendations for safety improvements,<sup>257</sup> the defendant's failure to warn of potential dangers, and tendency to exaggerate in advertising its product's benefits without also warning of risks involved, et cetera.<sup>258</sup> Once the defendant's liability has been established, the plaintiff's lawyers may also seek the production of documents regarding the financial situation of the defendant

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252. Ralf Michaels, *The Second Wave of Comparative Law and Economics?*, 59 U. TORONTO L.J. 198 (2009).

253. See generally Dale I. Larson & Robert M. Wattson, *The Discovery and Proof of a Punitive Damages Claim: Strategy Decisions and Pretrial Tactics When Representing the Plaintiff*, 11 WILLIAM MITCHELL L. REV. 395 (1985).

254. *Id.* at 399.

255. See e.g., Cal. Civ. Code § 3294(a) and Cal. Civ. Jury Instructions 3948. Punitive Damages Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase). Other state laws' instructions are very similar. See SUNSTEIN ET AL., *supra* note 235, at 12-13.

256. Larson & Wattson, *supra* note 253, at 409.

257. *Id.* at 410.

258. *Id.* at 411.

in order to provide the jury with evidence for the calculation of sums sufficient to punish and deter the defendant from similar misconduct.<sup>259</sup>

Pre-trial discovery is unknown to Mexico's procedural law.<sup>260</sup> There are no developed rules on this issue. In Mexico, the judge controls the process, and will only order the production of evidence under the control of the other party if such is material for the case and the requesting party precisely identifies the evidence concerned.<sup>261</sup> That being said, such orders are rarely requested and granted, since the procedural law principle that a party has the obligation to prove its case (itself) is consistently applied. Accordingly, the lack of procedural rules in Mexico that encourage and facilitate the production of evidence under the control of a defendant, could be a serious obstacle to a victim's capability to prove her punitive damages claim. In fact, the February 26, 2014 decision by the Supreme Court of Mexico shows that the victim's parents had no access to any document under the Hotel's control that would corroborate a constant gross misbehavior. The evidence considered regards witness statements and expert reports offered spontaneously by the victim's parents or the Hotel after the accident happened.<sup>262</sup> Interestingly, the Supreme Court of Mexico concluded that the Hotel had been negligent in its failure to maintain properly the artificial lake's equipment, increasing the risk of its customers—not because of the request or forced production of any existing maintenance diaries kept by the Hotel, but because the Court seems to have shifted the burden of proof, mentioning that in the Answer to the Complaint the Hotel did not furnish any evidence to demonstrate that it kept the artificial lake in optimal conditions for its customers' use.<sup>263</sup> In the past, the Supreme Court of Mexico had already ruled that in the health industry, health professionals had the burden to prove that they acted diligently in performing medical services because the evidence to that

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259. See e.g., Cal. Civ. Jury Instructions 3949. Punitive Damages - Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase) [...] There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount: [...] (c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct?

260. ZAMORA ET AL., *supra* note 38, at 330.

261. *Id.*

262. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at 62-75.

263. *Id.* at 72, n.92.

respect is usually under the control of such professionals, clinics or hospitals.<sup>264</sup>

The absence of jury trials in Mexico could also cause a lower demand for punitive damages.<sup>265</sup> In the United States, the jury plays an important role in tort cases.<sup>266</sup> If the victim exercises her constitutional right under the Seventh Amendment, a jury, in lieu of a judge, will assess the value of the evidence presented by the parties during trial. The jury also decides the amount of compensational and punitive damages if the plaintiff prevails. Research illustrates that larger stakes cases tend to be routed to juries rather than judges for adjudication.<sup>267</sup> There are also perceptions in the United States that juries are more amenable to awarding punitive damages and awarding higher levels of punitive damages.<sup>268</sup> Some of the reasons mentioned to explain this difference is that judges possess professional and reputational interests in avoiding having their damage awards adjusted on appeal.<sup>269</sup>

In Mexico, the lack of juries in both civil and criminal trials will always leave the decision to award punitive damages in the judges' hands. This difference may limit the number and sums of punitive damages awarded in the Mexican context and, thus, affect the deterrence function of punitive damages.<sup>270</sup> In fact, the structural differences between the United States judicial system and Mexico's are also a fundamental mismatch that may make American punitive damages "better law" than Mexican punitive damages. As a country with lengthy judicial proceedings, justice in Mexico is less accessible than in other countries with similar economic characteristics.<sup>271</sup> In Mexico, there is a grounded distrust among citizens

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264. See Supreme Court of Mexico, First Chamber, *Gaceta del Semanario Judicial de la Federación*, Libro 34, Septiembre de 2016, Tomo I, Materia(s): Civil, Tesis: 1a. CCXXVII/2016 (10a.), at 514.

265. ZAMORA ET AL., *supra* note 38, at 321.

266. Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the upreme Court?*, 8 J. OF EMPIRICAL LEGAL STUD. 345, 346 (2011).

267. *Id.*

268. *Id.*; Hironari, *supra* note 171, at 383.

269. Eisenberg & Heise, *supra* note 266, at 328.

270. ZAMORA ET AL., *supra* note 38, at 322: "the lack of jury system and severe limits placed on the amount of damages that may be awarded in personal injury suits, helps to explain the relative lack of tort litigation in Mexico."

271. Cf. OECD, *Judicial performance and its determinants: a cross-country perspective - A Going for Growth Report 13* (OECD June 2013).

towards state courts.<sup>272</sup> Distrust is due to the inefficiency of the system of criminal justice that prosecutes fewer crimes than it should,<sup>273</sup> and also because of the corruption and negligent practices that impact civil proceedings negatively.<sup>274</sup> Corruption at the lower levels of justice creates high barriers to access to justice,<sup>275</sup> thus, this will influence both the filing and awarding of punitive damages claims in Mexico.<sup>276</sup> As has been pointed out, citizens that have experienced unjust outcomes from the justice system may choose not to rely upon formal legal procedures for the solution of their justice problems.<sup>277</sup>

Accordingly, the lack of pre-trial discovery during the taking of evidence phase of the proceedings and the absence of juries in Mexico's legal system will also disadvantage Mexican tort victims in succeeding in their claims and decrease the demand for the transplanted punitive damages, making American punitive damages "better law" in accomplishing their function. In the next section, we propose how to best fine-tune the incomplete and deficient incorporation punitive damages in

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272. Miguel Carbonell, *Corrupción Judicial E Impunidad: El Caso De México*, LO QUE TODOS SABEMOS SOBRE LA CORRUPCIÓN Y ALGO MÁS 4, 5 (Ricardo Méndez-Silva ed., 2010) (stating that in 2010 surveys reported that only 10 percent of the population had trust in Mexico's Supreme Court that enjoys more reputation than lower courts). Mariana Hernandez-Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing The Shadow Of The Law Through Citizen Participation*, 10 CARDOZO J. OF DISP. RESOL. 91, 98, n. 22 (2008). It has been reported that Mexico ranks among the top 5 OECD countries whose population perceives its government as highly corrupt, only below Russia, Venezuela and Paraguay. See OECD, *Economic Surveys - Mexico* 23, ¶ 24, Figure 11 (OECD ed., Jan. 2015).

273. Mexico ranked 93 out of 102 in the Factor 8 Criminal Justice of the World Justice Project's Rule of Law Index 2015 which measures whether the criminal investigation, adjudication, and correctional systems are effective, and whether the criminal justice system is impartial, free of corruption, free of improper influence, and protective of due process and the rights of the accused. See World Justice Project, *Rule of Law Index* 30 (2015).

274. In terms of Civil Justice, which regards how much a justice system is accessible and affordable, free of discrimination, corruption and improper influence by public officials, Mexico ranked 82 out of 102 countries in the World Justice Project's Rule of Law Index 2015. See *id.*

275. Julinda Beqiraj & Lawrence McNamara, *International Access to Justice: Barriers and Solutions* 29 (International Bar Association ed., Oct. 2014).

276. This specifically affects Mexico because before a matter reaches an appellate court, parties often have undue dealings with the judge or administrative staff of a court of first instance. There are numerous examples of corruption practices by Court clerks and other administrative staff. In one occasion one court clerk was investigated for holding around USD \$30 million on its bank account. Cf. Gustavo Castillo-García, *Acumula Secretario de Juzgado Más de \$432 Millones en Siete Años*, LA JORNADA, 28 May 2011.

277. Beqiraj & McNamara, *supra* note 275, at 29.

Mexico in order to achieve a successful transplant following the recommendations provided by Milhaupt, Pistor, and Öricü.

#### 6. The Necessary Fine-tuning of Mexican Punitive Damages

Öricü suggested that the tuning of the transplanted law after transposition is more important to achieve a successful legal transplant than the source of supply or affinity of a foreign rule with the host system.<sup>278</sup> Adjustments to the foreign rule increase its receptivity in the host legal system.<sup>279</sup> Milhaupt and Pistor also submitted that the effectiveness of legal transplants will vary depending on how well the new rules and the host system adapt to each other.<sup>280</sup> The punitive damages rule transplanted into the Mexican legal system has already been adjusted by the Supreme Court of Justice's interpretation of punitive damage as part of moral damages. But such adjustment has resulted in a mismatch that will likely impair the proper functioning of punitive damages in Mexico when compared to the American ones (see Section 5.4 above).

Milhaupt and Pistor submit that adaptation may consist of removing procedural obstacles to its enforcement and, in general, create the proper environment and incentives for applying the new law.<sup>281</sup> Under this guideline, changes in the procedural law allowing pre-trial discovery or the introduction of the jury-trial would be a positive change to support the application of the new punitive damages in Mexico. However, Mexican lawyers are rather unfamiliar with the "adversarial" legal system that requires some degree of cooperation between the parties during discovery phase. The use of juries would also involve a fundamental change in the structure, theory, and practice of civil justice in Mexico. The adoption these institutions, a different legal transplant in itself, would clash with the traditional conduct of the local actors who would most likely reject them.

We agree that for successful transposition, adjustments should not necessarily result in resemblance but rather in harmony.<sup>282</sup> We cannot expect that punitive damages in Mexico work in the exact same manner as the American ones in a legal and social context that is different. For that to happen, the whole civil liability law and procedure in the United States

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278. Öricü, *supra* note 98, at 207.

279. *Id.* at 208.

280. MILHAUPT & PISTOR, *supra* note 108, at 211-12.

281. *Id.*

282. Öricü, *supra* note 98, at 211.

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would need to be imported to Mexico and not only one isolated rule.<sup>283</sup> Still, there is no warranty that such full transposition would make Mexican punitive damages exactly the same as in the United States. Yet, the Mexican legal actors could perform some fine-tuning at the substantive law level that would make Mexican punitive damages achieve their function better.

The Supreme Court of Mexico's decision commented in this article is already a great step forward in this field. Punitive damages are now part of the Mexican legal system and the legal actors have positive expectations about this new addition. However, this decision rendered incomplete law in several aspects, which will need further fine-tuning. The Supreme Court of Mexico did not provide any guidelines as to the calculation of punitive damages or the proportion that punitive damages should have in relation to "actual physical harm" or "moral damages with pecuniary consequences." In fact, this was one of the shortcomings highlighted in the Concurrent Opinion issued by Justice Cossío Díaz, but yet to fill the gap.<sup>284</sup> It suggested that the Supreme Court should have looked at American scholarship and case law in order to provide guidelines to calculate the amount of punitive damages that would deter the defendant from engaging in similar tortious conducts.<sup>285</sup> However, we demonstrated above that using such guidelines will be problematic in light of the compensatory nature of punitive damages in Mexico (see Subsection 5.4 above).

The Supreme Court of Mexico also omitted furnishing the Mexican legal system with other elements that are required for the optimal functioning of punitive damages. For instance, the Court did not set the standard of conduct that would warrant the award of punitive damages. The commented decision states that the conduct of the tortfeasor was "serious," and thus the "degree of liability was high."<sup>286</sup> It also stated that the activities of the tortfeasor had a "high social relevance."<sup>287</sup> Nonetheless, it failed to explain whether for an award of punitive damages a "high degree of liability" where the tortfeasor activity is of "high social relevance" needed to be established concurrently. It also failed to explain what elements are to be established to prove a "high degree of liability."

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283. *Id.* at 216.

284. Supreme Court of Mexico, First Chamber, *Voto Concurrente*, José Ramón Cossío Díaz, A.D. 30/2013, *supra* note 3, at 12-16.

285. *Id.* at 14.

286. *Id.* at 116.

287. *Id.* at 117.

Some of the statutory provisions on punitive damages in the United States set the standard of conduct of the tortfeasor stating that no punitive damages are authorized unless defendant's conduct involved at least "reckless disregard"<sup>288</sup> or in wrongful death actions or when "the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."<sup>289</sup> In the United Kingdom, for example, punitive damages are limited to three scenarios: 1) abuses of power by government officials that infringe on individuals' rights; 2) injuries caused by defendants who sought profits in excess of harm caused; and 3) express authorization by statute.<sup>290</sup>

Similar guidelines by the Supreme Court of Mexico would have been welcomed by lower courts and the Mexican legal community to implement the institution of punitive damages in the country. That would have given them a more clear and precise definition of the permissible contours of punitive damages and its calculation. Instead, the Supreme Court was vague and relied only on unrelated ideals such as the victim's right to adequate compensation<sup>291</sup>— in spite of clarifying that punitive damages are not compensatory in nature in the United States or elsewhere – and, as a second aspect, "sending a message of official disapproval for the violations of the human rights in question and the commitment that they will not happen again."<sup>292</sup> This last ideal, for example, contradicts the Supreme Court of the United States' holding that a jury may not deter a defendant based on public harm when calculating the amount of an award and that the jury must base an award only on the circumstances specific to the case at bar, not on the idea relating to the fulfillment of a greater public duty.<sup>293</sup>

In addition, the Supreme Court of Mexico has tacitly endorsed the award of punitive damages in contractual claims. In principle, moral damages are also available in contract law cases under Mexican law. This means that, in Mexico, punitive damages, as part of moral damages, may be awarded for such claims too. In the United States, however, punitive damages cannot generally be awarded in contract disputes.<sup>294</sup> The main

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288. See e.g. Okla. Stat. tit. 23 § 9.1.

289. See e.g. Ala. Code 1975 § 6-11-20.

290. Rookes v. Barnard, *supra* note 77, at 410-11.

291. Supreme Court of Mexico, First Chamber, A.D. 30/2013, *supra* note 3, at. 86, n.121 (citing *Cantoral Benavides vs. Perú*, *supra* note 61, ¶ 53).

292. *Id.*

293. Philip Morris II, 549 U.S. at 354-55.

294. See e.g., Okla. Stat. tit. 23, § 9.1(A). Also Cal. Civ. Code § 3294 provides in relevant part: "[i]n an action for the breach of an obligation NOT ARISING FROM CONTRACT,

exception is in insurance bad faith cases if the insurer's breach of contract is alleged to be so egregious as to amount to a breach of the "implied covenant of good faith and fair dealing," and is therefore considered to be a tort cause of action eligible for punitive damages.<sup>295</sup> The Mexican legal actors, in particular, legislators, should further analyze the effects of adopting punitive damages as part of moral damages for contract claims and be explicit about the reasons to maintain them or reject them.

The same would apply to the possibility of awarding punitive damages against the government. Moral damages may be awarded against the Mexican Federal Government for torts caused by its officials.<sup>296</sup> In this regard, however, the amount of moral damages may not exceed 20,000 times the daily minimum wage in Mexico City.<sup>297</sup> On the other hand, in the United States, the law explicitly precludes the availability of a punitive damages remedy in cases of federal government's tort liability,<sup>298</sup> while in the United Kingdom the Crown is subject to exemplary damages.<sup>299</sup> Again, Mexican legal actors should consider whether the English or American approach is preferable for Mexico<sup>300</sup> and determine accordingly whether the Mexican law on government tort liability should evolve to allow for the possibility of punitive damages without limiting their amount or, on the contrary, to exclude them altogether.

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where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant [emphasis added]."

295. Some landmark cases are: *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 328 (1958) (third-party liability insurance), and *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566 (1973) (first-party fire insurance).

296. See Article 113 of the Mexico Constitution and Article 1 of Ley Federal de Responsabilidad Patrimonial del Estado. See also Supreme Court of Mexico, First Chamber, Tesis 2a./J. 99/2014, *Semanario Judicial de la Federación*, Décima Época, libro 13, t. I, 13 December 2014, at 297. See also generally, Magda Zulema Mosri Gutiérrez, *Análisis de la Ley Federal de Responsabilidad Patrimonial del Estado y de la Ley General de Víctimas: Desafíos y Oportunidades de un Régimen en Construcción*, CUESTIONES CONSTITUCIONALES 149 (2015).

297. See Article 1 of the Ley Federal de Responsabilidad Patrimonial del Estado (the 2017 daily minimum wage in Mexico City is 80 Mexican pesos, i.e., around 4.5 US Dollars).

298. Federal Tort Claims Act, 28 U.S.C. §§ 2674-75 (2012): "The United States shall be liable, respecting the provisions of this title to tort claims . . . but shall not be liable for interest prior to judgment or for punitive damages." See also Raboin, *supra* note 6, at 262 (2016).

299. *Id.* at 263.

300. For an analysis of the two approaches, see *id.* at 282 et seq.

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Finally, we know that transplanting a law means to apply effectively a rule developed in a different socio-economic order in a place with its own local conditions.<sup>301</sup> In this regard, changes in the transplanted rules or legal institutions indicate that the appropriateness of these rules has been considered and modifications were made to take into account domestic legal practice and conditions of the host country.<sup>302</sup> Adaptation does not necessarily require that the transplanted law be changed significantly. However, at the very least, an informed choice about alternative rules must have been made.<sup>303</sup> Punitive damages would achieve their function better in Mexico if they were legislated as a specific type of damage, separate from other types of compensatory damages such as moral damages and actual physical damages. Legislating punitive damages is the fastest and most effective way to obtain a better law in Mexico. The strict rules on judicial precedent and the courts' restricted task to interpret the law (*see* Section Three above) means that it would take many years before courts in Mexico can develop proper guidelines for the adequate implementation of punitive damages. The legislative enactment of punitive damages should be preceded by extensive debates about the adoption of one of several foreign options.<sup>304</sup> The legislative debates may evaluate the statutory provisions on punitive damages from some American states or from other legal systems such as the Canadian province of Quebec, a civil law jurisdiction at least with regard to its substantive private law. As we mentioned before, the familiarity with the country of origin is an indicator of successful transplant. Enacting a rule modeled by the punitive damages provision in Sec. 3294(a) California Civil Code regarding the standard of misconduct required for the award of punitive damages, or Article 1621 of the Quebec's Civil Code, which explicitly sets a list of criteria to be considered when evaluating the amount,<sup>305</sup> may not need major adaptations. For this type of fine-tuning to take place, a strong push from

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301. Berkowitz et al., *supra* note 121, at 177.

302. *Id.* at 179.

303. *Id.* at 180 (stating that extensive comparative research prior to the adoption of a foreign legal system is indicative for an informed choice).

304. *Id.*

305. Article 1621 of the Quebec Civ. Code states where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose. Punitive damages are assessed in light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the reparatory damages is wholly or partly assumed by a third person.

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Mexico's ruling elite or the legal profession will be needed.<sup>306</sup> This can only be possible with the support of educational institutions, proactive legislators, creative scholars, and diligent judges.

## 7. Conclusion

The Supreme Court of Mexico adopted the legal institution of punitive damages from the American legal system. However, Mexico's legal system is currently suffering from a "transplant effect," caused by the mismatches between preexisting conditions in Mexico and the transplanted punitive damages from the United States. The main mismatch is a dogmatic one, with practical consequences. The common law tradition treats punitive damages as a type of non-compensatory damages, since their main function is to punish the tortfeasor for outrageous misconduct and to deter him and the others from similar misbehavior in the future. On the contrary, punitive damages in Mexico are now part of moral damages that are compensatory by nature. This construction of moral damages will influence the method of calculating punitive damages in Mexico. Other divergences at the procedural grounds, such as the lack of pre-trial discovery rules and jury trials in the Mexican legal system, will also weaken the effectiveness of punitive damages in Mexico.

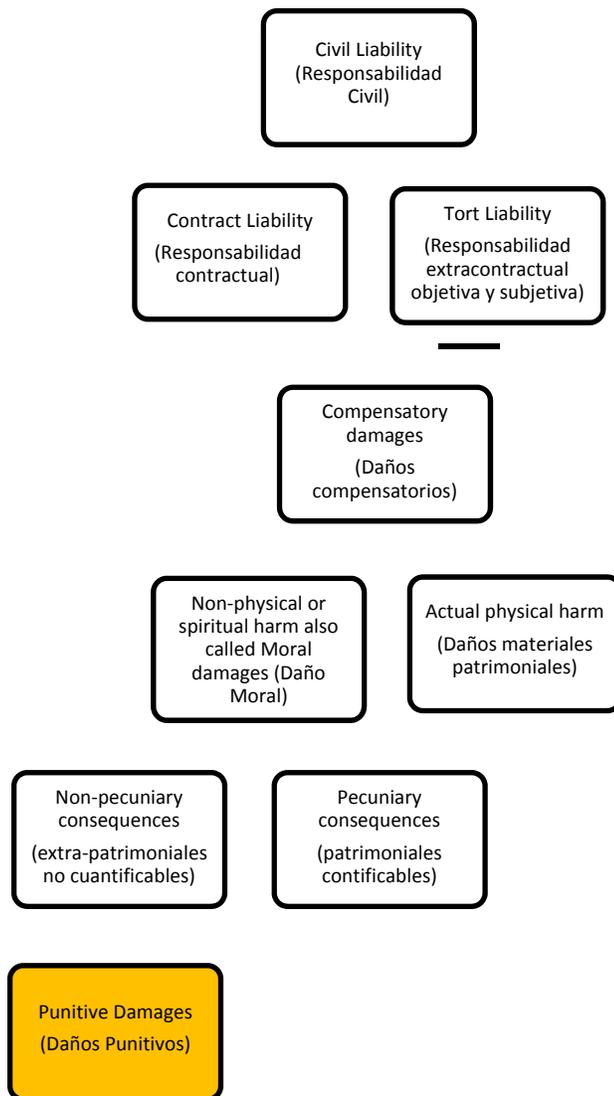
In addition, the decision by the Supreme Court of Mexico was insufficient in several aspects. The current situation will reduce the demand for punitive damages in Mexico, which is an indicator for successful legal transplantations. This means that, despite being comparable legal rules, punitive damages in Mexico will not accomplish their function as effectively as their Anglo-American forerunners. The transplant of punitive damages in Mexico will not succeed unless the Supreme Court of Mexico receives the firm support from the federal and state legislatures. Punitive damages would achieve their function better in Mexico if they were legislated as a specific type of damage, and separate from other types of compensatory damages such as moral damages and actual physical losses. Mexican legal actors need a more clear and precise definition of the permissible contours of punitive damages and its calculation. Today there are many questions regarding the tortfeasor's standard of conduct and the method to calculate the award of punitive damages in Mexico. Their scope is also too broad to cover contractual claims and government liability. In light of the Mexican courts' limited roles to only interpret the statutory law and the constitutional restriction to

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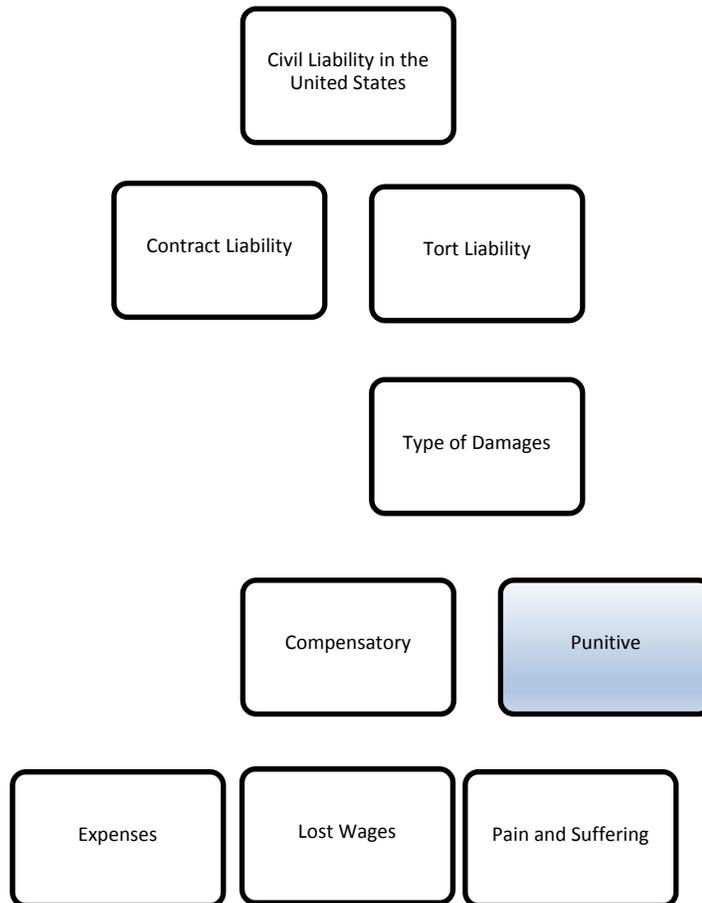
306. Örüciü, *supra* note 98, at 212.

creating new law, it would take many years before they develop proper guidelines for the adequate and complete transplantation of punitive damages. Accordingly, the statutory enactment of punitive damages is the fastest and most effective way to achieve a better law in Mexico.

*Chart Number 1 (Mexico)*



*Chart Number 2 (United States)*



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