



## THE BRAZILIAN EXPERIENCE WITH COLLECTIVE MORAL DAMAGES: A COMPARATIVE REFLECTION FOR A LATIN AMERICAN AUDIENCE

### La experiencia brasileña con el daño moral colectivo: Una reflexión comparada para una audiencia latinoamericana

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#### Abstract

This article discusses the Brazilian experience with collective moral damages, based on collective actions for consumer protection filed in the state of Rio de Janeiro, by examining the phenomenon of lucrative illegality, the case study of Dieselgate, and the challenges related to its quantification. The doctrinal discussion of the nature and function of these collective moral damages provides the opportunity for a comparative reflection for a Latin American audience, as an instrument for punishment, retribution, and deterrence, not only for the purpose of compensation for social damages. In terms of the potential functions of civil liability, the Brazilian experience with collective moral damages is shaped by a dispute of perspectives between multi-functionalists and uni-functionalists that influences mass torts litigation and consumer protection.

**Keywords:** *Collective Moral Damages; Mass Torts; Class Actions; Lucrative Illegality; Dieselgate; Consumer Protection.*

#### Resumen

Este artículo discute la experiencia brasileña con el daño moral colectivo, basado en acciones colectivas interpuestas en el Estado de Río de Janeiro, examinando el fenómeno de la ilegalidad lucrativa, el estudio de caso de Dieselgate, y los desafíos relativos a su cuantificación. La discusión doctrinal sobre la naturaleza y función de este daño moral colectivo proporciona la oportunidad para llevar a cabo una reflexión comparada destinada a una audiencia latinoamericana, como un instrumento de castigo, retribución y disuasión, no solo con el propósito de compensación de daños sociales. En términos de las potenciales funciones de la responsabilidad civil, la experiencia brasileña con el daño moral colectivo está moldeada por una disputa de perspectivas entre multi-functionalistas y uni-functionalistas, que influencia la litigación en materia de daños colectivos y protección al consumidor.

**Palabras clave:** *Daño moral colectivo; daño colectivo; acciones de clase; ilegalidad lucrativa; Dieselgate; protección al consumidor.*

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## I. INTRODUCTION

Importantly, this article originated from an invitation made by the Chilean Institute of Civil Liability ('Instituto Chileno de Responsabilidad Civil – ICHRC') to present the trajectory of the institute of collective moral damages in Brazil to a Chilean audience in a joint seminar held in September 2020. As part of the preparation for this workshop, we needed to choose a date for our academic event and the Chilean colleagues proposed the date of September, 7<sup>th</sup>, 2020, which is the Brazilian independence day and definitely not a convenient date from our side for a workshop as this is a very important national holiday. The suggestion made by the Brazilian Institute for Studies on Civil Liability ('Instituto Brasileiro de Estudos de Responsabilidade Civil – IBERC') to our hosts was to organize this workshop on the date of September, 18<sup>th</sup>, 2020, which is the Chilean Independence Day and also obviously not a convenient date. This anecdote reveals that Latin Americans share a common social and political history as neighbors in the same continent, but eventually may know more about other countries in Europe and North America – ironically, we are aware of 4<sup>th</sup> of July and 14<sup>th</sup> of July as the National holidays in the United States and France. Therefore, sharing the Brazilian experience with collective moral damages should be considered relevant as a comparative reflection for a Latin American audience, perhaps especially for Chilean scholars because of the legislative reform that introduced this institute in Chile a few years ago.

This article is based on my previous research and scholarship with consumer protection collective actions in Brazil. In addition to this introduction, I will examine the phenomenon of lucrative illegality and the economic consequences of collective actions. Subsequently, the case study of Dieselgate provides opportunity to reflect on the calibration of collective moral damages, and the challenges related to its quantification. Moreover, I will provide a summary of the doctrinal discussion on the nature and function of these collective moral damages and will reflect on the possibilities and limitations related to the collective moral damages. Finally, the article will be concluded with some final remarks.

## II. LUCRATIVE ILLEGALITY AND ECONOMIC CONSEQUENCES OF COLLECTIVE ACTIONS

The phenomenon of lucrative illegality resulted from empirical research that I conducted in 2011 and that investigated 405 collective actions filed by the Attorney General Office from the State of Rio de Janeiro against private corporations between 1991 and 2010.<sup>1</sup> The empirical analysis of 160 cases revealed the limited economic impact and the deterrent

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<sup>1</sup> FORTES (2019a).

effect of these judicial actions.<sup>2</sup> Therefore, the civil justice system does not seem capable of preventing companies from harming consumers through violations of the Consumer Defense Code, as Brazilian companies have economic incentives to break the law.<sup>3</sup> Even when companies were convicted, economic sanctions were low. These class actions are not effective in punishing wrongdoers. The reluctance of judges to impose effective economic sanctions is explained by a legal culture that is relatively suspicious of the potential adoption of punitive damages.<sup>4</sup> The concept of ‘lucrative illegality’ refers to the association between wrongdoings and profits, leading to a setting in which corporations have clear economic incentives to violate the law.<sup>5</sup>

An important clarification for a Latin American audience is related to the role of the Attorney General Office in Brazil as a plaintiff on behalf of society for the protection of diffuse, collective, and homogeneous individual interests.<sup>6</sup> Originally, citizens had standing for protection of these collective rights through the ‘popular action’,<sup>7</sup> but legislative reforms in the 1980s established the new model of ‘civil public action’ and a list of potential collective plaintiffs, like the Attorney General’s Office, Political Parties, Unions, and the State, for example.<sup>8</sup> The Brazilian model of ‘civil public action’ served as a paradigm for Latin American legal reforms and should be conceptually distinguished from the U.S. model of ‘Class Actions’ and the European model of ‘Collective Redress’.<sup>9</sup> In contrast to the United States, an individual consumer may not initiate these collective action and depend on the collective actor for vindicating their collective consumer rights in courts.<sup>10</sup> In contrast to the European jurisdictions, these collective actors have incentives to pursue collective actions that may perform regulatory functions and set standards for corporate behavior in B-2-C (Business to Consumers) relationships.<sup>11</sup>

However, there was a clear contrast in the two different decades that I examined in this empirical research. Between 1991 and 2000, prosecutors filed only 24 consumer protection collective actions. On the other hand, between 2001 and 2010, prosecutors filed 381 collective actions against private corporations for wrongdoings against consumers.<sup>12</sup> Among the reasons for the limited number of collective actions during the first decade, we

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<sup>2</sup> FORTES (2019a).

<sup>3</sup> FORTES (2019a).

<sup>4</sup> FORTES (2019a).

<sup>5</sup> FORTES (2019a).

<sup>6</sup> FORTES *et al.* (2021), p. 145; FORTES *et al.* (2020).

<sup>7</sup> DA SILVA (1968); SIDOU (1983).

<sup>8</sup> GRINOVER *et al.* (2009).

<sup>9</sup> FORTES (2009), p. 86; FORTES (2019b).

<sup>10</sup> FORTES (2009), p. 86; FORTES (2019b).

<sup>11</sup> MARTINS *et al.* (2019), pp. 213-242; FORTES (2019c), pp. 213-242.

<sup>12</sup> FORTES (2019a), pp. 104-132.

could mention the following ones: (a) lack of consolidated doctrine on the Consumer Defense Code (CDC), because it was a recently enacted legislation; (b) lack of institutional structure to conduct investigations and collect evidence of collective wrongdoing; (c) lack of independence of the prosecutors, as they were appointed by the Attorney General, acted by delegation, and could be removed from these cases at anytime during this initial decade; (d) lack of specialization to conduct civil investigations and to promote the protection of diffuse, collective and homogeneous individual rights, as the professional training of public prosecutors had been essentially in the application of criminal law.<sup>13</sup>

In 2001, the Attorney General's Office restructured its consumer protection department by appointing four new and independent public prosecutors, who pursued investigations, litigations, and settlements without his direct control and supervision.<sup>14</sup> Independence increased productivity, because there was no need to seek hierarchical approval or worrying about the political consequences of suing private corporations.<sup>15</sup> Additionally, the institutional structure to conduct civil investigations improved and facilitated evidence collection.<sup>16</sup> The appointment of four independent prosecutors with professional tenure also collaborated for the development of technical expertise, because of their growing experience and reputation that gradually improved the quality of their work and the quantity of the collective actions.<sup>17</sup>

Typically, prosecutors propose settlements before suing these private corporations with terms normally involving a commitment to stop breaking the Consumer Defense Code, but most corporations refuse to negotiate and prefer to litigate. Assuming that corporations are risk averse and make decisions based on economic rationality,<sup>18</sup> the Brazilian experience suggest that a lack of economic sanctions provides incentives for corporations to continue to violate the law. Interviewed legal professionals declared that courts are conservative, and judges were forged in legal culture of classical tort law that would make them reluctant to apply a punitive function of torts and sanction corporations for their collective wrongdoings and their sentences would normally be limited to a declaration of illegal action combined with the compensation for material damages.<sup>19</sup>

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<sup>13</sup> FORTES (2019a), pp. 104-132.

<sup>14</sup> FORTES (2019a), pp. 104-132.

<sup>15</sup> FORTES (2019a), pp. 104-132.

<sup>16</sup> FORTES (2019a), pp. 104-132.

<sup>17</sup> FORTES (2019a), pp. 104-132.

<sup>18</sup> Importantly, economic rationality could also be deemed bounded, as explained by behavioral economists, like Richard Thaler. See, for instance, THALER (2018), pp. 1265-1287; THALER (2015). THALER (2000), pp. 133-141; THALER, (1994)..

<sup>19</sup> FORTES (2019a), pp. 104-132.

Most interviewed legal professionals are concerned that the civil justice system may create incentives for frivolous litigation or for irrational convictions, but they praised the Brazilian model of ‘civil public actions’ for not obliging corporations to pay compensations for ‘collective moral damages’ to individual consumers, but rather to the ‘Consumer Rights Protection Fund’, established according to Article 13 of the Civil Public Action Act (‘Lei da Ação Civil Pública’). This institutional design provides an interesting alternative to the U.S. model of class actions, in which punitive damages may be attributed to one single victim of a consumer protection wrongdoing as happened in the well-known ‘McDonald’s Coffee Case’.<sup>20</sup> According to the academic literature, punitive damages should be optimally efficient to produce deterrence without producing excessive externalities for corporations that will be internalized and transferred to stakeholders and other consumers.<sup>21</sup>

Except by the interviewed private corporate lawyers, all legal professionals defended the existence of the concept of ‘collective moral damages’ as a potential instrument for application of punitive damages and affirmed that the lack of punitive damages will almost always produce economic incentives for private corporations to violate the Consumer Defense Code (CDC).<sup>22</sup> Corporate lawyers considered that these corporations are concerned about their image and avoiding negative publicity and that these punitive damages would be internalized as costs and harm consumers who would have to pay for them through higher prices or lower quality services.<sup>23</sup> The two interviewed judges from the specialized courts on corporations (‘Varas Empresariais’) highlighted the fact that quantification of ‘collective moral damages’ involved a complex equation and should be proportionate – without harming consumers, investors, or businesses.<sup>24</sup>

From a comparative perspective, another relevant feature of the Brazilian experience with the ‘civil public actions’ consist of the limited response for full compensation of individual consumers for their economic losses.<sup>25</sup> In contrast to the U.S., Brazilian rules of civil procedure do not have a discovery procedure for collecting evidence under full disclosure rules and corporations are normally not required to provide detailed information about the exact amount of unfair fees and tariffs charged from each individual consumer or to disclose the total monetary amount of illegal profit resulting from the violation of the Consumer Defense Code (CDC). Likewise, rules of notice do not require individual notification of all affected consumers through registered mail, as the CDC considers the publication of a notice

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<sup>20</sup> MCCANN *et al.* (2001).

<sup>21</sup> POLINSKY & SHAVELL (1997), p. 869; SUNSTEIN *et al.* (1997), p. 2071.

<sup>22</sup> FORTES (2019a), pp. 104-132.

<sup>23</sup> FORTES (2019a), pp. 104-132.

<sup>24</sup> FORTES (2019a), pp. 104-132.

<sup>25</sup> FORTES (2019a), pp. 104-132.

in the official gazette and local newspapers to be sufficient, but most victims are unaware of these collective actions and do not follow these judgments.<sup>26</sup>

Finally, the institutional design also requires consumers to be proactive to receive their individual compensation, because after a final court decision obliges a corporation to compensate victims for their economic losses, each individual is expected to hire a lawyer, cover the individual legal fees to have access to justice, and participate individually in the collective action with a demand for the share of compensation.<sup>27</sup> Because most of these cases are individually related to small monetary value claims, most victims remain in a state of rational apathy and do not claim their individual damages in courts. Given the lack of information on the total amount of economic losses, prosecutors may not be able to oblige these corporations to make a full deposit of the total monetary amount of illegal profit in the ‘Consumer Rights Protection Fund’ as an alternative to the lack of comprehensive individual consumer compensation.<sup>28</sup> In a nutshell, this is the phenomenon of lucrative illegality that emerged from my empirical research and provides justification for effective application of economic sanctions to corporations for their collective wrongdoings.<sup>29</sup>

### **III. DIESELGATE, MATHEMATICAL TURN AND THE CHALLENGES OF QUANTIFICATION**

The impact of the calibration of the economic consequences from the ‘collective moral damages’ is revealed by the prodigious case study of the Dieselgate.<sup>30</sup> In a case study of the Dieselgate judgment in the Brazilian court, together with my co-author Pedro Farias Oliveira, I examined how the low calibration of the regime of economic incentives influences the civil liability system and the prevention of collective wrongdoings.<sup>31</sup> Our case study supports Lawrence Friedman’s statement that corporate behavior is influenced by cost-benefit analysis and that when complying with the law provides higher benefits than costs, corporations would prefer to comply with the law instead of violating the law.<sup>32</sup>

In a context of low calibration, the punitive and precautionary functions of civil liability are important to change incentives, increasing the costs resulting from collective wrongdoings related to the awareness that these are social damages with a diffuse nature<sup>33</sup> that transcend the compensatory function of traditional tort law and may be characterized as

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<sup>26</sup> FORTES (2019a), pp. 104-132.

<sup>27</sup> FORTES (2019a), pp. 104-132.

<sup>28</sup> FORTES (2019a), pp. 104-132.

<sup>29</sup> FORTES (2019a), pp. 104-132.

<sup>30</sup> EWING (2017); DI RATTALMA (2017).

<sup>31</sup> FORTES & OLIVEIRA (2019).

<sup>32</sup> FRIEDMAN (2016), p. 213.

<sup>33</sup> SHARKEY (2003), p. 347.

an instrument for punishment, retribution, and deterrence inasmuch as for the purpose of compensation for social damages.<sup>34</sup> As put by Professor Nelson Rosenvald, the punitive function of civil liability translates the application of a sanction to the wrongdoer as means to discourage future wrongdoings, while the precautionary function has the objective of inhibiting potentially harmful activities in support of a dissuasive strategy that includes the general and specific prevention of harmful conduct.<sup>35</sup> In a more recent work, Professor Nelson Rosenvald also defends the restitutive function of civil liability, derived from the gains earned by the offender (gain-based damages), which must be removed, disgorged, or returned to the claimants (restituted damages).<sup>36</sup>

Dieseldgate was a global scandal involving the Volkswagen group and considered to be the biggest corporate fraud of the 21<sup>st</sup> century, which became public in 2015 with the announcement by the US Environmental Protection Agency (EPA) that the manufacturer intentionally programmed its diesel engines with turbo direct injection (TDI) technology so that the gas emission control systems were only activated during specific conditions present in laboratory tests.<sup>37</sup> Consequently, these cars released extremely high levels of dangerous substances into the atmosphere in daily routine use, but presented in controlled tests an artificial result of low emission of pollution particles, because of a software with noise and acoustic functions that recognized the laboratory setting and the ‘defeat device’ activated a mechanism that reduced emissions during these laboratory tests.<sup>38</sup> In the U.S., Volkswagen publicly admitted the use of the defeat device, its CEO offered formal apologies to their society at a dinner with then-President Barack Obama specially organized by German Chancellor Angela Merkel in April 2016, and agreed to a settlement for payment of 15 billion dollars in damages to harmed consumers, including 4,7 billion dollars destined to special funds for the restoration of social damages.<sup>39</sup>

In Brazil, Dieseldgate led to a civil public action filed by the Brazilian Association for Consumer and Worker Defense (‘Associação Brasileira de Defesa do Consumidor e do Trabalhador’), a private association that may function as a collective actor, and I worked as the public prosecutor in supervision of this case as a *custos juris*, recommending the court to convict the corporation to provide full disclosure of the information regarding the Brazilian vehicles, to compensate individual vehicle owners with moral and material damages, and to sanction the fraudulent behavior with punitive damages.<sup>40</sup> In contrast to the requirement

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<sup>34</sup> FORTES & OLIVEIRA (2019).

<sup>35</sup> ROSENVALD (2014), p. 77.

<sup>36</sup> ROSENVALD (2019).

<sup>37</sup> EWING (2017).

<sup>38</sup> EWING (2017).

<sup>39</sup> EWING (2017).

<sup>40</sup> Procedure n. 0412318-20.2015.8.19.0001.

made by the attorneys hired by Volkswagen that defended that the court should appoint a local engineer as a technical expert for the judicial case, I expressed the opinion that there was a sea of evidence of the corporate fraud related to the tests made by the Environmental Protection Agency (EPA), the California Air Resources Board (CARB), and the Brazilian Institute for Environment and Renewable Natural Resources (IBAMA) and the Brazilian judges should acknowledge this evidence and respect their quality through the exercise of judicial deference.<sup>41</sup>

Based on this legal opinion, the court convicted Volkswagen on September 13<sup>th</sup> 2017 in the following terms: (a) to provide clear, safe, and complete information related to all diesel vehicles related to the installment of the ‘defeat device’; (b) to compensate individually each consumer owner of a diesel vehicle the pre-fixed amount of R\$ 54,000.00 (then equivalent to around US\$ 17,728 according to Brazilian Central Bank converter<sup>42</sup>) for the material damages caused by the installment of the fraudulent software in the diesel vehicles; (c) to compensate individually each consumer owner of a diesel vehicle the pre-fixed amount of R\$ 10,000.00 (then equivalent to around US\$ 3,190 according to Brazilian Central Bank converter<sup>43</sup>) for the moral damages caused by the installment of the fraudulent software in the diesel vehicles; (d) to compensate the Brazilian society for the collective moral damages of pedagogical and punitive character due to the collective corporate fraud caused in the Brazilian automobile market of an amount of R\$. 1,000,000.00 (then equivalent to around US\$ 319,050 according to Brazilian Central Bank converter<sup>44</sup>).

Analyzing this sentence, we may observe that the total amount of individual material damages consisted of more than one billion Brazilian Reals, which contrasted with the amount estimated for the collective moral damages of one million Brazilian Reals. In other words, the calibration of the collective moral damages seems inadequate and leads to an unbearable lightness of civil sanctions.<sup>45</sup> Interestingly, the explanation from the lightness of the punitive function of collective moral damages comes from the path dependence established by the Superior Court of Justice (‘Superior Tribunal de Justiça’), which initially rejected the punitive function of collective moral damages and even denied the existence of such damages.<sup>46</sup> Subsequently, the decisions from the Superior Court of Justice (‘Superior Tribunal de Justiça’), recognizing the punitive function of collective moral damages and imposing the payment of such damages adopted relatively low amounts of money, so that paradoxically the consolidation of the institute of collective moral damage in Brazil came also

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<sup>41</sup> On deference, among others, see SUNSTEIN (2006), p. 187; VERMEULE (2020).

<sup>42</sup> <https://www.bcb.gov.br/conversao>

<sup>43</sup> <https://www.bcb.gov.br/conversao>

<sup>44</sup> <https://www.bcb.gov.br/conversao>

<sup>45</sup> FORTES & OLIVEIRA (2019).

<sup>46</sup> FORTES & OLIVEIRA (2019).



with the definition of minimal amounts of payment and a low calibration of the weight of its punitive function.<sup>47</sup>

The mathematical turn on legal analysis requires that both professional lawyers and legal scholars take seriously mathematical formulas, calibration of sanctions, and the normativity embedded in equations that may improve fairness and justice.<sup>48</sup> Norms, values, and legal principles are often embedded in challenges related to the calibration of the punitive function of mass torts and the calculation of the quantification of these collective moral damages. Depending on these aspects, a legal regime may generate under-deterrence by not discouraging collective wrongdoings and by not preventing potential collective accidents or may generate over-deterrence by encouraging excessive investment in precautionary measures that may produce economic loss to corporations that may internalized to consumers or shareholders.<sup>49</sup>

Regarding the quantification of the collective moral damages, the Brazilian experience provides examples of four different types of techniques for measuring the amount of money to be paid by defendants for their collective wrongdoings. First, there is the *estimative of a minimum amount of collective moral damages*, that is, the quantity estimated for collective moral damages is defined by a minimum amount, especially when it is not clear from the investigation how much should a defendant pay and the plaintiff would like the judge to have margin to establish the amount. This technique is normally translated into the petition as a request that the court should convict the defendant to pay collective moral damages in the amount of, at least, a given sum of money (eg. R\$ 1,000,000.00). In practice, this is the most common technique adopted in practice by Brazilian legal professionals, because of the challenges related to the precise quantification of the collective moral damages in a particular case.<sup>50</sup>

Secondly, there is the technique of *skimming-off the illegitimate profit derived from the wrongdoing*, that is, the extraction of the monetary surplus that was produced because of an illegal act, so that the wrongdoing may not pay a profit to the wrongdoer. Originally found in German competition law and inspired by the extraction of extra fat out of the milk through skimming, this technique of quantification is relevant for abusive practices that affect the marketplace and may generate superior profit to a player in an abusive position because of the collective wrongdoing.<sup>51</sup> One prodigious example of application of this technique of quantification of collective moral damages comes from the case of geographical

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<sup>47</sup> FORTES & OLIVEIRA (2019).

<sup>48</sup> FORTES (2015), pp. 39-55; FORTES (2020), pp. 453-469; RESTREPO AMARILES (2015); RESTREPO AMARILES (2017), pp. 465-484; MCLACHLAN (2017), p. 163.

<sup>49</sup> POLINSKY & SHAVELL (1997), p. 869.

<sup>50</sup> FORTES & OLIVEIRA (2018).

<sup>51</sup> FORTES & OLIVEIRA (2018).

discrimination caused by an e-commerce giant that practiced geographical pricing and geographical blocking of Brazilian consumers in the context of the Olympic Games in Rio de Janeiro.<sup>52</sup> Because this e-commerce giant used information related to the geographical origin of the consumer to explore asymmetries of power and information and manipulate the digital market against Brazilian consumers, the plaintiff calculated the collective moral damages according to the amount of illegitimate profit related to the period covered by the evidence of geographical discrimination in 2016.<sup>53</sup>

The third technique is the quantification of collective moral damages based on *the amount of investment made on the illegal activity*, which became possible and more prominent in Brazil because of the development of the anti-corruption investigations and the Car Wash Operation ('Operação Lava Jato'), especially because it revealed the total amount of the bribes paid by some sectors to corrupt politicians. Therefore, one would expect that the total investment by a corporation to bribe politicians could be a consistent proxy of the expected profit that this corporation could extract from this illegal activity related to the corruption. For instance, because the transportation companies of Rio de Janeiro invested a lot of money on corruption and the monopoly of electronic ticketing was granted to them by the public authorities as part of this corruption process, the collective action to require a public bid for electronic ticketing also include a request for conviction to pay collective damage, whose amount corresponded to the identified amount of corruption paid by the Transportation Federation (FETRANSPOR). Importantly, the amount of money invested in the corruption of public official may be considered as a proxy for calculating the collective moral damages, as an indicator of the harm caused to the population by the precarious provision of public services to the people.

A fourth technique identified for calculating the collective moral damages consists of the evaluation based on the *total amount of material damages related to a collective wrongdoing*. Inspired by techniques adopted in the U.S. for estimating punitive damages, this technique examines the total amount of material damages suffered by each individual victim in a case of mass torts. For instance, in the Exxon Valdez case, the calculation of punitive damages corresponded to the same amount of the sum of material damages, but without any additional calibration of the sanction because of the circumstances of this accident of navigation. In contrast, cases of corporate fraud may lead to a multiplication of the material damages for a multiplying factor related to the seriousness of the collective wrongdoing. There are cases in which the punitive function of the collective moral damages may lead to a multiplication of the total amount of material damages for four times to achieve optimal deterrence.<sup>54</sup> This technique evokes the multiple functions of civil liability, especially the punitive, the

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<sup>52</sup> FORTES *et al.* (2021), p. 145; FORTES *et al.* (2020).

<sup>53</sup> FORTES & OLIVEIRA (2018).

<sup>54</sup> POLINSKY & SHAVELL (1997), p. 869.

precautionary, and the pedagogical ones.<sup>55</sup> In Latin American collective actions, however, sometimes the calculation of the complete amount of individual material damages paid to the victims is not clearly made. These techniques reveal opportunities for reflecting on how to improve our experience with collective moral damages.

#### **IV. COLLECTIVE MORAL DAMAGES: NATURE, FUNCTIONS, POSSIBILITIES AND LIMITATIONS**

There is no clear Brazilian legislation that recognizes the institute of punitive damages or that establishes parameters for its judicial application. In 2002, some Brazilian federal representatives attempted to include this institute in the reform of the Brazilian Civil Code, but their project was never submitted to a vote. On the other hand, the academic literature and the judicial doctrine established the institute of the ‘collective moral damages’, which serves as the point of entry for the application of punitive damages in the Brazilian civil justice system.<sup>56</sup> According to Article 6, number VI, from the Brazilian Code for Defense of Consumers (CDC), one of the basic rights consists of the ‘effective prevention and compensation of the individual, collective, and diffuse material and moral damages’. Additionally, the Civil Public Actions Act (‘Lei da Ação Civil Pública’) also refers to the possibility of vindicating moral damages through collective actions, resulting from environmental pollution, consumer mass torts, urban disorder, loss of cultural and historical heritage, and anticompetitive practices.<sup>57</sup>

Most Brazilian scholars consider that ‘collective moral damages’ provide the legal basis for application of punitive damages. Bittar Filho explains that collective moral damage is the unjust harm for the moral sphere of a given community or, in other words, the illegal violation of certain collective values.<sup>58</sup> André Ramos considers that collective moral damages result from unlawful collective wrongdoings that justify the application of extra-patrimonial compensation for society.<sup>59</sup> Hugo Mazzilli conceives of the collective moral damages as a collection of the individual damages, reminding of the punitive function of collective litigation and its extra-patrimonial character.<sup>60</sup> Fredie Didier Junior and Hermes Zanetti Junior

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<sup>55</sup> ROSENVALD (2014).

<sup>56</sup> FORTES (2019a), pp. 104-132.

<sup>57</sup> FORTES (2019a), pp. 104-132.

<sup>58</sup> BITTAR FILHO (1994), pp. 44-62.

<sup>59</sup> RAMOS (1998), p. 82.

<sup>60</sup> MAZZILLI (2008), p. 146.

indicate that collective moral damages are necessary to compensate for a communitarian loss, imposing a sanction that combines reprehension, compensation, and pedagogy.<sup>61</sup>

An eloquent critique of ‘collective moral damages’ in Brazil came from Professor Teori Zavascki, who considered that society could not suffer, and that compensation and sanction could not be confused by the recognition of this institute.<sup>62</sup> Because Teori Zavascki was also a Justice of the Brazilian Superior Tribunal of Justice (‘Superior Tribunal de Justiça’), his views were influential. The initial decisions of the 1<sup>st</sup> Chamber of STJ rejected requests for convictions of parties to pay collective moral damages. Subsequently, however, the 2<sup>nd</sup> Chamber of STJ defended the existence of collective moral damages and applied this institute in several cases. Nowadays, there is no more dissent in the STJ, as the chambers and Brazilian courts in general currently adopt the concept of collective moral damages.

In terms of the potential functions of civil liability, the Brazilian experience with collective moral damages is shaped by this dispute of perspectives between multi-functionalists and uni-functionalists, contrasting the views of those who consider that civil liability is limited to compensation of harms with the complex setting that includes deterrence, prevention, precaution, punishment, and pedagogical functions. Collective moral damages may support various functions of civil liability and provide opportunity for correcting collective wrongdoings in contemporary societies. On the other hand, there are also limits and we should not consider it to be a panacea that could provide responses for all problems related to collective actions. For instance, collective actions against hooliganism depended more on specific prohibitions of access to football stadiums and other measures addressed to sport fans rather than payment of money for their collective wrongdoings.<sup>63</sup>

This debate is not exclusive of the Brazilian experience, but rather shapes the global exchange on class actions.<sup>64</sup> Particularly the academic literature related to the Chilean experience with collective actions described a poor calibration of economic incentives that led to a defendant-friendly procedure and discouraged plaintiffs to litigate them.<sup>65</sup> However, a recent legislative reform introduced the institute of collective moral damages in Chile especially for consumer protection and cases related to the violation of human dignity and the physical and moral integrity of consumers.<sup>66</sup> As revealed by the joint debates held by IBERC and ICHRC on September 2020, there are concerns about the nature, function, and impact of collective moral damages that are common to both countries and the Brazilian

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<sup>61</sup> ZANETTI JR. & DIDIER JR. (2009).

<sup>62</sup> ZAVASCKI (2009).

<sup>63</sup> FORTES (2013); FORTES (2014), p. 63.

<sup>64</sup> HENSLER *et al.* (2009); HENSLER *et al.* (2016).

<sup>65</sup> BARROILHET (2012), p. 275.

<sup>66</sup> GONZÁLEZ CAZORLA (2021), pp. 122-173.

experience may provide also basis for a reflection for a comparative reflection on the possibilities and limitations of collective moral damages in Latin America.<sup>67</sup>

Interestingly, the idea that moral damages are strictly personal and, therefore, limited to individual harms emerged also in the Chilean academy. Renzo Munita Marambio considers that the judiciary could only protect material damages through collective actions, but not moral damages.<sup>68</sup> In contrast to this opinion, however, some Chilean scholars acknowledge that the new consumer law introduced the punitive function with the incorporation of punitive damages and these collective moral damages. For instance, Pamela Mendoza Alonso explains that Chilean law received the influence of the Common Law institutes of ‘punitive damages’ and ‘exemplary damages’ and, therefore, it is not limited to the compensation of harms caused by wrongdoings, but also functions as a civil sanction for the wrongdoer.<sup>69</sup> She considers that the official terminology should be ‘extra-patrimonial damage’ and that punitive function and collective moral damages strengthen the autonomy of tort law.<sup>70</sup>

Rodrigo Momberg Uribe and Alberto Pino Emhart emphasize that the concept of collective moral damage caused perplexity among Chilean scholars, but also identify this new institute with a private sanction, a social sanction and the deterrence effect of tort law.<sup>71</sup> In their opinion, collective moral damages should be applied only in selected cases of a collective wrongdoing that causes psychological or physical harm to a group of consumers or affects the dignity of consumers.<sup>72</sup> In another article on this theme, Alberto Pino Emhart clarifies his understanding that collective moral damages could operate as a mechanism for aggregation of a collection of homogeneous individual interests of consumers, but not as the justification for convicting defendants to pay damages for violation of diffuse or strictly collective interests that transcend these individual rights.<sup>73</sup> Exploring the historical tradition of imposing civil sanctions in Chile, the character of these damages as punitive and not only compensatory seems more evident.<sup>74</sup> In summary, the discussion on the nature and function of collective moral damages focuses on the same questions in both Brazil and Chile, providing grounds for an important comparative dialogue across these jurisdictions.

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<sup>68</sup> MUNITA MARAMBIO (2019).

<sup>69</sup> MENDOZA ALONSO (2019).

<sup>70</sup> MENDOZA ALONSO (2019).

<sup>71</sup> MOMBERG URIBE & PINO EMHART (2021).

<sup>72</sup> MOMBERG URIBE & PINO EMHART (2021).

<sup>73</sup> PINO EMHART (2021).

<sup>74</sup> PINO EMHART (2021).

## V. CONCLUDING REMARKS

This article discussed the Brazilian experience with collective actions for consumer protection, by examining the phenomenon of lucrative illegality and the economic consequences of collective actions, especially the problems related to the poor calibration of collective moral damages revealed by the ‘Dieselgate’ and the challenges related to its quantification through different techniques, like the estimative of a minimum amount, skimming-off the illegitimate profit from the wrongdoing, the amount of investment made on the illegal activity, and the total amount of material damages related to a collective wrongdoing. The doctrinal discussion related to the conceptual nature and the potential role of the functions of deterrence, prevention, precaution, punishment, and pedagogy are important for reflecting on the possibilities and limitations of collective moral damages in contemporary Latin America.

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