Revista da Faculdade de Direito da UERJ-RFD- Rio de Janeiro, v.1, n.23, 2013, **ISSN 22363475**

# Personal injury industry?:

# Scrutinizing the theory and the precedents in Brazil

Felipe Frank [1]

Lígia Ziggiotti de Oliveira[2]

Rafael Corrêa[3]

## ABSTRACT

The present study seeks to make a critical analysis of the expression "personal injury industry", which, in spite of being widely applied in legal vocabulary, does not sustain itself in the Brazilian context. Contrary to what the expression suggests, the democratization of the access to justice and the extension of the individual's protection promoted by the Constitution can not be ignored due to unfounded legal claims. In Brazil, the legal claims of personal injury reflect the precarious comprehension of personality rights much more than a strategy that the claimers use in order to profit. Therefore, the primacy of the "human being" instead of the "human having" through an axiological reading on civil liability is defended, considering constitutionalism, especially about personal injury, that is deeply connected with the existential view of Law, requires the full compensation and the rejection of simplistic formulas to the complexity involved in its foundation: the dignity of the person, that must be considered in its own reality.

**KEYWORDS:** Personal injury industry; Civil liability; Dignity of the human person.

# Indústria do dano moral?:

# Considerações a partir de uma análise doutrinária e jurisprudencial

## RESUMO

[1] Master in Law from the Federal University of Paraná (UFPR), Bachelor of Law UFPR; researcher at the Center for Studies in Civil and Constitutional UFPR "Copernican Turn"; lawyer E-mail: felipefrank89@gmail.com.
This article was translated by Priscila Cabral and autorized for publication by the author in. 30/06/2013.Version in portuguese received in 19/09/2012, acepted in 17/12/2012.

[2] . The fifth academic year at the Federal University of Paraná (UFPR); researcher in Scientific Initiation Program UFPR E-mail: ziggiotti@gmail.com

[3] Bachelor in Law from Faculdade Dom Bosco / Paraná; lawyer .E-mail: rafakri@gmail.com

O presente artigo tem por objetivo a análise crítica da expressão “indústria do dano moral”, que apesar de ser bastante recorrente no vocabulário jurídico brasileiro não se fundamenta no cenário pátrio. Ao contrário do que a expressão sugere, a democratização do acesso à justiça e a ampliação da tutela do sujeito promovidas pela lógica constitucional não podem ser confundidas com a banalização das demandas judiciais infundadas. No Brasil, as demandas de danos morais são antes reflexos da absorção deficiente dos direitos da personalidade do que efetivamente meio de lucro para seus autores. Nesse sentido, defende-se a primazia do “ser” em relação ao “ter” mediante uma leitura axiológica de índole constitucional sobre a responsabilidade civil, em especial sobre os danos morais, que estão fortemente ligados ao aspecto existencial do Direito e que, por isso, exigem a reparação integral e o afastamento da aplicação de fórmulas fechadas e reducionistas em relação à complexidade de seu próprio fundamento: a dignidade da pessoa humana concretamente considerada.

**PALAVRAS-CHAVE:** Indústria do dano moral; Responsabilidade Civil; Dignidade da pessoa humana.

## 1. INTRODUCTION

Consecrated by the phenomenon of civil law constitutionalization, the protection of the human person has increasingly generated debates in the legal field and also has found, through the critical eye of the authors and the proactive conduct of the Courts, increasingly importance in Law studies.

As postulated by Luiz Edson Luiz Fachin, it is required, "in the contemporary architecture of Civil Law, the wise choice of premises that do not confine the structural and cyclical." (2002, p. 42) According to the author, that is how a critical approach to the law in light of the Constitution is given: plural, attentive to concrete facts and open to axiological principles of constitutional nature (2012).

The personal injury, according to Yussef Said Cahali (2000, p.52), had ascending appreciation in Brazil from the twentieth century, especially after the promulgation of the 1988 Constitution and the development of Abridgment No. 37 of the Superior Court.[4]

The reason for the delay in the consideration of the subject by the doctrine and homeland jurisprudence, however, is historically justified. Ricardo Luis Lorenzetti (1995) points

[4] "Supreme Court - Abridgment No. 37 - 12/03/1992 - DJ 17/03/1992: **Indemnities - Injury - Material and Moral - Even Fact - Accumulation.** Are cumulative indemnification for property damage and personal injury arising from the same facts. "

that the personal injury was not always capable of pecuniary consideration, which has led in the past to a patrimonial sense of recovery. Therefore, in light of the nineteenth century systematics, the existencial profile of the law was not positioned above its patrimonial profile; as a matter of fact, it was not even put on the same level with it.

There is when it was possible to glimpse the stormy climbing of the Law existential facet, which brought attention to the order of *who* was conferred legal tutelage, and not just for *what.*

To the extrapatrimonial damage it was promissed, therefore, a fertile space for development. Besides the extensive relationship that keeps with what is most human in civil responsibility, there is also the great debate regarding their translation into numbers, which remained compounded by the fact of not having been brought forth (rightly) by the new Civil Code, a sure formula for establishing the amount of compensation for personal injury.

This scenario has cost to the extrapatrimonial damages the suspicious view of many authors and operators of Law. After all, letting it express a right of this nature could incite its misuse. Hence, it was built up the expression "personal injury industry", which recurrence created a saying among lawyers and spread some reductionism of the discussion to an enclosure that could facilitate and make its application certain and closed.

However, reductionism is something that should be abjured from the present theme, considering the complexity of its structure and its foundation. The indemnification clause, as inferred by Maria Celina Bodin de Moraes (2007), is the general clause of the Civil Code, and, as added by Carlos Eduardo Pianovski Ruzyk (2002, p. 136), "the ground of civil responsibility for personal injury is seated in the very principle of dignity, not in patrimonial criterion."

Therefore, as the theme carries inaccurate and porous contours, the protection and the subsequent satisfaction of the victim should not foreclose on cold concepts and calculations, and also it should not withdraw its value from the fear that the extrapatrimonial damage indemnity brings. Therefore, paying attention to the complexity of the issue, is that one must critically investigate the personal injury, revealing and demystifying the alleged industry that underlies the legal ideas on the subject, notably in relation to the doctrine and homeland jurisprudence.

## 2. RECEPTION OF PERSONAL INJURY BY COUNTRY LAW

Legal protection for personal rights, in the civil context, has received - including from legislation - the proper importance on account of the phenomenon of private law constitutionalization.

The personal injury, guarded closely in this order of rights, is part of a more contemporary comprehension, with real concern in valuating the human person. In this regard, expressed Giselda Novaes Hironaka Maria Fernandes (2008, p. 802):

> It is an interesting breakthrough already known in other foreign laws, and caters strictly to this postmodern paradigm that points the focus of attention, from the right and the law, to the person of the victim and to the indispensability of the damage suffered, but especially from the remake of its law holder condition to dignity constitutionally shaped in the maximum value of the human person, by the imposition of the duty to indemnity to the damage maker.

If the Brazilian Civil Code of 1916 was punctuated by exaggerated zeal of capital assets, reflecting the tendency for the study of civil responsibility, it is the consecration of the existential rights, guaranteed by the Constitution of 1988, that the liability for damaging the property of others conquer real space.

The broad defense of personal rights did not find fertile ground until recently. About this topic, Luiz Paulo Lobo Netto (2008, p. 1) manifests with primacy:

> The well known Brazilian jurist of the nineteenth century, Teixeira de Freitas, rejected the idea of personality rights, just because they could not be translated into pecuniary values. The spirit of the time could not admit that the right could have as object property or non-property values, and that the protection of the person itself was enough.

Nevertheless, it could not qualify as unprecedented, at that time, such an idea. Some legislation of the first half of the twentieth century were already included on the matter, although very incipient in its content. The Law 3.071/16 demonstrates this subtle treatment, addressing responsibility of civil order - in addition to the criminal - related to homicide. [5]

[5] Other legal documents came to support the personal injury until the promulgation of the Constitution. On this track, shown as an example the Decree-Law 7.661 (Bankruptcy Law), Law 4.117 (Brazilian Telecommunications

Evidently, however, those sparse indications did not ensure applicability to the institution. For that reason one can claim that the placements of the Constitution of 1988 have been decisive, especially in its 5th article, to the full reception of personal injury. In 2002, the Civil Code would also regulate the institution, punctuating the line between this document and the Constitution, both in the letter of the law and in its application. Teaches, in this respect, Gustav Tepedino (2002, p. 113):

> It seems essential to remain with an alert behavior and to be permanently critical when it comes to the Civil Code so that, in order to give it the maximum social efficiency, it won't lose sight of the values enshrined in the civil and constitutional order.

Therefore, the protection of personal rights - which results in personal injury - seems to find space in this new full legal cosmos. This porosity seems to have led the legislature to not correctly define what should be indemnified as personal injury, nor state formulas or tax criteria on how should be calculated the indemnity value deriving from such damages.

Therefore, it has been in charge of the doctrine and jurisprudence the construction of the terms by means of which the institution will be defined. For the analysis of these contributions it is necessary to face the debate that deals with the effective implementation of the personal injury, abandoning the fear that resembles it to an industry.

## 3. MORAL DAMAGES IN RESPECT OF CIVIL RESPONSIBILITY

Classically, it introduces the topic of civil responsibility by the analysis of assumptions to indemnify. In this core participates the unlawful act, the agent act or omission, the fault, the causal relation and the damage - where it includes, in addition to patrimonial, the private.

Although the purpose of this article doesn't include the explanation of each one of these categories, it is worth reviewing them briefly. Francisco Amaral (2006) explains that the unlawful act is the one practiced in violation of a legal or contractual duty, resulting in damage

---

Code), Law 4.737 (Election Code), Law 5.250, with provisions to protect the honor and reputation against untrue information unreported; and the Law 5.772, which provided legal protection for intellectual property.

to another. The author puts the opposition to a legal duty, the offense to an absolute subjective right, the violation of legal rule that protects foreign interests and the abuse of rights as generators of illegality.

The agent can also portray the event of unlawful acts or when it is omitted. This conclusion is reached through the analysis of Article 186 of the Civil Code of 2002, dispositive which houses conducts of omission and commission in broad spectrum[6].

As for fault and causal relation, both have received wide attention because of the doctrinal innovations brought by the appreciation of the so called objective guilt[7]. It is possible to study the fault from two angles: objective and subjective. The last one is largely committed to the psychological state of the subject, questioning about its due diligence to make a certain conduct. On the other hand, the objective guilt may be inferred from the concrete action of the subject, regardless of fault, protecting, in this case, the victim.

About causal relation, Caio Mário da Silva Pereira (2000, p. 84) considers it as "the most delicate of the civil responsibility elements and the harder to be determined." That's because the institution proposes to tie precisely the action - or omission - of the agent to the result caused. According to José de Aguiar Dias (2006), in an updated perspective, the Civil Code of 2002 adopts for the causal relation the theory of immediate causation, which requires the direct and immediate relation of cause and effect .

At last, the injury is analyzed, which notifies the offense from a legal right. To João de Matos Antunes Varella (2008, p. 592), "the injury is the loss in natura that the injured person has suffered, as a result of certain facts, in the interests (material, spiritual or personal) that the right violated or the infringed rule aims to protect. "

It is known that when it reaches material goods of the victim, remains determined damage to property, which is subdivided into material damages and future earnings, being the

[6] "Article 186. The one who, by voluntary action or omission, negligence or recklessness, violates the law and harm others, even if only in a personal matter, commits an unlawful act. "

[7] The objectification of guilt: in some cases, unnecessary to prove the related link. The theory of risk applies to illustrate this statement. Although consecrates the so called theory of guilt, which considers the causal relation, the Civil Code provides, in Article 927, in which case the agent, due to the risky activity that practices and for which receives profits , remains liable for harmful damages caused .

first one lost due to the illegality and the last one the importance that it has failed to see because of the offense.[8]

However, the damage suffered can be identified beyond the patrimonial scope. It can configure, therefore, personal injury, whose object of guardianship binds to its own constitutional foundation, as shown in the definition of Celina Maria Bodin de Moraes (2003, p. 327):

> Personal injury is damage to any of the component aspects of human dignity - dignity that is based on four substrates and, therefore, embodied in all the principles of equality, psychophysical integrity, freedom and solidarity.
> Circumstances that reach the person in his/her human condition, which deny this quality, will automatically be considered violative of his/her personality and, if realized causing personal injury, to be repaired.

Therefore, in addition to the classical doctrine, according to which the personal injury would remain delineated only from the pain and suffering caused to a person, it seems preferable to harness over the constitutional principles of psychophysical integrity, equality, freedom, social and family solidarity and, especially, dignity of the human person.

This choice is consistent in large-scale with the constitutional tendency found in the private law. Weighs, therefore, one of its most intrinsic profiles: an opening that demands analysis of the concrete case, then gaining prominence the jurisprudential teachings, instead of the cold detention promoted by the letter of the law (Moraes, 2007).

## 4. INDEMNITY AMOUNT: THE PERSONAL INJURY IN NUMBERS

In a commendable lecture by José Peres Gediel (2010) at Universidade Federal do Paraná, it was mentioned the difficulty of the movement of *from value to price*, referring to the pecuniary quantification of the personal injury. This is because in the Civil Code it is not well

[8] To illustrate the explanation, we make use of the following example: if A, in a traffic accident, causes damage to vehicle B, taxi driver, due to reckless action, the duty to indemnify is needed. The actual damage shall include the repair of the vehicle. In the other hand, the future earnings will try to cover the amount that B will cease to accrue, since, being a taxi driver, he/she needs the vehicle to develop his/her activity.

described how to translate the personal injury into price, resulting in little chance of beacon for the magistrate.

Valuing the negative effects of an injury in a legal culture that emerged in the context of personality devaluation is only possible from the doctrinal and jurisprudential aid. About this difficulty Maria Celina Bodin de Moraes (2007, p 43) manifests:

> The human person is distinguished by 'a single substance, a quality that is only addressed to humans: a dignity inherent to the human person', while things have price and no dignity. It turns out that this moral value, interior, represented by dignity 'is infinitely above the value of goods because it doesn't admit, unlike the latter, to be replaced by equivalent.

The inaccurate understanding of fundamental rights, and how they are individually and socially absorbed, extends sometimes to the judge and the lawyers. How, after all, can the hard way from value to price be traced?

In this matter, it is important to examine the nature of the indemnity that comes from personal injury. The doctrine converges to characterize the indemnity as compensation for property damage, but it is discussed, with respect to personal injury, whether it is compensation or satisfaction to the victim, in other words, if it is penalty or compensation (BRIZ, 1993).

Yussef Said Cahali (2000, p. 175) opens three possibilities for functional understanding of the institution, stating that "the personal injury indemnity performs a triple function: repair, punish, admonish or prevent."

In this sense, the case law has proclaimed that both punitive - for educational purposes, to discourage the conduct of the offender - and compensatory - to satisfy the victim - matter. As an example, we quote the following decision:

> CIVIL APPEAL - DESCONSTITUTION ACTION WITH INDEMNITY FOR DAMAGES - CIVIL RESPONSIBILITY - UNLAWFUL CONDUCT OF THE AGENT - PERSONAL INJURY CAUSED - CAUSAL RELATION - OBLIGATION TO INDEMNIFY - INDEMNITY QUANTUM - PROPORTIONAL AND REASONABLENESS PRINCIPLE - AFFIRMATION OF THE JUDGEMENT.
> For fixing the indemnity quantum for the personal injury caused, the judge must approach carefully to the victim need to compensate the shock suffered and the appropriate amount to the discouragement of the unlawful conduct, always attentive to the reasonableness principle (TJ-MS. Civil Appeal 2010.030202-2/0000-00, Third Civil

> Panel. Judge who delivers the opinion: Rubens Bossay Bergonzi. Judged on October 19, *2010).*

Nonetheless this is the position of the majority doctrine, some scholars criticize the elite of punitive damages for personal injury, win which we can highlight the position of Schreiber Anderson (2007, p. 199-205), for whom the Civil Code of 2002 would exclude from the personal injury calculation the punitive aspect by providing that "indemnity is measured by the extent of the damage" (Art. 944, CC). Also, the author indicates that the so-called *punitive damages* focus on the legislative impedment that seals enrichment without purpose (Art. 884, CC).

In this sense, we also quote Celina Maria Bodin de Moraes (2007, p. 331-332), for whom:

> Only the elements pertaining to personal conditions of the victim and the scale of the damage, the latter corresponding to both its social repercussions and its severity, should be taken into account to finally settle the indemnity, in particular, based on the relationship between such components. Therefore, for example, the judge may decouple each of these two variables in many others, but should always examine the situation before the victim. In fact, one has to analyze the situation before, to find what is the measure (extension) of the damage to the person of the victim.
> Only then is possible to start solving the 'quantum debeatur' problem and find a level of compensation that is, in this case, efficient and adequate.

Anyway, according to Judith Martins-Costa (1991, p. 34-35), "the damage system of repair or prosecution rests precisely on the notion of justice as balance, *epicikia*, harmonious relationship between the whole and the parts". Therefore the binomial that the agreed price can neither be so negligible that it does not meet the victim, nor so high that prevents its payment by the offender.

So, it has to assure that the repair of personal injury cannot forget the complexity of the theme in question, which unfortunately occurs with some frequency in some courts, that have marked an implausible path in the field of personal injury. Maria Celina Bodin de Moraes (2007, p. 37) shares this position, as follows:

> Using, in most cases, only the generic arguments of "reasonableness" and "good sense", and almost always based only on intuition, the determination of the due amount - composed by the compensatory amount added to the punishment award - is not tied to

> any relationship of cause and effect, coordinated with the facts arising in the process, leaving no detail in the path that leeds the judge to allocate that amount, rather than any other.

In any case, being the personal injury in this proceeding illuminated by the Constitution of 1988 and the full reparation to the victim, it is possible to assert that, in light of the doctrine of Ingo Wolfgang Sarlet (2002), the function of State powers is to protect the dignity of the human person, as well as the doctrinal services function is to ensure its defense. However, it is notable, that the human person here refers not to an abstract person, to the metaphysical subject of rights, but to the concrete person, well regarded by Edson Luiz and Carlos Eduardo Fachin Pianovski Ruzyk (2008) the *correlational subject*[9] understood within his/her factual events real needs.

## 5. THE MYTH OF THE PERSONAL INJURY INDUSTRY

### 5.1 The fears of doctrine

In the United States, the personal injury receives heavy punitive load. Known as *"punitive damages"*, whose purpose is to prevent damage generator acts. Admittedly, the American courts grant millionaire amounts in causes of this nature.[10]

Alerted to the trend of the country, many national authors began to prophesy, based on the wave of actions claiming personal injury, that enormous amounts would be deferred to its respective applicants, sparking interest of reprehensible nature, in certain subjects of, having suffered setbacks, would have motif to argue the content, fitted by personal injury, to earn large amounts of money.

Accordingly, Schreiber Anderson (2007, p. 186) asserts:

---

[9] According to the authors, the concept of the subject to be seized by law must relate to the human person specifically considered, and not the subject of rights codified, fruit of the "pandectista" rationality that reduces life to abstract legal relationship, in such a way that the human being dignity *"gaugeable in meeting the needs that enable the subject to develop effective freedom - not only present in a formal context, but relies too in the effective presence of the material conditions of existence that ensure the viability of the real exercise of freedom. "* (FACHIN; PIANOVSKI, 2008, p. 108-109).

[10] Some examples: Leonard Ross x New York Times, which earned US$ 705 million in damages, Richard Sprague x Philadelphia Inquirer, which earned US$ 34 million; Houston Money Management x Wall Street Journal, which earned US$ 232 million in damages.

> More than a concern with the exponential growth of the number of indemnity acts for personal injury, where the use of the term 'industry' is a front connection to its mechanical production, something artificial, with a view to making a profit, in a kind of capitalized approach of an institution ontologically existential. Although the concern is valid, under the scientific point of view, it is certain that, **at least in Brazil, its importance can not be exaggerated, since in most cases the result of the personal injury actions is more frustrating than effectively enriching.** (Author's highlight)

For some - most pessimistic - it is no longer a subject of mere fear. With relative ease, there are quite emphatic stating positions assuring, with certainty, that the personal injury industry is a fact to be faced by the Brazilian judiciary.

To quote, as an example, (i) the article *"The 'Personal Injury Industry' - Strategies for Companies to avoid being Targets of Process Avalanches of Procedure"*, posted on the website of the Order of Attorneys of Brazil, (ii) the headline "*Against 'Personal Injury Industry*'", published by the Gazeta do Povo on 27/08/2012, (iii) the Civil Appeal No. 70015366263, of the Rio Grande do Sul Court, and (iv) the Law 150/1999.

In the first article, Thaissa Taques states that the Brazilian judiciary is crammed by unfounded demands generated by the *'personal injury industry*", especially after the edition of the Consumer Code, which generated a mass of actions discussing personal injury, making the judiciary slow and causing "immeasurable damage to the business community" (TAQUES, s.d, p. 1).

In the article *"Against 'Personal Injury Industry'"*, Alexandre Costa Nascimento adds that the personal injury industry must be fought, even assuring that "experts say that such damage *[personal injury]* must be proved by the force of facts" (NASCIMENTO, 2012, p. 1).

However, in the Civil Appeal No. 70015366263, of Rio Grande do Sul Court, the Associate Justice Vincente Barroco de Vasconcellos, without bringing any technical or theoretical reference to its claim, assured in his vote that: "It should be repressed the personal injury industry that is currently overflowing the Courts divisions. It should be limited the refund of moral commotion condemnation to the species that really prove is necessary and due in the concrete case. " (TJRS, AC 70015366263, 15th CC, Judge who delivered the opinion Vicente Barroco de Vasconcellos, Judged on 07/06/2006).

Finally, the Bill 7124/2002 (PLS 150/1999), seeking to place a limit on the supposed "personal injury industry", tries to set maximums for personal injury compensation in its Article 7, featuring in its first paragraph that "low level offenses" must be compensated up to twenty thousand Brazilian reais, "medium level offenses" up to ninety thousand Brazilian reais and "high level offenses" up tow one hundred eighty thousand Brazillian reais.

As if the failed attempt of fixing a price control to personal injury weren't enough, the same Article 7 of PL 7124/2002, in its 2nd paragraph, provides that "in determining the compensation amount, the judge will take into account also the social, political and economic status of the people involved, the circumstances in which the offense or personal injury occurred, the intensity of the suffering or humiliation, the degree of deceitfulness or guilt, the existence of spontaneous retraction, the effective effort to minimize the offense or injury and the forgiveness, tacit or express," as if such criteria could safely define, absolutely, an offense as high, medium or low.

If the problem is reported in the law application ambit, it is of primary importance to analyze the direction of the jurisprudence regarding local damages. Through a brief presentation of concrete cases, it is intended to demonstrate that the personal injury industry is more folkloric than realistic.

### 5.2 The reflections in the jurisprudence

The Brazilian legal system is the result of a patrimonial tradition that counts - at least for now - with little experience in dealing with areas that are beyond this orbit. The insertion of personal injury as an express possibility in our system - especially as it was made, without listing objective criteria for characterizing and quantifying value - did join a number of applications claiming indemnity for extra patrimonial damages in court. The period between 2005 and 2010 indicated an increase in actions of this nature, in the Rio de Janeiro State Court of Justice, equivalent to 3.607% (CONJUR, 2011, p. 1).

The perception was criticized by the jurists. The Associate Judge Décio Antônio Erpen said, in an article published in Zero Hora Newspaper, on October 10th, 1998:

> Without a scientific definition of what is really a personal injury, without establishing range areas and legal parameters for its quantification, it allows fir the dangerous and unpredictable subjectivism of the case, putting the judge in an uncomfortable position. The judge, who must be the executor of the rule, now personalizes it. (...). The bellicose current, if successful, will generate an intolerant society, in which it will promote hate, rivalry, seek for advantage over others or even narcissistic exaltation. **The promising personal injury will end in this sad picture.** (Author's highlight)

Apart from this, two situations deserve special attention: in 1998, the date when the article above was published, the expression "personal injury industry" already occupied the national legal dictionary. Furthermore, characterizing it as "promise" also deserves a highlight. After all, is it about a truly lucrative stock market or distrust without concrete support?

Despite the existence of decisions granting greater indemnities, unlike of what it suggests, they are granted only in extreme cases, as in the case of the victim's death by the offender's fully proven guilt and in personal injury convictions.

In a paradigmatic case of personal injury conviction, judged in 2011 by the Federal Superior Court of Appeals, the offender guilty for the accident was driving faster than the speed allowed on site and ended up running over and killing a woman. That led to the offender's conviction to pay five hundred minimum wages (R$ 272,500.00 - two hundred and seventy-two thousand five hundred Brazilian reais) for personal injury to the victim's family (STJ, 2011, p. 1).

In another landmark case, judged in 2012 by the Federal Superior Court of Appeals, the business group Lima Araújo Agropecuária was ordered to pay R$ 5,000,000.00 (five million Brazilian reais) as personal injury. Despite of the millionaire value of the compensation, it appears that its origin lies in the fact that the business group has reduced 180 (one hundred eighty) workers to conditions analogous to slavery (SENATE, n.d., p. 1).

Forensic Practice proves, indeed, much more a fear than reality. Therefore, it is explicit the Judiciary inexperience in dealing with extra-patrimonial damages. As an example, the following decision was selected. This is the case in which a family photo was used in flyers of an envent in Rio Grande do Sul state without permission. Personal injury was claimed, but it was understood that the family should be proud to be selected to illustrate the local culture:

> PERSONAL INJURY. RIGHT TO PRIVACY. PUBLICITY RELEASE OF FAMILY PHOTO OBTAINED IN PUBLIC EVENT. NON-OCURRANCE OF NEGATIVE FACT THAT CONFIGURES INDEMNITY.

> The advertising image should always be authorized. However, there is no injury to compensate if this exposure does not result in negative or derogatory fact to the authors, who at the time were attending the event of large public access. (TJRS. AC 70008025348, 10th CC, Justice who delivers the opinion José Conrado de Souza Junior, judged on 15/04/2004).

In that judgment, reports still that:

> On the other hand, there is not a single line in the initial regarding the manner in which the defendants had been injured in their moral or honor. And this could not happen. Contrary to the claims, I believe that the average citizen would be honored to illustrate the promotion of the largest agricultural fair in Latin America, especially when it highlights the traditions of Rio Grande do Sul state, except, of course, if they had some fair and legal reason to not want to appear in public, which was not demonstrated or even mentioned. (TJRS. AC 70008025348, 10th CC, Judge who delivers the opinion José Conrado de Souza Junior, judged on 15/04/2004).

In another case, the Rio de Janeiro State Court of Justice excluded the indemnification amount payable in respect of personal injury to a famous actress on the grounds that, although she had not allowed the newspaper to publish a photo where she was naked, as she was a beautiful woman, it was not evident pain or suffering that justified the occurrence of personal injury to be repaired. In this case, the decision was reversed, by majority vote, by the Federal Superior Court of Appeals:

> The Court a quo, Judge who delivers the opinion, the eminent Associate Justice Wilson Marques, reversed the judgment, in this particular [to exclude the amount payable in respect of personal injury], according to the following grounds:
> "*The personal injury, as known, is one that entails, for whom suffers the damage, great pain, great sorrow, deep sadness, much embarrassment, shame, humiliation, suffering.*
> ***In the circumstances of the concrete case, it is unclear how the non-consented use of the author's image may have entailed her pain, sadness, sorrow, grief, shame, humiliation.***
> *Rather, the view of her beautiful body, of which she, with justifiable reason, is certainly very proud, naturally gave her much joy, cheerfulness, contentment, satisfaction, elation, happiness, that was just not complete because of the lack of payment that she deserved for the non-consented use of her image.*
> ***Only ugly woman may feel humiliated, embarrassed, vexed to see her naked body plastered in newspapers or magazines. The beautiful, no.*** *(…)If the author was an ugly woman, fat, full of stretch marks, cellulite, riding breeches and trimmings, the publication of her naked photo - or almost - in a major newspaper, certainly would bring her a lot of embarrassment, great humiliation, huge embarrassment, countless sufferings, to justify - then yes - her claim for personal injury compensation, to serve her as alleviation of the damage suffered.* ***In this case, however, involving one of the most beautiful women in Brazil, nothing justifies such request, exactly for the absence here of personal injury to be indemnified****."* (…)

> The magazine, which was demanded to be sealed, was only allowed to publish the photos in the artistic context that they were produced, without concomitant dissemination of posters; it was the author's feeling of personal dignity that demanded this caution.
> The publication of posters and their full disclosure by daily newspaper certainly defied this sense of personal dignity, causing great moral suffering - that should be compensated - by the amount of R$ 50,000.00 (fifty thousand Brazilian reais), in terms of the Panel's consensus. (STJ. REsp 270 730, Judge who delivers the opinion Minister Carlos Alberto Menezes, Judgment issued by the Minister Nancy Andrighi, judged on 19/12/2000). (Author's Highlight).

In some cases, the personal injury industry doesn't seem to be a truly profitable business. The next decisions demonstrate that some values set in court, often in cases that generate notorious personal injury, are unattractive. This perspective was analyzed in a report published on the website of the Regional Labor Court of Appeal's of the 4th Region (TRT4, 2012, p. 6):

> After a year and a half working for the lumber dealer Woodgrain do Brasil Ltda., a former employee claimed in court that she developed **occupational disease due to repetitive physical effort.** Medical expertise proved the existence of synovial cyst and tendonitis of the right wrist - injuries that have relation with the tasks of the "molding" official function in the company.
> The employee asked for indemnity for personal injury in the amount of 100 federal minimum wages, reimbursement of medical treatments and life pension equal to 50% of the last salary. With the help of a witness, further proved that there was no gymnastics or rest breaks in the company.
> In the Regional Labor Court of Appeals of the 9th Region (PR**), the company was ordered to pay R$ 1,000 [one thousand Brazilian reais] in personal injury.** As Brazilian law does not adopt objective criteria for fixing the indemnity amount, the Court took into account the degree of the company's fault, the impact of the damage in the employee's assets and the pedagogical nature of the measure, among other factors.

Also surprising was the court decision that granted the amount of R$ 2,500.00 (two thousand five hundred Brazilian reais), by means of personal injury, for two families that on the occasion of their beloved's funeral noted that the hospital where the bodies came from had exchanged bodies. Follows the excerpt from the report published on Rio Grande do Sul Court of Appeals website (TJRS, 2010, p. 1):

> The authors filed a claim for damages against the establishment for extra-patrimonial damages. The author's part informed that in the day after the completion of surgery, the patient died of cardiovascular problems. After receiving the death news, the family began the arrangements for the funeral ceremony, having problems at the Hospital with the release of the death certificate. The body exchange was seen only after the arrival of the corpse to the crematorium.

> The claim was judged granted in 1st Degree, with sentencing the defendant to pay R $ 2,500.00 for each of the three authors for personal injury.

It seems clear that besides the great increase in the number of applications related to personal injury, these claims do not seem to move gears in order to resemble an industry.

In this sense, Anderson Schreiber states (2007, p. 186):

> Faced with a reasonably contained number of eccentric cases, the legal community and especially the lawyers community are pointing their weapons against the proper expansion of the damage compensation. **The target seems entirely wrong, since the expansion of compensation corresponds to a legitimate extension of the individual and collective interests tutelage, and, therefore, being its baseless invocation the cause of troubles that afflicts the doctrine and trivialize the courts role.** Incorrect, therefore, are all measures that have been proposed against the expansion of damage in general, ranging from restriction of interests previously typified to limited indemnities by unreasonable an even unconstitutional maximum rates. (Author's highlight)

It is therefore clear that, first, the Judiciary, acting in its field of discretion, often does not even recognize the disrespect for human dignity in cases involving personal injury, and second, when recognizing them, recurrently grants petty amounts to the victims, providing real disservice to the integral repair function. For an order that aims to put more emphasis on "being", and less on "having", still seems to situate the damages in a locus far from desirable.

## 6. CONCLUSION

The cases of mismatch between doctrine and jurisprudence in Brazilian law are not few. However, in the personal injury perspective, both have shown exaggerated fear, ignoring that the topic, because of one facet of this contemporary law that attempts to balance extra-patrimonial issues, merits further study in order to develop.

Now, if assured the tutelage of personal rights and protection to the person specifically considered, it seems evident the need to pay attention to full compensation for damages to the person. It is possible to extract from the analysis above that, if on one hand the indemnity is

accepted, on the other, little is done, in fact, for the protection of the victim, in order to enjoy the due satisfaction.

That is why personal rights keep a paradox. They are existential, having the dignity of the human person as object and foundation of their tutelage. There lies the problem for the law applicator, to decipher them numerically.

Furthermore, it is expected that the judiciary receives in a better way the new proceeding and the renewed doctrine which was built from it. Working with clauses and principles presuppose labor in the concrete case, therefore, the attempts to encapsulate personal injury and their indemnities - that ensure fundamental rights - in prepared formulas[11] are pitiful.

On the other hand, it is necessary to address the complexity of the issue by civil and constitutional bias. It is how Maria Celina Bodin de Moraes (2007, p. 241) states: "the more consistent criterion claims that indemnification will be the relevant event occurred according to a balancing of the interests at stake in the light of constitutional principles."

As already said, the human dignity was pointed as the foundation of personal injury. Therefore, it is impossible to imprison its complexity, since the very concept of dignity shows up as "fluid, multifaceted and multidisciplinary" (SZANIAWSKI, 2005 p. 140). And so, it is from its concrete side that the results will be extracted, and not from the mere mathematical reasoning.

Finally, there is an exempt: it is noticeable, in fact, a large volume of actions claiming personal injury. Needless to warn to the inflation in the Brazilian Judiciary's office, where the procedural economy proves to be absolutely necessary and becomes a legitimate concern for anyone following claims at trial that often result in nothing. Consequently, we hold that the lawyers are guardians of the institute, besides the judges, because they must guide their clients not to claim a nonexistent personal injury, under penalty of being convicted of bad faith litigation.

It should be noted, however, that the access of justice democratization and the person tutelage extension promoted by constitutional logic can't be taken as synonyms of a supposed "industry", and should not be confused with the trivialization of baseless judicial demands. In

[11] Unfortunate is such a complex reduction presented, for example, in the initiative of listing personal injury by the Federal Superior Court of Appeals (2009, p. 1), which, once published a table, presenting a note explaining that it was not properly a closed price-fixing, but a simple schematic summary of decisions regarding personal injury.

Brazil, the demands of personal injury are rather reflections of malabsorption of personal rights than effectively as means of profit to their authors, since its growth is not associated with the economic benefit received from the personal injury.

In this sense, it defends the primacy of "being" over "having", interceding by an a axiological reading of constitutional nature over civil responsibility, in particular over personal injury, which is strongly linked to the existential aspect of the Law and, therefore, requires the removal of the closed formulas and reductionist applications in relation to the complexity of its own foundation.

For that reason, doctrine, legislation and case law should be, together with the parties and their lawyers, committed to the human dignity protection of the person specifically considered, seeking, in harmony, the personal rights tutelage and avoiding demands for no good reason, therefore contributing in the construction of a place in the sun for another trait of this existential profile of Civil Law.

## 7. REFERENCES

AGUIAR DIAS, José de. **Da Responsabilidade Civil**. 11ª ed. Rio de Janeiro: Renovar, 2006.

AMARAL, Francisco. **Direito Civil – Introdução**. 6ª ed. Rio de Janeiro: Renovar, 2006.

ANTUNES VARELA, João de Matos. **Das Obrigações em Geral**. Vol. I. Portugal: Almedina, 2008.

BRIZ, Jaime Santos. **La responsabilidad civil**. 7ª ed. Madrid: Editora Montecorvo, 1993.

CAHALI, Yussef Said. **Dano moral**. 2ª ed. São Paulo: Revista dos Tribunais, 2000.

CONJUR. **Cresce Número de Ações por Danos Morais no TJ-RJ**. Available at: <http://www.conjur.com.br/2011-ago-29/cresce-numero-acoes-danos-morais-tj-rio>. Published in: 29/08/2011. Accessed in: 12/09/2012.

ERPEN, Décio Antônio. **A indústria do dano moral.** Zero Hora, Porto Alegre, 10 de outubro de 1998.

FACHIN, Luiz Edson. Pressupostos hermenêuticos para o contemporâneo Direito Civil brasileiro: elementos para uma reflexão crítica. *In*: **Revista do Tribunal Regional Federal da Quarta Região**, ano 23, nº. 80, Porto Alegre, 2012, p. 49-58.

_____. Transformações do direito civil brasileiro contemporâneo. *In*: TEPEDINO, Gustavo *et al* (coord.). **Diálogos sobre o Direito Civil**: construindo a racionalidade contemporânea. Rio de Janeiro: Renovar, 2002.

_____; PIANOVSKI RUZYK, Carlos Eduardo. A dignidade da pessoa humana no direito contemporâneo: uma contribuição à crítica da raiz dogmática do neopositivismo constitucionalista. *In*: **Revista Trimestral de Direito Civil**, v. 35, Rio de Janeiro, 2008.

GEDIEL, José Peres. Palestra proferida em 22 de outubro de 2010, no II Congresso Internacional de Direito Civil da Universidade Federal do Paraná.

HIRONAKA, Giselda Maria Fernandes Novaes. Responsabilidade Pressuposta: evolução de fundamentos e de paradigmas da responsabilidade civil na contemporaneidade. *In*: FACHIN, Luiz Edson *et al* (coord.). **O Direito e o Tempo**. Rio de Janeiro: Renovar, 2008.

LÔBO, Paulo Luiz Netto. **Danos morais e direitos da personalidade**. Available at: <http://direitoachadonasarjeta.wordpress.com/2008/10/25/danos-morais-e-direitos-da-personalidade/>. Published in: 25/10/2008. Accessed in: 11/09/2012.

LORENZETTI, Ricardo Luis. **Las normas fundamentales de Derecho Privado**. Buenos Aires: Rubinzal-Culzoni Editores, 1995.

MARTINS-COSTA, Judith. **Os fundamentos da responsabilidade civil**. Revista Trimestral de Jurisprudência dos Estados, São Paulo, v. 93, ano 15, out. 1991.

MORAES, Maria Celina Bodin de. A constitucionalização do direito civil e seus efeitos sobre a responsabilidade civil. *In*: SOUZA NETO, Cláudio Pereira *et al* (coord.). **A constitucionalização do direito**: fundamentos teóricos e aplicações específicas. Rio de Janeiro: Lúmen Juris, 2007.

_____. **Danos à Pessoa Humana**: uma leitura civil-constitucional dos danos morais. Rio de Janeiro: Renovar, 2003.

NASCIMENTO, Alexandre Costa. **Contra a 'Indústria do Dano Moral'**. Available at: <http://www.gazetadopovo.com.br/economia/conteudo.phtml?id=1290786&tit=Contra-a-industria-do-dano-moral>. Published in: 27/08/2012. Accessed in: 11/09/2012.

PEREIRA, Caio Mário. **Responsabilidade Civil**. 12ª edição. Rio de Janeiro: Forense, 2000.

PIANOVSKI RUZYK. Carlos Eduardo. Transformações do direito civil brasileiro contemporâneo. *In:* TEPEDINO, Gustavo *et al* (coord.). **Diálogos sobre Direito Civil**: construindo a racionalidade contemporânea. Rio de Janeiro: Renovar, 2002.

SARLET, Ingo Wolfgang. **Dignidade da pessoa humana e direitos fundamentais na constituição federal de 1998.** Porto Alegre: Livraria do Advogado, 2002.

SCHREIBER, Anderson. **Novos Paradigmas da responsabilidade Civil.** São Paulo: Atlas, 2007.

SENADO. **Condenação é comemorada**. Available at: <http://www.senado.gov.br/NOTICIAS/JORNAL/EMDISCUSSAO/trabalho-escravo/leis-e-escravidao/condenacao-e-comemorada.aspx>. Accessed in: 05/01/2013.

STJ – SUPERIOR TRIBUNAL DE JUSTIÇA. **STJ busca parâmetros para uniformizar valores de danos morais**. Available at: <http://www.stj.jus.br/portal_stj/publicacao/engine.wsp?tmp.area=398&tmp.texto=93679>. Published in: 13/09/2009. Accessed in: 11/09/2012.

_____. **Ministro segue método bifásico e fixa dano moral por morte em 500 salários mínimos**. Available at: <http://www.stj.jus.br/portal_stj/publicacao/engine.wsp?tmp.area=398&tmp.texto=101710>. Published in: 06/05/2011. Accessed in: 05/01/2013.

SZANIAWSKI, Elimar. **Direitos de personalidade e sua tutela.** 2. ed. São Paulo, Revista dos Tribunais, 2005.

TAQUES, Thaissa. **A 'Indústria Do Dano Moral' – Estratégias para Empresas não Serem Alvos de Avalanches Processuais**. Available at: <http://www.oab.org.br/oabeditora/revista/users/revista/1242741776174218181901.pdf>. Accessed in: 11/09/2012.

TEPEDINO, Gustavo. Crise de fontes normativas e técnica legislativa na Parte Geral do Código Civil de 2002. *In*: **Revista Forense**, v. 364, Rio de Janeiro, nov./dez. 2002.

TJRS – TRIBUNAL DE JUSTIÇA DO RIO GRANDE DO SUL. **Hospital condenado por troca de cadáveres**. Available at: <http://softjuri.blogspot.com.br/2010/06/tjrs-hospital-condenado-por-troca-de.html>. Published in: 08/06/2010. Accessed in: 04/09/2012.

TRT4 – TRIBUNAL REGIONAL DO TRABALHO DA 4ª REGIÃO. **JT rejeita pensão a empregado com LER que mantém capacidade de trabalho**. Disponível em: <www.trt4.jus.br/ClippingPortlet/download/19.03.2009.doc>. Published in: 19/03/2009. Accessed in: 04/09/2012.