v. 5, n. 8, 2025

Scientific Journal of Applied Social and Clinical Science

THE PRINCIPLE OF FULL REPARATION: FOUNDATION, LIMITS AND CONTROVERSIES IN BRAZILIAN LAW

Lucas Alem Martins

Acceptance date: 12/06/2025

Abstract: This paper examines the principle of full reparation and its role in civil liability. The study starts from the realization that the search for full restitution of the injured party to the *status quo ante* represents not only an ideal of corrective justice, but also a practical challenge in the face of the diversity and complexity of the damages currently faced. Initially, the methods of reparation recognized by the doctrine are discussed, differentiating between specific reparation and pecuniary reparation. Next, the historical development and foundation of the principle of full reparation is analyzed, with emphasis on its enshrinement in the 2002 Civil Code and its link to the idea of corrective justice. The main controversial aspects of full reparation in Brazilian law are also analyzed, such as equitable reparation in the civil liability of incapacitated persons, the general clause of equitable reduction of compensation and the limits imposed by concurrent fault. The conclusion is that an in-depth understanding of the principle of full reparation allows for a fairer and more efficient application of civil liability, reconciling the effective protection of the victim with the limits imposed by the legal system and the peculiarities of each specific case.
Keywords: Full reparation, civil liability, compensation, corrective justice, equity, Civil Code.

INTRODUCTION

The principle of full reparation occupies a central position in the civil liability system, reflecting not only an ideal of justice, but also a practical requirement in the face of the growing complexity of damages and the multiplicity of interests protected by the law. In a scenario in which the damages suffered by victims are increasingly varied and often difficult to measure, it is essential to understand how the Brazilian legal system seeks to ensure full restitution for the injured party, as well as the limits and controversies surrounding the implementation of this principle.

The purpose of this paper is to study the principle of full reparation in the context of civil liability, with special attention to its foundations, its historical evolution and the practical challenges of its application. The aim is initially to examine the methods of reparation provided for in doctrine and legislation, and then to delve deeper into the principle of full reparation, highlighting its enshrinement in Brazilian law and its relationship with the idea of corrective justice. Next, the main controversial aspects of the subject will be addressed in the light of the 2002 Civil Code, such as compensation by equity in the civil liability of incapacitated persons, the general clause for reducing compensation and the limits imposed by concurrent fault.

The importance of the subject lies precisely in the need to improve the effectiveness of reparation, in order to ensure that the victim is, as far as possible, restored to the *status quo ante*, without this entailing unjust enrichment or disproportionate solutions. At the same time, it must be recognized that the application of the principle of full reparation is not without its difficulties and controversies, requiring the jurist to be sensitive and technically rigorous in order to deal with the limits imposed by the legislation and the peculiarities of each specific case.

Firstly, the aim is to present the modes of reparation and their evolution; then to discuss the foundation, scope and justification of the principle of full reparation; and finally to analyze the main exceptions and controversies brought about by the Civil Code of 2002. The aim is to offer a critical and up-to-date view of the subject, contributing to the debate on the challenges posed by contemporary reality.

METHODS OF REPARATION

The primary function of civil liability is to restore the victim to the situation they would have been in had the damage not occurred. For this reason, reparation is measured by the extent of the damage[1] so that it corresponds to all the damage suffered, which is why it is said that reparation must be comprehensive.

It is important to clarify that this is not the moment when the elements of civil liability are measured and, consequently, the duty to make reparation (*an debeatur*), but rather a moment after this has been established, when the amount of reparation (*quantum debeatur*) is discussed[2] , a phase which has not received the same attention and study from doctrine or jurisprudence as the previous phase.

Thus, once liability has been characterized, it is up to the agent to re-establish the legal--economic balance broken by the damage. In this context, the principle of full reparation prevails, or also the principle of equivalence between the damage and the compensation, which "seeks to place the injured party in a situation equivalent to the one they were in before the unlawful act occurred, directly linked to the very function of civil liability, which is to make the effects of the damaging event disappear as far as possible"[3].

The way in which damage is repaired consists of determining the content of this obligation, so there are two main forms of reparation: specific or natural reparation (*in natura*), and reparation in kind or by equivalent in money.[4]

Under the natural reparation model, the injured party is given back the same asset that was taken from his or her estate[5]. In this way, reparation for the damage is carried out materially, making specific reparation the ideal form of reparation, as it better realizes the idea of commutative justice and the return to the *status quo ante*.[6]

Compensation in kind is a subsidiary form of reparation for damage, applicable when specific reparation is not possible or does not provide full reparation for the injured party.

As natural reparation is the most appropriate means of repairing the damage, allowing it to be effectively removed, the doctrine defends the adoption of this model as the main form of reparation. For this reason, attempts have been made to broaden the scope of Article 947 of the Civil Code, which at first was restricted to commercial liability, in order to provide a legal basis for this position.[7]

However, it is precisely the main and most attractive feature of this model of reparation that makes it limited in view of the numerous

1. DIREITO; CAVALIERI FILHO, 2011, p. 371

2. With regard to these two levels of analysis of civil liability, MONTEIRO FILHO points out that "it is necessary to clarify which are the two levels of successive investigation that it is now important to portray. The first involves demonstrating the assumptions of liability (damage, causal link and fault, when not dispensed with in objective cases). In fact, when faced with a reparation claim, the magistrate's first question is whether the assumptions that characterize the duty to compensate are present. In this context, basically two situations can occur: either the assumptions are proven, and thus the obligation to pay compensation arises; or they are not present, and there is no need to deal with compensation. The amount of the duty to make reparation is only investigated when we are faced with a situation that establishes the existence of the preconditions. And once this first level has been overcome (an debeatur), attention turns to the issue of assessing and quantifying the damage that has already been recognized. This is the second moment in the order of successive considerations in civil liability lawsuits (quantum debeatur), which will only be reached after successfully characterizing the assumptions." MONTEIRO FILHO, 2000, p. 124-125.

3. SANSEVERINO, 2010, p. 19

4. DINIZ, 2010, p. 135

5. Based on Carlos Alberto Ghersi, SANSEVERINO presents two factual possibilities for specific reparation. The first consists of repairing the same damaged property, preserving the essential elements of the damaged property and its functional faculties. This is the case, for example, of repairing the infiltration of a property or damage to the paintwork of a car. The second possibility is characterized by replacing the damaged asset with a similar asset with the same function. SANSEVERINO, 2010, p.39

6. MARTINS-COSTA, 2009, p. 144

7. SANSEVERINO, 2010, p. 38

Art. 947: If the debtor is unable to perform the service in the form agreed, it shall be replaced by its value in currency.

obstacles to its implementation. Since the content of the reparation is the damaged asset, the effectiveness of this model is linked to the nature of this asset, which is why it is more applicable to property damage.[8]

Given this relationship with the injured property, the possibility of specific reparation, its suitability and the real benefit to the injured party can only be assessed in the specific case, in which case it will be up to the judge to evaluate the interests of the victim - who may insist on natural reparation or prefer reparation in cash - and the onerousness of the measure for the debtor, since it can become excessive and disproportionate. [9]

These factors have led to pecuniary reparation becoming the most common form of reparation for damage, as it has greater practical advantages[10] , since it promotes reparation for damage by re-establishing the balance of assets through the payment of an amount equivalent to the extent of the damage suffered by the victim. In this case, it is interesting to clarify that reparation is a debt of value, since its direct object is not money, which is only a means of measuring the reparation payment[11]. By virtue of the principle of full reparation, this payment must not exceed the damage suffered by the victim, enriching them, nor fall short of the full extent of the damage, making the reparation incomplete and insufficient to fulfill its purpose.[12]

It can be seen, therefore, that in specific reparation it is easier to determine how the agent should compensate the injured party, since the reparation consists of restoring the same asset or replacing it with an equivalent. The same is not true of pecuniary recovery, in which the damage suffered has to be assessed in its entirety in order to determine what amount of money corresponds to full restitution of the injured party's assets.

In both forms of reparation, it is possible to see how the principle of full reparation is inserted as a fundamental criterion for determining the reparation due, highlighting the importance of this principle for the proper development of the main purpose of civil liability.

THE PRINCIPLE OF FULL REPARATION

The principle of full reparation (*restitutio in integrum*) or the principle of full reparation, or the principle of equivalence between damages and compensation, has the main objective of putting the victim in the situation they would have been in had the harmful event not occurred.[13]

The idea of erasing the damage by restoring the injured party to the *status quo ante* is one of the legal fictions on which the legal system is based, because, naturally, there are damages which, although they can be compensated, are truly irreparable, which is why this objective

8. Notwithstanding the insufficiency of specific reparation for off-balance sheet damage, there are remedial measures of this model that can be taken in order to repair the damage, such as retraction, rectification or even elimination of the unlawful act in cases of moral damage.

9. In certain cases, specific reparation is more beneficial to the injured party than a return to the state prior to the damage, e.g. replacing an old thing with a new thing of greater value. When faced with this situation, Aguiar Dias argues that it would be up to the judge to reject natural reparation or to determine this form of reparation by making the debtor make more reparation and then claim the difference in reparation later, in order to avoid undue enrichment. The solution is appreciated for giving primacy to natural reparation, but it is criticized that, in the face of difficulties in complying with specific reparation, the judge should order its replacement by pecuniary reparation, as provided for in article 947 of the Civil Code, in order to avoid prolonging the dispute with the calculation and collection of the difference. DIREITO; CAVALIERI FILHO, 2011, p. 439-440

10. SANSEVERINO, 2010, p. 40

11. DINIZ, 2010, p. 135

12. GAMA, 2011, p. 604

13. SANSEVERINO, 2010, p. 48

is achieved in an approximate or conjectural way[14]. Thus, as the primary function of civil liability is to make the most complete reparation for the damage, the principle is the main guideline for assessing the damage and setting the reparation, because if in practice it is not always possible to achieve full reparation, "the law should not for this reason fail to seek to come as close as possible to the best compensation, that is, the form or value that best suits the offended party"[15].

The principle of full reparation is present in both specific reparation and reparation in cash, although it is better realized in the first way, because the damage is materially repaired. However, specific reparation is not always enough to achieve full reparation for the damage, which can be demonstrated most clearly by Article 952 of the Civil Code, which, when providing for reparation in the event of usurpation or embezzlement, determines, in addition to restitution of the property, reparation for loss of profits and any deterioration of the property.[16]

It is in compensation in cash that the principle of full reparation is most useful in practice. It is in the case of pecuniary reparation that the task of assessing the extent of the damage is required in order to determine what amount will fully compensate for all the damage suffered.

Since Roman law - in which civil liability and criminal liability were confused in the face of the unity of the unlawful act - it has been proclaimed that "'*Restitutio in integrum in genere sic solet difiniri: Ut sit pristini status amisi recuperatio*' (full restitution can thus be defined: let it be the recovery of the primitive state of the lost)"[17]. However, it wasn't until the Renaissance, with the unification and generalization of tort through the advent of a general clause of subjective civil liability in the French Civil Code of 1804, that French jurisprudence and doctrine developed the principle of full reparation based on the general clause of liability (art. 1.382) plus a second article which provided, in a generic way, that reparation for breach of contract covered consequential damages and loss of profits (art. 1.149).

Although there was no provision similar to that of art. 1.149 for non-contractual liability, French doctrine does not dispute that it applies to other cases. On the contrary, there seems to be no doubt that the principle of *restitutio in integrum* is, at least implicitly, accepted by all French doctrine because it corresponds to a fundamental requirement of justice, with only objections as to the extent of its field of application.[18]

The French systematization influenced other modern legal systems, especially those of Roman-German origin, so that in Brazil the idea developed from a generic provision in Art. 22 of the Criminal Code of 1830[19] , through a mixed treatment of a general clause and typification of civil wrongdoing in the Civil Code of 1916[20] , and the Federal Constitution of 1988 which, overcoming the legal

14. MARTINS-COSTA, 2009, p. 143

15. CASILLO, 1994, p. 85

16. Art. 952. In the event of usurpation or encroachment, in addition to the restitution of the property, the compensation shall consist of paying the value of its damage and that due as loss of profits; if the property is missing, the injured party shall be reimbursed its equivalent.

17. CASILLO, 1994, p. 84

18. VINEY, 1988, p. 81-82

19. Art. 22: Satisfaction shall always be as complete as possible, and in the event of doubt shall be in favor of the injured party. To this end, the harm that results to the person and property of the offended party shall be assessed in all its parts and consequences.

As can be seen, there was an atypicality similar to that established by the French civil code, although there was still no definitive separation of civil and criminal wrongdoing.

20. Article 159 of the Civil Code of 1916 contained a generic concept of an unlawful act, but opted to typify the main compensable

debate on the subject, enshrined reparation for off-balance sheet damage[21] , until reaching the Civil Code of 2002 which, innovating in the matter, brought not only a general clause of subjective and objective civil liability[22] , but also the positivization of the principle of full reparation in the *caput of* art. 944, stating that "compensation shall be measured by the extent of the damage".

From the wording of the provision, it is clear that in the context of compensation, the focus of analysis should be on the damage and not on the offender, i.e. the law should look not at the person who caused the damage, seeking to measure their guilt, but at the damage in order to assess its extent.[23]

The *caput of* art. 944 of the Civil Code enshrines this understanding, clearly embracing the principle of full reparation, the foundation of which can be drawn from the Federal Constitution and one of the most basic principles of the legal system, or even, before that, from Aristotle's own conception of corrective justice.

For the philosopher, corrective justice is that which performs a corrective function in the relationship between individuals, seeking to maintain equality according to an arithmetic proportion, in such a way that it becomes indifferent whether the conduct is carried out by a good or bad man. In this sense, injustice is characterized by inequality, which, in turn, can result from damage that generates a "loss" and a "gain". This type of injustice is corrected through the middle ground between the greater and the lesser, that is, between the gain and the loss, in order to achieve justice through the equality existing before and after the damage.[24]

The requirement that there be correspondence between the reparation and the loss, as a way of providing equality between the moment before and after the damage demonstrates how the Aristotelian conception of corrective justice fits in with the principle of full reparation and the modern notion of civil liability.

In addition, the principle of full reparation can be seen in the constitutional protection of private property, more than that, in the very function of the legal system in not only seeking the harmonious action of each individual within their sphere of freedom, but also ensuring that any violation of the sphere of others is fully repaired.

Hence WALD's brilliant assertion that, with the principle of full reparation, the reparation function constitutes a true

> the constitutional principle of private property. Not compensating the victim is tantamount to denying or taking away this right.
>
> In this way, the obligation to compensate is nothing more than a guarantee of protection for the property that makes up an individual's assets, which is considered a projection of their own personality. [25]

parts in cases of homicide and bodily injury through articles 1.537, 1.538 and 1.539.

Art. 159. Anyone who, through voluntary action or omission, negligence or recklessness, violates a right, or causes damage to another, is obliged to repair the damage.

21. Art. 5 Everyone is equal before the law, without distinction of any kind, and Brazilians and foreigners residing in the country are guaranteed the inviolability of the right to life, liberty, equality, security and property, under the following terms:

V - the right to reply is guaranteed, proportional to the offense, in addition to compensation for material, moral or image damage;

X - people's privacy, private life, honor and image are inviolable, and the right to compensation for material or moral damage resulting from their violation is guaranteed;

Until the advent of the 1988 Constitution, Brazilian jurisprudence resisted recognizing moral damage, which was often assessed from a patrimonial perspective without it being possible to cumulate this damage with material damage. MONTEIRO FILHO, 2008

22. Art. 927. Anyone who, as a result of an unlawful act (arts. 186 and 187), causes damage to another, is obliged to make reparation.

Sole paragraph. There will be an obligation to repair the damage, regardless of fault, in the cases specified by law, or when the activity normally carried out by the author of the damage implies, by its nature, a risk to the rights of others.

23. ALVIM, 1972, p. 215

24. ARISTÓTELES, 1984, p.126-127

25. WALD, 2011, p. 53

This is why compensation is measured by the extent of the damage, as its aim is to maintain the integrity of all the assets and rights that make up the individual legal sphere of the injured party.

From this perspective, it seems clear that, according to the principle of *restitutio in integrum*, the limit of reparation is the damage itself, and it is up to the responsible party to repair "all the damage, but no more than the damage"[26]. It is based on this idea that SANSEVERINO argues that the damage suffered by the injured party does not only correspond to the minimum floor of compensation, but also to its maximum ceiling, thus the author lists three purposes, or functions, of the principle of full reparation:

> The full reparation of the damage must correspond to the totality of the losses effectively suffered by the victim of the harmful event (compensatory function), but may not exceed them in order to prevent civil liability from being a cause for the unjustified enrichment of the injured party (indemnity function), and a relationship of effective equivalence must be established between the compensation and the actual losses derived from the damage with concrete evaluation by the judge (concretizing function or real loss).[27]

In fact, compensation is the most expressive purpose of the principle of full reparation, however, the indemnity function deserves some consideration due to the practical aspects it exerts in determining the reparation due.

Based on this facet of the principle of full reparation, it must not exceed the extent of the damage, at the risk of giving rise to unjust enrichment of the victim. In this respect, full compensation for damage and illicit enrichment, although correlated, are not to be confused[28] , since the former prevents the latter from occurring.

One of the effects resulting from the purpose of compensation is the compensation of the advantages or benefits obtained by the victim as a result of the harmful event, which is called *compensatio lucri cum damno*[29]. Compensation occurs precisely to prevent the victim from being unjustifiably enriched after the damage has been repaired, because if the same event gives rise to damage and a benefit, repairing the damage without compensating the victim would generate undue enrichment for the injured party.

It should be noted, then, that the fundamental requirement for *compensatio lucri cum damno* is that the benefit and the reparation arise from the same fact, i.e. there must be identity of causes for both the damage and the advantage obtained.[30]

It is due to the lack of identity of causes that doctrine and case law have ruled out the possibility of compensation between the reparation and the benefits obtained by social security or damage insurance, since the harmful event is not the factual support of the benefit, but only the factual support of the legal rule that gives rise to it.[31]

26. VINEY, 1988, p. 81

27. SANSEVERINO, 2009, p. 58

28. Civil liability and unjust enrichment are two types of autonomous obligations. The first is aimed at repairing damage and the second at removing unjustified increases in assets, which is why it does not require the existence of damage. Thus, a fundamental difference is that "unjust enrichment acts on the patrimonial sphere of the enriched, determining the *restitution of* the unduly obtained advantage (*restitutio in integrum*) [*sic*], while civil liability has the function of repairing damages with the restoration of the injured party's assets to the state prior to the harmful event (*status quo ante*)". NANNI, Giovani *apud* SANSEVERINO, 2009, p. 61

29. This compensation is not to be confused with the compensation provided for in art. 368 of the Civil Code, in which there is a mutuality of credits and debits between individuals, since in *compensatio lucri cum damno* only the injured party's assets are considered, as they have obtained advantages and damages from the harmful event.

30. SANSEVERINO, 2009, p. 64-65

31. With regard to social security and damage insurance, the idea is that the benefit derives from a legal rule laid down in the

Another effect of the compensatory purpose of the principle of full reparation is the direct incompatibility of this principle with *punitive damages*, because if the extent of the damage acts as a limit to compensation, there is an obstacle to exceeding this value for punitive or preventive purposes.[32]

In view of the practical difficulty of accurately determining the extent of the damage and, therefore, the minimum and maximum compensation, it can be seen that the impossibility of compensation exceeding the damage due, rather than serving as a parameter for compensation, is sometimes used as a brake on the legitimate interests of the injured party, passing on to them the burden of uncertainty. For this reason, some scholars argue that, in the face of doubt, the judge's attention should be turned in favor of the injured party, even if there is a risk of excess compensation, because "the inverse risk of the victim receiving less than they are entitled to cannot be admitted"[33].

From this understanding comes the aphorism "*in dubio pro* creditoris"[34] , whereby, *when in* doubt, the decision is made in favor of the injured party and not the agent, because

> It is the victim, and not the offender, who should first and fully deserve the protection of the law and the legal system, whenever there are no secure and mathematical means of establishing the amount owed. All the judge's attention must be on the victim, because if there is a risk that the offender will pay more than they should, or that the victim will receive less than they are entitled to, it is not the defendant who should benefit. Anyone who commits an illicit act and assumes the duty to compensate for the damage caused must subject themselves to the risk of any excess. [35]

Given the practical difficulty of faithfully measuring the extent of the damage, as an effect of the principle of full compensation, it should be noted that the compensation owed to the injured party must be determined on a case-by-case basis by means of a concrete assessment by the judge. Thus, an abstract analysis of the issue and the pricing of compensation is ruled out from the outset, and the individualization of the property and non-patrimonial damage suffered is always required, with due attention to the specific case. [36]

agreement or regulation between the victim and the insurer or social security company, so that the occurrence of the damage would only be the fulfillment of the necessary condition for the payment of the benefit which, in reality, is a consideration for the amount paid by the victim to the insurer or social security company. Thus, for example, in car insurance, the compensation owed by the responsible party cannot be offset by the premium received by the victim, because, although it depends on the occurrence of the harmful event, the premium is a consideration for the amount paid by the insured party in the insurance contract, and this legal transaction is the cause of the premium and not the harmful event.

Furthermore, the fact that this is damage insurance, with the victim as the insured party, is relevant, because case law has established the understanding that it is possible to offset the compensation against the amount paid by the DPVAT, since, in general, as the insured party is the offender, the DPVAT would function as civil liability insurance, meaning that the benefit paid in favor of the victim derives from the benefit paid by the offender. Hence the STJ's Precedent 246, which states that "The amount of compulsory insurance must be deducted from the judicially established compensation".

32. Here the problem of reverting to the victim the increase in compensation for *punitive damages* with the aim of punishing the perpetrator and deterring similar conduct becomes clear. This is why, as is the case in US law, the increase in the amount due to this function must be set at the part of the amount corresponding to the reparation function. This is not the case in Brazilian courts. However, the relevance of the issue is obscured by the fact that *punitive* damages are associated with off-balance sheet damage, the nature of which makes it impossible to determine the economic value of the compensation limit.

33. CASILLO, 1994, p. 87

34. Arnaldo Marmitt explains that "the aphorisms *of in dubio pro creditoris* and *in dubio pro reo* are unmistakable. The latter has a totally different purpose, being applicable only in the criminal sphere, in the face of doubts as to authorship and materiality. The freedom of the citizen is protected here, since in compensation for an unlawful act there is a confluence of two private interests, placed on the same level with regard to matters of evidence". MARMITT, 2005, p. 377

35. MARMITT, 2005, p. 376

36. SANSEVERINO, 2009, p. 76-77

For this reason, VINEY argues that one of the main virtues of the principle of full reparation is the adaptation of reparation to the concrete situation of the damage by means of an objective criterion that provides greater security and reduces the uncertainties of an equitable criterion.[37]

However, there are some objections to the application of the principle. It is claimed that the principle is marked by its economic content, which is why its applicability is compromised in the field of off-balance sheet damage. In addition, the principle does not take into account the real needs of the injured party, the benefit obtained by the offender or their economic capacity or the degree of guilt of their conduct, which can lead to situations in which the lack of proportion between the reprehensibility of the conduct and the damage caused is an affront to fairness.[38]

It is in order to deal with this possible equitable disproportion that some authors see a solution to this problem in the sole paragraph of the aforementioned article 944 of the Civil Code. However, the sole paragraph of this article is highly controversial.

CONTROVERSIAL ASPECTS OF FULL REPARATION IN THE 2002 CIVIL CODE

The principle of full reparation plays an important role in determining the *amount of* reparation owed to the victim in order to restore them to the *status quo ante*. However, "while from the victim's perspective, the advantages of unrestricted enshrinement of the principle are evident, from the perspective of the agent causing the damage, its full and absolute adoption may constitute an exaggeration"[39].

It is for this reason that the Civil Code has established some exceptions to the rule of full reparation in which equity is used to set the amount of reparation. Among them, the main one is the possibility of reducing compensation when there is an excessive disproportion between the seriousness of the fault and the damage caused, provided for in the sole paragraph of art. 944 itself. In addition to this hypothesis, the Civil Code provides for compensation by equity in cases of civil liability of the incapacitated and concurrent fault, respectively in articles 928 and 945 of the Civil Law.[40]

In all these cases, the legislator entrusted the court with adapting the reparation to the specific case by means of equity, which, in this sense, plays an integrative role, serving as an instrument for the judge to draw up a solution that corresponds to the specificities of the specific case when the abstract application of the rule could not resolve.[41]

The exceptional use of equity in fixing compensation does not imply that the law should be departed from by giving the judge the power to judge the case arbitrarily according to their personal conception of justice. On the contrary, the decision must mitigate the abstract rigidity of the rule in a reasoned manner and in compliance with the legal criteria that authorized the trial by equity.[42]

37. VINEY, 1988, p. 83

38. VINEY, 1988, p. 84-85

39. SANSEVERINO, 2009, p. 80

40. In addition to these cases, there is reparation by equity in cases of offense to honor by libel, slander or defamation, and offense to personal liberty (arts. 953 and 954 of the Civil Code). However, in these cases it is not necessarily a question of mitigating the principle of full reparation, since, due to the nature of the damage and the cause, equity would have the role of modifying the tariff criterion previously laid down according to the penalty for the crime that gave rise to the offense.

41. CARVALHO FILHO, 2003, p. 88-89

42. SANSEVERINO, 2009, p. 93

EQUITABLE REPARATION IN THE CIVIL LIABILITY OF INCAPACITATED PERSONS

In the Brazilian legal system, the civil liability of incapacitated persons[43] is subsidiary. This is because, under Article 932, I and II of the Civil Code, the legal representative is held liable for unlawful acts committed by the incapacitated person, regardless of the representative's fault in the duty of supervision (Article 933 of the Civil Code)[44]. So, in principle, the person responsible for the incapacitated person is also responsible for the damage caused by the incapacitated person. However, art. 928 states

> Art. 928. The incapacitated person is liable for the damage they cause, if the persons responsible for them have no obligation to do so or do not have sufficient means.
>
> Sole paragraph. The compensation provided for in this article, which must be equitable, will not take place if it deprives the incapacitated person or the people who depend on them of what is necessary.

The liability of the incapacitated due to the absence of an obligation on the part of the guardian is more remote, since its incidence is restricted to cases of suspension of family power. The civil liability of the incapacitated person due to the insufficiency of the representative to pay the compensation is more common. In this case, the reparation is fixed by means of equity, taking into account the economic conditions of the parties in order to better adapt to the specific case and reconcile two objectives, that is, guaranteeing the livelihood and dignity of the incapable person and those who depend on them and, at the same time, providing the injured party with reparation for the conduct of the incapable person even in the absence or insolvency of the legal representative.[45]

It is important to note that, in this case, it is not necessarily impossible for the reparation set in equity to include all the damages suffered by the injured party, which should even be sought by the judge, as long as it does not financially harm the incapable person's livelihood.

GENERAL CLAUSE REDUCING COMPENSATION - THE SOLE PARAGRAPH OF ART. 944 OF THE 2002 CIVIL CODE

Of all the cases, this is the broadest and most controversial. Firstly, because there is unlikely to be any disproportion between the seriousness of the fault and the damage, and secondly, if not because of the terms or criteria adopted, at least because of the rationality of the provision. Let's see:

> Art. 944. Compensation is measured by the extent of the damage.
>
> Sole paragraph. If there is an excessive disproportion between the seriousness of the fault and the damage, the judge may equitably reduce the compensation.

From the wording of the sole paragraph, we can see that this is a general clause[46]. In this way, the wording of the provision is broad and generic, allowing it to be applied to a

43. Incapacity is characterized by the incapacity of the person causing the damage, which, as a rule, results from the absence of age (under 18) or mental sanity, arts. 3 and 4 of the Civil Code.

44. Art. 932: The following are also liable for civil reparation

I - parents, for minor children who are under their authority and in their company;

II - the guardian and curator, for wards and curatees who are in the same condition;

Art. 933. The persons indicated in items I to V of the preceding article, even if there is no fault on their part, shall be liable for the acts carried out by the third parties referred to therein.

45. SANSEVERINO, 2009, p. 134-135

46. According to AMARAL "general clauses are normative propositions whose hypothesis of fact (*fattispecie*), by virtue of their broad abstraction and generality, can govern a large number of cases, giving the interpreter greater autonomy in their creative function. They differ from legal rules in that the latter have a more precise, less vague structure. They present a certain

whole range of situations in which it will be up to the judge to adapt it to the peculiarities of the specific case and for doctrine and case law to better establish when there will be excessive disproportion, the meaning and degrees of fault, the damage involved, as well as how to proceed in the equitable reduction of compensation.

Among the elements that give rise to the application of the provision, the need for a significant disproportion between the degree of fault and the damage is fundamental to restricting the application of equitable reduction, since it is an exception to full reparation, the rule accepted by the *head of* the provision. Thus, it should be repeated, as there will generally be an imbalance between the degree of fault and the damage, it is required that the disproportion be excessive, manifest, i.e. in extraordinary situations.

The focus of the doctrinal discussions on the provision is on the seriousness of the fault. Firstly, it should be clarified that the sole paragraph adopts the degree of fault as *an* element for quantifying compensation (*quantum debeatur*) and not for its configuration (*an debeatur*), in which case even slight fault gives rise to the duty to compensate.[47]

The question then arises as to whether the provision refers to fault in the broad sense, including intent, or to fault in the strict sense. Based on comparative law, the doctrine rules out the possibility of an equitable reduction in compensation based on malice, which is why it is culpa in the strict sense. Furthermore, as STOCO rightly points out, although it has intensity, malice does not have a degree, which would compromise its application to the case.[48]

Having ruled out the possibility of reducing compensation due to intent, the equitable reduction of compensation occurs according to the degree of fault, returning to the Roman division into serious, light and very light fault[49] , in order to direct the analysis of the court.

It is therefore debated whether the assessment of fault would occur *in concrete*, observing the conduct of the agent in the case, or *in abstracto*, *in* view of the behavior expected of a normal individual in the circumstances of the case. On this point, SANSEVERINO[50] concludes that, although the abstract concept prevails in non-contractual liability when verifying the occurrence of the unlawful act, for an equitable reduction in compensation, fault must be analyzed in concrete terms, which, after all, is more appropriate to the idea of equity present in the provision.

From the need to assess the degree of the agent's fault, the problem arises of the possibility of an equitable reduction in compensation in cases of strict liability, where the agent's fault is not discussed.

At first, the doctrine took the position that it was impossible to apply the sole paragraph of art. 944 of the Civil Code to strict liability, which was enshrined in Statement no. 46 of the 1st Civil Law Conference held in 2002 by the Federal Justice Council - CJF and its Center for Legal Studies - CEJ:

indeterminacy in the factual hypothesis, which is why they can only be understood in conjunction with other normative realities. They would therefore be incomplete rules, which take shape within the scope of the normative programs of other provisions." AMARAL, 2008, p. 105-106

47. SCHREIBER, 2009, p. 45

48. STOCO, 2023, p. 1244

49. TARTUCE explains that culpa *lata,* or serious fault, is when the agent, although he didn't want the result, behaved as badly as if he did. Light or intermediate fault, on the other hand, is caused by the failure to observe average conduct, conduct expected of an average man, and, finally, very light fault is that in which the damage could only have been avoided through extraordinary caution. TARTUCE, 2022

50. SANSEVERINO, 2009, p. 101-106

> 46 - Art. 944: the possibility of reducing the amount of compensation in view of the degree of fault of the agent, established in the sole paragraph of art. 944 of the new Civil Code, must be interpreted restrictively, as it represents an exception to the principle of full compensation for damage, and does not apply to cases of strict liability.

The basis for excluding the application of the provision to cases of strict civil liability basically consists of the contradiction of judicially discussing the culpability of the agent in order to quantify a duty to make reparation, the imposition of which does not require fault. This is in addition to the concern to restrict the scope of the reduction clause to personal injuries frequently caused by accidents.[51]

However, making it impossible for the sole paragraph to apply to cases of strict liability implies an even greater contradiction, since in cases where fault is a prerequisite for liability, the extent of fault must be assessed in order to equitably reduce compensation. On the other hand, in cases where fault is not required, the agent should be fully liable for the damage, even if they were not at fault.[52]

Hence CRUZ's important lesson in criticizing the distribution of damages according to fault. The author clarifies that "the agent who acted with the greatest degree of fault was not always the one who had the greatest participation in the harmful event"[53]. Thus, she draws from Pontes de Miranda that degrees of fault are not weighed up, but rather damages in relation to causes, otherwise the agent who acted with greater fault would be punished instead of the one who contributed more to the damage[54] , a criterion that applies to criminal liability, but not to civil liability.

For this reason, the author concludes that the extent of the damage should be analyzed based on the causal link and not guilt, since the causal link is the most appropriate way to relate the agent's conduct to the damage suffered[55]. Thus, SANSEVERINO suggests that, for a more appropriate application of the general clause of equitable reduction of compensation, "it is enough to replace the expression 'seriousness of the fault' with 'relevance of the cause', so that, if there is an excessive disproportion between the causal fact attributed to the defendant and the extent of the damage, in strict liability, the judge may equitably reduce the compensation"[56].

From this perspective, the causal link has a dual function, since it is both an element of civil liability and a measure for setting compensation[57]. This criterion makes it possible to apply the general reduction clause to cases of strict liability, which was later recognized by Brazilian civil doctrine in Statement no. 380 of the IV Civil Law Conference held in 2006:

> 380 - A new wording is attributed to Statement no. 46 of the 1st Civil Law Conference, with the deletion of the final part: not applicable to cases of strict liability.

It can be seen, then, that the graduation of fault does not seem to be the most appropriate criterion for the equitable reduction of compensation, which has been criticized by the doctrine, among which STOCO points out that

> There is no denying that equity is a valid and powerful instrument with the virtue of avoiding iniquities and establishing ductile and adequate criteria. It follows that we are not against mitigating the amount of compensation in exceptional cases, according to the circumstances of the specific case. What we

51. SANSEVERINO, 2009, 122
52. STOCO, 2023, p. 1243
53. CRUZ, 2005, p. 330
54. CRUZ, 2005, p. 331-333
55. CRUZ, 2005, p. 334
56. SANSEVERINO, 2009, p. 123
57. CRUZ, 2005, p. 334

> don't think is the best solution is to adopt a graduated system of fault for this purpose.[58]

Thus, it would be better if the provision remained as it was in the Draft Civil Code, which, before going to Congress, allowed for an equitable reduction in compensation "if there is an excessive disproportion between the act and the damage"[59] , i.e. without mentioning fault as a criterion for measuring compensation.

This also corroborates the treatment provided for in comparative law[60] , in which the reduction in compensation does not derive directly from the degree of fault, but above all from the comparison of the merely culpable conduct with the debtor's economic situation.

The aim is to prevent the debtor from being driven into a state of need by seriously compromising their economic situation as a result of the reparation owed for culpable conduct. This is why, despite the lack of legal indication, the doctrine maintains that the judge must consider the economic condition of the agent when equitably reducing the reparation, in order to avoid the reparation of the damage generating the economic ruin of the debtor, exchanging one victim for another.[61]

In this way, the debtor's dignity is protected by imposing a humanitarian limit on full reparation[62] , which is fundamental to understanding the rationale of the provision, since

> if the principle of full compensation for damage is constitutional, the use of an equitable reduction in compensation based on excessive disproportion between the degree of fault and the damage must, in addition to respecting the limits of the provision, be based on the application of another constitutional principle that must prevail in the specific circumstances of that specific case.[63]

In this way, an equally important right is required for the victim to be deprived of the right to be fully compensated and thus return to the state in which they were before the damage occurred, an issue that highlights the need to look not only at the economic situation of the debtor, but also at the situation of the victim who, more importantly, cannot have their dignity compromised or ruined by the "equitable" reduction in compensation.

CONCURRENT FAULT AND OTHER LIMITS TO FULL REPARATION

Finally, there are the cases of reciprocal fault between the injured party and the offender, which is provided for in Article 945 of the Civil Code:

> Art. 945: If the victim was culpably involved in the harmful event, his compensation will be fixed taking into account the seriousness of his fault in comparison with that of the perpetrator of the damage.

It can be seen, then, that there is concurrent fault when the victim, alongside the agent, engages in culpable behavior, without which there would be no harmful event.

From the outset, it should be noted that, once again, the legislator preferred to use the expression "seriousness of the fault" when the most appropriate criterion for assessing the issue is the causal link. In this case, it is even more evident than in the case dealt with in the sole paragraph of Article 944 of the Civil Code, since the weight of two types of conduct is compared with the harmful event in order to reduce the liability of one in relation to the other.

58. STOCO, 2023, p. 1242

59. Draft Civil Code: Art. 1.003. Compensation shall not be measured by the seriousness of the fault, but by the extent of the damage. However, if there is an excessive disproportion between the act and the damage, the judge may equitably reduce the compensation. SANSEVERINO, 2009, p. 84

60. This is the case of art. 494 of the Portuguese Civil Code of 1966; art. 64, paragraph 2, of the Swiss Code; art. 1069 of the Argentine Civil Code; and the Dutch Civil Code of 1992, in its art. 6:109.

61. MONTEIRO FILHO, 2008

62. CALIXTO, 2008, p. 325

63. KONDER, 2007, p. 32

What matters in this case is the identification of the causal link between the agent's conduct and the victim's conduct for the occurrence of the damage. For this reason, the doctrine prefers the term "concurrence of causes" or "concurrence of liability" to the term "concurrence of faults", as the article only applies if the agent's conduct and the victim's conduct are concauses of the same damage, so that both are essential to the occurrence of the damage.[64]

As with the general clause on the reduction of compensation by equity, the application of concurrent fault in cases of strict liability is questioned. As we saw earlier, the issue is overcome by the adoption of the causal link as a criterion for assessing the extent of the damage, which allows the provision to be applied to cases of strict liability, since the causal link is also one of its elements.

By measuring, through the causal link, the contribution of each conduct to the occurrence of the damage, it is up to the court to proportionally set the compensation according to the contribution of each act in producing the injury, and not necessarily on the basis of fault. If it is not possible to quantify the cause, it is recommended that compensation be halved.[65]

Furthermore, it is clear that if the victim's exclusive fault is proven, there is no need to talk about a proportional reduction in compensation for concurrent fault, since in this situation the victim's exclusive fault is the sole cause of the damage, excluding any causal link between the damage and the agent's conduct.

Finally, it should be noted that concurrent fault presupposes the absence of willful misconduct, because if the offender acts with willful misconduct, even if the victim is at fault, it is not possible to compare the conducts since "the willful misconduct of the offender is sufficient to cause the damage, if compared to the fault of the offended party"[66].

64. DIREITO; CAVALIERI FILHO, 2011, p. 406
65. CARVALHO FILHO, 2003, p. 107
66. DIREITO; CAVALIERI FILHO, 2011, p. 413
67. ALVIM, 1972, p. 201

ADDITIONAL CONSIDERATIONS

From what has been shown so far, it can be seen that, although the Civil Code of 2002 has accepted full reparation as the rule for reparation, the principle of *full reparation* does not have unrestricted applicability in the field of civil liability, but is mitigated to prevent its unconditional adoption from generating inequities in the specific case.

Thus, the Civil Code, in certain cases, gives the court greater decision-making power in order to better tailor compensation to the elements of the specific case.

Despite the difficulties arising from the terms used by the legislator, the prevailing understanding of these hypotheses shows that, in general, they do not rule out the principle of full reparation; in fact, they provide a fine adjustment between the reparation and the damage actually attributed to the harmful conduct, ensuring that the reparation does not exceed the limits set by the causal link.

In these terms, we can see that full reparation would in fact only be ruled out in cases where the reparation actually due is reduced in order to prevent it from causing the economic ruin of the person responsible, compromising the minimum necessary for their dignified existence.

Although these cases are commonly analyzed from the debtor's point of view, since the rule generally focuses on the debtor in order to protect him against possible excesses and disproportions of full reparation, the legal exceptions to the principle can play an interesting role in favor of the victim. This is because, in the face of significant disproportion, "the judge might feel inclined to deny guilt in order to avoid a condemnation that cannot be half-hearted"[67].

This leads us to state that the "exceptions" to the principle of full reparation, rather than weakening it, only confirm that full reparation is the rule and the main objective of civil liability.

It is for this reason that the legal system has adopted equity as an exceptional criterion for setting compensation, and it should be applied in an extraordinary way in order to avoid inequities whose seriousness justifies protecting a right of the offender at the expense of the victim.

Given this panorama, it can be seen that the principle of full reparation, far from being just an abstract guideline, is revealed as a structuring element of the entire system of civil liability, guiding the search for full restitution for the injured party and serving as a parameter for judicial action. At the same time, an analysis of the limits, exceptions and controversies that permeate its application shows that the effectiveness of reparation depends on constant reflection and improvement, especially in view of the peculiarities of each case.

Thus, understanding the scope and nuances of the principle of full reparation not only contributes to the correct application of the law, but also reinforces the importance of a sensitive and attentive approach to demands for material justice.

CONCLUSION

This paper sought to address the role of the principle of full reparation in the civil liability system, highlighting its historical evolution, its theoretical foundations and the practical challenges that permeate its application in contemporary Brazilian law. It was found that, although the ideal of full restitution of the victim to the *status quo ante* is a fundamental guiding principle, the implementation of this principle is limited by the nature of the damage - especially in cases of off-balance sheet damage or damage that is difficult to measure - and by the exceptions provided for by law, such as the possibility of an equitable reduction in compensation and reparation by equity.

The study of the methods of reparation and the main doctrinal and legislative controversies revealed that the quest for full reparation must be balanced with the need to avoid unjust enrichment and to adapt the solution to the specific case, respecting the parameters of corrective justice. In addition, the importance of objective criteria for setting the amount of compensation was analyzed, as well as the role of the judge in individualizing the response, especially in the event of concurrent fault or the civil liability of incapacitated persons.

From a practical point of view, an in-depth understanding of the principle of full reparation contributes to more conscious and well-founded action by legal operators, allowing them to identify the limits and possibilities of the reparation system in the face of society's increasingly complex demands. From a theoretical point of view, the subject remains relevant to the academic debate, as it involves fundamental questions of justice, effectiveness and the protection of rights.

In short, it reaffirms the usefulness of the principle of full reparation as an instrument for the effective protection of rights, while recognizing the need for constant improvement of the civil liability system so that it can respond fairly and adequately to the challenges posed by contemporary reality.

REFERENCES

ALVIM, Agostinho Alvim. **Da inexecução das obrigações e suas consequências**. 4. ed. São Paulo: Saraiva, 1972.

ARISTÓTELES. **Ética a Nicômaco**. Trad. Leonel Vallandro e Gerd Bornheim. 2. ed. Brasília: Editora da UnB, 1984.

CASILLO, Antônio Junqueira de Azevedo. **Reparação do dano e responsabilidade civil**. São Paulo: Revista dos Tribunais, 1994.

CAVALIERI FILHO, Sergio**. Programa de responsabilidade civil**. 11. ed. São Paulo: Atlas, 2015.

CRUZ, Maria Cristina de Brito. **Responsabilidade civil e a cláusula geral de equidade**. Revista dos Tribunais, v. 837, p. 330-335, 2005.

DIAS, José de Aguiar**. Da responsabilidade civil**. 11. ed. Rio de Janeiro: Forense, 2011.

HIRONAKA, Giselda Maria Fernandes Novaes. **Responsabilidade civil: novas tendências**. 2. ed. São Paulo: Revista dos Tribunais, 2000.

MONTEIRO FILHO, Carlos Edison do Rêgo. **Dano moral e sua reparação**. 6. ed. Rio de Janeiro: Forense, 2008.

NORONHA, Mario Luiz Delgado. **Responsabilidade civil: aspectos atuais**. 2. ed. São Paulo: Saraiva, 2010.

SANSEVERINO, Paulo de Tarso Vieira. **Princípio da reparação integral e a cláusula geral de redução equitativa da indenização**. Revista dos Tribunais, v. 890, p. 58-106, 2009.

SCHREIBER, Anderson. **Responsabilidade civil e análise econômica do direito**. 2. ed. São Paulo: Atlas, 2011.

STOCO, Rui. **Tratado de responsabilidade civil**. 10. ed. São Paulo: Revista dos Tribunais, 2023.

TARTUCE, Flávio. **Manual de direito civil**. 12. ed. São Paulo: Método, 2022.

VINEY, Geneviève. **A reparação do dano**. Trad. Ana Maria Louzada. São Paulo: Revista dos Tribunais, 1988.

WALD, Arnoldo. **A responsabilidade civil e sua evolução**. 6. ed. São Paulo: Revista dos Tribunais, 2011.