

THE CONCEPT OF DAMAGE AND THE HARM PRINCIPLE*

CONCEPTO Y PRINCIPIO DE DAÑO

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Abstract:

In this study I will analyze the concept of damage as it is used in tort law. To do this, I will address three questions: first, is there a single concept or multiple concepts of harm? Second, what is the explanatory power of comparative versus non-comparative criteria for determining what constitutes harm? Third, how are the concepts of harm, interest and well-being linked? I propose, first of all, to analyze these three questions on the basis of certain debates held in moral and political philosophy regarding the harm principle. Second, I will defend the hypothesis of the relevance of a generic concept of damage and the advantages of a complex comparative criterion for determining cases of damage. Finally, I will argue that the link between the concept of damage and the notion of interest cannot be sustained independently of certain moral conceptions.

Key words: *Damage; Harm Principle; Comparativism; Interest; Well-Being*

Resumen:

En el presente trabajo analizaré el concepto de daño de acuerdo con su uso en la práctica jurídica de responsabilidad extracontractual. Para ello, abordaré tres interrogantes: primero, ¿existe un único concepto o varios conceptos de daño? Segundo, ¿cuál es el poder explicativo de criterios comparativos *versus* criterios no comparativos para determinar qué constituye un daño? Tercero, ¿cómo se vinculan los conceptos de daño, interés y bienestar? Me propongo, en primer lugar, analizar estas tres cuestiones a partir de ciertas discusiones sostenidas en filosofía moral y política sobre el principio de daño.

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En segundo lugar, defenderé la hipótesis de la relevancia de un concepto genérico de daño y las ventajas de un criterio comparativista complejo para determinar los casos de daño. Por último, argumentaré que la vinculación entre el concepto de daño y la noción de interés no puede sostenerse con independencia de alguna concepción moral.

Palabras clave: *daño; principio de daño; comparativismo; interés; bienestar*

I. CONCEPT OF DAMAGE IN TORTS: RELEVANCE AND PROBLEMS IN CONCEPTUALIZING

It is obvious to say that the concept of damage is central in private law, particularly in the field of torts. However, what exactly constitutes damage, even within that particular domain of legal practice, is not clear at all. If we observe case law, and the development of civil law doctrine, we may conclude that the content of the concept and the criteria for its identification are not explicit at all: there are a wide variety of situations considered damage which are presented within the framework of a casuistry apparently guided by particular situations.¹ Difficulties in the conceptualization of damage sometimes lead to confusing the damage itself with other factors that make it compensable. It is not unusual, in this sense, to confuse questions regarding the relevant causal relationship with problems related to the concept of damage itself.

Both the diversity of criteria existing in the practice of torts, criteria that are often incompatible, as well as the inconsistencies when it comes to theorizing about the basis of liability for torts, are problems that may be addressed, at least partially, by examining more deeply certain debates regarding the concept of damage.

By legal practice I understand both case law and scholarship and consider relevant what it has to say about damages. Legal practice will vary in different legal systems as well as in the same legal system over time. This does not hinder us from mentioning some generally shared criteria in doctrine and case law, in different systems of continental tradition, regarding what constitutes damage in tort law.² In general, the notion is linked to either the idea of an injured legitimate interest or that of a violated right. This second notion of damage, in general, is

1 SEIJAS QUINTANA (2007); DÍEZ PICAZO GIMÉNEZ (2009).

2 I therefore exclude systems that classify cases of damage or protected interests.

currently linked to moral or psychological damage, when it is identified with the violation of personality rights.

On the other hand, the same legal practice many times identifies and uses different criteria for identifying damage. The comparative criteria are the ones most widely used in case law, but it is also possible to find non comparative notions, especially in cases of damage to future people or future generations. Although it is not possible in this paper to carry out a detailed review of legal practice, the existence of diverse criteria for the identification and understanding of damage is clear, and highlights the need to reflect on such criteria and on the content of the concept itself.³

The challenge lies, therefore, in contributing to the elucidation of the concept of damage in such a way that the theoretical criteria for its identification make it possible to give meaning and to reconstruct its use in the legal practice of torts. In this sense, we may observe, and we will argue so in this study, that some debates in the field of moral and political philosophy regarding the harm principle, can shed light on our understanding of the concept of damage. This relationship is evidenced, particularly, in questions related to its use. I am interested in highlighting and addressing three problems in particular: that of singularity vs. the multiplicity of concepts of damage; comparative criteria versus non comparative criteria for the determination of cases of damage, and, finally, the relationship between damage, interest and well-being.

A preliminary clarification, however, is necessary: theoretical discussions regarding the harm principle often involve a broader notion than the one used in tort law, which we refer to as damage. The former type of analysis tends to highlight the moral significance of harm or its relevance in a normative sense.⁴ I understand, however, that a concept of harm, understood in this way, may be found at the base of a practice that collects and regulates, more specifically, the consequences of some (not all) damages. In other words, following this type of

3 The various criteria in legal practice regarding what is to be understood by damage in civil liability can be observed in numerous studies of civil law doctrine and in the case law belonging to different periods. By way of example only, BARROS BOURIE (2007) may be mentioned; ALESSANDRI (2005); DÍEZ PICAZO (1999); BUSNELLI et.al. (2013); REGLERO CAMPOS (2002) in all these studies, I repeat, by way of example, the variety of classifications and criteria to identify damage is evident. The same can be said, and even more so, regarding case law and its multiplicity of criteria. For an analysis of this characteristic in Spanish case law, see DÍEZ PICAZO GIMENEZ and ARANA DE LA FUENTE (2009).

4 The moral significance of harm is underlined, for example, in the treatment of the concept by FEINBERG (1984), HANSER (2008) and SHIFFRIN (2012), among many others.

analysis there may be assumptions of damage, which the legal system in question may not consider compensable, resulting in an absolutely contingent situation. I will return to this point when analyzing the relationship between the notions of harm and interest in section 2.3 of this paper.

II. CONTRIBUTIONS FROM MORAL AND POLITICAL PHILOSOPHY: THE HARM PRINCIPLE.

The harm principle begins with Mill's book, *On Liberty*, and relates not only to matters of a moral or political nature, but also projects into more circumscribed theoretical domains. An already classic example of these applications is the harm principle and the role it plays in criminal theory and regulation, especially in terms of justification.⁵ It is not new, in this sense, to state that the analysis of the harm principle illuminates various aspects of theory in legal practice. The general idea that I defend here, however, is that of certain explanatory advantages of the harm principle with respect to the concept of damage. It is, therefore, a theoretical relationship but not necessarily of a justificatory nature. This will be analyzed in section 2.3 of this essay.

A first question, when relating the harm principle and the concept of damage, has to do with the singular or multiple character of one and the other. In other words, does the plurality or singularity of the harm principle commit us to the singularity or plurality of the concept of damage? This question will be briefly addressed in the following section. Secondly, the relationship between the harm principle and the concept of damage can be observed in theoretical debates on comparative and non-comparative criteria for the determination of harm, since these criteria are also applicable for the determination of legally relevant damages, in accordance with the practice of the law of torts. Third, the relationship between harm, interest and well-being has been extensively analyzed with regards to the aforementioned principle, and such analysis is very useful for a better understanding of the concept of damage.

The three different aspects through which, as I understand it, an analysis of the harm principle can be translated into a theoretical contribution to advance the elucidation of the concept of damage, can be summarized in what is known as the problem of the scope of the harm principle.⁶ A better understanding of the concept of harm is essential in determining the type of situations with respect to

5 See FEINBERG (1984).

6 HOLTUG (2002), p. 364.

which the harm principle can be invoked in defense of individual freedom. At the same time, the theoretical considerations circumscribed within the scope of the harm principle are also useful theoretical contributions for the understanding of one of the central concepts in the law of torts.

2.1. Multiple principles, one concept

The harm principle has long been studied as *a* principle according to which, at least in its classic formulation, it is possible to affect the individual liberties of citizens only in case it is necessary for the prevention of harm. Thus, according to Mill, the only purpose that justifies the exercise of force against a person's will is the prevention of harm.⁷ However, when considering more recent analyzes of the subject, we observe that there is not *a* single but *many different* formulations of the harm principle. This has led some authors to support the existence of *multiple* harm principles.⁸ Although an exhaustive study of all the variants of the harm principle or principles would require an independent analysis, it is nonetheless useful to review this point in order to assess whether, and to what extent, defending the existence of multiple harm principles influences somehow in the understanding of the concept of damage as a single concept or as various different concepts.

Edwards, whose doctrine I will take as reference regarding the notion of multiple harm principles, understands that many of the complexities and objections to the harm principle derive, first of all, from its ambiguity. He proposes, first of all, a Disambiguation Thesis, according to which there are multiple harm principles classifiable according to two criteria: first, the logical relationship between the elements of the principle and the normative role of those same elements.⁹ According to the first criterion, the logical relationship between the elements of the principle will determine that a principle is restrictive (if the action that causes the harm or risk of harm is a necessary condition of the state's action in a broad sense) or permissive (if the action that causes harm or risk of harm is not a necessary condition for state action in a broad sense). According to the second of the criteria, the normative relationship between both elements may be positive (when the action that causes the harm or risk of harm is a reason for the state's action in a broad sense) or negative (when the action causing the harm or risk of harm eliminates a reason for the state not to perform that action).

7 MILL (2012), pp. 21-22.

8 EDWARDS (2014).

9 EDWARDS (2014), p. 254.

Edwards, in addition, distinguishes another series of harm principles according to how we interpret state action: whether it is deployed in a legitimate way or with pretense of legitimacy. This action, for example, can be instrumental (considering that it will probably prevent harm); it may be focused on the act prohibited or regulated by that action; or, the action of the state may be linked to the purpose of regulating certain types of actions or states of affairs.¹⁰

These distinctions allow, first, for the identification of four different harm principles resulting from the combinations of both criteria (positive permissive, negative permissive, positive restrictive and negative restrictive).¹¹ Likewise, the permissive and restrictive principles may also be, respectively, instrumental, centered on the act or focused on the purpose of their implementation. All this means, in short, that, following Edwards' reasoning scheme, there are at least ten different harm principles (in addition to the four previously mentioned, restrictive instrumental or permissive instrumental, restrictive act-centered or permissive act-centered, and restrictive focused on the purpose or permissive focused on the purpose).¹²

While it is possible to think of other formulations of the harm principle, for example if we consider that a principle can be instrumental and consider the purpose of the prohibition simultaneously, the point of drawing attention to this scheme is to try to determine if these various formulations of the harm principle have any correlation with the concept of damage. In other words, we must now ask ourselves whether these multiple and diverse harm principles also imply diverse and therefore multiple concepts of damage. I understand that such an implication does not exist. In the first place, if we consider the first distinction, between the restrictive and the permissive principle, it seems clear that the consideration of the logical relationship between the condition of application of the principle and the action of the state is independent of the content of the damage and, therefore, of the concept of damage. Let's suppose, for example, a restrictive harm principle according to which if individual interests have not been monetarily affected, the state is not allowed to intervene. We may consider, in the same example, that individual monetary damage is not a necessary condition for the state to intervene in the lives of individuals.

10 EDWARDS (2014), p. 263.

11 Edwards himself provides an example of the principle of positive and permissive harm in Feinberg's formulation. For the latter, the prevention of harm is a reason in favor of coercion, but coercion may be permissible even in the absence of that reason. See EDWARDS (2014) p. 257.

12 EDWARDS (2014), p. 265.

The concept of damage, despite a change in the type of harm principle, remains constant. However, this becomes less clear when we think of a positive or negative harm principle, that which, respectively, is a reason to intervene, or eliminates a reason not to intervene, or with regards to the principle of instrumental harm that focuses on the act or on the purpose. In all these cases, I believe, the underlying normative considerations, whether in terms of reasons or type of justification for state action, seem to indicate that what constitutes harm is not irrelevant, and, therefore, neither is the concept of damage involved. For example, a restrictive instrumental harm principle may be compatible with the concept of damage constructed on the basis of prudential considerations, but not with the concept of damage constructed on the basis of other moral considerations, as in such a case there may be reasons intrinsic to the very concept of damage, to its moral component, that exclude the considerations of utility required by an instrumental principle.

Now, this interdependence between the principle and the concept of damage can be interpreted in two different ways. First, as an interdependence that determines that there are multiple concepts of damage, the validity of which will depend on the harm principle at stake. Second, as possible criteria to defend the application or use of one concept of damage instead of another, according to its ability to explain more fully, among other things, the functioning of the various harm principles. According to this second interpretation, there would be *one correct* concept of damage, or leaving aside discussions on correction criteria in the moral sphere, that which is more justified in its application. Determining which of these two interpretations may prosper requires greater analysis of the problem than I can carry out in this study, but I am interested in emphasizing that, in any case, the postulation that there are multiple harm principles *does not exclude* this second interpretation, that is, the existence and plausibility of a concept of damage in a generic sense.

Ultimately, I understand that debates regarding the structure and justifying role of the harm principle may be considered, conceptually, as an independent question of the relationship between the harm principle and the concept of damage. The harm principle, or principles, may constitute a weaker or stronger reason to justify the intervention of the state in certain circumstances, but if we admit that it exists as a principle and that, for this very reason, it has some significance in a moral or normative sense, then we must presuppose a certain concept of damage, which will help us determine the scope of the principle as a normative parameter. In what follows, therefore, I will assume that it is plausible to speak of a concept of damage in a generic sense, as this is not excluded by any formulation of the harm principle. But also, as we will see later, understanding the concept of damage in a generic sense will allow us to appreciate more clearly

the contributions of the debates surrounding the harm principle starting from the relationship with the notion of interest and the problem of comparative criteria and non comparative criteria for its determination. The following two sections are devoted to these two questions, in reverse order.

2.2. Damage determination criteria

The criteria for determining damage, in general, have been associated with a harm-state and are usually divided into comparative and non-comparative criteria, depending on whether the harm-state is derived from the comparison between two situations, or is independent of any comparison. Within the comparative criteria, it is possible to confront two situations that take place in a given timeline in which changes are observed regarding a person's interest are observed on certain good; this is the historical kind of comparison. The comparison is counterfactual, however, when comparing a current situation with a hypothetical one. On the other hand, the criterion is non-comparative when certain situations or states of affairs are considered bad in themselves without them necessarily being worse than others.

The three positions mentioned have certain advantages and are also problematic when it comes to explaining some cases of damage. In a succinct way, I will address these advantages and problematic aspects here, defending a reformulated version of the counterfactual criterion which allows us to overcome some of the objections raised against it.

A preliminary clarification is necessary. By 'theoretical criteria for the determination of damage' I will understand those theoretical criteria, comparative and non-comparative, that present a certain conceptual independence regarding the content of the damage. We might ask why I argue that this debate is, to some extent, independent of the specific content of the damage. I understand that, whether we link the harm to a damage of interest, decreased well-being, or impairment of the exercise of autonomy, theoretical considerations regarding whether such states or events are identified by comparison or in a non-comparative way are equally applicable. Let's look at an example to illustrate the point: Ana is a successful lawyer who, one afternoon, is injured as a result of the recklessness of a taxi driver, who runs her over while she is crossing the street. As a result of the injuries, she must suspend certain work commitments that were due, reasonably, to bring her economic benefits. The example is simple and does not present problematic aspects. However, the same case may be viewed from the affectation of Ana's interests, well-being, or autonomous life plan. In any of these cases, it will be necessary to understand if her current situation, in which she has been damaged, depends on the comparison made with another situation (previous or hypothetical)

or that her current situation is simply bad according to some other parameter. In any case, the terms of such conceptual independence require some nuance since the distinction makes sense only at the conceptual analysis level, but obviously not in the specific instances of damage.

Returning to the analysis of the considered criteria, we may affirm that in general the comparisons, or absence thereof, are established between situations or states of affairs.¹³ Comparative theories consider that harm exists if, by virtue of a comparison between two situations or states of affairs, a person is worse off in relation to a certain good or interest. Non-comparativism, on the other hand, maintains that there is harm regardless of any comparison: what is relevant is not being worse off than before or worse off than one *could* be, but being in a bad state, in a situation or state of things that is harmful in itself.

As stated in the introduction, the three criteria mentioned (historical comparative, comparative versus factual and non-comparative) present advantages and problems when it comes to explaining certain types of situations that, in general, we would consider relevant damage in any legal system and, in particular, for any standard non-contractual civil liability system. Therefore, an in-depth analysis of each of these criteria, as well as some of the situations that are problematic for each of them is required. This will allow me, later in the paper, to evaluate some of the solutions presented to overcome these objections.

The historical comparison criterion allows us to say that there is damage when a person is in a current situation or state of affairs *t1* that is worse than a situation or state of affairs *t2*, in which that same person was in at a previous moment. What is decisive, for purposes of comparison, is obviously the time factor. However, it is not entirely clear what moments should be taken into account when comparing and what their limits are. These two moments, it seems, will be separated by the occurrence of the event that caused the damage, but sometimes that moment is not easy to pinpoint. Consider, for example, environmental damage, or damage caused by taking a certain drug in a long-term treatment. In all cases, the determination of *t1* and *t2* will depend on the type of event which caused the damage, the criterion of causality considered, the need to assess the normality or stability of the state of affairs prior to the damage, among other

13 There is an ongoing debate regarding whether what is relevant, in relation to these situations or states of affairs, is the harmful action or the suffering state. Although I will not go into this question in detail, it should be clarified that the suffering state and the incorporation of thresholds for its determination is more compatible, in general, with non-comparativism. Focusing on the notion of suffering harm, among others, HANSER (2008) and TRUCONE BORGOGNO (2016).

factors. The intervention of these variables in the evaluation of what separates the relevant times or moments for the historical comparison, allows us to say that the relative indetermination of this element of the comparison is not problematic enough to discard this criterion.

However, there are other problematic issues for historical comparativism. In the first place, when applying this criterion, it is possible that problems of under inclusion arise, specifically to account for cases of loss of opportunity as situations that constitute damage. Let's consider the same successful lawyer in another situation: her driver negligently drives her to the airport without having slept and makes a wrong turn on the way, causing delay in her arrival to the airport, which means she eventually misses her flight. This flight is the one that would have allowed her to get to a meeting, which in turn would have presumably allowed her to complete a negotiation. The lawyer's situation, before and after arriving late for her flight is the same, historically, and with regards to the economic benefits. She has not lost an asset or benefit that she already had. However, she clearly missed out on the opportunity to obtain that benefit. Let's think of a person who undergoes an operation to improve her eye sight by 50%. Due to the surgeon's negligence, she recovers only 10% of her sight after the operation. By virtue of mere historical comparison, not only would we not say that there was damage, but we should also state that there was a benefit. However, damage did occur because if the doctor had acted diligently, she would have recovered 40% more of her vision. This type of case occupies a highly relevant place in the legal practice of torts, paradigmatically, in cases of loss of opportunity or loss of chance, so the difficulties of the historical comparative criterion to account for them is not a minor issue. Further ahead we will analyze some suggestions that look to strengthen the historical comparative criterion so that it can explain, precisely, cases of loss of opportunity such as the ones aforementioned.

The counterfactual comparison criterion, comparison between the current situation or state of affairs *ta* and that which would exist if the event or harmful action had not taken place *th*, seems to solve some of the problems of the previous criterion, but presents other difficulties.

On the one hand, it seems to be the appropriate criterion to explain situations of damage such as loss of opportunity, the case of the lawyer and the case of the eye operation. The lawyer has been damaged because, although at a time prior to missing her flight, she did not have the economic benefits reported by the negotiation, if she had not missed it, she would have such benefits. Likewise, if the surgeon had carried out the operation with due diligence, the patient would have obtained a benefit, or would have seen her health related interests satisfied to a greater degree than she actually saw. Ultimately, what this criterion integrates,

through the inclusion of counter-factual hypotheses, are the benefits or interests over which people have a right or a legitimate expectation, and this allows for the explanation of cases such as those mentioned.

However, this criterion presents certain problems in explaining two types of cases: first, those cases that are often referred to as causal overdetermination of damage. Second, the damage that Anglo-Saxon literature calls *preemptive harms*,¹⁴ that is, damage that once caused, prevents further damage. Let us look at two examples to illustrate these problems. Let us suppose the case of an automobile accident between two cars which is not a serious accident. When colliding, both cars involved in the accident cause damage to a third car, parked in an authorized space on the street. Hours later, due to an earthquake in that same city, a building with construction defects partially collapses causing the destruction of the car previously damaged in the car accident. This is a case in which there seems to be a causal overdetermination of the harmful result and in which, even hypothetically excluding the first of the harmful events, the result is not modified. However, not considering the first of the events to be harmful does not seem reasonable, at least as a general criterion for determining damage and leaving aside considerations regarding compensation criteria. Consequently, the comparison of the current situation, in which the car is destroyed, and the hypothetical situation in which the first event had not taken place, does not seem to be sufficient for the determination of the damage, much less for the determination of liability.

Now let's consider a variant of the taxi and plane example. Let us suppose that a businesswoman takes a taxi to the airport and has an accident on the way because another vehicle crossed a red light and hit the taxi. This accident causes the businesswoman various personal injuries and, in addition, prevents her from taking the flight that would allow her to have a meeting which would report important economic benefits. However, the flight that the businesswoman was going to take also ends up in an accident at takeoff, and the entire crew and passengers die. In this case, if the taxi accident had not taken place (with the bodily harm and other damages caused) the businesswoman would have died, along with the rest of the passengers on that flight. However, it appears that the damage caused by the taxi accident is also clearly damage. This is an example of preventive or *preemptive harm* that the counterfactual criterion also seems to have problems explaining because, if we hypothetically suppress the damaging event that actually occurred, the damage caused by the taxicab accident, the resulting situation would not have been better but much worse for the woman, as it would have resulted

14 Cases of preventive damages can also be studied as a problem related to causal relationship. This is the interpretation that, for example, GARCÍA AMADO (2018) favors.

in her own death. In both cases, ultimately, the counter-factual comparison has trouble explaining why the first event causes harm. In one case, because there appears to be a causal overdetermination of the damage. In the other, because there is damage that prevents another even more serious suffering. However, there are some reformulations of the criteria studied that may help solve these problems. I will return to the point at the end of this section

The non-comparative criterion, on the other hand, has been mainly set forth by Seana Shiffrin.¹⁵ The author starts from a critique of the comparative criteria, both historical and counter-factual, considering that they are problematic in explaining the centrality of the notion of harm in any regulatory regime and the asymmetry between harm and benefit. She understands that this asymmetry is not only present in our intuitions, which tell us that damages and absence of benefits are not the same, but it is also evident in the type of reasons required to authorize the cause of harm and to authorize the non-granting of a benefit, reasons that are of greater weight in the first case. By ignoring this centrality of harm, Shiffrin understands, the comparative criteria present problems in explaining that harm exists in cases of non-identity, harm caused when the victim is not yet born. Taking into account, then, the deficiencies of the comparative position, the notion of harm in Shiffrin's proposal is then linked to situations in which there is conflict, an alienation in her terms, between the will of a person and its current situation or experience. Her defense of the harm thesis as alienation goes hand in hand with a non-comparative criterion.¹⁶ Harm is caused when a person is placed in a bad state and that state, for anyone and in any circumstance, constitutes harm. In general, some additional criteria for the determination of harm are usually incorporated according to this criterion. Thus, recognition or establishment of some type of threshold is usually required, beyond which there is a state of harm.

To illustrate the non-comparative approach, consider the case of a woman with a drug addiction problem who, having recently stopped using drugs, wants to have children. This woman is advised by her doctor in the following way: if she conceives now, her future child will have a high probability of suffering from certain health problems associated with her recent consumption habit. If, on the other hand, she waits "x" amount of time to conceive, assuming that during this time she does not use drugs again, that probability disappears. This woman, against the advice of her doctor, decides to conceive immediately and, as predicted, her son is born with health problems associated with his mother's previous drug use. The problem, pointed out by the non-comparative theory, is

15 SHIFFRIN (2012).

16 SHIFFRIN (2012), pp. 389-397.

that any comparative criteria would fail to realize that there is harm in this case. The historical criterion fails for obvious reasons, there was no person yet in a state of affairs t_2 to allow any historical comparison. However, the counter-factual criterion also fails: if the woman in our example had decided not to conceive, we cannot say that the child would have not suffered any harm, but that he would not exist. If she had followed the doctor's advice and waited x time to conceive, we could not say that the same person did not suffer harm, but that we would be speaking, plain and simple, of a different person. This is usually called the problem of wrongful life, which is framed within the more general problem of non-identity. The solution in this type of case is, then, to define harm -and, thus, cases of damage- in non-comparative terms, as a bad or negative state of affairs, according to certain criteria or below a certain threshold, independently of any other previous or hypothetical state of affairs.

However, the non-comparative criterion presents some problems of under-inclusion because it cannot account for certain relevant situations in the legal practice of torts. The main problem of under inclusion is situations where we could say that there is damage, although the state of the injured person is not negative, nor below any threshold. Consider any case in which a very wealthy person is prevented from closing a deal that would bring her an economic benefit that, in turn, would not substantially change her general economic condition. The problem of theories or non-comparative criteria to account for these situations of damage, is linked to the more general problem of accounting for the relational aspect of damage, aspect to which I will return shortly.

As it is clear at this point, both comparativism (in its historical and counterfactual version) and non-comparativism have shortcomings when it comes to explaining certain types of cases.

Starting with the non-comparative criterion, and even though non-identity cases seem to constitute a type of situation that shows certain advantages in adopting this perspective, the criterion presents some important problems that are reflected in the difficulties in explaining certain types of cases, such as the ones exemplified. The first observation regarding this criterion, I believe, derives from asking what, or on what basis the comparison is made, or consequentially, what is not comparable. Obviously, one can always choose to consider irrelevant a state of affairs prior to the current one, or a state of affairs counterfactual justifying, when appropriate, why leaving such considerations aside would be legally or morally justified *vis a vis* other normative considerations. However, in at least one sense, there is no notion of harm that escapes comparison. Even if this comparison is not made between historical moments or between possible worlds, there is, at least, a comparison of the current state of affairs and a hypothetical state of

affairs close to a normatively ideal situation. From this point of view, there are no entirely non-comparative criteria. In this sense, in the case of the pregnant woman with addiction problems, it is possible to say that there is a comparison between the current situation, her son was born with health problems associated to or caused by the mother's addiction, with a hypothetical situation as well. It is not a question of whether the person that was born later, that is, conceived after the risk period to the fetus, is another person. This is naturally not in dispute. The issue is whether that person with a health problem is in a bad state and therefore suffers some sort of harm, then we may say that a person, anyone, is or would be better off in any case of absence of that same health problem.

A clarification is essential at this point: I am not claiming here that the comparison takes place between the current situation or state of affairs and an ideal situation, because, in such a case, all situations or states of affairs would systematically constitute harm. By definition, every situation is worse than an ideal situation. What I maintain is that the comparison would be made between the current situation or state of affairs *ta* and another hypothetical situation, theoretically constructed from certain normative criteria *thn*. The difference, in this sense, with the counter-factual comparative criterion is clear: the situation to be compared with the current state of affairs is not constructed by means of a hypothetical suppression of the mother's action, but is constructed taking as a parameter a state of ideal things, a hypothesis is constructed from a certain normative criteria. -From this point of view, escaping from the comparison of terms, situations, or states of affairs seems to be an impossible task.

Now, one could say that this is a limited interpretation of the non-comparative criterion. What this criterion seems to want to capture is that there are situations in which it is morally relevant to state that harm exists, even though there has not been and *there could not be* a better state of things for that particular person. This implies, however, assuming a relevant cost, which is that of ignoring the relational aspect of the damage and, therefore, the possibility of assigning responsibility based on that aspect.¹⁷ It is important to clarify, on this point, the scope of this observation because, even though assigning is not just the consequence of the identification of damage but of all the other elements of civil liability as well, the link itself, and therefore the relational aspect, may be suggested by the concept of damage: if A causes damage B, in the sense of causing B to be worse off now than before A acted, this same conception of damage suggests a first sense in

17 By relational aspect I understand that which derives from the correlation of corrective justice, in the classic sense proposed by WEINRIB (2017). This correlation has, as the author indicates, various elements or aspects and one of them is the one that links the defendant and the plaintiff with the bilateral conception of damage.

which such a normatively relevant link may be established. It may be the case that A, however, does not have to repair, for example, because C responds for the damages caused by A. However, the point is that the same comparison indicates a possible *relationship* and this seems to be of decisive importance in many of the cases of damage considered in legal practice. This, however, does not exclude that the analysis of civil liability considers other aspects that do not follow from such a relational aspect.

The prevention made in the preceding paragraph allows us to introduce further clarification: the relational aspect or the bilaterality linked to corrective justice as a principle that explains and justifies non-contractual liability, is not exactly the same issue as the one addressed by the debate regarding comparative and non-comparative criteria. The reason for this statement is implicit in the approach to the object of this study, as its intention is to elucidate the concept of damage according to its use in the area of civil liability, but not the underlying principle or principles that explain and justify *all* legal practice in that area. Although both problems may be related, they are distinguishable at the conceptual level and the possible answers have different scopes.

Considering the preceding clarifications, and agreeing on this point with García Amado,¹⁸ who states that the types of cases with respect to which the non-comparative criterion presents advantages does not constitute a sufficient reason to assume the cost, which consists of the difficulties in accounting for a large part of the cases of damage considered in legal practice. This is not only because in tort law abandoning the relational aspect can be problematic, but also because of the problem of sub-inclusion that the criterion presents, such as the case of damage caused to the wealthy person, which is not placed below any threshold.¹⁹

For its part, the historical comparison criterion, as we saw, presents the greatest difficulty in reconstructing and explaining the cases that, generically, are considered loss of a chance. An alternative in order to overcome this problem has been proposed in more complex versions of the historical comparison criterion. Velleman and Thomson,²⁰ for example, have argued that cases in which the opportunity to obtain a benefit is lost may be understood as harm if we

18 GARCÍA AMADO (2018).

19 This does not imply, therefore, the dismissal of the relevance of distributive justice in tort law, but merely points out certain limitations in identifying classes or assumptions of damage based on an exclusively non-comparative criterion.

20 VELLEMAN (2008) and THOMSON (2011).

make a comparison between the current state of affairs and a historically future one, and incorporate the very notion of opportunity in that real time line. That is, in time $t1$, the businesswoman has, among the viable courses of action, the opportunity or chance to close a deal that would bring her extra benefits. In a $t2$ moment (the present) at least one of those courses of action is not viable and this means not having the previous chance or opportunity.²¹ A similar version is suggested by Thomson upon analyzing the historical criteria. This author states that in cases like that of the businesswoman, a historical comparativist would not say that she is in the same situation as before taking the taxi, because now her chance has been lost. In the authors' words, "(...) in general, having a less chance of obtaining a benefit is worse for a person than having a greater chance of obtaining it. However, in general, it may be said that the current chances of obtaining benefit matter for determining if one is currently better or worse off".²² The problem with this version, however, is that it denaturalizes, in a sense, the historical comparison, transforming it, in fact, into a counter-factual comparison. The introduction of the idea of chance, opportunity, probability or possible worlds in the current state of affairs is nothing more than a way of introducing the counter-factual criterion. Obviously, there is a sense in which no comparison can dispense of a certain temporal criterion. Consideration of possible worlds, with or without harmful action, and with or without harmful outcome, must have a time limit to be reasonable and to be justified. However, this does not make it a historical comparison.

Finally, we must remember that the counterfactual comparison criterion is problematic in cases of preemptive harm and cases of alleged or apparent causal overdetermination. There are some proposed solutions within the framework of this criterion to overcome these problems. One of them, which is particularly interesting, is that of making the counter-factual comparison criterion more complex. Tadros²³ proposes, along these lines, that these difficulties may be solved if we admit that in these cases there is *more than one* counterfactual comparison with normative relevance. That is, there are at least three normative judgments that require comparisons with different hypothetical states of affairs.²⁴ In the example of the businesswoman (E) who is hurt in the taxi accident (T), but, having been the victim of this damage, avoids the plane crash (A) that would have killed her, we must consider the following statements and comparisons:

21 VELLEMAN (2008), pp. 242-243.

22 THOMSON (2011), p. 445.

23 TADROS (2014).

24 TADROS (2014), pp. 185-189.

First, the damage that T causes E (the damage caused in the accident): this requires a comparison between the current state of E and the hypothetical state in which she did not suffer any damage.

Second, the magnitude of the threat to A: this requires a comparison between two hypothetical situations, the one in which E suffered no harm and the one in which she died (because of the plane crash).

Third, the benefit that T generally caused the businesswoman E: this requires comparing the current situation (E was hurt by the car accident) with the hypothetical situation in which E dies.

Carrying out, according to Tadros' proposal, multiple comparisons between current and hypothetical situations that are normatively relevant, and analyzing the results of such comparisons, we can explain cases such as that of the businesswoman: preemptive harm. In the first place, it is possible to consider both harmful events and conclude that one of them, (death), is worse than the other (injury). Second, two hypothetical situations can be compared and not just a current situation with a hypothetical one. In this case, the situation in which no harm occurred to E can be compared to the hypothetical situation that ends in the death of E. Therefore, the *combination* of these various comparisons, after assigning value to each result, allows us to conclude that even though the taxi accident prevented E from suffering the ultimate damage, the act that prevented it is also harmful.

I understand that, even though there is no perfectly suitable theoretical parameter or criterion to cover and explain all the situations that we normally consider damage in tort law practice, the counterfactual comparison criterion is the one with the greatest explanatory power with respect to the others. I believe, first of all, that this responds to the advantage that, in general, comparativism has, *vis a vis* non-comparativism. Indeed, compared to non-comparative criterion, comparative criterion seems to be preferable since they explain a greater number of types or assumptions of damage. Furthermore, these criteria, as previously pointed out, suggest a relational aspect that is relevant in tort law. This is so, at least in part, because comparison between two situations implies that a certain event caused a change in a person's situation with respect to a certain right or interest. Ignoring this fact, as a consequence of not comparing, implies a problem in explaining certain cases of damage, and, in addition, to establish that connection between damage and the attribution of responsibility, even when we are not yet talking about legal responsibility. However, there is an advantage or role to be played by the non-comparative approach. I think that the consideration of the negative state in which a person may be in, may also be useful when evaluating

the introduction of criteria of distributive justice in tort law and in private law in general, although this reflection deserves a detailed analysis that exceeds the object of this study.²⁵

Finally, among the comparative criteria, I understand that the counterfactual is the one that manages to explain more effectively the greatest number of situations, or classes of situations, that we consider as constituting damage. An alternative is to adopt a complex version like the one proposed by Tadros. But there are other alternatives: similar consequences follow, for example, from the simple version, adding certain principles such as those proposed by García Amado. This author proposes the concept of damage as distinct from other problems typical of tort law, which require the introduction of maxims that will solve certain difficulties. Specifically, the principle of the individuation of damage by reason of subject matter achieves the same result as the proposal of multiple counterfactual comparisons. According to this principle, derived from a generic principle of subjective and material individuation of harm, what is at issue is "... to establish the conceptual independence between damage and causation (...) the damage itself is independent of the possible variants of its causation".²⁶

In short, regarding this point, I consider that a reformulation of the comparative counterfactual criterion, following the proposal of multiple comparisons and the proposed guidelines or principles to distinguish it from causality problems, is an alternative that allows us to overcome the difficulties of this perspective for understanding damage.

2.3. Harm, interest, and well-being

As we said at the beginning of this study, the most classic conception of the harm principle –as formulated by Mill– means that "...living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first,, in not injuring the interests of others, or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights".²⁷ The principle of harm that Mill talks about is directly linked to the notion of interest or, rather, to the

25 Note that here, as with the comparative criterion, the non-comparative criterion is not equated with distributive justice. What I state simply, is that cases apt to be explained by non-comparativism may be a good starting point for the analysis of the role of distributive justice in tort law.

26 GARCÍA AMADO (2018), p. 283.

27 MILL (2012), p. 134.

harm to certain interests. This becomes even clearer when, in the same study, the author expresses, when talking about the applications of this principle, which are the maxims where it reveals itself: “First, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself [...]. Secondly, that for such actions as are prejudicial to the interest of others, the individual is accountable and may be subjected either to social or to legal punishments”.²⁸ Then, in addition to one of its classic expressions as justification for state intervention in a liberal system, the concrete link between the concept of harm and the notion of interest arises.

Analyzing the limits that the state can impose through criminal regulations, Feinberg also recognizes the harm/interest relationship, although in a sense, of course, more specific than Mill’s. Feinberg’s objective is normative and consists of, as he explains, analyzing the limits within which it is morally legitimate for the state to establish criminal norms.²⁹ To achieve this purpose, he examines the harm principle, and studies the concept of harm itself in depth. He contends that a better understanding of the concept of harm depends on the consideration of the states of harm. In this sense he expresses that “... the states of harm are fundamental, for they determine in part which acts are to count as acts of harming, and to become thereby proper targets of prohibitory legislation. An act of harming is one which causes harm to people [...] is one which has tendency to cause harmed states or conditions in people”.³⁰ Feinberg understands that the vagueness and ambiguity of the term ‘harm’, requires making some specification in order to get a better comprehension of it. He distinguishes three senses of the term harm. The first of these is broad and is discarded as relevant for the explanation of this principle. It refers to the sense in which we can say that anything may absolutely suffer damages, regardless of the affectation of interests. He affirms that actions such as ‘breaking’, ‘cutting’, etc. were carried out even when there is no interest in relation to them. But he believes that we cannot state that the thing has been harmed in this sense, regardless of any interest.

The second sense of the term is conceived as the frustration, impediment or defeat of an interest that, likewise, is understood as a set of *situations* in which participation is involved, and in which there is risk. Regarding interests, this author distinguishes between interests as a whole and singular interests or, in other words, self-interest. Self-interest consists of the advancement of all the

28 MILL (2012), pp. 168-169.

29 FEINBERG (1984), pp. 4-5.

30 FEINBERG (1984), p. 31.

interests of a person, considered in plural. The assets over which interest is expressed, make up what is considered the well-being of the person.

There is, for Feinberg, a third sense of the term harm which has a normative dimension: this is the concept that interests the author in the analysis of the principle of harm. One person harms another, in this sense, when “their indefensible conduct (unjustifiable and inexcusable) violates the other’s rights, and in all but certain very special cases such conduct will also invade the other’s interest and thus be harmful in the sense already explained”.³¹ The second and third sense of the term harm are linked. However, “though almost all harms in the special narrow sense (wrongs) are also harms in the sense of invasions of interest, not all invasion of interest are wrongs, since some actions invade other interests excusably or justifiably, or invade interests that the other has no right to be respected”.³² The meaning of harm, to which Feinberg refers to with the harm principle, results from an overlap of the second and third sense (although we must bear in mind that his objective is to analyze the concept of harm with regards to the justification of criminal law). That is, he is interested in the harm principle in the sense of impairment or frustration of interests that constitute wrongs and the wrongs that constitute impairment of interests. I am going to leave aside the specific meaning of wrongs in this study.

What can this analysis tell us about the concept of damage used in the practice of tort law? I believe, despite the fact that the notion of harm associated with the impairment of interests is also over-inclusive in this area (not just in criminal law), it is closer to the concept of damage that we are interested in analyzing in this area. The problem of over-inclusion, in this sense, may be considered relative (although we cannot eliminate it) if we make the notion of interest more complex. Feinberg himself provides us with an explanation of the complexity of interests. First of all, we must leave out of the harm/interest relationship what may be considered ‘passing’ desires and also, what we may call ‘ultimate’ or ‘higher’ ends in a person’s life, such as ‘achieving happiness’. Identifying these cases as examples of interest would unduly distort our understanding of it. We are left, then, with an *intermediate* range of interests. Within this range, a first class of interests are desires which are linked to the satisfaction of interests of a lower rank, that is, instrumental interests. A second class of interests are linked to the well-being of a person and, in general, are aimed at maintaining a minimum level of physical and mental health, material and economic assets, and political freedom. These interests have the characteristic of being stable and durable. Finally, there

31 FEINBERG (1984), pp. 33-34.

32 FEINBERG (1984), p. 35.

are other interests - whose satisfaction depends to a great extent on the previous ones - that are related to the objective of achieving some type of superior good or well-being. Some of these assets involve the person individually, while others are oriented to others or publicly.³³ The point I consider most relevant in the scheme proposed by Feinberg is that interests, in general, are not presented in isolation, but within a network. The satisfaction or impairment of some, may affect other interests. In developing the ways in which interests may be damaged, in effect, the author distinguishes three types of situations that result in harm or impairment to them: first, those in which the person who harms modifies an interest *directly* so that it conflicts with another interest; second, those in which the *diversity of prudential interests decreases*; and third, cases in which an interest is directly harmed which forms part of a person's *well-being*, thus reducing their possibilities of satisfying various other ulterior interests.³⁴ This notion of the different ways of affecting interests reaffirms the notion of network, especially because of the way in which the affectation of some can impact the satisfaction of others.

Obviously, not all interests are legally protected. There are many interests which may become damaged and we are simply forced to tolerate within society. On the other hand, many of these interests are not protected by criminal law, but they may be protected by private law and more specifically by tort law. But even within the domain of private law, where the protection of interests, in fact, encompasses more kinds of cases than in the criminal law system, the conceptualization of damage as impairment or deterioration of interests will be over-inclusive with respect to cases that we would actually consider damage. In other words, defining damage as impairment of interests, even of interests understood in a *certain* way, results in the identification of damage with situations and events that legal practice does not admit, nor would it admit, as such. It is therefore appropriate to ask about the problem of over-inclusion and whether it constitutes a problem for the conceptualization of harm. I understand that over-inclusion, as it has been understood with regards to harm, is not a problem for the conceptualization and analysis of the concept of damage. The notion of a *network of interests* is therefore essential to the topic. The fact that interests are presented in this way, as interrelated, implies that those same relationships will limit, or, in any case are able to determine, in the specific case, which one must be protected and, therefore, what constitutes damage. However, this will require having some criteria to take stock of which are the interests that must prevail in this complex network and, therefore, merits protection. A possible criterion is

33 FEINBERG (1984), p. 59.

34 FEINBERG (1984), pp. 41-42.

given by relating the notion of harm and interest to that of well-being, something that Feinberg himself does with respect to a class of interests.

Now, in what sense are networks of interests linked to the well-being of a person? In general terms, we may say that the concept of harm can be analyzed from a prudential or moral point of view. From the first point of view, it has been understood that harm is equivalent to some type of affectation (a negative one) regarding the well-being of a person. This implies, (if we accept the definition of harm as impairment of an interest) that it is this interest that deserves consideration from a prudential point of view, or from certain theories or moral conceptions. From a prudential point of view, harm and interest have been associated on many occasions with the notion of well-being.³⁵ Thus understood, harm is that event or situation that reduces the well-being of a person, negatively affecting it in some way, or, if we make the definition more complex, harm must be understood as an impairment to the interests that make up a person's well-being.

Now, if we associate well-being with a certain pleasant mental state, obviously any notion of harm as affectation of well-being understood in this way would comprise too many cases, constituting, consequently, a concept too far removed from our understanding and our intuitions. If we adopt another viewpoint and consider any affectation of well-being as harm, understanding well-being as the satisfaction of a desire, the previous problem remains. How, then, can the indisputable subjectivity and the potential for inclusivity of harm as an affectation of well-being be overcome? A third possibility, far more promising, is to resort to the notions of quantity or quality of well-being. In the first case, we will consider that harm exists when a certain minimum amount of well-being has been affected. There are certain problems however with this prudential notion of well-being. One of them has to do with the potential arbitrariness in choosing a certain amount of well-being, the affectation of which may determine whether there is harm. However, this is a problem that does not only affect this notion and that, in any case, may be nuanced by considering other factors in the evaluation of the compensable nature of the damage. Second, this notion is criticized stating that in cases of minimal affectations to well-being, i.e. multiple impairments that do not reach the necessary minimum threshold on their own, in which case we would have reasons to assume that there is harm because, for example, a class of people has been harmed, but the notion of quantity of well-being would not allow us to consider these cases as harm.³⁶ Another possibility of associating the

35 See for a synthesis, HOLTUG (2002), pp. 364 ff.

36 HOLTUG (2002), pp. 366-367. To demonstrate the insufficiency of this criterion, Holtug proposes the example of the ban on Salman Rushdie's publication of *The Satanic Verses* as a case in which minimal amounts of welfare are undermined, which are insufficient

concept of harm with well-being, then, is to understand the latter in a qualitative sense. Then there would be types of interests, or sets of networked interests, that qualitatively differ from each other and only in cases where their impairment affects a person's life plan, will we consider them harmed. This alternative, however, requires some substantive criteria that allows for a balance to be made between the interests, or groups of interests, at stake.

I understand that, in this sense, a prudential criterion of well-being is not enough, because this would result in the aforementioned problems. Therefore, to obtain a complete panorama, we would need to link not only the concept of harm with that of the network of interests, but also analyze this relationship in terms of some moral theory. In very general terms, this can be done from a utilitarian standpoint or by appealing to some notion of autonomy of will.

What are the reasons for adopting one or another moral theory to give a qualitative content to the notion of well-being (and, therefore, to the notion of network of interests whose affectation explains, in part, what is harm), is a complex problem that must be analyzed in greater detail and depth. What I consider relevant to point out is that this relationship is possible and, furthermore, that it has an important role in solving certain problems of over inclusion of damage. In this sense, I believe that not all cases of over-inclusion derive from an erroneous conceptualization of damage. One of the points that I take up in this analysis is, in effect, that it makes sense to speak of damage as a concept with a normative aspect and that this is not equivalent to speaking of compensable damage. Some problems of over inclusion may perhaps be approached through other relevant notions when talking about compensable damage, for example, asking ourselves what is the notion of causality that we can consider relevant and justified in this area. If this is possible, then we should not even claim that there is a problem of over-inclusion here. What we should affirm, instead, is that the criteria for evaluating the compensable nature of damage are not a component of this concept, but rather presuppose it. In other words, we can conclude that damage is compensable as the conclusion of a reasoning process and one of the preconditions of these types of reasoning is knowing, or being able to recognize, what constitutes damage and what criteria determines it. The remaining problems of over-inclusion, or at least part of them, can be reconsidered in a more relative sense if we make the notion of interest and well-being more complex, as suggested.

to regard that ban as harmful. However, he argues, this is precisely the kind of case, the ban on a publication like this, that the harm principle is supposed to avoid in a liberal system.

III. CONCLUSIONS

The analysis of the harm principle may be relevant in achieving a better understanding of the concept of damage involved in the practice of tort law.

This relevance may be observed through three types of problems or debates. First, the debate regarding the singleness or plurality of harm principles and how this determines whether or not we speak of several concepts of damage or of a single one in a generic sense. Second, debates regarding the criteria, comparative or non-comparative, for determining harm. Third, the debate regarding the relationship between harm, interest, and well-being.

Regarding the first, I have argued that, even if we accept that there is not one but multiple harm principles, this does not necessarily commit us to a diversity of equally valid concepts of damage.

Assuming, therefore, the plausibility of a generic concept of damage, it is still necessary to clarify what are the criteria that allow us to determine the cases of damage. Regarding the comparative and non-comparative criteria to determine and identify the damage, I understand that a reformulated notion of the counterfactual criterion explains in a better way most of the cases of damages in tort law.

Finally, I understand that damage may, as well as harm, be understood as affecting a network of interests and that this relationship, likewise, is linked to the interests that make up the well-being of a person. Some problems in the notion of well-being, however, require the adoption of some moral conception that allows us to speak of well-being in a qualitative sense. The relationship between harm, interest, and well-being, understood in this way, could solve some problems of the concept of damage that have usually been classified as problems of over-inclusion. However, a thorough understanding of those relationships requires the adoption of a moral theory or conception.

Undoubtedly, these theoretical debates regarding the harm principle do not eliminate all questions regarding damage, but they bring us closer to an understanding of this central concept in tort law.

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