Article

Breaking Down the Walls between Compensatory Damages and Extra-Compensatory or Punitive Damages

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Abstract

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Introduction

Consider the following two test cases:

***The Soccer Example***: Zack is a well-known soccer player who refuses to be vaccinated, despite the coronavirus epidemic and the unequivocal recommendations of the Ministry of Health to be vaccinated against it. He tries to protect himself as much as possible against infection. However, he was recently infected with COVID-19 and became seriously ill. He continues to suffer from severe side effects of the disease even months after the illness. Zack wishes to sue the operators of the stadium of one of the rival teams, after a private investigator working on his behalf found that in one of the matches between Zack’s team against that rival team, the coronavirus regulations were not enforced. He believes that he will be able to prove a conceptual duty of care on the part of the stadium operators, a breach of that duty, and a causal connection between their negligence and his falling ill with COVID-19. He also intends to claim punitive damages from the stadium operators, having discovered that they had not enforced the required coronavirus regulations as a matter of course over several months and not only in the game in which he participated.

***The Store Example***: Linda owns a store that sells home and garden products on a central street in her city. At the end of each working day, Linda normally locks the shop with a simple lock. The storefront has not bars. Linda does not have insurance (assume that there is no obligation to insure businesses). Two years earliery, her store had been broken into for the first time, with a great deal of merchandise stolen and considerable other merchandise damaged. The thief was caught after the police located him by means, inter alia, of a security camera in the street. Linda filed a tort claim against the thief after his criminal conviction and won her suit. Since then, Linda’s store has been broken into three more times and other stores on the street have also been burgled, causing great concern on the part of store owners and residents in the area. Nevertheless, Linda continues to lock her shop with a simple lock. In the most recent burglary of her store, the thief was caught and prosecuted. This individual had already committed several burglaries, particularly in that area, but none of the victims had brought a tort action against him. Linda intends to sue him for damages as well, including a claim for punitive damages against him, charging that he was a serial wrongdoing thief who had operated for a long period of time without being caught.

What these two examples have in common is not only that the behavior of the injured parties— Zack and Linda —has negative consequences, but that this behavior also externalizes costs, imposing them on society. It is reasonable to expect that the legislator in such cases would want to intervene and prevent the externalization of such costs. It should be noted that the mechanism of contributory or comparative negligence is sometimes irrelevant, except for behavior in the individual case. In fact, even in individual cases where contributory or comparative negligence does arise, compensation is not always reduced. Consequently, victims have no incentive to internalize their behavior. It may therefore be necessary to examine, instead, the reduction of punitive damages as a remedy for the problem of individuals externalizing the costs of their behavior. Among the questions raised is whether this approach is possible and acceptable.

The literature and case law in various countries on the issue of punitive damages have long grappled with the question of the appropriate justification for imposing punitive damages in tort law. There are quasi-criminal approaches that regard such compensation as an “island” of criminal law within the law of torts, possibly a remnant of the approach that claims that the law of torts evolved out of criminal law. Such approaches require a malicious or at least intentional act as a condition for considering punitive damages and as a justification for attributing mens rea to the act, which is generally not required in the law of torts.[[2]](#footnote-2) The focus is thus on the mental element attributable to the tortfeasor, without a necessary connection to the person harmed.

Other approaches explain that punitive damages are an expression and reflection of the revenge that the harmed person-victim feels driven to exact against the tortfeasor in the appropriate cases. These therefore focus on the nature of the relationship between the parties to the tort and on the background to the creation of the harm.[[3]](#footnote-3)

Over three decades ago, an economic—multiplier—approach to punitive damages was proposed by Mitchell Polinsky and Steven Shavell.[[4]](#footnote-4) According to them, punitive damages are not actually punitive. Rather, their purpose is optimal deterrence of serial and mass wrongdoers who are normally not sued for all the wrongs they commit. As such, if we once again focus on the actions of the tortfeasor alone, there is economic justification for imposing on that tortfeasor against whom a lawsuit has already been filed, payment of compensation that reflects not only the harm in the current case but also other harms that they caused in earlier similar cases. According to this approach, which focuses on incentives to potential tortfeasors, it is not problematic that it is the specific plaintiff, i.e., the injured party in the pending lawsuit, who will also receive the punitive damages, and not only compensatory damages that reflect the harm caused specifically to them.

Some two decades ago, a social approach was also introduced by Catherine Sharkey, termed “extra-compensatory social redress.”[[5]](#footnote-5) Under this approach, compensation in excess of the amount of the actual damages is regarded as social compensation for related cases in which the action of the tortfeasor harmed society as a whole and not only the specific victim. While this social approach, like the economic multiplier approach, appears to emphasize the action of the tortfeasor, it also incorporates social considerations as well as economic ones. Other approaches exist as well.[[6]](#footnote-6)

In many states and at the federal level, the traditional quasi-criminal approach was preferred, whereby punitive damages are awarded in relatively rare cases, when the tortfeasor’s actions were malicious and intentional. For example, in the U.S. Supreme Court, the economic multiplier approach was explicitly rejected for various reasons. Among them was an inherent conflict with due process, since charging a defendant in a one specific case for other cases as well, for which he was not actually sued, does not allow him to defend himself against those unfiled claims. The U.S. Supreme Court was also unwilling to uphold a lower-court judgment in which punitive damages amounting to tens of times the amount of the actual damage were awarded, ruling that such compensation was too high for a tort claim.[[7]](#footnote-7)

The gap between normal tort compensatory damages and punitive damages is expressed not only in the difference in the amount of damages. We think that the difference in the amount of damages is the result of a fundamental difference in the policy considerations and liability criteria that are taken into account when determining normal tort compensatory damages and when determining punitive damages. For example, when determining standard compensatory damages, it is customary to compare the behavior of the tortfeasor to that of the victim. However, when determining punitive damages, it is notable that in nearly all cases, only the behavior of the tortfeasor is examined. In tort law, there are balancing criteria for determining liability for damages and the obligation to pay compensation. On the one hand, the degree of fault or negligence involved in the tortfeasor’s behavior and their incentives to prevent the damage or whether they are the least expensive cost-avoider and the best decision-maker must be examined. On the other hand, the tortious behavior must also be compared to the behavior of the victim. Thus, it is necessary to consider the victim’s contributory or comparative negligence and/or examine whether the plaintiff and not the defendant is actually the least expensive cost-avoider or the best decision-maker. Addressing all these questions and balancing all these considerations is regular practice when determining standard compensatory damages. In determining punitive damages, however, no similar balancing is carried out between the plaintiff and the defendant. This is one of the main reasons for the large gap between the amount of payments in punitive damages compared to ordinary compensatory damages, since in the latter, the amount of compensation due to the plaintiff is reduced or the defendant’s liability is completely nullified if there is contributory negligence on the part of the plaintiff. Punitive damages awards are not subject to any such considerations or reductions. Courts in certain states award compensation that is astronomical and, in fact, unreasonable, which seems incompatible with the basic concepts of tort law. Courts and academic scholars must look beyond classical tort law to justify such awards, turning instead to the conceptual world of criminal law. In criminal law, the notion of reducing punishment due to the contributory negligence of the victim is not accepted.

This gap between tort and criminal law with respect to contributory negligence is significant. Notably, in all the approaches, there is a lack of sufficient reference in the literature to the issue of the preventive measures taken by the injured party as a parameter for ruling on punitive damages, both in relation to the award itself and to reducing the compensation. This lack of reference is even more glaring given that the contributory negligence of the injured party is actually examined routinely as a defense claim when imposing basic tortious liability. In fact, when punitive damages are added to the basic and standard tortious liability that is reflected in compensatory damages, the reference to the incentives to the victim to prevent the damage or at least reduce it miraculously disappears.

A considerable number of theoretical approaches to punitive damages concentrate on the actions of the tortfeasor, whether for the purpose of deterrence or for social or other reasons, and this would seem to reflect positive law.[[8]](#footnote-8) But is this also the normative situation? After all, at the stage of imposing the basic liability and imposing compensatory damages, economic and other approaches also examine the incentives for the victim, and reduce the compensation accordingly, in line with the recognized major approaches.[[9]](#footnote-9) Why not do so also at the stage of imposing punitive damages, and also consider the behavior of Zack and Linda—the plaintiffs-victims—in determining the amount of punitive damages? These questions are at the core of our proposal that offers various alternative solutions to the dilemma of punitive damages awards. Integral to these alternatives is our proposal that the tortfeasor should indeed be obligated to pay all punitive damages for the purpose of achieving real optimal deterrence for both the tortfeasor and the injured party in the appropriate cases. However, the entire amount should not necessarily be transferred to an injured party who was serially and seriously negligent. Instead, part of the punitive damages award should be transferred to relevant social organizations.

Part I introduces different approaches to punitive damages and focuses on two of them. Part II introduces our proposal to reduce punitive damages in the appropriate cases. It presents justifications for the proposal, discusses it in depth, and presents an alternative proposal. Part III discusses different implications of the proposal, such as its contribution to the reduction of the fear concerning moral hazard, its help in reaching proportionality between the compensatory and extra-compensatory damages, and its ability to address issues such as the possible problem of double reduction. We conclude by providing a view of the possible future complementary research on this question.

1. Punitive Damages – The Different Approaches

In contemporary scholarship and case law, different approaches exist to identifying the rationale of punitive damages.[[10]](#footnote-10) According to some traditional approaches, punitive damages are most likely to be awarded in cases of very serious harm or potential harm, or reprehensible conduct on the part of the tortfeasor.[[11]](#footnote-11) According to many traditional views, punitive damages should be uncommon and should be awarded only for malicious, intentional torts. Therefore, such damages should be awarded only where both deterrence and punishment are particularly important.[[12]](#footnote-12) However, significant criticism has been levelled at the traditional approaches towards punitive damages, arguing that the civil context is not suitable as a forum for awarding punitive damages and that it is wrong to mingle criminal and civil principles.[[13]](#footnote-13) Other scholars have recently focused on revenge and the dignity of the victim, as part of discourse about victims’ rights.[[14]](#footnote-14) Unlike the instrumental, economic, and societal approaches which will be addressed below, a revenge-based approach does not and cannot take into consideration injured parties other than the plaintiff-victim, as punitive damages are considered a matter of personal revenge for personal suffering experienced by the plaintiff.

The issue of the imposition of punitive damages on allegedly serial tortfeasors lies at the heart of the discussion about the non-application of the law and economics approach to punitive damages— i.e., the multiplier approach,[[15]](#footnote-15) —in the U.S. Supreme Court in recent years. Many injured parties never actually sue.[[16]](#footnote-16) As a result, many tortfeasors end up not paying.[[17]](#footnote-17) Therefore, to require serial tortfeasors to pay for the harm they cause only if sued in practice would result in under-deterrence.[[18]](#footnote-18) For example, if a tortfeasor causes a harm of 50 dollars to each of eight persons, but only two of them are expected to sue him, this tortfeasor would internalize a cost of hundred dollars only, even though the cost of the negative externalities of his acts totals four hundred dollars (50 dollars for each of eight persons).[[19]](#footnote-19) Polinsky and Shavell explain that imposing punitive damages results in an increased level of deterrence for potential (mostly serial and mass) tortfeasors, and optimal deterrence is ultimately achieved provided that the correct amount of punitive damages is awarded.[[20]](#footnote-20) In other words, imposing punitive damages for reprehensible conduct in cases in which tortfeasors already pay damages may represent a certain overpayment locally. However, overall, these tortfeasors will be paying at most for the wrongs they actually caused, which would create optimal (or near-optimal) deterrence rather than over-deterrence.[[21]](#footnote-21)

As Polinsky and Shavell explain, potential tortfeasors would behave more efficiently and aggregate welfare would consequently increase if tortfeasors were to consider this possibility in advance. In the above-mentioned example, if the tortfeasor has a chance of being sued (and held liable) in two out of the eight cases in which he committed a tort (25%), damages should be $400—the $100 harm (50 x 2), multiplied by 2. The total damages should be $400: $100 represents compensatory damages and the additional $300 is the optimal amount of punitive damages.[[22]](#footnote-22)

Two judges who are among the founding fathers of the school of tort law and economics invoked similar approaches in federal courts. In *Ciraolo v. City of New York*, Judge Guido Calabresi an approach substantially identical to the multiplier appraoch, calling his approach “socially compensatory damages.”[[23]](#footnote-23) In *Mathias v. Accor Economy Lodging Inc.*, Judge Richard Posner also essentially applied the multiplier approach.[[24]](#footnote-24) These judgments were handed down prior to developments in the U.S. Supreme Court rejecting the multiplier approach based on the reasoning that it, inter alia, contradicts due process. In essence, the Supreme Court has found that the multiplier approach denies the defendant the opportunity to defend him/herself in cases in which torts are attributed to him/her and are then relied upon for the purpose of the multiplier and the calculation, even though no decision has been handed down about additional acts of malfeasance.[[25]](#footnote-25)

In any event, in order to apply the multiplier approach, information is required relating to similar harms caused by the same serial tortfeasor in earlier cases. Such information can be obtained from previous legal proceedings that ended, for example, in compromises or in the suit being withdrawn for various reasons.

In this context, Sharkey has argued that:

[P]unitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a *societal compensation* goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case.[[26]](#footnote-26)

According to Sharkey, “societal damages” should be awarded in cases of intentional torts.[[27]](#footnote-27) These are actually extra-compensatory damages awarded to the plaintiff. However, from the defendant’s standpoint, these damages are what they must pay because society is interested in reducing this type of behavior, although not necessarily through criminal sanctions.

The significance of Sharkey’s call to award punitive sanctions for societal damages is that injured parties other than the actual victim/plaintiff should also be considered. This means that the conduct of the tortfeasor should be regarded from a much wider perspective of general conduct, beyond the concrete case under discussion.[[28]](#footnote-28)

Several similar approaches that regard punitive damages as a means of providing redress for the injured party and/or as a societal compensation goal have also been raised. Some of these approaches regard punitive damages as in fact extra-compensatory damages for the plaintiff. However, from the defendant’s standpoint, these damages are what they must pay in the eyes of society, which wants to suppress this behavior but not through criminal (or quasi-criminal) sanctions. Let us examine a few major approaches that advocate this line of thought, besides that of Sharkey.

John Goldberg argued that “notwithstanding the dominant tendency among modern scholars to treat tort law as an instrument for attaining public goals such as loss-spreading or efficient precaution-taking, it is still best understood as a law of redress.”[[29]](#footnote-29) David Owen argued that punitive damages “offer victims of aggravated wrongdoing robust redress for the panoply of losses that were aggravated by the flagrancy of a wrong.”[[30]](#footnote-30) He emphasized that their role is not simply to punish or deter, but to recompense victims and redress wrongs.[[31]](#footnote-31)

Margaret Jane Radin may have been the first to focus on redress,[[32]](#footnote-32) arguing that redress provides a more useful framework for understanding punitive damages, forcing the wrongdoer to recognize that what s/he did was wrong.[[33]](#footnote-33) Radin suggests that redress seeks to “symbolize public respect for the existence of certain rights and public recognition of the transgressor’s fault in disrespecting those rights.”[[34]](#footnote-34) Matthew Parker explained that Radin was arguing that redress is not necessarily about monetary restitution. Instead, she sees it as servings to affirm public recognition of certain rights and wrongs. Therefore, there is a certain incommensurability between the harm caused by a tort and the corresponding award of compensation.[[35]](#footnote-35)

We will focus mainly on two approaches, that of Polinsky and Shavell’s multiplier, and that of Sharkey’s social redress extra-compensatory damages.

1. The Proposal
2. The Body of the Proposal: Reducing Punitive Damages in the Appropriate Cases

In many states, courts were not prepared to introduce principles of comparative negligence into the punitive damages.[[36]](#footnote-36) In fact, today there is no official and calculated reduction of punitive damages due to contributory negligence, as there is for compensatory damages. The exception is that according to legislation in some states, consideration of contributory negligence in punitive damages awards is a matter for the jury’s discretion.[[37]](#footnote-37) The literature has also not dealt with this issue in depth.[[38]](#footnote-38) It is of course possible to consider a number of components when determining the punitive damages, such as the severity of the behavior, how repeated and serial it was, or how malicious and intentional. These, however, are not clear and uniform criteria. Moreover, they do not consider the actions of the injured party.

We offer a new proposal that would allow Linda to continue to lock her store, perhaps even in the same way, thereby taking preventive measures, although relatively minimal ones in view of the expensive goods in her store, which invite break-ins. Regarding compensatory damages, courts may determine that she is not at fault for every case of theft. In such a case, in any such lawsuit she brought specifically against a concrete thief, her compensatory damages would not be reduced by courts due to contributory negligence. That is, the fact that although she did lock the store, she could have made more of an effort. There may be some courts that will nevertheless reduce her compensatory damages for her contributory negligence. In any event, Linda, the injured party, acts in a consistent serial manner. True, she is not the serial tortfeasor, but rather, the victim. As a victim, however, she acts in a serial fashion by not investing more in preventive measures, despite the previous events in the vicinity in general, and even in her own store in particular. There may be room to consider this to her detriment and to reduce part of the punitive damages awarded to her for two reasons. First, due to her part in not doing enough to prevent the harm, and, second, in order to incentivize potential victims such as herself to invest more in precautions to prevent their own potential harms. To be precise, in her first suit, Linda is still not an injured party who has acted serially in an incautious manner. Therefore, in the first suit, at most, contributory negligence can be deducted from the compensatory damages. Even if the court should order the defendant to pay Linda punitive damages in the first lawsuit because, for example, their actions were severe and malicious, it is not relevant for reducing the amount of extra-compensatory damages that would be awarded to Linda. It is relevant only to reduce the amount of compensatory damages in accordance with her contributory negligence. The idea here is the seriality of the wrongdoing of the injured party.

This solution gives rise to a slight difficulty, as it allows potential tortfeasors to plan tortious actions that lead to intentional harm to a specific population. Insofar as we reduce the punitive damages tortfeasors pay at the expense of injured parties who were not sufficiently careful, the former are likely to plan their actions in such a way that they deliberately harm people who are not protected, thereby saving on the compensation. In this way, the reduction of punitive damages is liable to lead to intentional harm to the community of the “non-cautious,” who, although we want to incentivize them to desist from their problematic custom of not protecting themselves from harm, we do not want to cause them new harm. This can be expected to happen only when the wrongdoers are given the ability to locate and pinpoint vulnerable victims.

Similarly, Zack can continue to refuse vaccination, and it is very possible that there will be no reduction of compensatory damages in the lawsuit he files, due to, inter alia, principles of personal autonomy and the right not to be vaccinated. Indeed, he is not a tortfeasor who commits an ongoing wrong but the injured party; nevertheless, he does not take sufficient precautions to avoid being injured over time. It is possible that this will not be considered a moral hazard and will not result in the denial or reduction of his compensatory damages. But it is also possible that some courts will reduce compensatory damages and will regard Zack’s ongoing serial behavior as contributory negligence. Regardless, it is precisely when Zack claims punitive damages that it may be necessary to consider his ongoing conduct regarding insufficient preventive measures and reduce the punitive damages awarded.

Therefore, even if the compensatory damages awarded to Linda and Zack at the stage of imposing basic liability is not reduced due to contributory negligence, these two injured parties’ behavior over time of not taking sufficient steps to prevent the harm should very possibly be considered at the stage of imposing punitive extra-compensatory damages. This would find expression in the form of a reduction of the punitive damages and would act as a type of incentive for the injured party to take sufficient precautions, which are also reflected and considered at the punitive damages phase.

In terms of economic analysis of the law, the way to incentivize both parties is not necessarily that *all* compensation be paid by the harming party to the injured party. There is a possible, perhaps desirable alternative in some cases, which is that only a certain part of the compensation be paid to the injured party, with the balance to be paid to a relevant third party, such as a social organization. We will expand on this proposal later (Part D below), but a brief mention is warranted here. According to this alternative proposal, a tortfeasor who is a serial wrongdoer will in any case pay punitive damages at an optimal rate, for example, according to the multiplier approach, with the intention of deterring the wrongdoer. However, the injured party, who has also acted poorly, will receive only part of the amount of the punitive damages and not the entire sum. The tortfeasor will still pay the full amount, which will not be reduced even where the injured party did not behave properly, but they will pay the balance—the extra-compensatory damages above and beyond the amount of the actual damage— to a third party and not to the injured party. This proposal combines a social and economic idea. Adopting this solution will bring about an optimal internalization of the costs of each party. Thus, there would be no threat of the tortfeasor not internalizing the costs due to paying less. They will still pay the entire amount, but not all of it will go to the plaintiff-injured party. As a result, the latter will also internalize the adverse aspects of their behavior.

Regarding a certain necessary minimum of fault on the part of the injured party for the activation of the reduction of punitive damages, we may say that once the harm to which their negative conduct contributed can be defined as social damage, according to the social redress approach, their punitive damages will be reduced. It may also be possible to consider, for this purpose, similar conduct of the injured party in the past, since we are interested in showing that the social damage in which they were involved is serial. For this purpose, it will be possible to take into account what is usually not taken into account according to the laws of evidence, which is the tortious past of the injured party, using information about the plaintiff from previous proceedings, as a type of personalized law.[[39]](#footnote-39)

However, one could decide that fault, possibly as part of both corrective justice and optimal deterrence, may not be the only or the main element in deciding how much to award in punitive damages, but that other considerations and aims of tort law are also relevant. Indeed, following a pluralist view of the aims of tort law,[[40]](#footnote-40) we might also try to integrate elements of distributive justice, such as considering further reduction of the sum for plaintiffs who, unlike Linda, have deep pockets who could have easily invested in greater precautions than others and chose not to do so.

We should also point out in this context that it may also be argued, in a kind of parallelism, that since punitive damages have been awarded so sparingly and rarely to date, then once they are already awarded, we will not rush to reduce them, even if we have already deducted the contributory fault.

B. Justifications for Reducing Punitive Damages

What is the justification for denying punitive damages, or at least part of them? With punitive damages, the injured party receives a sort of windfall that they do not necessarily deserve, since the punitive damages far exceed the amount of damage they actually suffered. Therefore, denying the plaintiff-damaged part of this windfall from is certainly subject to much broader and more varied policy considerations than those involved in reducing compensatory damages based on contributory negligence according to the Learned Hand formula, the goal of which is to create optimal deterrence (which is neither under- nor over-deterrence). Indeed, those same broad considerations in the policy of imposing punitive damages achieve much broader aims than optimal deterrence, including the maliciousness of the act, the degree of its criminality, the fact that it is serial or has an unusual social effect, as well as indifference in the face of repeated risks and failure to adopt minimal precautions.

One may criticize the proposal by arguing that traditionally, punitive damages focus on the behavior of the defendant only. But this is precisely what we wish to change. Our goal is to achieve greater symmetry between considerations in awarding fault-based compensatory damages, in which courts reduce damages for contributory damages, and extra-compensatory punitive damages, in which, traditionally, courts do not do so.

We again emphasize that this does not necessarily mean that the amount of compensation paid by the injured party will decrease. Rather, according to the alternative that we proposed above and about which we will elaborate below (Part D), it is possible that the tortfeasor will pay the same amount of extra-compensatory damages irrespective of the conduct of the injured party. What will change is the part received by the injured party from that compensation money (assuming that the balance will be paid by the tortfeasor to a third party).

The proposal is based on the premise of a liability regime of fault and contributory negligence. Therefore, if difficulties are raised about the reduction of punitive damages for the injured party, originating in difficulties regarding the reduction of compensation in general, they are not relevant to the proposal in this article. These should be raised regarding a reduction in compensatory damages for contributory negligence, for example, by virtue of a regime of strict liability. In view of our overall goal, we are less inclined to deal with such a regime in this article. However, this does not mean that we propose reducing punitive damages in every case in which contributory negligence is also reduced. Regarding some matters, there may be no reason to reduce the contributory negligence from the standard compensation in a particular case, but there may be a reason to reduce the punitive damages due to the serial behavior of the injured party. In any event, the actual possibility of reduction is not disputed in a regime of fault and contributory negligence.[[41]](#footnote-41)

C. Is the Proposal Actually a Type of a Reverse Multiplier?

This proposal aligns mainly with economic approaches, including approaches such as that of the Learned Hand formula in the actual imposition of liability. This represents an economic approach that examines the fault of the injured party as well as that of the tortfeasor according to the preventive measures taken by each party regarding the extent of the damage.[[42]](#footnote-42)

There is actually a kind of reverse multiplier here, or a type of multiplier that is also tested in relation to the victim. The fact that a victim serially refrains from taking sufficient precautions should be used against him/her, just as it is used against a serial or mass wrongdoer according to the original multiplier approach. It should be reflected in the fact that if punitive damages are awarded, they will be reduced in the case of Linda or Zack, for the same, “converse,” reason that they were awarded against the burglar or the stadium operators in the store and soccer examples. In our opinion, this is an additional and necessary step in the multiplier approach, and we can assume, cautiously, that its creators, Shavell and Polinsky,[[43]](#footnote-43) would not be opposed to the application of this step. In fact, they might even claim that even though they did not discuss and explicitly state the consequences of contributory negligence for this step in awarding compensation, these consequences are natural and part of their original approach.

This proposal may also be in keeping with Sharkey’s extra-compensatory social redress approach,[[44]](#footnote-44) which may want to see the injured party, too, helping to prevent harm to society. In the example of Linda’s store, this approach may promote better preventive measures that could lead to an end to the wave of burglaries in the area. This may calm the residents, who are presently afraid to let their children walk or play outside. This is a social harm that Linda shares, even though she is not the direct tortfeasor but a victim. The shopkeepers also suffer social harm as a result of every additional burglary, even if in some cases, at least, this does not affect the element of personal and concrete damage caused to each of them. However, if the victim is a party to a harm to himself/herself—i.e., self-risk only,[[45]](#footnote-45) and not to a wider social harm, it may be, if only according to Sharkey’s extra-compensatory social redress approach, that punitive damages would not be reduced for him/her.

All of this should be based on the assumption that Linda’s precautions are less than the harms caused to her due to the burglaries. The difference between the cost of the simple lock and a reasonable lock that could have prevented a social harm should be significantly smaller than the overall harm caused to her. Only then should the reduction of punitive damages for her, as a plaintiff, be considered. If the precautions are much more expensive than the harm caused, the considerations may be different: it will be difficult to incentivize Linda to invest more and take better precautions ex ante in order to receive greater punitive damages rather than ex post reduced punitive damages.

In our opinion, one qualification should be added regarding the fault of the injured party. There are quite a few situations in which the injured party could have reduced the harm or the chances of it occurring, but there is no reason to prevent them from receiving all the punitive damages. Examples include a man who lived in a dangerous area and therefore was robbed or was the victim of a terrorist attack, or a woman who married her boyfriend who beat her from time to time and became a battered married woman. In these cases, it is arguable that the man could have lived in a place in which he was not in danger, or that the woman should not have gotten married to an abusive partner and should have left (assuming she really could). But it should be clear that society will neither withhold punitive damages for either of them nor reduce them, for various legal-economic or policy reasons.

However, it is important to ascertain where the line is drawn and when exactly the nature of the injured party’s contribution to the occurrence of damage will be taken into account. For example, if a person enters a place known to be dangerous and teeming with robbers, ostentatiously dressed in luxury clothing and sporting a luxury watch, we may treat him/her differently than the previous examples and perhaps reduce punitive damages. This is because the costs of preventing his/her harm are lower. Alternatively the court, given its considerations, may not view these actions as worthy of protecting in the same way as it protects in the previous examples.

D. The Defendant Pays the Whole Sum of Punitive Damages, but the Plaintiff Does Not Receive the Whole Amount

It is possible and even desirable to decide that injured plaintiffs are not eligible to receive any punitive damages at all due to their behavior, resulting in a kind of 100% reduction of punitive damages. This approach is similar to the situation in different countries regarding class actions that may be submitted only when the plaintiffs acted in good faith.

Alternatively, in such cases, there should be a transfer of part of the punitive damages to a relevant body, such as a social organization that deals with harm similar to the harm experienced by the plaintiff, as was proposed in the literature regarding extra-compensatory social redress.[[46]](#footnote-46) One could go further and decide to split the punitive damages in the appropriate cases, with only a part of them awarded to the plaintiff, and the rest to such organizations. In this way, each person who causes harm, both the wrongdoer and the injured party, should ideally cover the damages resulting from their actions. This is a reasonable alternative to the injured party internalizing his/her contribution by receiving reduced punitive damages, while the wrongdoer does not internalize everything since the compensation he pays is reduced.

This proposal to award the injured party a smaller portion of the total punitive damages without reducing the total amount paid by the wrongdoer may be especially justified in cases of plaintiffs who have deep pockets, who could have easily invested in more precautions than others and have chosen not to do so.

Another alternative is to give the plaintiff the whole sum of punitive damages, but to compel him/her, as a pre-condition, to use part of the sum to invest in better precautions in order to contribute to the avoidance of future harms, e.g., by buying cameras, hiring a security company, and so on. By making the neighborhood safer, this result would be compatible with Sharkey’s social redress approach. This alternative can resemble, in a way, the idea of reversible rewards.[[47]](#footnote-47) Of course, oversight and enforcement of such a solution involves costs. Nevertheless, it may still be economically and socially worthwhile.

Alternatively, another mechanism inspired by class action suits may be proposed. In class actions, too, there is a problem of monitoring the implementation of the judgment after it has been handed down, when the distribution of the funds between many parties is involved. The approach followed by several courts worldwide has been successful from a practical point of view. Initially, the representative plaintiff is given only a part of the compensation amount, receiving the balance only after reporting to the court on how the initial amount was distributed, and, of course, presenting account sheets and other documentary evidence. Only then does the court release the rest of the money and then too, it requires a final report. This mechanism does require the court to monitor even after a judgment is rendered, but it is usually very effective, and we consider adopting this solution here.[[48]](#footnote-48)

E. Does the Reverse Multiplier Defeat the Purpose of the Multiplier Approach? The Importance of Optimal Deterrence of Both Parties—the Tortfeasor and the Injured Party

Earlier, we said that presumably, our reverse multiplier approach would in fact have been sympathetically received by Shavell and Polinsky, the authors of the article presenting the original multiplier,[[49]](#footnote-49) but this may be doubtful. The reverse multiplier approach that we propose in this essay may be perceived as a reverse multiplier only from a technical-external point of view, but not from a substantive one. The reason is that our approach is arguably incompatible with the trend of the original multiplier approach, which focuses on the actions of the wrongdoer so that they pay for their actions and internalize all the costs of their behavior. For this reason, when they are sued, they must also pay for previous incidents for which they were not sued, although apparently, they should have been. According to this approach, we focus on the defendant’s actions and the need to optimally deter them. The plaintiff, however, enjoys a windfall and essentially does not deserve the amount of the punitive damages. Nonetheless, the defendant receives the punitive damages as an expression of the public interest in deterring the defendant. According to this approach, a person who claims punitive damages is similar, to a degree, to a plaintiff in a class action. In both cases, the plaintiffs are fulfilling public interests, although, unlike a class action, the person who sues for punitive damages does not share the amount s/he receives with other victims who, in their particular case, did not sue. Bearing in mind the objective of optimal deterrence, what is important under the multiplier approach is that the wrongdoer pays for the entirety of the harm they caused in all the cases, even if they were sued for only some of them, as we emphasized in the previous section. Apparently, our reverse multiplier approach achieves a different and quite opposite result—a reduction of the payment that the tortfeasor will pay because of the actions of the particular injured party. In essence, here the particular injured party and their actions are relevant and we take into account what the injured party did or did not do in their contribution to the damage. The possible result is the reduction of the compensation that the tortfeasor must pay is reduced, which reduces the deterrence of the tortfeasor. The tortfeasor apparently behaves in the same way whether or not the injured party behaves inappropriately. The basic goal of the multiplier approach is frustrated by such a result. The approach is designed to ensure that a wrongdoer pays for everything they did, in order to achieve optimal deterrence, even if they are only sued for some of their actions. The multiplier approach presumes that the defendant committed all those acts that are presumed to be torts. Therefore, the amount of punitive damages should not be reduced, even if the injured party also acted wrongly.

There are three possible answers to this problem. The first this potential result does not detract in any way from our approach; it only means that our approach is compatible with the multiplier approach only structurally and technically, in that it in fact constitutes a kind of reverse multiplier. However, it is not substantively compatible with the original approach since the deterrence vis-à-vis the tortfeasor is not optimal. Thus, it is possible that Shavell and Polinsky and their supporters would not necessarily accept our approach.

Another possible answer is that the reverse multiplier also works well with an economic approach of optimal deterrence. However, in this case, the result of the multiplier and reverse multiplier must be justified in a reality in which the injured party also contributes to the harm, and both parties must be optimally deterred. Indeed, if the injured party acted properly, there is no reason to reduce his/her punitive damages (nor the compensatory damages), in which case the original multiplier approach is applicable and the wrongdoer will pay the injured party punitive damages as well under the multiplier approach, even for wrongs committed against others who made no claim. However, applying our approach, which is inspired by Maimonides,[[50]](#footnote-50) if the injured party was at fault and their behavior contributed to the tort, we would want both to incentivize the injured party and to deter them and others like them in the future. This would be accomplished not only by reducing contributory negligence from the compensatory damages, but also from the punitive damages as well.

Essentially, when the reverse multiplier is relevant, we want to deter both parties who both contributed to the damage. This is a “zero sum game,” as the court will award the same amount of punitive damages, let’s say 100, but now it will deduct 20 from them due to the contribution of the serial victim in his/her actions or omissions. In practice, the defendant will be ordered to pay 80 and not 100. The idea is to reduce the punitive damages that the injured person receives from the tortfeasor, since there is no other economic way to deter the injured person. However, it must be remembered that in such a case, the tortfeasor still pays punitive damages, which are in addition to the amount of the compensatory damages. This deters the tortfeasor while there is room to deter the injured party as well by reducing the punitive damages theye will receive, thereby deterring both. In such a case the tortfeasor will benefit from the reverse multiplier by not paying all of the punitive damages, but only part of them. This result is not, however, incompatible with an economic approach of optimal deterrence. As with the distinction between fault and contributory negligence, the reduction of compensation does not contradict an economic approach, such as that of the Learned Hand formula. The economic logic of the multiplier is also found in the reverse multiplier, as optimal deterrence across a broad view requires us strive to deter those who do not take sufficient precautions, whether they caused the harm or suffered it. This applies both at the compensatory damages stage and at that of punitive damages. The distribution between the parties at the punitive damages stage as well, such as a certain reduction of the award to the injured party-plaintiff since they did not take sufficient precautions, means that both parties must internalize the results of their actions, namely, the fact that neither took sufficient precautions. Thus, we propose a more precise use of the economic approach, whereby in order to achieve the optimal accurate and comprehensive deterrence of both the tortfeasor and the tortfeasor, we must use both the multiplier and the reverse multiplier.

According to Sharkey’s social approach, the result we propose of optimal deterrence of both parties might be problematic prima facie. This is because society as a whole is indeed harmed and deserves compensation for this harm, irrespective of the behavior of the specific harmed person who decided to sue. If a different injured party, whose actions were blameless, was the plaintiff, then there would be no need to reduce the compensation. This would be a more optimal results from society’s point of view. However, it is possible that if the injured party contributed to the social harm, it would be reasonable to reduce their damages as well. This is because s/he is the one receiving the compensation on behalf of society. Therefore, there is randomness in the social approach. This relates to whether the compensation to society as a whole will in practice be reduced according to this social approach. The question of how much society will receive for the harm it suffered will be determined not by the amount of the harm per se but by the identity of the plaintiff. This is somewhat similar to the case of a class action plaintiff who is not acting in good faith. In that case, however, the plaintiff will not be allowed to and another plaintiff who does not have a problem of bad faith will be sought. In the present example, if the plaintiff did not act properly, it may be possible to justify reducing their compensation according to Sharkey’s approach. The reason is that this plaintiff is the one who receives the compensation on behalf of society. If this plaintiff is allowed to file the claim (which is not the case with a class action plaintiff), it makes sense to reduce their compensation if their actions also contributed to that social harm. We can, for example, assume that if Linda had locked her store more securely and invested more in preventive measures, like other store owners on the street, the burglars would have given up and quietly left the street, since burglars are usually looking for an easy and convenient break-in. These are not bank safes, the contents of which may warrant hard work to break into, but only a store, where the fruits of the break-in are, at most, the daily takings in the cash register and items from the store. Presumably, making the possibility of breaking in significantly more difficult will cause the burglar to “think twice” about their actions.

Sharkey’s thesis can be extended to view the tortfeasor and the direct injured party as a single unit, as both parties together created a single social harm for society. Therefore, it seems that the how the punitive damages are distributed is less to society than the award itself as long as there is optimal deterrence to prevent such harm in future. For example, assume that the amount of the obligation determined in Linda’s case is 100. The burglar can be obligated to pay the entire amount, so that s/he and other burglars like him/her will be deterred and thus there will be fewer burglaries. Alternatively, the burglar can be required to pay part of the punitive damages, for example 60, with Linda bearing 40. Each of them will be deterred at least to a certain level, which will cause fewer break-ins. Linda will also be motivated to protect her store better, as will others like her, who will know that punitive damages will be reduced if they do not protect their assets. In this way, in the appropriate cases, the reduction for Linda may even reach close to 100%.

A third explanation, which may also solve the problem posed by our proposal according to Sharkey’s social approach, emerges from one of the solutions that she raises. It was also mentioned in the previous Part as one of the alternatives to the proposal: in cases in which the injured party did not act properly, the punitive damages paid by the wrongdoer should not be reduced. Instead, the relative portion that the specific injured party receives from the total amount of punitive damages paid should be reduced. That is, the wrongdoer will pay the same amount that was imposed on them due to the harm to society—say the amount of the harm multiplied by five. However, if the harmed person acted improperly and has committed some form of contributory negligence, that plaintiff will receive, hypothetically, only two-thirds of the punitive damages, while the other third will be given, for example, to an organization that serves society. In class actions, it is accepted that there is a remedy in the public interest.[[51]](#footnote-51) In a class action for smoking damages, for instance, where it is not always possible to locate all those harmed by smoking and transfer to them all the compensation paid by the cigarette company, part of the compensation could be transferred to a lung cancer research institute that works for the benefit of all those harmed in society by smoking. Above, we proposed doing something similar in our model, albeit in a different way. Under our proposal, the total amount of punitive damages that the wrongdoer must pay will not be reduced if there was contributory negligence by the injured party. This in order not to reduce the optimal deterrence needed for the tortfeasor. However, in cases of contributory negligence, not all the money will go to the injured party. Instead, the plaintiff will receive a reduced sum, only part of the award, with the balance given to a public body for the benefit of the public. It is also possible to establish a state fund for this purpose, the goals of which are, for example, the protection of crime victims.

For the purposes of this approach we propose, the entire harm may be perceived differently from the possible extension to Sharkey’s approach discussed above. Under this proposal, the two stages—compensatory and extra-compensatory damages—must be separated, precisely in relation to seeing the entire harm as one unit. During the first stage, the tortfeasor and the injured party are seen as sharing the concrete harm, a kind of joint wrongdoers. Therefore, it is not the tortfeasor who caused 100: if the entire damage is 100 and the injured person’s share as contributory fault is 20, then the tortfeasor’s share is only 80 and not 100. At the second stage it can be perceived differently. It may be that in the individual case, according to our approach, nothing will be deducted from the extra-compensatory damages, but due to the seriality, there is room to reduce the what the injured party receives. Still, the tortfeasor caused the concrete harm. Therefore, they should pay everything, but the injured party should not receive everything.

F. An Alternative Proposal: Constructing a Scale of Reduction of Compensation in Accordance with the Behavior of the Injured Party

As an alternative to our proposal to reduce, in certain cases, punitive damages due to the behavior of the injured party, it may be suggested that the court construct a scale in advance, ex ante, for ruling on punitive damages.[[52]](#footnote-52) Under this scale, full punitive damages will be awarded if the injured party’s behavior is irreproachable. If their behavior was very problematic, serious, and contributed significantly to the harm, or if it was serial, they will not receive punitive damages; if it was less problematic or not serial (that is, there were several incidents and in some they behaved appropriately), they will be given a portion of the full punitive damages received in similar cases, say 40% or 50%. There are two parallel axes here—the severity of the behavior and the social harm, and the seriality of the act. Sometimes the default of the injured party is serial, as in Linda’s case, sometimes the omission is potentially more serious in terms of social harm, as in Zack’s case, and sometimes the omission is both serious and serial, in which case the punitive damages must be further reduced.

In terms of social harm, it is clear, for example, that there is a difference in the potential for social harm as a result of different tortious events. Breaking into a kiosk and breaking into a bank should not be compared in terms of the public impact or in terms of the public costs, such as those arising from enforcement and oversight authorities. Therefore, it is important to encourage people to prevent harms, especially those that may cause greater damage to society.

There are several options for constructing this scale. One option for determining the reduction in the amount of punitive damages involves examining how much the plaintiff has invested in precautions. One possibility is to reduce the sum of punitive damages only for plaintiffs who did not take reasonable precautions. Another possibility is to increase the sum of punitive damages awarded to plaintiffs who took good precautions which are more than reasonable but not overly-precautious, especially if one suspects that excessive precautions could be taken only in order to receive an increased sum of punitive damages. Awarding more extra-compensatory damages in these cases may incentivize the victim to take greater precautions and avoid the harm from the outset. As mentioned, it is also possible to include in the scale the matter of the seriality of the wrongdoing as an additional parameter for the question of how much to deduct from the punitive damages.

Another option for constructing the scale is to adopt, as an additional component of the criteria for reducing the damages (in addition to the severity of the behavior, the social harm and the seriality), or as an independent model, the probabilistic model inspired by Talia Fisher’s model regarding criminal justice.[[53]](#footnote-53) Fisher proposed a model according to which the greater the probability of committing a crime, the higher the level of punishment. The standard criminal decision-making regime is endowed with a binary structure of “all or nothing”: up to the threshold of the evidentiary standard of “beyond a reasonable doubt,” neither criminal liability nor any punishment may be imposed on the accused. From this point on, however, the liability is absolute. Therefore the degree of punishment imposed on the convicted person should also be absolute, in the sense that it must be detached from any residual doubt concerning the convicted person’s guilt. Fisher reexamined the binary decision model, introducing an alternative decision model—probabilistic punishment. According to her proposal for a probabilistic model, criminal conviction and punishment should be conceptualized linearly, along the evidentiary spectrum, in a way that supports different categories of conviction (such as “conviction beyond a reasonable doubt,” “conviction based on clear and convincing evidence,” or “conviction according to the preponderance of the evidence”). The degree of the punishment, in turn, would be adjusted to the category of the relevant conviction (so that, for example, punishment due to a conviction beyond a reasonable doubt would be greater than punishment deriving from a conviction according to the preponderance of the evidence for the same offense).

A similar probabilistic model exists and is applied in various countries in the civil context of factual causation in tort. There is a difference between a probabilistic model in criminal law and a probabilistic model in torts, although the results are quite similar. Because the burden of proof is much higher in criminal law, the subject of Fisher’s model, than in civil law, it is easier to create a scale of a percentage for conviction, such as between 50% (preponderance of the evidence) and a much higher rate of, for example, beyond a reasonable doubt. In tort law, on the other hand, the correct way to construct a probabilistic model is to maintain the principle of preponderance of the evidence in every case. The scale applies to the compensation. Suppose that the tort is exposure to radiation. The compensation will be awarded at a partial rate, based on the degree of harm to the chances of recovery or the amount by which the risk of becoming ill increased due to the exposure. In other words, according to the probabilistic tort model, if the fraction attributable to the defendant is 30%, it means that there is a 30% probability that s/he reduced the plaintiff’s chances of recovery or increased his/her risk of becoming ill, but regardless, that 30% part will be proven according to the preponderance of the evidence (for example, by scientific evidence).[[54]](#footnote-54) To be precise, it seems that Fisher, in her proposal relating to the criminal law, ranks different burdens of proof on a scale and adjusts the punishments to them. In contrast, applying the probabilistic model in tort leaves in place the fixed burden of proof of the preponderance of the evidence and only requires the plaintiff to prove the fraction of the share which is probabilistically attributed to the defendant based on the preponderance of the evidence, in terms of proof 30% above and beyond the 50%. This appears to be the difference between the models, even if their outcome is similar—the imposition of a partial sanction.[[55]](#footnote-55)

Regardless, adoption of the probabilistic model in the context of examining the behavior of the plaintiff-injured person in the context of punitive damages can lead to interesting results. For example, it could be argued that the more the plaintiff’s indifferent behavior in the face of the risk of being harmed repeats itself, the greater the probability that s/he did not take appropriate preventive measures. This would then justify reducing the amount of punitive damages to which s/he is entitled.

Therefore, it seems to us that this proposal of the probabilistic model is similar to our first proposal presented above (in Part IIA) to reduce the punitive damages, taking into account the level of preventive measures taken by the plaintiff. It is also possible to apply the probabilistic model in an alternative manner to our earlier proposal, with a different underlying presumption. In our proposal, the underlying presumption is that the injured party should receive punitive damages in the appropriate cases. Punitive damages should be partially reduced only in special, serious, and serial cases. These cases should be defined, and the damages probably should not be reduced too drastically. In the alternative proposal presented here, which relies on the probabilistic model, the underlying assumption is that the question of whether to grant punitive damages and how much must be pre-determined in accordance with an ex ante construction of a scale. But here too, if the underlying presumption is that punitive damages must be awarded in the appropriate cases, the difference may be only semantic.

1. Discussion of Different Implications of the Proposal

A. The Proposal Reduces Concern About Moral Hazard

The award of full punitive damages, especially repeatedly in the case of serial wrongdoing, may cause the injured party not to take any preventive measures on their part in order to receive those punitive damages. In some case, it may be worthwhile to be harmed in order to receive any compensation, especially high punitive damages. Our proposal reduces the incentive to endure harm and the incentive to refrain from taking preventive measures. This is because the although the wrongdoer will pay punitive damages, these may be reduced if the injured person fails to take precautions. These damages may be transferred in whole or in part to another party, such as a relevant organization. In such a case, the injured party will have less incentive to suffer harm and will have a greater incentive to adopt precautionary measures.

B. The Proposal Helps Achieve Proportionality between Compensatory and Extra-Compensatory Damages

As stated above, one of the problems in many states is that their courts award astronomical and unreasonable punitive damages, which are totally incompatible with the basic concepts of tort law. Our proposal can help reduce the amounts of punitive damages. In this regard, it aligns with efforts made by some states to reduce the rate of punitive damages, inter alia, for the sake of reaching greater proportionality between compensatory and extra-compensatory damages.[[56]](#footnote-56)

C. Does the Severity of the Behavior of the Plaintiff Affect the Reduction of Punitive Damages?

Academic literature in law and economics has explored the relationship and compatibility between the severity of the behavior of the tortfeasor and the amount of damages awarded. Some critics argue that the compensatory damages are not usually adjusted to the severity of the behavior of the tortfeasor but only to the extent of the damage.[[57]](#footnote-57) This problem is less relevant regarding punitive damages, at least according to the approach that awards such damages in malicious and intentional cases. This is because they are awarded in many cases based on the severity of the behavior and not the extent of the original harm. Such criticism seems to be compatible with the thesis in the present article. If the injured party is also guilty of the harm, especially in a serial manner, there is no reason not to reduce the punitive damages as well as the compensatory damages. The injured party’s behavior in such cases contributed significantly to the harm and was serious in terms of the repeated nature of the act, in the sense of repeatedly failing to take sufficient preventive measures.[[58]](#footnote-58) In effect, the injured party also contributed to the cost of repeated lawsuits and to the waste of judicial time. This behavior of is considered criminal negligence, even if it was not actually malicious, as is required from the tortfeasor. This is the case under some approaches to punitive damages for the purpose of imposing such damages on the injured party. The mens rea required for imposing punitive damages (according to the approach of the malice of the act of the tortfeasor) does not necessarily have to be symmetrical to the mens rea required for reducing punitive damages to the injured party, where criminal negligence in a serial omission is sufficient. If malice on the part of the injured party was required in order to obtain symmetry, it appears that only cases of moral hazard—cases in which the injured party wishes to be harmed in order to receive punitive damages—would constitute a basis for reducing punitive damages. There are fewer such cases than would be optimal for forming a basis for the said reduction.

D. Should the Behavior of the Injured Party be Examined *Per Se* or *Vis-à-Vis* the Behavior of the Tortfeasor?

One parameter for the implementation of our proposal may be a comparison of the behaviors of the tortfeasor and the injured party, as was done regarding the issue of comparative negligence in the common law. There, to reduce compensation in compensatory damages, both behaviors were examined, and the party that contributed more to the occurrence of the damage (and therefore its fault exceeded 50%), was held fully liable. In some U.S. jurisdictions, this is still the way it is done today. This may also be the case for punitive damages, but only in conjunction with other relevant parameters, such as the seriality of the act, as we saw in the case of Linda.

Another perspective to consider is to analyze the conduct of the victim towards prospective wrongdoers, but not necessarily the particular wrongdoer. Sharkey’s approach justifies imposing punitive damages based on the social dimension that was harmed by the tortfeasor. The injured party can also receive social redress if they did not behave in a socially appropriate manner by not taking proper precautions and thus contributed to damage. The multiplier method also provides a similar explanation. The behavior of the injured party must be examined not only *in* relation to the specific tortfeasor who pays punitive damages, but also in relation to all past tortfeasors who were not caught. For example, Linda’s punitive damages will be reduced based on, among other things, the consideration that she did not take sufficient preventive measures not only against the person who ended up breaking into her store and was caught and sued in tort, but also towards other potential tortfeasors.

E. Is there a Problem of Double Reduction?

There is apparently a problem of a double reduction for the same behavior. According to our proposal, if the contributory negligence was deducted from compensatory damages, then it will be deducted again from the punitive damages for the same behavior, at least in some cases. It is important to note that compensatory damages for the injured party in a particular case will not be reduced due to contributory negligence, but punitive damages alone will be reduced.

Moreover, in our opinion, even the cases where there is a double reduction do not really present a problem. The reduction of each component of compensatory damages and punitive damages together does not constitute double compensation, at least according to some approaches.[[59]](#footnote-59) Rather, they are two different components of compensation, each of which has a different purpose. Similarly, the reduction of each of the components due to the behavior of the injured party does not constitute a doubling of the reduction but an attempt to reach an accurate award of the compensation, whether for social or economic purposes.

F. Why Not Also Apply the Proposal to the Stage of Compensatory Damages and Obligate the Defendant to Pay the Entire Amount of Compensation, but Transfer Only Part of That Amount to the Plaintiff?

Should the proposal according to which the tortfeasor pays the full extra-compensatory damages, but a part goes to public organizations and only a part to the injured party, in order that everyone internalize their behavior that contributed to the damage, be implemented also at the initial stage of contributory negligence in compensatory damages?

We think not; rather, we think that the two stages in the compensation ruling should be separated with respect to the proposed mechanism. At the first stage of compensatory damages, if there is contributory negligence on the part of the injured party, both parties are seen as sharing the harm, literally as jointly tortfeasors. Therefore it is therefore logical that the injured party does not pay everything but shares the cost with his/her “partner.” In practice, since a person does not pay him/herself, the tortfeasor receives a reduction. Regarding compensatory damages, we do not consider the tortfeasor and the injured party as partners in the harm in relation to the component of extra-compensatory damages, at least at the level of the individual case and individual claim, notwithstanding the approach we adopt. This is a type of punishment for the injured party, who, for example, according to our proposal, serially contributes to the harm, even if their action is insignificant at the level of the individual case. Therefore, in the individual claim it may not be possible to view the tortfeasor and the injured party as sharing the component of the extra-compensatory damages as joint tortfeasors. In this case, the tortfeasor can pay all the extra-compensatory damages, but the injured party will not receive the whole sum. This is beneficial in terms of cost internalization. According to Sharkey’s approach, social considerations come into play only at this stage, when there is a clear social effect. In all cases, it is also justified to give part of the compensation to society. However, in the individual case, this is not the case with contributory negligence, at the first stage of compensatory damages. There, contributory negligence can be seen as a contribution of the injured party to the harm, in which case the tortfeasor actually caused less than the total amount of the harm. Alternatively, it may be more accurate to say that the tortfeasor has a partner, so that it is logical that the payment of the compensation will be imposed on both. In practice, the plaintiff does not pay himself, and the amount will be deducted from the tortfeasor, or the tortfeasor will pay all and part will go to social organizations, for example.

Conclusion and A View to the Future

This article is a significant first step in the important discussion of the proposal to reduce the rate of extra-compensatory damages that the injured party receives in light of their behavior. Extra-compensatory damages are compensation beyond compensatory damages, which the tortfeasor is required to provide for various reasons, usually due to the seriality of his/her actions. There are various justifications for the existence of extra-compensation, the most salient of which is the need to deter the tortfeasor from an economic point of view, as well as other economic-social justifications. The article discusses the significant difference between compensatory and extra-compensatory damages. In determining compensatory damages, the injured party’s effort to prevent the harm from occurring is considered in the form of contributory negligence, which reduces the compensation in the appropriate cases. In relation to extra-compensatory damages, however, it is customary not to reduce. The article proposes that even when determining extra-compensatory damages, the amount will be reduced for the injured party who, in a serial manner, does not take sufficient preventive measures, thus contributing to the overall harm, and not only to themselves.

An important alternative proposal is that the tortfeasor will pay all of the extra-compensatory damages, but the serial injured person will receive only part of these damages, according to a scale to be determined. The other part will be paid to relevant entities and organizations, thus preserving the internalization of the costs of the harm both by the tortfeasor in full and by the injured person and will be deducted according to the latter’s contribution to the serial damage. The main purpose of this alternative proposal is to incentivize both parties to act in a way that will minimize the harm to society and reduce the chances of the serial damage occurring, without causing under-deterrence for either party.

In the last part of the article, we addressed the consequences and effects of the proposal, including the reduction of the moral hazard incentive and more. We hope that this article will be a significant step in the review and promotion of a possible development of considerations for determining punitive damages, and the way they are awarded. This can replace the current focus in many countries on the punitive-criminal aspect of punitive damages, that concentrate only or mainly on the actions of the tortfeasor-defendant.

This article represents only the beginning of the discussion on this subject. Other issues may arise and require further discussion in future research. Regarding the reduction or non-reduction of contributory negligence in compensatory damages vis-à-vis punitive extra-compensatory damages, is there is a distinction between different types of harms, such as those that are beneficial in our world in principle as against those that are not? This distinction exists in the law and economics literature,[[60]](#footnote-60) but has not been juxtaposed with the present matter. Or will the focus be on the behavior of the injured party only and their ability to prevent the damage? Can a distinction be made between cases of those who were harmed more than once, such as Linda, and those who were only harmed once, such as Zack, or is this irrelevant to our case? Should extra-compensatory damages be reduced for an injured party who contributes to social damage through their behavior, including that of the injured party? Even if the injured party is only harmed once, they may contribute to the harms of others. Is it justifiable to impose liability on a victim who does not help prevent crimes, such as Linda, in a world of criminal law where legal systems avoid punishing omissions? Perhaps in tort law specifically, liability should be imposed on those who do not do enough to prevent crimes against themselves and others. Just as liability is reduced due to contributory negligence in compensatory damages, in these cases of insufficient investment in prevention, it should also be reduced at the stage of punitive damages. Is it possible to require proof at the level of criminal law—beyond a reasonable doubt, instead of at the level of civil law—a balance of probabilities or preponderance of the evidence? These questions may also be relevant to our proposal regarding the examination of the contributory negligence of the injured party at the stage of punitive damages. It could also prove to contribute an addition to the literature regarding civil-punitive sanctions[[61]](#footnote-61) that occupies a middle position between criminal and civil law (such as compensation within the framework of the criminal process).

Although the main point of our discussion is how to incentivize the injured to take precautions, it should be pointed out that the effect of insurance on the issue of punitive damages is no less interesting. Few have dealt with this topic, especially the aspect we are discussing, namely, how to create a new insurance reality the insurance company compensates the injured party not only compensation for the amount of the harm but also, possibly, punitive damages in the event of certain behavior on the part of the tortfeasor.[[62]](#footnote-62) This question is certainly very relevant to theoretical tort approaches (such as that of Calabresi, regarding the cheapest cost-avoider and the best decision-maker[[63]](#footnote-63)) according to which the insurance companies play a central role in creating a desired standard of behavior for the insured. They know how to require the insured to adopt beneficial behaviors (such as directing their behavior towards purchasing safety devices for their vehicles). It is possible that the expansion of our proposal and its application in the world of insurance will result in insurance companies doing the same regarding the injured party, requiring them to meet certain standards as a condition for receiving insurance at the rate of extra-compensatory damages, i.e., punitive damages. In appropriate cases, it would be significant to reducing the punitive damages to the injured-insured party in the appropriate cases in which they acted in a serial and grave manner, and their behavior was not aimed at reducing the chance of the accident happening, despite the insurance company’s behavioral standards.

In this article, we focused on the application of contributory negligence in the component of punitive extra-compensatory damages. It should however be emphasized that this is only a test case for broader questions that address the application of the system of considerations and the central concepts of tort law to punitive damages. This includes the examination of additional basic components, such as the definition of damage or the application of causal criteria to punitive damages.

This article opens the door to a future discussion of a broader question: Is it time to consider applying to punitive damages criteria that are as similar as possible to those applied to normal tort damages? If necessary, should we expand and adapt them to the unique goals of punitive or extra-compensatory damages, instead of invoking justifications, policy considerations, and criteria taken from outside of tort law, especially from criminal law in relation to these compensations? The tension and great gap between compensatory and punitive damages would decrease if punitive damages were rightly perceived as an integral part of tort law, rather than a remnant of criminal law that seems foreign to the world of torts.

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2. See *infra* Part I. [↑](#footnote-ref-2)
3. See *infra* Part I. [↑](#footnote-ref-3)
4. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 887–88 (1998). See also *infra* Part I. [↑](#footnote-ref-4)
5. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003). See also *infra* Part I. [↑](#footnote-ref-5)
6. See also *infra* Part I. [↑](#footnote-ref-6)
7. For a recent overall view of U.S. Supreme Court judgments on this issue see Yuval Sinai & Benjamin Shmueli, Maimonides and Contemporary Tort Theory: Law, Religion, Economics & Morality 270–76 (2021). [↑](#footnote-ref-7)
8. See *infra* Part I. [↑](#footnote-ref-8)
9. See generally, Richard A. Posner, Economic Analysis of Law (7th ed., 2007) [hereinafter Posner 2007]. [↑](#footnote-ref-9)
10. See Guido Calabresi, *Reflections on Maimonides’ Tort Theory*, *in* Sinai & Shmueli, *supra* note 6, Chapter 9, Part B(6) (2021) (providing several rationales for punitive damages). [↑](#footnote-ref-10)
11. Neil Vidmar & Matthew Wolfe, *Punitive Damages*, 5 Ann. Rev. L. & Soc. Sci*.* 179, 192 (2009). See also David Partlett, *Punitive Damages: Legal Hot Zones*, 56 La L. Rev*.* (1996) 781. [↑](#footnote-ref-11)
12. For example, according to Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 Yale L.J*.* 392, 421–67 (2007), punitive damages should be understood as a form of punishment for private wrongs. See also Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 602 (2003) [hereinafter Colby 2003]. [↑](#footnote-ref-12)
13. *See*, *e.g.*, Anthony Sebok, *Punitive Damages in the United States, in Punitive Damages in European Law*, in: Helmut Koziol & Vanessa Wilcox (eds.), Punitive Damages: Common Law and Civil Law Perspectives (Tort and Insurance Law) 155, 174–75 (Vienna/New York, 2009) (arguing that the damages take on a “quasi criminal form” under the theory that punitive damages vindicate public rights.”); Colby 2003, *supra* note 11, at 602 (discussing the argument that it is wrong to mingle criminal principles with civil ones, which is necessitated by punitive damages); Matthew Parker, *Changing Tides: The Introduction of Punitive Damages into the French Legal System*, 41 Ga. J. Int’l & Comp. L*.* 389, 413–14 (2013) (presenting the main arguments against that mingling, stating that “… because punitive damages serve as a form of criminal-like sanction, critics maintain that they should be abandoned, and proper recourse for the vindication of public rights should be in a criminal court… punitive damages increase the possibility of further upsetting the moral balance by over-penalizing tortfeasors for their wrongdoing.”); David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 Vill. L. Rev*.* 363, 382–83 (1994) (explaining the problem also from an evidential aspect. Owen contends that the civil context may not be the best forum to provide social redress or to vindicate social rights in view of a lower burden of proof in civil suits, and the possibility of a single tort incident with multiple victims generating multiple lawsuits with punitive damage awards). [↑](#footnote-ref-13)
14. Dan Markel, *How Should Punitive Damages Work?*, 157 158 U. Pa. L. Rev*.* 1383, 1394–95 (2009); Mark Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. Cal. L. Rev*.* 263, 269–74 (2008); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 Tex. L. Rev*.* 105, 106 (2005); Colby 2003, *supra* note 11, at 602. [↑](#footnote-ref-14)
15. Polinsky & Shavell, *supra* note 13. Certain reservations to the model have been expressed over the years, but their focus was mainly on the methods of calculating the effective multiplier in various tortious situations, without impacting the essence of the model. *See*, *e.g.*, Keith N. Hylton & Thomas J. Miceli, *Should Tort Damages Be Multiplied?*, 21 J.L. Econ & Org. 388, 410 (2005); Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. Legal Stud. 463 (1996). [↑](#footnote-ref-15)
16. *In re* Zyprexa *Products* Liability Litig., 489 F. Supp. 2d 230, 245 (E.D.N.Y. 2007) (“Despite this effective civil prosecution network, there are usually a substantial number of potential harmed plaintiffs who never press their claims.”). Reasons for the victims not suing include a disinclination to do so, the costs of filing and conducting a suit vis-a-vis the anticipated compensation, the reluctance of the attorney to pursue the claim due to concerns about cost effectiveness, evidentiary problems and uncertainty, or even because of certain errors made in the enforcement process. See also Polinsky & Shavell, *supra* note 13, at 888. [↑](#footnote-ref-16)
17. *See, e.g.*, Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 Vand. L. Rev*.* 1281, 1295–97 (1980). [↑](#footnote-ref-17)
18. Izhak Englard, The Philosophy of Tort Law146 (1993) (presenting the economic analysis of punitive damages). [↑](#footnote-ref-18)
19. This example is drawn from Polinsky & Shavell, *supra* note 13, at 873–74, 888–90. We have used different numbers to illustrate the same point. [↑](#footnote-ref-19)
20. *Id*. [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id*. at 888–90. [↑](#footnote-ref-22)
23. Ciraolo v. City of New York, 216 F.3d 236, 243, 245 (2d Cir. 2000).See also Guido Calabresi, *The Complexity of Torts – The Case of Punitive Damages*, *in* Exploring Tort Law 333 (M. Stuart Madden ed., 2005). [↑](#footnote-ref-23)
24. Mathias v. Accor Economy Lodging Inc., 347 F.3d 672 (7th Cir. 2003). [↑](#footnote-ref-24)
25. SeeSteve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 Geo. Wash. L. Rev*.* 774 (2010) (presenting an overview of the U.S. Supreme Court’s denial of the multiplier approach is presented). [↑](#footnote-ref-25)
26. Sharkey, *supra* note 4, at 351–52. [↑](#footnote-ref-26)
27. *Id.* at 352. Nevertheless, in the U.S. case law, the extent of the punitive damages sanctions was restricted and it was ruled, by the majority opinion in *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007), that the purpose of punitive damages is to punish the wrongdoer purely for the harm s/he caused to the injured party, and not to the harm caused to society as a whole. At the same time, even the majority agreed that evidence may be brought regarding the extent of the harm caused to the public in its entirety in order to prove the degree of fault and the severity of the act, which need to be considered in the award of punitive damages. On the parameter of the severity of the act, see also below in Part IIIC. [↑](#footnote-ref-27)
28. See also Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 Tenn. L. Rev. 117 (2003) (presenting a similar approach). From a substantive point of view, Maimonides’ approach to double and four- and five-fold payments for theft and robbery in Biblical Jewish law, which is echoed in punitive damages in modern law, may be viewed as being situated between the multiplier—the economic approach—and Sharkey’s societal approach. See Sinai & Shmueli, *supra* note 6, Chapter 4. [↑](#footnote-ref-28)
29. John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J*.* 524, 530 (2005). [↑](#footnote-ref-29)
30. David G. Owen, Response, *Aggravating Punitive Damages*, 158 U. Pa. L. Rev*.* 181, 182 (2010). [↑](#footnote-ref-30)
31. *Id.*, at 192–93. [↑](#footnote-ref-31)
32. Margaret Jane Radin, *Compensation and Commensurability*, 43 Duke L.J*.* 56 (1993). [↑](#footnote-ref-32)
33. *Id.*, at 56, 61, 85. [↑](#footnote-ref-33)
34. *Id.*, at 61. [↑](#footnote-ref-34)
35. Parker, *supra* note 12, at 404. [↑](#footnote-ref-35)
36. See the detailed description of Victor E. Schwartz & Christopher E. Appel, *Two Wrongs Do Not Make a Right: Reconsidering the Application of Comparative Fault to Punitive Damage Awards*, 78 Missouri L. Rev. 133, 135–42 (2013). [↑](#footnote-ref-36)
37. *See*, *e.g.*, in South Carolina: S.C. Code Ann. §15-32-520. Regarding the US in general see Anthony J. Sebok, *Punitive Damages in the United States*, 25 TIL 155 (Helmut Koziol et al. eds., 2009); In Australia: Danuta Mendelson, *Punitive Damages Sensu Stricto in Australia*, in The Power of Punitive Damages – Is Europe Missing Out?145 (Emily Nordin & Lotte Meurkens eds., 2012). Regarding New Zealand, see John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat’l L. 391, 418–19 (2004) (distinguishing New Zealand, where the judges award punitive damages, from other systems in which the jury decides, and at times goes overboard with the amounts). On the discretion of the jury in the UK see Law Reform (Miscellaneous Provisions) Act 1934, §1(1) and 1(2)(a). As to punitive damages in the UK in general, see: Vanessa Wilcox, *Punitive Damages in England*, in Helmut Koziol & Vanessa Wilcox (eds.), Punitive Damages: Common Law and Civil Law Perspectives (Tort and Insurance Law) 7 (Vienna/New York, 2009); Rookes v. Barnard [1964] A.C. 1129 (H.L.) (presenting several qualifications for the awarding of punitive damages in the UK). See also, generally, Michael O. Finkelstein & Bruce Levin (eds.) Statistics for Lawyers (Statistics for Social and Behavioral Sciences) (3rd ed. 2019). [↑](#footnote-ref-37)
38. Schwartz & Appel, *supra* note 35 (The authors do indeed examine briefly the ramifications of comparative negligence with respect to punitive damages, but in most of their discussion of the practical ramifications, they deal with the distribution of liability between the various defendants and the common law distinction between intentional and unintentional torts (*id.* at 143–46, 153–59). They deal briefly with cases in which the plaintiff-injured party was negligent (*id.* at 165–66), and without discussing the economic implications and the multiplier approaches and that of social redress that are mentioned here and on which we are focusing. The authors also do not discuss the theoretical problems that were raised here and the solutions that we shall propose, but it is clear from their article that there is room for discussion of such matters, for reasons of policy as well, which have not been sufficiently dealt with in the literature to date). [↑](#footnote-ref-38)
39. See Benjamin Shmueli & Moshe Phux, *Small Data, not (Only) Big Data: Personalized Law and Using Information from Previous Proceedings*, 35 Ohio St. J. Disp. Resol. 331 (2020) (examining the use of data from earlier cases that were litigated in order to examine punitive damages to be paid by the tortfeasor, inter alia. Here this idea can be used as against the injured party). [↑](#footnote-ref-39)
40. On pluralist approaches to the aims of tort law see Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*,48 U. Mich. J.L. Reform 745 (2015) and the many sources cited there. [↑](#footnote-ref-40)
41. *Cf.* Schwartz & Appel, *supra* note 35 (addressing briefly the case in which it was the plaintiff-injured party who was negligent, and the implications for punitive damages. See *id*. at 165–66). [↑](#footnote-ref-41)
42. Posner 2007, *supra* note 8, at 167–71; Robert Cooter & Thomas Ulen, Law & Economics 349–53 (6th ed. 2012). [↑](#footnote-ref-42)
43. Shavell and Polinsky, *supra* note 13. [↑](#footnote-ref-43)
44. Sharkey, *supra* note 4. [↑](#footnote-ref-44)
45. *See*, *e.g.*, Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*,29J. Leg. Stud*.*, 19 (2000). [↑](#footnote-ref-45)
46. Sharkey, *supra* note 4, at 415–20, 422–28. In various legal systems, the punitive damages or part thereof are transferred to the state treasury or to the public fisc. *See*, *e.g.*, the laws in Alaska, Georgia, Oregon, and Indiana, in Wilson Elser, *Punitive Damages Review*, *50 - State Survey, 2023 Update*, available at [2018 Punitive Damages Review. (wilsonelser.com)](https://digital.wilsonelser.com/punitive-damages-review). [↑](#footnote-ref-46)
47. Omri Ben-Shahar & Anu Bradford, *Reversible Rewards*, 15 Am. L. & Econ. Rev. 156 (2012) (proposing that the enforcing party, who is interested in directing the conduct of the potential violator, establish a fund, monies from which will be transferred to that potential violator as a carrot to the extent that s/he fulfills its requirements. If the violation becomes actual, the fund will be transformed into a stick, i.e., the monies will apply to sanctions against the violator, and to that purpose only. The fund is one-sided and cannot be directed to the enforcer. The authors explain that this proposal has a double effect from the point of view of incentives for the potential violator. It is also relevant, even critical, in instances where sticks alone are not effective due to their costs (litigation costs, costs of enforcement, and so on) being higher than the harm that they prevent, as well as where carrots alone are also ineffective, in that their cost, too, is higher than the harm that they are designed to prevent. In such cases, reversible rewards can achieve deterrence at approximately half the cost.). For a proposal to use reversible rewards in different area of law see Benjamin Shmueli, *Sticks, Carrots, or Hybrid Mechanism: The Test Case of Refusal to Divorce,* 18 I-CON–International Journal of Constitutional Law 893 (2021) (suggesting implementing Ben-Shahar and Bradford’s reversible rewards in intrafamilial tort lawsuits for *get* refusal). [↑](#footnote-ref-47)
48. *Cf.* Yuval Sinai & Benjamin Shmueli, *Victim Pays Damages to Tortfeasor: The When and Wherefore*, 61 McGill L.J. 275 (2016) (proposing a similar mechanism, of an interim payment by injured parties who wish to put a stop to the damage caused to them but from a have a proprietary point of view they have no cause, according to Rule 4 of Calabresi and Melamed’s famous Four Rules, the rule of liability in favor of the tortfeasor. According to the proposal, part of the money will be paid at the first stage, and then the tortfeasor will stop his/her harmful actions, and another part of the payment will be paid later in other ways. See *id.* at 41–43). [↑](#footnote-ref-48)
49. See *supra* Part I. [↑](#footnote-ref-49)
50. Sinai & Shmueli, *supra* note 6, at 270–80. [↑](#footnote-ref-50)
51. There are those who suggest transferring the damages to the state, with the state becoming responsible for their distribution to the public. *See*, *e.g.*,Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law,* 16VA. J. Soc. Pol’y & L. 258 (2008). [↑](#footnote-ref-51)
52. For an initial direction on constructing a scale, or at least a list of parameters and rules for devising threshold tests for distinguishing between different behaviors, while understanding that establishing a single standard rather than a scale is not advisable, as it does not allow for the possibility of imposing punitive damages for a range of behaviors (such as unintentional behavior, if it is decided in advance which illegitimately motivated behaviors will justify the imposition of punitive damages) see Adam Kolber, *Smooth and Bumpy Laws*, 102 Cal. L. Rev. 655 (2014) (“Whether or not a legal relationship is smooth may depend on precisely how a law is applied. For example, punitive damages could be understood in a smooth fashion. Suppose punitive damages were only awarded when defendants acted from reprehensible motivations. In cases demonstrating such motivations, punitive damages could smoothly increase the more reprehensible the defendant’s motivations were. On the other hand, courts sometimes permit punitive damages for unintentional conduct that merely represents an extreme form of negligence. If punitive damages do not gradually increase with the egregiousness of the negligence but rather kick in suddenly at some high level, then punitive damages would not be entirely smooth. Punitive damages are also less than entirely smooth to the extent that we firmly cap damages at a multiple of compensatory damage.” *Id*. at 662). [↑](#footnote-ref-52)
53. Talia Fisher, *Probabilistic Punishment,* 32 Tel Aviv U. L. Rev. 515 (2008) (Heb.). [↑](#footnote-ref-53)
54. *See*, *e.g.*, Benjamin Shmueli, *“I'm not Half the Man I Used to Be:*” *Exposure to Risk without Bodily Harm in Anglo-American and Israeli Law*, 27 Emory Int’l L. Rev. 987 (2013) [hereinafter Shmueli 2013]. [↑](#footnote-ref-54)
55. Here, too, we must be precise and say that in relation to the probabilistic model in tort, some emphasize that compensation at the rate of 30% that is equivalent to the attributable part that was proved above the 50% is not partial compensation that expresses an evidentiary concession, but an expression of a new category of damage in tort—the category of damage of lost opportunity or increased risk. That head of damage is proved according to the preponderance of the evidence, such that there is no concession or deviation from the normal evidentiary rules, but an innovation in the sense of the creation of a new head of damage in torts. *See, e.g.,* Shmueli 2013, *supra* note 53*.* [↑](#footnote-ref-55)
56. *See*, *e.g.*, as to Ireland, The Law Reform Commission, Report on Aggravated, Exemplary and Restitutionary Damages (LRC 60-2000), at 14, 26-30. In New Zealand, some of the statutes regarding punitive damages limit the rate of the compensation. See Gotanda, *supra* note 36, at 415–20. [↑](#footnote-ref-56)
57. Kolber, *supra* note 51. For case law that takes into account, for the purpose of awarding punitive damages, the severity of the tortfeasor’s behavior, *See*, *e.g.,* *Philip Morris v. Williams*, *supra* note 26, see *id.*; *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141 (“Courts calculate punitive damages by considering the following four factors: (1) the character of the defendants’ act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants.” *Id*. at 32). See also, based on Restatement (Second) of Torts § 908(2) (“In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.”): *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1 (D.C 1998) p.32; *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51 (D.D.C.2010) p.23; *Harrison v. Sudan*, 882 F. 2d 23; CA 9225/01 *Zeiman V. Kumran*, para. 24 of Judge Proccacia’s opinion, 62(1) IsrSC 260 (2006) (Isr.); CF (Jerusalem District) 2287/00 *Chesser* *v. the Palestine Liberation Organization* (Nevo 7.21.2021) (Isr.) (ruling that the nature of the tortfeasor’s behavior, the degree of revulsion that his behavior arouses and the *mens rea* accompanying the act are parameters that should be taken into account when ruling on punitive damages and determining their rate (see *id*., paras. 75 and 83). For additional references in comparative law, see *id*., paras. 76–7, 83. [↑](#footnote-ref-57)
58. Seriality (and the commission of mass torts as well) was recognized in fact as a parameter of the severity of the act in relation to the issue of recognition of compensation according to probability as increasing the risk in the majority opinion of the Israel Supreme Court in 2010 in CFH 4693/05 *Carmel-Haifa Hospital v. Malul* IsrSC 64(1) 533 (2010) (establishing a criterion for accepting the doctrine, “the tendency to repetition,” whereby, inter alia, only if the behavior was serial or mass would compensation be awarded on the basis of probability). [↑](#footnote-ref-58)
59. According to some approaches, corrective justice might possibly give rise to a problem of doubling, but certainly not according to the approaches described in this article. [↑](#footnote-ref-59)
60. Oren Bar-Gill & Ariel Porat, *Harm-Benefit Interactions*, 16 Am. L. & Econ. Rev. 86 (2014) (demonstrating from a case in which the owners of a boat attach it to a pier in order that it not sink in a storm, but owing to the waves, harm is caused to the pier. Because the harm to the pier is less than the harm that could have been caused to the boat, we will define the harm to the pier as beneficial harm). [↑](#footnote-ref-60)
61. *See*, *e.g.*, Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992). [↑](#footnote-ref-61)
62. See Shmueli & Phux, *supra* note 38, at 364–72 (suggesting, *inter alia,* as an exception to the evidentiary principle of not using information from previous cases and files against the parties, that such previous information be used in the current lawsuit and punitive damages be imposed on insurance companies when these companies abuse the insured parties on a serial basis, and calculate that at most they will be dragged to court in some cases and pay, but in other cases the insured party will give up or compromise). [↑](#footnote-ref-62)
63. Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis 68–75, 107–13 (1970); Guido Calabresi & Jon T. Hirschoff, [*Toward a Test of Strict Liability in Torts*,](https://lemida.biu.ac.il/mod/resource/view.php?id=1489411) 81 Yale L.J. 1055 (1972). [↑](#footnote-ref-63)