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 Corona epidemic and the unequivocal recommendations of the Ministry of Health to be vaccinated against that epidemic. 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, in light of findings made on his behalf by a private investigator, that in one of the matches of Zack’s team against that other team, the regulations regarding Corona 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 illness with Covid-19. He also intends to claim punitive damages from the stadium operators, having discovered that they did not enforce the required Corona regulations, not only in the game in which he participated, but as a matter of course over several months.

***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 does not have bars. Linda does not have insurance (assume that there is no obligation to insure businesses). Two years ago, her store was broken into for the first time, and a great deal of merchandise was stolen, and a lot of other merchandise was also 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 last case, the thief was caught and prosecuted. This is a thief who has already committed several burglaries, particularly in that area, but none of the victims brought a tort action against him. Linda intends to sue him for damages as well, and she also wants to claim punitive damages against that serial-wrongdoing thief who 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—Linda and Zack—has negative consequences, but this behavior also externalizes costs, imposing them on society. It makes sense that in such cases the legislator would want to intervene and prevent the externalization of the costs, and the mechanism of contributory or comparative negligence is sometimes irrelevant except for behavior in the individual case; sometimes, even in the individual case, compensation will not be reduced, which will in no way cause victims to internalize their behavior. It may therefore be necessary to examine, instead, the reduction of punitive damages. Is this possible and acceptable?

The literature and case law in various countries on the issue of punitive damages have been grappling for generations 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 as a remnant of the approach that claims that the law of torts developed from criminal law. It therefore requires, as a condition for the activation of punitive damages and as a justification for attributing *mens rea* to the act – which is generally not required in the law of torts – a malicious or at least intentional act.[[2]](#footnote-2) Such an approach focuses on the mental element attributable to the tortfeasor, without a necessary connection to the person harmed.

Other approaches explain that the punitive damages are an expression and reflection of the revenge that the harmed person-victim feels driven to take against the tortfeasor in the appropriate cases, and they therefore focus on the nature of the relationship between the parties – both 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 Polinsky and Shavell.[[4]](#footnote-4) This approach explains that 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 him, when a lawsuit has already been filed against him, compensation that reflects not only the harm in the current case but also other harms he caused in earlier similar cases. According to this approach, which focuses on incentives to potential tortfeasors, the fact that it is the specific plaintiff, i.e., the injured party in the lawsuit that has already been filed, who will also receive the punitive damages, and not only compensatory damages that reflect the harm caused specifically to him, is not problematic.

Some two decades ago, a social approach was also introduced, by Catherine Sharkey, termed “extra-compensatory social redress.”[[5]](#footnote-5) This approach regards compensation in excess of the amount of the damage as social compensation for relevant cases in which the action of the tortfeasor actually harmed society as a whole and not just the specific victim. It seems that this approach, like the economic multiplier approach, places the emphasis on the action of the tortfeasor, but also brings into the mix social considerations and not just economic ones. Other approaches exist as well.[[6]](#footnote-6)

In many states, the traditional quasi-criminal approach was preferred, according to which punitive damages will be awarded in relatively rare cases, when the tortfeasor’s actions were malicious and intentional. For example, in the US Supreme Court, the economic multiplier approach was explicitly rejected for various reasons, including a conflict with due process, since charging a defendant in a concrete 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 US Supreme Court was also unwilling to pursue an earlier course of action in one US jurisdiction in which punitive damages amounting to tens of times the amount of the actual damage were awarded, saying that such compensation was too high for a tort claim.[[7]](#footnote-7)

The gap between normal tort compensatory damages and punitive damages is not only expressed 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 as compared to those that are taken into account in punitive damages. While in normal compensatory damages, for example, it is customary to compare the behavior of the tortfeasor to that of the victim, it is noticeable that almost always in punitive damages, only the behavior of the tortfeasor is examined. In tort law, there are balanced criteria for determining liability for damages and the obligation to pay compensation. According to these criteria, not only is it necessary to examine the degree of fault or negligence involved in the tortfeasor’s behavior and his/her incentives to prevent the damage or whether s/he is the cheapest cost-avoider and the best decision maker, but the tortious behavior must also be compared to the behavior of the victim, and it is necessary to consider the contributory negligence or comparative negligence or check whether the cheapest cost-avoider or the best decision maker is actually the plaintiff and not the defendant. All of this is regular practice regarding normal 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 in the amount of payments in punitive damages as 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. This does not happen with punitive damages, and therefore, courts in certain states award astronomical and unreasonable amounts of compensation that seem incompatible with the basic concepts of tort law, driving themselves, as well as academic scholars, to find justifications outside of classical tort law taken from the conceptual world of criminal law, in which the concept of reducing punishment due to the contributory negligence of the victim is not accepted.

The import of this gap is that among all the approaches that try to explain the payment of punitive damages, the 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 is noticeable – both in relation to the award itself and at least for reducing the compensation. This lack of reference is even more glaring in light of the fact that with respect to the imposition of basic tortious liability, the contributory negligence of the injured party is actually examined routinely as a defense claim. In fact, when the additional level of punitive damages is piled atop 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 himself, 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, economic and other approaches also examine the incentives for the victim at the stage of imposing the basic liability and imposing compensatory damages, and reduce the compensation accordingly, in keeping 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? This will be the core of our proposal. In the framework of the proposal, we will offer various alternative solutions to the dilemma, and as part of those alternatives we will also propose, in order to achieve real optimal deterrence for both the tortfeasor and the injured party, that the tortfeasor be obligated to pay, in the appropriate cases, all punitive damages, but that the entire amount not necessarily be transferred to the injured party who was serially and seriously negligent, and instead that part of the amount 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 also 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 more, and it deals with 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 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, and 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 recognition of punitive damages according to the traditional approaches, to the effect that the civil context is not suitable as a forum for awarding punitive damages, and that it is wrong to mingle e criminal and civil principles.[[13]](#footnote-13) Other scholars have recently focused on revenge and the dignity of the victim, as part of victims’ rights.[[14]](#footnote-14)Unlike the instrumental, economic and societal approaches which will be addressed below, such an approach does not and cannot take into consideration injured parties other than the plaintiff-victim, for this is 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) hence 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, 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 thus 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, but overall, these tortfeasors will be paying at most for the wrongs they did cause, which would create optimal (or near-optimal) deterrence rather than over-deterrence.[[21]](#footnote-21)

As Polinsky and Shavell explain, the actions of potential tortfeasors, would be more efficient and aggregate welfare would consequently increase if they 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 (50x2), 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 used the same substantial approach as the multiplier, calling it “socially compensatory damages.”[[23]](#footnote-23) In *Mathias v. Accor Economy Lodging Inc.*, Judge Richard Posner also applied the multiplier approach in practice.[[24]](#footnote-24) These judgments were handed down prior to developments in the U.S. Supreme Court rejecting the multiplier approach, *inter alia* in that it contradicts due process and denies the defendant the opportunity to defend him/herself in cases in which torts are as it were attributed to him/her relied upon for the purpose of the multiplier and the calculation, even though no decision is handed down .[[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, Catherine Sharkey 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, but from the defendant’s standpoint this is merely what the defendant 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 not only should the actual victim/plaintiff be considered, but other victims as well. This means that the conduct of the tortfeasor should be regarded from a much wider perspective, i.e., from the 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 victim and/or as a societal compensation goal have also been presented. 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 s/he 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) and suggesting 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’s was arguing that redress is not necessarily about monetary restitution, but rather it acts to affirm public recognition of certain rights and wrongs, and therefore there is a certain incommensurability between the harm caused by a tort and the corresponding award of compensation.[[35]](#footnote-35)

We wish to 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, the case law was 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 as there is for contributory negligence with respect to compensatory damages, except that in the legislation of some states, it 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, in determining the punitive damages, various components such as the severity of the behavior, and for example, how repeated and serial it was, or how malicious and intentional. These, however, are not clear and uniform criteria, and moreover, they do not consider the actions of the injured party.

We offer a new proposal that allows Linda to continue to lock her store, maybe even in the same way, thus taking preventive measures, although these are relatively minimalist 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, and one can assume that in any lawsuit she files specifically against a concrete thief, her compensatory damages will not be reduced by courts due to contributory negligence, namely, the fact that although she did close 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 case, 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 in investing less 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, due to her part in not doing enough to prevent the harm and in order to incentivize potential victims such as herself to invest more in precautions to prevent their own potential harms. To be precise: in the 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 already in the first lawsuit, for example, because his/her actions were severe and malicious, it is not relevant to reduce the amount of extra-compensatory damages that will 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, in that it allows for tortious planning on the part of potential tortfeasors that will 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 such that they deliberately harm people who are not protected, and thus they will save 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 would wish to incentivize them to desist from their problematic custom of not protecting themselves from harm, we do not wish to cause them new harm. This is anticipated to happen only when the wrongdoers are given the ability to locate and single out 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, *inter alia* due to principles of personal autonomy and the right not to be vaccinated. He is indeed not a tortfeasor who commits an ongoing wrong but rather, 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. In any case, it is precisely when Zack comes to claim 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, the behavior over time of these two injured parties in not taking sufficient steps themselves 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, 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, while the balance is 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 right now. 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, to deter him; however, the injured party, who has acted badly, 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 he will pay the balance—the extra-compensatory damages above and beyond the amount of the actual damage— to that third party and not to the injured party. This proposal combines a social and economic idea. Adoption of this solution will bring about an optimal internalization of the costs of each party. Thus, there will not be a concern that the tortfeasor, because he paid less, will not internalize the costs. He will pay the entire amount, but not all of it will go to the plaintiff-injured party, and thus the latter will also internalize his 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 his/her negative conduct contributed can be defined as social damage, according to the social redress approach, his/her punitive damages will be reduced. It may also be possible to take into account, for this purpose, similar conduct of the injured party in the past, since we are interested in showing that the social damage in which she/he was 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, on 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 or Zack, 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 said, in a kind of parallelism, that since punitive damages are awarded so sparingly and rarely, 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 he does not necessarily deserve, since they far exceed the amount of damage s/he actually suffered. Therefore, the denial of part of this windfall from the plaintiff-damaged is certainly subject to much broader and more varied policy considerations than the considerations in reducing compensation in 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, and they include the maliciousness of the act, the degree of its criminality, the fact that it is serial or has an unusual social effect, and more, 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, thus achieving 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, but according to the alternative that we proposed above and on 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 receives 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: they should be raised regarding a reduction in compensatory damages for contributory negligence, for example by virtue of a regime of strict liability, and we are less likely to deal with such a regime in this article, in view of the said starting point. However, this does not mean that we proposed the reduction of punitive damages in every case in which contributory negligence is also reduced. Regarding some matters, there may be no reason in the particular case to reduce the contributory negligence from the normal compensation, but there is a reason to reduce the punitive damages due to the seriality of the injured party. In any case, 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 may comport mainly with economic approaches, including approaches such as that of the Learned Hand formula in the actual imposition of liability – 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 *vis-à-vis* 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 “opposite” reason that they are awarded in the first place against the burglar or the stadium operators in the soccer and store 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; 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. We, of course, adhere to our approach, even if Shavell and Polinsky were to reject our thesis for one reason or another.

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 victimלינדה. 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 wide 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 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, a reservation 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 still there is no reason to prevent him from receiving all the punitive damages. For example, 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.

Apparently, the woman should not get married but leave (assuming she really could), and the man could also live in a place that did not endanger him. But it should be clear that society will neither withhold punitive damages for any of them nor reduce them, for various legal-economic or policy reasons.

However, it is important to find 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, dressed in luxury clothing and sporting a luxury watch, all in a showy manner, we may treat him differently than the previous examples and perhaps reduce punitive damages. This is because the costs of preventing his harm are lower or alternatively the court, with its considerations, will not see these actions as something worth 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, perhaps similar in a way to the situation in different countries regarding class actions that may be submitted only when the plaintiffs acted in good faith, that in some cases, 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.

Alternatively, as was proposed in the literature regarding extra-compensatory social redress,[[46]](#footnote-46) in such cases there should be a transfer of the component of punitive damages to a relevant body, such as a social organization that deals with harm like the harm experienced by the plaintiff. One could go further and decide to split the punitive damages in the appropriate cases – only a part of them will be given to the plaintiff, and the rest to such organizations. In this way, each person who causes harm, both the wrongdoer and the injured party, will optimally cover the damages to whose occurrence s/he was party, instead of 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 for better precautions in order to contribute to the avoidance of future harms, e.g., by buying cameras, hiring a security company etc., and thus make the neighborhood more safe, which may also be compatible with Sharkey’s social redress approach. This 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 the mechanism of a class action may be proposed. In those 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 path followed by several courts worldwide is successful from a practical point of view. Initially, the representative plaintiff is given only a part of the compensation amount, and he receives the balance only after reporting to the court on how he distributed the initial amount and, of course, presents account sheets, etc. 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 might propose 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 point of view. Why? Our approach could be said to be incompatible with the trend of the original multiplier approach, where the whole idea is to focus on the actions of the wrongdoer so that s/he pays for his/her actions and internalize all the costs of his/behavior. For this reason, when s/he is already being sued, s/he must also pay for previous incidents for which s/he was not sued, although apparently s/he should have been. According to this approach, we focus on the defendant’s actions and the need to deter him/her optimally, while the plaintiff enjoys a windfall: in other words, s/he does not deserve the amount of the punitive damages but s/he receives it as an expression of the public interest in deterring the defendant. According to this concept, 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 did not sue. What is important under the multiplier approach in keeping with the objective of optimal deterrence is that the wrongdoer pays for the entirety of the harm s/he caused in all the cases, even if he was sued for only some of them, as we emphasized above (in the former Part). Apparently, our reverse multiplier approach achieves a different and quite opposite result—a reduction of the payment that the tortfeasor from will pay, because of the actions of the particular injured party. That is to say, here the particular injured party and his/her actions do enter the picture and we also care about what the injured party did or did not do in his/her contribution to the damage. The possible result is the reduction of the compensation that the tortfeasor must pay, i.e., reducing the deterrence of the tortfeasor, who apparently behaves in the same way whether the injured party behaves inappropriately or not. As such, the basic goal of the multiplier approach, according to which a wrongdoer pays for everything s/he did, by virtue of the optimal deterrence goal, even if s/he is only sued for some of his/her actions, is apparently frustrated. According to the multiplier approach, since the defendant still committed all those acts that are presumed to be torts, the amount of punitive damages that should be paid should not be reduced, even if the injured party too acted wrongly.

Three answers to this may be offered. The first is that this matter 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, but it is not compatible with the original approach substantively, since the deterrence *vis-à-vis* the tortfeasor is not optimal. Then 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, except that now, 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 comes into the picture and the wrongdoer will pay the injured party punitive damages as well under the multiplier approach, i.e. also for wrongs s/he committed against others who did not claim. However, if the injured party him/herself was at fault and his/her behavior contributed to the tort, then on our approach, which is actually an approach inspired by Maimonides,[[50]](#footnote-50) we would want both to incentivize the injured party and to deter him/her and others like him/her in the future, not only by reducing contributory negligence from the compensatory damages themselves, but also from the punitive damages.

In other words, when the reverse multiplier comes into play, we want to deter both parties, who both contributed to the damage. This is a “zero sum game”, for 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, and 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 beyond the amount of the compensatory damages themselves. S/he is therefore deterred, but there is room to deter the injured party as well, which is done by reducing the punitive damages s/he will receive, and thus both are deterred. If so, the tortfeasor will apparently 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, just as in the distinction between fault and contributory negligence, the reduction of compensation does not contradict such an approach, such as that of the Learned Hand formula. The economic logic of the multiplier is also found in the reverse multiplier, since optimal deterrence on a broad view means that we seek 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, i.e., a certain reduction of the award to the injured party-plaintiff since s/he did not take sufficient precautions, means that both parties must internalize the results of their actions, namely, the fact that neither took sufficient precautions. In other words, we propose a more precise use of the economic approach, according to which 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.

Prima facie, the result we propose of optimal deterrence of both parties might be problematic according to Sharkey’s social approach, since 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 apparently be no room for a reduction of the compensation, and this result would seem to be more optimal from the point of view of society. Although perhaps if the injured party him/herself contributed to the social harm, it makes sense to reduce his/her damages as well, since s/he is the one who receives the compensation for society. Therefore, there is randomness here in relation to whether in practice the compensation to society as a whole will be reduced according to this social approach, since 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 like the matter of a class action plaintiff who is not in good faith. In that case, however, s/he will not be allowed to sue if s/he is not in good faith and another plaintiff who does not have a problem of bad faith will be sought, whereas in the present case, if compensation is nevertheless reduced for the plaintiff who did not act properly, it may be possible to justify this even according to Sharkey’s approach. The reason is that this plaintiff is the one who receives the compensation on behalf of society, and if s/he is allowed to file the claim (which is not the case with a class action plaintiff), it makes sense to reduce his/her compensation if his/her 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, which may warrant hard work to break in and steal their contents, 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 his steps.”

A possible, perhaps even probable, extension of Sharkey’s thesis is to say that society should look at the tortfeasor and the direct injured party as one unit, that is, that the former in his/her active deed, and the latter in his passive action, together created a single social harm for society. Therefore, seemingly, it matters less to society how the court distributes the punitive damages, as long as there is optimal deterrence to prevent such harm in future. In other words, let us 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, and Linda bears 40. Then each of them will be deterred to at least a certain level, which will cause fewer break-ins, because Linda will also be motivated to protect her store better and so 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 according to Sharkey’s social approach, emerges from one of the solutions that she herself brings up, and which was 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, but 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 him/her due to the harm to society – say the amount of the harm multiplied by five – but if the harmed person acted improperly and has a kind of contributory negligence, then the harmed person will receive, for example, 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 example, 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 might 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, albeit in an alternative way, in our model: the wrongdoer will not have the total amount of punitive damages that must be paid reduced, in order not to reduce the optimal deterrence needed for him/her, but on the other hand, not all the money will go to the injured party, if there was contributory negligence on his/her part. Rather, the part s/he receives is reduced, and the balance is given to a public body as a remedy for the benefit of the public. It is also possible to establish a state fund for this purpose, whose goals are, for example, the protection of crime victims.

For the purposes of this approach, the entire harm may be perceived differently from the possible extension to Sharkey’s approach, discussed above. For this approach, the two stages—compensatory and extra-compensatory damages—must be separated, precisely in relation to seeing the entire harm as one unit. For this approach, at 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, s/he 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 his/her behavior was very problematic, serious and contributed significantly to the harm, or if it was serial, s/he will not receive punitive damages; if it was less problematic or not serial (that is, there were several incidents and in some s/he behaved appropriately), s/he will be given a portion of the full punitive damages received in similar cases, say 40% or 50%. That is to say, 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, and sometimes the omission is very 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—after all, 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, e.g. of the enforcement and oversight authorities. Therefore, it is important to encourage people to prevent especially the harms that may cause greater harm to society.

There are several options for constructing this scale. One option for determining the reduction in the amount of punitive damages is to examine how much the plaintiff has invested in precautions. Two different categories can be suggested: One is to reduce the sum of punitive damages for plaintiffs who did not take reasonable precautions and not to reduce the sum of punitive damages for plaintiffs who did take reasonable precautions. to the other is to raise the sum of punitive damages for plaintiffs who took good precautions which are more than reasonable, but not over-precautious, especially if one surmises that this was done 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 alternatively 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 normal 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, and 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 will 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 will, in turn, be adjusted to the category of the relevant conviction (so that, for example, punishment due to a conviction beyond a reasonable doubt will 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. In criminal law, with which Fisher dealt, because the burden of proof is much higher than in civil law, it is easy to more create a scale, e.g., between 50% (preponderance of the evidence) and a much higher conviction percentage, i.e., 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, but the compensation will be awarded at a partial rate, for example, the degree of harm to the chances of recovery or by how much the risk of becoming ill increased due to exposure to radiation. 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 in any case that 30% part will be proven according to the preponderance of the evidence (e.g., by scientific evidence).[[54]](#footnote-54) If we are 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, whereas the probabilistic model in tort leaves in place the fixed burden of proof of the preponderance of the evidence and only requires the prosecutor to prove on the preponderance of the evidence the fraction of the share which is probabilistically attributed to the defendant, 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)

In any case, 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. Thus, for example, it could be said that the more the plaintiff's indifferent behavior in the face of the risk of being harmed repeats itself, there would seem to be a greater probability that s/he did not take appropriate preventive measures, and this would 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, and it is possible to apply it in an alternative manner to our proposal. The starting point may be different. In our proposal, the starting point is that the injured party should receive punitive damages in the appropriate cases, and those cases should be partially reduced only in special, serious and serial cases: these cases should be defined, and the damages probably not be reduced too broadly. In the alternative proposal presented here, which relies on the probabilistic model, the starting point is that from the outset the question of whether to grant punitive damages and how much must be decided, as an ex-ante construction of the scale. But here too, if the starting point 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, and especially time after time in the case of serial wrongdoing, may cause the injured party not to take any preventive measures on his part, in order to receive those punitive damages. This is not always worth his/her while, but in some cases it pays for him/her to be harmed in order to receive any compensation at all, and especially punitive damages in a large amount. Our proposal lowers the incentive to endure harm and refrain from taking preventive measures, since although the wrongdoer will pay punitive damages, if these are reduced if the injured person does not take precautions, and even transferred wholly or partially to another party such as a relevant organization, the injured party will have less incentive to be 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, and in this sense comport 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?

There is academic literature in law and economics on the question of the relationship and compatibility between the severity of the behavior of the tortfeasor and the amount of the damage, and there are those who criticize the result according to which the sanction—viz., the compensatory damages—is not usually adjusted in tort law 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, since they are awarded in many cases according to the severity of the behavior and not according to the extent of the original harm. It seems that this critical writing fits the thesis in the present article, since 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 and not only the compensatory damages. This is because the behavior of the injured party contributing to the occurrence of the harm was also serious, in terms of the seriality of the act, in the sense of failing to take sufficient preventive measures time after time.[[58]](#footnote-58) The injured party in effect also contributed to the cost of repeated lawsuits and to the waste of judicial time. This behavior of his/her is considered criminal negligence, even if it was not actually malicious as is required from the tortfeasor, according to some approaches to punitive damages, in order to impose such damages on him. In other words, there is no necessary symmetry regarding the *mens rea* required for the imposition of punitive damages (according to the approach of the malice of the act of the tortfeasor) and the *mens rea* required for the purpose of reducing punitive damages to the injured party, where criminal negligence in a serial omission is sufficient. If we were to also require malice on the part of the injured party in order to obtain symmetry, it seems 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, and these cases are fewer than we would like to form 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, just as was done regarding the issue of comparative negligence in the common law, where, for the purpose of reducing compensation in compensatory damages, both behaviors were examined, and the one that contributed more to the occurrence of the damage (and therefore its fault exceeded 50%), resulted in full liability being placed on the shoulders of that party. This is how it is done to this day in some U.S. jurisdictions. If this is the case at the stage of compensatory damages, it may also have a place at the stage of punitive damages, even if only together with other relevant parameters at this stage, such as the seriality of the act, as we saw in the case of Linda.

Another point of view might also be offered, which is to examine the behavior of the injured party towards potential tortfeasors, but not necessarily the specific tortfeasor. Since the justification for imposing punitive damages according to Sharkey’s approach is based on the social dimension that was harmed by means of the tortfeasor, the same can be said in relation to the injured party, for whom there is also social redress in the opposite direction, if s/he too did not behave in a socially appropriate manner by not taking proper precautions and thus contributed to damage. A similar explanation can also be given according to the multiplier method too, i.e., that the behavior of the injured party must be examined not only *vis-a-vis* the specific tortfeasor who pays punitive damages, but also *vis-a-vis* all past tortfeasors who were not caught. For example, Linda’s punitive damages will be reduced, among other things, based on 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; She behaved in a similar way 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: if the contributory negligence was deducted in compensatory damages, then according to our proposal, it will be deducted again from the punitive damages for the same behavior, at least in some cases. Indeed, it is important to note that we saw above that in reality, 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. Just as ruling on compensatory damages and punitive damages together does not constitute double compensation, albeit only on some of the approaches,[[59]](#footnote-59) but rather, they are two different components of compensation, each of which has a different purpose, so too the reduction of each of the components due to the behavior of the injured party does not constitute a doubling of the reduction but rather an attempt to reach an accurate award of the compensation, whether socially or economically, according to the approach.

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 the organizations and only a part to the injured party, in order that everyone internalize their behavior that contributed to the damage, be implemented also to the initial stage of contributory negligence in compensatory damages?

We don’t think so, and 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, and it is therefore logical that the injured party does not pay everything but shares with his/her “partner”. In practice, since a person does not pay him/herself, this means a reduction for the tortfeasor. As for extra compensatory damages, it depends on the approach that we adopt, but it seems that in all events, at least at the level of the individual case and the individual claim, we do not consider the tortfeasor and the injured party as partners in the harm in relation to the component of extra compensatory damages. This is a type of punishment for the injured party, who, for example, according to our proposal, serially contributes to the harm, even if his/her action is insignificant at the level of the individual case. Therefore, in the individual claim it is not necessarily possible to see the tortfeasor and the injured party as sharing, as joint tortfeasors, the component of the extra-compensatory damages. In this case there is room for payment of all the extra-compensatory damages by the tortfeasor, but the injured party will not receive the whole sum: this works out well in terms of cost internalization. And according to Sharkey’s approach, only at this stage is there a clear social effect and social considerations come into play, and in all events, it is also justified to give part of the compensation to society. But it is not so with contributory negligence in the individual case, at the first stage of compensatory damages. There contributory negligence can be seen as a contribution of the injured party as well to the harm, in which case the tortfeasor actually caused less than the total amount of the harm; or it is more correct to say that he has a partner, so that it is logical that the payment of the compensation will be imposed on both of them. In practice, since the plaintiff does not pay himself, 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 his/her 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 deals with the difference, which is significant, between compensatory and extra-compensatory damages, and it is that in determining compensatory damages, consideration is accorded to the injured party’s effort to prevent the harm from occurring, in the form of contributory negligence that 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 him/herself.

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, to be deducted in accordance with his/her contribution to the serial damage. The main purpose of this alternative proposal is to incentivize both parties to act in a way that will harm society less and minimize the chances of the serial damage occurring, without causing under-deterrence for either party.

In the last part of the article we dealt with 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, in place of the 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 was only the beginning of the discussion on this subject. Other issues may arise and require further discussion in future research, such as the following: Is there room to distinguish, regarding the reduction or non-reduction of contributory negligence in compensatory damages vis-à-vis punitive extra-compensatory damages, between different types of harms, such as those that are beneficial in our world in principle as against those that are not (a distinction that exists in the law and economics literature,[[60]](#footnote-60) but which was not juxtaposed with the present matter), or will the focus be on the behavior of the injured party only and his ability to prevent the damage?; Is there room to distinguish between cases of those who themselves 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? Does the fact that the behavior that contributes to the harm, including that of the injured party, actually contributes to social damage according to the social approaches, require that extra-compensatory damages be reduced for that injured party, since even if he is harmed only once, he contributes to the harms of others?; Is there any justification for imposing liability on a victim who does not help prevent crimes, as in the case of Linda – perhaps as distinct from the case of Zack – in a world of criminal law in which the various legal systems refrain insofar as possible from punishing such omissions? Perhaps in tort law specifically, liability should be imposed on those who do not do enough to prevent crimes against themselves and others, and 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 there room, even if according to approaches whereby punitive damages are a reflection of criminal or quasi-criminal law, for a proof requirement at the level of criminal law, i.e., beyond a reasonable doubt, and not at the level of civil law, i.e., a balance of probabilities / preponderance of the evidence? This question may also be relevant to our proposal, regarding the examination of the contributory negligence of the injured party at the stage of punitive damages and constitute an addition to the literature regarding civil-punitive sanctions,[[61]](#footnote-61) that is, those that occupy a middle position between criminal and civil law (such as compensation within the framework of the criminal process).

Here it should be pointed out that although the main point of our discussion is how to incentivize the injured to take precautions, no less interesting is another question, that of the effect of insurance on the issue of punitive damages. This is a topic that not many have dealt with, and certainly not with the aspect we are discussing, namely, how to create a new insurance reality in which injured parties receive from the insurance company 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, and 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 vis-a-vis the injured party, requiring him/her to meet various standards as a condition for receiving insurance at the rate of extra-compensatory damages, i.e., punitive damages. This would also be significant with respect to the possibility of reducing the punitive damages to the injured-insured party in the appropriate cases in which s/he acted in a serial and grave manner, and his/her behavior was not aimed at reducing the chance of the accident happening, despite the insurance company’s directing of his behavior.

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, including the examination of additional basic components, such as the definition of damage or the application of causal criteria to punitive damages.

The discussion in this article opens a door to a future discussion of a broader question: Is it not time to consider applying to punitive damages criteria that are as similar as possible to those applied to normal tort damages, and if necessary to expand them 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, and especially from the criminal law in relation to these compensations? If this were done, the tension and the great gap between these two types of damages – compensatory and punitive or extra-compensatory – would decrease, and punitive damages would be rightly perceived as an integral part of tort law, and not as a remnant and enclave of criminal law that seems to be a foreign plant in 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 as a consideration that must be taken into account 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 evoke the 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, too, and they 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 his 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, and it is relevant, even critical, where sticks alone are not effective, due to their costs (litigation costs, costs of enforcement etc.) are higher than the harm that they prevent, and where carrots alone are also ineffective, in that their cost, too, is higher than the harm that they are designed to prevent. In that case, 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 & 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 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, and the state will be 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 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 the fact that establishing a single standard rather than a scale is not a good thing, and 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 what only behavior for an illegitimate motive will entail 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 head of damage in tort – the head of damage of lost chance or increases 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)