Book Review

Carlotta De Menech, *Le prestazioni pecuniarie sanzionatorie. Studio per una teoria dei «danni punitivi»* (CEDAM, 2019). x + 430 pp. ISNB 9788813370787

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Carlotta De Menech's book deserves to be studied starting from its telling title: 'Le prestazioni pecuniarie sanzionatorie', which can be translated as 'pecuniary sanctions' (or, more extensively, 'money judgments with a punitive function') and it is not by chance that the locution 'danni punitivi' (literally meaning 'punitive damages') makes its first appearance only in the subtitle and only in quotes, signalling a cautionary treatment thereof. In coherence with a line of scholarship suggesting that 'what is due as "punitive damages" is not *compensation*, just like "punitive damages" are not *damages*',[1] the author is firm in avoiding any misunderstanding: for the sake of clarity, she sets the stage by distinguishing the basic goal of any system of civil liability (ie, to provide fair compensation to the injured party) from the additional and often times neglected or misplaced purpose of sanctioning hurtful conduct in proportion to the wrongdoer's degree of reprehensibility.

Among the many labels utilised worldwide to name such pecuniary sanctions, the author deems fit for the purpose the broad definition provided by Recital 32 of the Rome II Regulation (EC) No 864/2007: 'non-compensatory exemplary or punitive damages' (pp 71, 179 and 256). This clarification brings the author to analyse four different sub-groups of 'prestazioni pecuniarie', namely: 1) for harmful but not wrongful behaviour (p 105); 2) *in lieu* of actual damages (ranging from statutory damages to penalty clauses); 3) for wrongful but (not necessarily) harmful behaviour; 4) irrespective of the proof of harmful behaviour (such as, arguably, statutory interests for late payments or lost profits as a basis of assessment of damages for IP infringements).

Where, exactly, we can draw a borderline between one group and the other is hard to tell. De Menech convincingly suggests a way out, highlighting that the lack of an actual loss (or the fact that the law does not require any proof thereof

1 *C Granelli*, In tema di «danni punitivi» (2014) Responsabilità civile e previdenza 1762: 'la prestazione dovuta a titolo di "danni punitivi" *non* è *risarcimento*, ed i "danni puntivi" *non* sono *danni*' (emphasis in original).

to justify a finding of civil liability) does not necessarily entail that the ensuing money judgment, entered in favour of the plaintiff, is designed to discharge a purely punitive function.[2] Besides, as one commentator noted, not all that overcompensates is punitive.[3] In some instances, courts are empowered to assess damages in an approximate fashion, granting the victim a sum that would compensate her – though imprecisely – for the loss suffered (which is hard to quantify). In such cases, even though the money judgment does not accurately reflect the loss suffered (because difficult or impossible to quantify), it would be inappropriate to speak of overcompensation.

The effort to analyse in a monographic work on civil liability the neighbouring and sometimes overlapping realms of compensation and punishment, putting under the spotlight the different shades of grey that can be found in between, is not new to continental European literature.[4] The distinctive feature of De Menech's book, alongside its lively comparative interaction with a large variety of judicial precedents and scholarly insights, is the fortune of finding itself in the aftermath of a landmark decision handed down by the Italian Supreme Court in 2017, reunited in its Grand Chamber, which can be regarded as an authentic watershed on the issue of the enforceability of foreign judgments awarding more-than-compensatory damages.[5] In that most anticipated decision, the Supreme Court abandoned its long-standing aversion of punitive damages, admitting that the pursuit of extra-compensatory aims in the civil process does not necessarily run afoul of public policy; that is for the simple reason that punitive damages (or 'pecuniary sanctions') are no stranger to the Italian system of civil liability.[6]

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2 *P Pardolesi*, Profitto illecito e risarcimento del danno (2005) 154; *P Sirena*, Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa (2006) Rivista di diritto civile 535; *F Quarta*, Illecito civile, danni punitivi e ordine pubblico (2016) Responsabilità civile e previdenza (Resp civ e prev) 102.

3 *L Coppo*, The Grand Chamber's Stand on the Punitive Damages Dilemma (2017) 3 The Italian Law Journal 605–609.

4 See, among others, *B Starck*, Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée (1947); *S Carval*, La responsabilité civile dans sa fonction de peine privée (1995); *P Meira Lourenço*, A função punitiva da responsabilidade civil (2006); *F Benatti*, Correggere e punire dalla law of torts all'inadempimento del contratto (2008); *F Quarta*, Risarcimento e sanzione nell'illecito civile (2013).

5 Cassazione Civile (Cass Civ), Grand Chamber [GC], 5 July 2017 no 16601, with an English translation in (2017) 3 The Italian Law Journal 593, with a note by *Coppo* (2017) 3 The Italian Law Journal 605. See also *A Venchiarutti*, The Recognition of Punitive Damages in Italy: A commentary on Cassazione di Sezione Unite (Cass Sez Un) 5 July 2017, 16601, AXO Sport, SpA v NOSA Inc (2018) 9 Journal of European Tort Law (JETL) 104.

6 *AP Scarso*, Punitive Damages in Italy, in: H Koziol/V Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 106; *F Quarta*, Foreign Punitive Damages Decisions and

The Supreme Court's u-turn, much more than sensing (and adjusting to) the winds of change, rectified a historical mistake:[7] the doctrine of punitive damages (as a civil remedy designed to punish and deter the wrongdoer in addition to compensatory damages) has never been unknown to Italian law. Suffice it to mention art 12 of Law 8 February 1948 no 47, on libel, adopted by the post-fascist Constituent Assembly:[8] the victim of a libellous publication may claim, in addition to economic and non-economic/moral damages (and irrespective of the punishment of the offender in the criminal proceedings),[9] an equitable sum called 'reparation', assessed in relation to two elements: the gravity of the offence and the width of the audience reached by the publication.[10] One may rightly call it an exceptional remedy (contrasted to the fundamentally compensatory nature or civil liability law), but the rule has been applied for more than half a century by all sorts of judges, witnessing that the pursuit of extra-compensation in the making of a civil obligation has never been contrary to public policy (ie, to the basic principles of fairness and justice in force in Italy).

More recently, the Italian Constitutional Court openly recognised the legitimacy of a rule (art 96 para 3 of the Civil Procedure Code) providing for the destination of extra-compensatory punitive damages for malicious prosecution (or abuse of process) in favour of the victim, instead of a public/solidarity fund.[11]

Just like the Supreme Court did in its 2017 Joint Divisions judgment, De Menech in her book recalls the said civil sanctions among the 'prestazioni pecuniarie sanzionatorie' worthy of consideration, but she places them *outside* the 'basic

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Class Actions in Italy, in: D Fairgrieve/E Lein (eds), Extraterritoriality and Collective Redress (2012) 269ff.

7 Cass Civ, III Ch, 19 January 2007 no 1183, translated in English with a note by *F Quarta*, Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto (2008) 31 Hastings International & Comparative Law Review (Hastings Int'l & Comp L Rev) 753.

8 *V Zeno-Zencovich*, Il risarcimento esemplare per diffamazione nel diritto americano e la riparazione pecuniaria *ex* art. 12 della legge sulla stampa (1983) Responsabilità civile e previdenza 55ff; amplius, *V Zeno-Zencovich*, Onore e reputazione nel sistema del diritto civile (1985); *P Cendon*, Pena privata e diffamazione (1979) Politica del diritto 149ff; *M Grondona*, Danno morale da diffamazione a mezzo stampa e ambito di rilevanza dei danni punitivi (2010) Resp civ 836; *Quarta* (2016) Resp civ e prev 102, 122–125.

9 *Venchiarutti* (2018) 9 JETL 104, 114.

10 'Nel caso di diffamazione commessa col mezzo della stampa, la persona offesa può chiedere, oltre il risarcimento dei danni ai sensi dell'art. 185 del Codice penale, una somma a titolo di riparazione. La somma è determinata in relazione alla gravità dell'offesa ed alla diffusione dello stampato'.

11 Corte Costituzionale 23 June 2016 no 152 (2016) Foro italiano, I, 2639, with a comment by *E D'Alessandro*.

scheme' of civil liability, arguing that through such special remedies, the law does not *stricto sensu* react to a loss (that remains – the author underscores – the task of compensatory damages), but displaces the focus on deterrence and retribution (at 101 f). This specification is quite relevant, as it somewhat overcomes the widespread opinion that the remedy of compensatory damages has in itself the potential to deter harmful conduct 'precisely'.[12]

De Menech voices the 'discomfort', shared by many continental European civil scholars, with a system of civil liability traditionally entrenched in a mono-functional dimension.[13] Here, the process of revitalisation of punitive civil sanctions (referred to as *pene pecuniarie private*) is regarded as a viable 'systematic alternative' to criminal law, within a logic of gradual decriminalisation of certain sectors. In order to unleash the still unexpressed potential of punitive civil sanctions, the author undertakes a thorough analysis of the applicable constitutional due process guarantees, which cannot remain the same in the civil, administrative, and criminal settings. While art 25 of the Italian Constitution spells out the fundamental *nulla poena sine lege* principle (undoubtedly addressed to govern criminal proceedings, but now understood as having an overarching scope),[14] the Italian Supreme Court, gathered once again in its Grand Chamber,[15] held in 2018 that art 23 of the Constitution – providing that *'No obligation of a personal or financial nature may be imposed on any person except by law'*[16] – is meant to apply 'exclusively to the relationships between the citizen/taxpayer and the State/public authority' (ie, the well-known *no taxation without representation* principle). This notwithstanding, art 23 continues to be recalled as one of the impediments to the imposition of extra-compensatory damages in civil disputes in cases where a statutory cap is lacking or where the conduct to be punished is not well identified (or is too broadly defined) by the legislator.

What makes the Italian Constitution (almost) unique worldwide is the explicit provision of the principle of solidarity, in its art 2, as a duty imposed on the peo-

12 Thus *C Castronovo*, Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di chance, danni punitivi, danno c.d. esistenziale, in: Liber amicorum per Francesco D. Busnelli **(2008)** 365, fn 41.

13 For an exhaustive account of such mono-functional dimension see *R Demogue*, The Validity of the Theory of Compensatory Damages (1918) 27 Yale Law Journal (Yale LJ) 585–591.

14 *G Bonilini*, Pena privata e danno non patrimoniale, in: FD Busnelli/G Scalfi (eds), Le pene private (1985) 311.

15 Cass Civ [GC], 11 July 2018 no 18287.

16 English text available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

ple, not only on the State.[17] Unlike, for example, art 136 of the Tunisian Constitution, where the principle of solidarity is aimed at ensuring the equitable flow of resources from the centre to the periphery (or arts 2 and 138 of the Spanish Constitution, empowering the State to foster solidarity between the different regions and autonomous communities in order to avoid 'economic or social privileges'), in Italy, the constitutional provision pervades and shapes private law relationships immediately, without the need for further legislative intermediation.[18] Article 3 para 2 of the Italian Constitution, in turn, provides that situations that are *not* identical should *not* be treated equally. Intentional harm constitutes a more intense violation of the constitutional principle of solidarity than a simply negligent offence. Hence, if we accept turning a blind eye on the wrongdoer's motive (subjective element) and always apply the same civil remedy (compensatory damages) to any kind of hurtful behaviour, the effectiveness of the basic tenets of the Italian Fundamental Charter would be impaired, especially when 'inviolable' rights are intentionally violated.

In his *Draft Bill on Civil Liability Law*,[19] Prof Brüggemeier theorised that the principle of solidarity, applied to the birth of an obligation grounded on civil liability, should bring about the following results: non-recoverability of trivial loss, on the one hand, and, on the other, the imposition of an adequately aggravated extra-compensatory portion mirroring the wrongdoer's actual intent.

So far, the Italian Supreme Court has only adopted the former rule (no recovery for trivial loss).[20] As for the latter (ie, the stable application of extra-compensatory civil sanctions based on the gravity of the offence), despite some meaningful precedents,[21] the Grand Chamber's decision no 16601/2017 has certainly paved the way for further developments, but the final chapter for a generalised application of punitive damages in Italy is yet to be written. Books such as the one intelligently written by Carlotta De Menech can drive the change in the right direction.

17 *V Federico/C Lahusen* (eds), Solidarity as a Public Virtue? Law and Public Policies in the European Union (2018).

18 *P Perlingieri*, Constitutional Norms and Civil Law Relationships (2015) 1 The Italian Law Journal 17, originally publishd, in Italian, in (1980) Rassegna di diritto civile 95.

19 *G Brüggemeier* (2011) Modernising Civil Liability Law in Europe, China, Brazil and Russia, Text and Commentaries (2014) 123f, arts 6:107 and 6:108(2).

20 Cass Civ [GC], 11 November 2008 no 26972.

21 Cass Civ, III Ch, 22 January 2015 no 1126 held 'the gravity of the offence an element undoubtedly relevant in the assessment of a damages award'. The decision can be read in (2015) Danno e responsabilità 511, with notes by *G Ponzanelli* and *F Quarta*.