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# YALE LAW JOURNAL

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Vol. XXVII

MARCH, 1918

No. 5

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## VALIDITY OF THE THEORY OF COMPENSATORY DAMAGES<sup>1</sup>

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A slow evolution in the matter of compensatory damages has tended gradually to exclude the notion of penalty, which was first received in the law under the influence of the desire for vengeance. In its stead the view has been adopted that in the civil law, as distinguished from the criminal law, the sanction for a wrongful act—that is, for a tort or a breach of contract—should be so measured as merely to restore the person injured to his former position. This evolution began in the Roman law and has reached its full development only in modern legislation.

The theory appears simple. It has the technical imprint of a vigorous doctrine which is encountered in both the economic and the artistic ideas prevalent at the end of the eighteenth century and the beginning of the nineteenth. This order of thought is appropriate to the fine strength of the period of the empire. It is the criminal law, not the civil law, which is concerned with penal ideas and with the prevention in the future of wrongful acts. What, therefore, is the basis of the sanction of a wrongful act? If it is to obtain security from the wrongdoer, he could be condemned only if chargeable with a fault, thus taking into account the subjective point of view; whereas a sanction is by nature objective. It must seek to cure an injury, nothing more. What, indeed, may the injured person demand? His security requires merely that he be restored to the condition in which he would have been had the wrongful act not taken place.

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<sup>1</sup> Translated from the French by Dr. Edwin M. Borchard, Professor of Law in Yale University.

Let us assume that a man's house has been set on fire by the negligence of a neighbor. A new house will be built for the owner, or he will be given money compensation to cover the cost of rebuilding. Or let us assume that a contractor has not done certain work within the period agreed upon. He must pay a sum of money sufficient to make good both the loss caused by his delay, and the loss of benefit which would have been realized by his prompt completion of the work. That is sufficient.

This notion that the person injured may claim the equivalent of the *damnum emergens* and of the *lucrum cessans* is, so to speak, classic in the codes of Europe and of America. The French Civil Code<sup>2</sup> provides that "damages are due as a rule to the creditor for the loss which he has suffered and the gain of which he has been deprived." The Italian,<sup>3</sup> the Venezuelan,<sup>4</sup> and the Dutch<sup>5</sup> Civil Codes contain like provisions. The Spanish Civil Code is inspired by the same principle, providing<sup>6</sup> that "the indemnity for an injury comprises not only the amount of the loss which has been sustained but also the amount of the profits of which the creditor has been deprived." The Portuguese Civil Code stipulates:<sup>7</sup>

"Indemnity may consist in the restitution of the thing or of the sum which constituted the principal object of the obligation, or in the restitution of that thing or sum and of the gain of which the creditor has been deprived in consequence of the nonperformance of a contract."

The Italian Civil Code likewise provides that reparation for an injury arising out of either the complete or the partial failure to perform an obligation must comprehend the harm done and the gain lost. The most recent codes embody the same principles. The Japanese Code<sup>8</sup> provides that

"the claim for damages has as its object the reparation of the injury which results from nonperformance according to the ordinary course of events."

The German Civil Code<sup>9</sup> provides that

"whoever is bound to make good an injury must restore the state of things which would have existed if the circumstances which gave rise to the obligation to make compensation had not occurred."

Further:<sup>10</sup> "the injury to be made good also comprises lost profits."

<sup>2</sup> Art. 1149.

<sup>3</sup> Art. 1227.

<sup>4</sup> Art. 1293.

<sup>5</sup> Art. 1308.

<sup>6</sup> Art. 1106.

<sup>7</sup> Art. 706.

<sup>8</sup> Art. 416.

<sup>9</sup> Art. 249.

<sup>10</sup> Art. 252.

The revised Swiss Federal Code of Obligations includes the same principles and provides<sup>11</sup> that "when the creditor cannot obtain the performance of an obligation or can obtain only an imperfect performance, the debtor is bound to make good the resulting injury."

The English law admits that

"where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."<sup>12</sup>

When special provisions of a code deal with non-contractual injuries inflicted on another, the same principles are generally followed. Thus, the French Civil Code<sup>13</sup> provides that "whoever by act or omission causes damage to another is obliged to make it good." This provision is embodied in the codes of many other countries.<sup>14</sup>

The principle of compensatory reparation is, therefore, an idea which has a strong foundation in modern law. When it is examined more closely, however, it will be observed that its force is not absolute, and that it encounters either practical obstacles, or else principles of a certain social utility which have not full validity but which, nevertheless, have their part to play in the complex combination which is presented by the solution of any social problem.

## I

As a matter of fact it is not always possible to replace the creditor obligee in exactly the same position as if the wrongful act,—namely, the tort or the breach of contract,—had not occurred. When compensation is made in kind, the restored *res* is again exposed to the same chances of destruction as the original *res*. This is the case when a vessel which has collided with another by the latter's fault, is so repaired by the owner of the ship at fault as to permit it again to navigate.

But more often, either because it is impossible to restore the former state of things, as where a person is injured bodily, or in order to avoid a discussion with reference to the execution of a contract, compensation for the wrongful act is made in the form of a money indemnity. How is it possible to make the sum a true compensation

<sup>11</sup> Art. 97.

<sup>12</sup> *Robinson v. Harman* (1848) 1 Exch. 850, 855, *per* Parke, B.

<sup>13</sup> Art. 1382.

<sup>14</sup> Textually reproduced in Art. 1428 of the Dutch Civil Code, Art. 1151 of the Italian Civil Code, and Art. 1217 of the Venezuelan Civil Code. Art. 2314 of the Chilean Code and Art. 709 of the Japanese Civil Code contain similar provisions.

for the injury sustained? Here again the result may be attained if the only uncertain element is the duration of the injury. The court may order periodic payments which shall continue as long as injury is suffered. If an individual has been the victim of an accident and has been temporarily incapacitated, though the injury will ultimately leave no trace, it is easy to accord him a return which will terminate the day he resumes work. It is likewise easy to make good an injury of limited duration in the enjoyment of property.

The injury may be uncertain in its extent as well as in its duration. Occasionally it is possible to determine, in spite of variations of fact, what would have happened in the absence of the wrongful act. Thus, an accident may lead to disability to work, followed by periods of good health which are interrupted by relapses. We may *a posteriori* fix at the end of each year the indemnity which may be due.

But the measure of damages may be uncertain because even *a posteriori* it is not possible to determine exactly what would have happened in the absence of the wrongful act. When a person has been rendered incapable of work because of an accident, how can we foresee the business opportunities that he may have lost? He might have been offered an excellent position, but, in view of the accident, the offer will not have been made.

Two recently enacted codes have begun to take account of these difficulties. The Japanese Civil Code of April 28, 1896, provides:<sup>15</sup>

"The claim for damages has as its object the reparation of the injury which results from nonperformance according to the ordinary course of events."

In the same spirit the German Civil Code of 1896 provides<sup>16</sup> that "the injury to be made good includes lost profit. Profit is deemed to have been lost when it might reasonably have been expected according to the natural course of events or according to the particular circumstances of the case, *e. g.*, according to the preparations or provisions made."

These two articles express a reasonable idea which may be accepted in countries where statutes contain no provision on the matter. It is informed by a practical consideration of the probable in life as the equivalent of the certain.<sup>17</sup> If a crop is destroyed before its maturity by the fault of a person, it is natural to presume that the crop, properly cared for, would have been harvested by its owner.

But if the general principle is admissible, it encounters serious difficulties in certain cases. In practice, life imposes the necessity of

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<sup>15</sup> Art. 416.

<sup>16</sup> Art. 252.

<sup>17</sup> A. Albinozzi, *Studio sul danno non patrimoniale* (3d ed.) 90.

considering as true that which is probable; but this entirely pragmatic opinion must yield before realities. Let us suppose that certain trees in a privately owned forest have been unlawfully cut down, but before damages are claimed, lightning causes the destruction of the entire forest so that the felled trees would have been and are unavoidably lost to their owner. May the owner bring an action against the original wrongdoer? The question may be posited in another form. To appreciate the existence or the extent of an injury, it is necessary to place one's self constructively at the time when it is inflicted, or when the magistrate, upon personal inspection, or the parties, by agreement, make an estimate of the injury. It appears logical always to yield to the lesson of facts. If the negligence of a person causes the loss of goods which at the moment of their destruction were worth a thousand francs, the owner of these goods may claim 1200 francs if it is established that at the time of judgment such an increase in the value of the goods has taken place as to justify the claim. Conversely, the person at fault will have to restore only 800 francs if it is proved that the market price of the goods declined to that extent after their destruction. The only inconvenience of this solution is that the injured person, in claiming his indemnity after the lapse of a period of time, prolongs the uncertainty of the wrongdoer's risks. But the wrongdoer may always offer the injured person the actual amount that has been lost. The danger, therefore, is minimal, and it is hardly profitable to discuss it at length.

In addition to the probable injury, there is the possible injury which might have resulted in consequence of a series of circumstances of which one may only assert that they might have occurred. By reason of some error or negligent act, let us say, a race-horse carried by a railroad does not arrive in time to take part in the race. In estimating the damages, must we take into account the prize which the horse might have won? Similarly, at the moment of the drawing of a lottery one of the numbers in the lottery is negligently missing: may the holder of that number claim damages, and how much shall they be? To give a reasonable solution to these difficulties we must, so far as possible, avoid two dangers. On the one hand, it is an exaggeration to assimilate the mere chance of winning a prize to a certainty or a probability. Indemnity should not be a matter of profit, else the injury will be sought after; this is, of course, contrary to the interests of society. On the other hand, is it not a somewhat crude policy to omit taking account of uncertain injuries? How many acts of man constitute merely a speculation upon the chance of gain!

A purely mathematical solution is conceivable. The table of probabilities might be placed under contribution, and this method of reaching precise results would be alluring to people who think it possible to deduce principles of law from rigorous calculations. But this method would be dangerous. Mathematics, of all sciences, is the least in con-

tact with the complex realities of life. To calculate chances is to render certain phenomena more apparent to the spirit, but not to fix their uncertain shapes.

The system of indemnity here encounters an impassable obstacle. The court may indemnify, but only by an act of the will: the court creates a reaction against the wrong instead of making it good.

French jurisprudence has chosen a more prudent course, and it may be said that it does not take cognizance of speculative injuries. Thus, with reference to a race-horse which was unduly over-weighted, it has been decided that

“there is in the outcome of races a certain unforeseen element, the winning or losing of a horse usually being not the result of a specific determined cause, but of a combination of diverse circumstances.”<sup>18</sup>

Perhaps this solution is too cautious, for it hardly attains its aim. This is merely acting as if the wrongful act had not occurred. To take account of only the certain injury is to take account of only the palpable injury. It would be better to renounce the idea of compensatory indemnity and to admit a moderate reaction against probable injuries.

These conclusions establish that the grant of an indemnity absolutely compensatory of the injury frequently encounters practical obstacles. These obstacles are not so numerous, however, because most codes provide that damages ought to comprehend nothing but the immediate and direct consequences of the nonperformance of an obligation.<sup>19</sup> Thus, the legislatures have adopted an easy method of evading the appreciation of certain damages, and at bottom they have admitted that the injury ought in certain cases to have as its sanction a pecuniary compensation not adequate to the loss sustained.

## II

The principle of assigning to the victim of the wrong as adequate a compensation as possible encounters obstacles other than those of fact. Under some circumstances the social utility of the principle is contested.

The theory of indemnity is, after all, a special aspect of the equalizing concept. This theory simultaneously presents the strength and the weakness of that concept. It would appear to be as simple as the theory of equivalents. The measure of the rights of the injured party

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<sup>18</sup> Nancy (Dec. 10, 1912) *Gazette du palais* 1912, 2, 525; and similarly, Bordeaux (July 15, 1912) *ibid.* 1912, 2, 526.

<sup>19</sup> Argentine Civ. Code, Art. 520; Chilean Civ. Code, Art. 1558; French Civ. Code, Art. 1151; Italian Civ. Code, Art. 1229; Mexican Civ. Code, Art. 1466; Portuguese Civ. Code, Art. 707; Spanish Civ. Code, Art. 1107.

will often be easy to determine, since it is fixed by a material element, namely, the damage done. On the other hand, the theory of indemnity corresponds to one of the primordial necessities of social existence—the necessity of security<sup>20</sup> conceived in its most simple form, that is, in the desire to maintain vested interests. When a right is recognized by law, it is best protected by enacting that if the right is violated, it will be re-established in its integrity, so that the wrongful act will, so to speak, be effaced. The possessor of the right then feels entire security in making use of his property. He knows that the value of the property is at least guaranteed against wrongful acts. He finds therein a cause of tranquillity and an inducement to economic activity. The system appears to be a compromise between the claims of the victim to obtain an exaggerated sum of money, and the desire of the person at fault to pay as little as possible. The judge in fixing the measure of damages seems to take the position of a reasonable third party; he satisfies the victim of the injury, who cannot demand more than he has lost, and his estimate is acceptable to the wrongdoer, who must bear the loss. Compensatory indemnity constitutes, therefore, a just measure of sanction. On the other hand, the theory of compensatory reparation has the weakness of all equalizing theories. These theories constitute an aspect of social life and often have a material aspect. They neglect the dynamic side, and consequently they do not constitute a forceful lever of social activity. This weakness, however, appears here without inconvenience; for even if the theory of indemnity does little to compel the person at fault to refrain from such wrongful acts, still it is recompensed by the penalty.

The indemnity, by the mere fact that it is a sanction, that it constitutes a reaction against the act committed, may sometimes deter repetitions. But that is not always true. The damage may be small, yet the fault may be great. This happens when there is an attempt whose effect is limited, or when the injury, being immaterial, hardly lends itself to a considerable compensation. But the penalty seems to make good this defect. If the wrongdoer is chargeable with a grave fault, the criminal law intervenes, having no aim other than to prevent a repetition of the wrong. It may proceed by way of general prevention (the theory of intimidation) or it may act upon the spirit of the wrongdoer himself (the theory of punishment).

The special purpose given to the indemnity and to the penalty is informed by a good analytic spirit, the past being effaced by the indemnity, the future being safeguarded by the punishment. But like all simple theories, these ideas do not embrace all variations of reality; the variations are fused into a uniform color. Upon reflection, it is

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<sup>20</sup> See on this subject the present author's *Notions fondamentales du droit privé*, 63 et seq.; *Analysis of Fundamental Notions*, in *Modern French Legal Philosophy*, 347, 418 et seq.

clear that cases exist in which it is fitting that a civil court substitute for compensatory reparation a pecuniary penalty, under the name of punitive or exemplary damages.<sup>21</sup>

This institution is not a deduction from a single idea, but is rather the point of convergence of concurrent difficulties. Thus it happens that according to circumstances it may present greater or less force, because under various hypotheses it may call to its aid stronger or weaker governing ideas.

It must be admitted that at first glance the idea of punitive damages, that is, a penalty exceeding the harm done, appears shocking. It involves what might seem to be an unjust enrichment on the part of the victim. This objection would be decisive if a pecuniary penalty always constituted a complete reparation of the injury. But perhaps the injury cannot be compensated by a pecuniary indemnity and can give rise only to a counter payment (as when an individual is slandered without suffering any loss of credit, or when a person is subjected, by the death of a near relative, to mental suffering without any property loss); then the transition is insensible between the indemnity looking only to a compensation of the loss sustained, and that looking to a punishment of the wrongdoer.

It is easier to pass from one to the other when we perceive that the domains of penal and of civil law—which have been gradually distinguished in the course of civilization—are not absolutely separate categories, and that it is proper to establish intermediate zones. The penalty is a powerful instrument which must be used judiciously. In addition to the public penalty pronounced by the criminal courts, it is proper in some cases to establish a private penalty (punitive damages) pronounced by the civil courts, the imposition of which may be demanded only by the person injured. Acts affected with a private penalty thus appear as *quasi* crimes, placed in an intermediate zone between the jurisdiction of the civil law and that of the criminal law. It may have been observed that there is a certain correlation between the cases in which a private penalty is assessed and those characterized as criminal offenses. Indeed, the law at times pronounces a public penalty by reason of the grave consequences of an act,—as in the case of homicide or assault and battery; such acts are punishable whether intentional or due to gross negligence. Occasionally the law is concerned particularly with the intention of the defendant, and it punishes only if criminal intent is found. Thus, the taking of another's property is not usually punishable if the taker has made a mistake without wrongful intent.

Cases in which it is proper to impose a private penalty are sometimes those in which the act appears to involve an element of risk, as

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<sup>21</sup> See Le Huguency, *L'idée de peine privée en droit contemporain* (Paris, 1904).

in the case of a rash accusation; and sometimes those in which the defendant intended to injure, or at least was conscious of injuring, as in the case of defamation, seduction, or a violation of individual liberty.

These are, indeed, the principal cases in which the English law imposes a private penalty under the name of exemplary damages.<sup>22</sup> These cases present examples of wrongful acts for which a public penalty would constitute a rather harsh measure; they are, nevertheless, acts which disturb the social order and individual security simultaneously. The difficulty of estimating the loss, combined with the desire of adjudging these acts to be serious, but not criminal, leads logically to a notion of private penalty. The benefit assigned to the person injured does not shock the legal sense, for we may fix with precision the point at which the benefit shall stop. Special reasons for imposing a private penalty may also exist when the wrongdoer has derived from his act a benefit greater than the injury inflicted. It is unjust for a wrongdoer to preserve even a part of such benefit. It is more equitable to grant it to the victim. It is good legal policy to solve the problem in this way in order that no advantage may ever be derived from wrongdoing. Particular reasons likewise exist when it becomes necessary for a loss to be borne by one of two litigants: thus, it is more reasonable to make the losing party pay court costs.

The reasons for imposing a private penalty would be weaker if we were dealing with an intentional injury which appeared scarcely to disturb the social order, or with an act having grave consequences, but which arose from only a slight fault. Here the concept of indemnity, looking to the restitution of conditions as they would have been had the wrongful act not occurred, is presented with such force as to be invulnerable to attack. Do the preceding arguments irrevocably indicate the principles according to which the rule of punitive damages must be applied rather than that of reparation? We think not. The evolution of institutions cannot be permanently arrested. They have a value only so far as they find support in the general psychological condition; and this condition has both permanent and temporary elements. It will require either a cruder civilization to extend the penal domain, or the creation of an altogether new inspiration in order that new theories may present themselves.

### III

The notion of compensatory reparation, with the idea of private penalty superimposed, is threatened, on the other hand, by the principle

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<sup>22</sup> See Italian Penal Code, Art. 38: in case of attack upon a person's honor, the court may pronounce a pecuniary penalty beyond any damage sustained.

of reparation by way of forfeiture (liability without fault) which has been recognized under the statutes of numerous European countries, especially in the matter of workmen's compensation.

If we examine the numerous laws which have accorded an action for indemnity to every workman injured by an accident in the course of his employment, we shall establish, in addition to this grant of a right of action even in the absence of proof of fault on the part of the employer, another feature not less important, namely, a limitation imposed upon the claims of the workman.

It is at once evident that the indemnity assured to the workman—or to his family in case of a fatal accident—is considerably less than the loss sustained. According to French law,<sup>23</sup> a workman totally and permanently disabled may claim a compensation equal to two-thirds of his annual wage. If partially yet permanently disabled, he is entitled to a pension equal to half his former earning capacity. In case of an accident followed by death, a pension is granted to certain dependent heirs not exceeding a total of 60% of the annual wage of the victim.

In Italy,<sup>24</sup> the compensation in case of permanent total disability is equal to six times the annual earnings, but never less than 3000 lire; in case of partial disability, it is equal to six times the annual earning capacity, but not less than 500 lire. In case of death it is equal to five times the annual wage. In Belgium,<sup>25</sup> a workman permanently disabled is awarded an annual allowance of 50% of his annual wage. In case of death his dependents are given a sum representing a capitalized annuity equal to 30% of his earnings, calculated upon the basis of his age at death. In Spain,<sup>26</sup> a totally disabled workman is entitled to an indemnity equal to his wages for two years; this is reduced by one-fourth if he is able to take up another occupation. If the accident is fatal a sum equal at most to two years' earnings is granted.

It would be easy to continue this enumeration and to show that the statutes, either in order to avoid placing too heavy a charge upon employers, or else to encourage workmen to be careful, grant the victim of an accident a sum of money considerably less than his earnings, and generally less than the loss sustained, for the workman may have expected in time an increase in his wages. Not only do the new cases of liability created in the absence of fault on the part of the employer constitute attenuated hypotheses of liability, but the traditional theory of liability in case of fault is also greatly limited.

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<sup>23</sup> Art. 3, law of Apr. 9, 1898.

<sup>24</sup> Art. 9, law of Mar. 17, 1898, amended June 29, 1903.

<sup>25</sup> Art. 4, law of Dec. 24, 1903.

<sup>26</sup> Art. 4, law of Jan. 30, 1900.

The Belgian law provides clearly<sup>27</sup>

“Nothing herein derogates from the general rules of civil liability when the accident was intentionally caused by the employer. Except for this limitation, damages arising out of accidents to workmen can be collected from the employer only to the extent of the compensation fixed by the present law.”

The same provision is to be found in German law.<sup>28</sup>

The French law of 1898<sup>29</sup> provides that “workmen and employees cannot avail themselves, in case of accident in the course of their employment, of any provisions other than those contained in the present law.” These provisions constitute the tariff indicated above, which is always applicable except in case of the inexcusable fault of the employer,—a fact which permits of a larger indemnity not to exceed, however, the amount of the annual wage.<sup>30</sup> The Spanish statute<sup>31</sup> seems likewise to exclude actions arising out of a fault established by the common law.

The Italian law<sup>32</sup> provides that the ordinary civil responsibility can be invoked only if there has been “a penal conviction for the act which caused the accident,” or, if the penal action is quashed, if the civil court determines the existence of facts which would have constituted a misdemeanor. In the same spirit the Swiss statute<sup>33</sup> provides that the judge is not bound by the legal maximum in case the corporal injury or death of the victim was caused by an act of the employer susceptible of being made the basis of a penal action.

The English Workmen’s Compensation Act of August 6, 1897,<sup>34</sup> is more favorable to the workman, and provides that “when the injury was caused by the personal negligence or wilful act of the employer,” the Act in no way affects the employer’s civil liability, but the workman may, at his option, either claim compensation under the Act, or pursue his common-law remedies. The statutes of certain other countries—for instance, that of Russia of June 2, 1903,—contain no provisions on the matter.

To sum up, there appears to be in European legislation a marked tendency to admit in favor of the workman only a limited responsibility on the part of the employer, unless certain grave faults may be ascribed to the employer which give rise to a common-law liability.

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<sup>27</sup> Art. 22.

<sup>28</sup> Art. 135, law of June 30, 1900.

<sup>29</sup> Art. 2, amended Mar. 22, 1902.

<sup>30</sup> Art. 20.

<sup>31</sup> Art. 16, law of Jan. 30, 1900.

<sup>32</sup> Art. 22.

<sup>33</sup> Art. 6, law of June 25, 1881.

<sup>34</sup> 60 & 61 Vict. ch. 37, s. 2 (b).

These results are important from two points of view. First, the modern rules in cases of accidents to workmen embrace one of the most important causes of liability. Again, they correspond to a general tendency of modern law to mask questions of social responsibility either by adopting a general solution in the case of unfortunate events such as accidents and sickness, or by according to the victim in all cases a certain assistance based upon social solidarity. The ordinary liability exists only in case of grave fault. Thus, in legislation of an objective character, the subjective consideration of fault still retains a certain place. Considering the whole matter, we must conclude that the modern tendency often results indirectly in replacing compensatory reparation by a reparation admittedly incomplete. In contrast to the private penalty (punitive damages), where the sum granted exceeds the injury, in these cases the victim is allotted a sum smaller than the loss sustained.

#### IV

From the preceding pages, it will have been established that the acceptance in law of the principle of indemnity constituted an advance because it substituted for the ideas of vengeance—which often exceeded the purpose which law should have properly pursued—a sanction which, though milder, was usually sufficient to satisfy the victim and even to prevent a recurrence of the wrongful act.

It would, however, be wrong to believe that the general application of the idea of compensatory indemnity is a definite stage in the evolution of law. Because of the attractive notion that it takes account of all losses sustained, the theory of indemnity presupposes a knowledge of numerous facts arising out of the fault committed, and requires minute research, leading finally to certain impassable obstacles. On the other hand, it encounters limitations of an opposite kind. Subjective considerations have led, in the case of some grave faults where the damage is difficult to measure, to the resurrection of the private penalty. The psychological analysis has here resumed its control over the objective determination of the damage.

Moreover, other objective considerations have been substituted for the already objective point of view of the compensatory indemnity. It has been sought to accord assistance to every victim of certain social events, such as accidents to workmen. The principle of compensatory indemnity has been maintained only where grave fault exists; it thus assumes a certain subjective basis.

The person entitled to indemnity may, therefore, lay claim to a sum which is in some cases greater than the injury sustained, in other cases, smaller. Ought we to conclude that the concept of compensatory indemnity, assaulted from two opposite sides, is destined to dis-

appear? By no means. It is appropriate to remark that between cases in which compensatory reparation has been applied, and those in which some other system has penetrated, for example, the private penalty or indemnity by way of forfeiture (liability without fault), there is a broad line of division occupied by the category of cases in which we apply the idea of fault,—especially, fault characterized as grave or intentional.

But while the notion of grave fault often leads to an admission of a private penalty, it leads, on the other hand, in the case of accidents to workmen, to the retention of the idea of compensatory reparation. The notion of fault has not, therefore, a convergent action in the various cases, leading to the substitution of a general system for the older system.

It cannot be said that the future will see the complete reaffirmation of such a single system of civil sanction for wrongful acts. So far as we may rely upon the past to predict the future, we may assume that we shall witness a struggle of more material and ontological conceptions of compensatory reparation on the one hand, with more spiritual and teleological conceptions of severity with respect to fault on the other hand. The former by their apparent simplicity, the latter by their social utility, have such strength that it is doubtful whether any of them can ever be definitely conquered. It is curious to note that while recent writers treating of the basis of legal liability have preferred the objective theory of risk to the subjective theory of fault,<sup>35</sup> subjective theories have been admitted with respect to the sanction for wrongful acts.

It seems, therefore, that, as on many other points of law, the question before us is not a question of principle but a question of delimitation. The theory of compensatory indemnity is sufficiently strong to survive, but too weak to rule alone.

Is it possible to fix the limit towards which the theory tends, and to fix a point at which it will remain stable after its diverse oscillations? This limit cannot be established once for all; we thus differ from what eighteenth century partisans of the school of natural law would have thought. It can only be said that the theory bears a close relation to the average social morality. Subjective considerations become less essential as the feeling that it is not necessary to commit faults grows more intense. If in any industry where the workmen's compensation legislation is applied, precautions ordinarily taken are sufficient to make faults exceptional, a statute establishing reparation by way of forfeiture (liability without fault) might command great authority or even be solely applicable, unless the desire to favor workmen leads to the imposition of heavy burdens of liability upon employers.

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<sup>35</sup> Cf. Tesseire, *Essai d'une théorie generale sur le fondement de la responsabilité*.

If attacks upon honor and the feelings are rare, we may have less reason to be concerned with private penalties (punitive damages). In other cases, however, they will be given a greater extension, unless, going beyond, we admit in such cases a wide application of public penalties, and decide that they are incompatible with private penalties. The law on the present subject appears to be in a state of flux between certain limits, and under the domination of a few theories rather complex in their application.