Legal Blame Game: State and Municipal Accountability in the Kiss Nightclub Fire

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Abstract: *This article examines the civil implications of the 2013 Kiss Nightclub fire in Brazil. It draws from six extensive lawsuits filed by survivors and their relatives against the nightclub, the State of Rio Grande do Sul, and the City of Santa Maria. The Civil Court of Santa Maria issued low indemnities and exempted both the state and the municipality from liability. Plaintiffs filed appeals, which led the state court to extend the liability to the state and the city, while maintaining low indemnification. This article argues that the cooperative form of federalism enshrined in the 1988 Constitution fostered a legal blame game between the state and the city, in which each viewed the other as responsible for keeping city venues safe. This article also argues that low indemnification relates to a narrow interpretation of Brazil's civil legislation despite existing precedents, doctrinal understandings and constitutional principles that could serve as the basis for higher rates of indemnification.*

Keywords: Punitive damages; Brazilian law; Federalism; Fire incidents; Indemnification; Man-made Disasters.

Resumo: *Este artigo examina as implicações cíveis do incêndio da Boate Kiss em 2013. Tem como base seis ações indenizatórias ajuizadas por sobreviventes e seus parentes em face do Estado do Rio Grande do Sul, o Município de Santa Maria. A Vara Cível de Santa Maria fixou baixas verbas*

indenizatórias e isentou os entes federativos de responsabilidade. As sentenças foram objeto de recursos de apelação, os quais levaram os desembargadores a estender a responsabilidade aos entes federados. As irrisórias indenizações foram, contudo, mantidas. Este artigo argumenta que o federalismo cooperativo da Constituição de 1988 favoreceu um jogo de empurra entre o estado e a cidade, uma vez que estes acusaram um ao outro de omissão quanto ao dever de garantir a segurança dos estabelecimentos comerciais do município. O artigo também argumenta que a baixa indenização tem correlação com uma interpretação restritiva da legislação civil brasileira, apesar de haver precedentes, entendimentos doutrinários e princípios constitucionais que podem servir como fundamento para a fixação de verbas indenizatórias mais significativas.

Palavras-chave: Dano moral punitivo; desastres causados pelo Homem; Direito brasileiro; incêndio; indenização.

Introduction

On a summer evening, on January 27, 2013, crowds of young adults including students, staff and alumni from a local public university gathered at the Kiss Nightclub for a concert. Just a few hours later, two-hundred forty-two people were pronounced dead, after one of the bands misused the outdoor-only pyrotechnical material which ignited the fire. Those who survived were injured and traumatized. The incident catapulted the quaint university town of Santa Maria into global headlines. Investigations followed in civil, criminal and administrative spheres, and civil society demanded justice. Authorities quickly blamed the deadly incident on the band's use of

fireworks inside the premises. In terms of repercussions, this was only the tip of the iceberg. In the criminal courts, the discussion revolved around intent (or lack thereof) to cause a deadly incident. In civil lawsuits, victims and their families sought cash reparations for their trauma.

In Brazil, civil cases pertaining to consumer life are more easily resolved than criminal cases. Dating back to the 1940s, daunting criminal laws contribute to a criminal justice system that is unfair, selective and often slow.[1] Terrifying dungeon-like conditions make Brazil's prisons among the worst in the world, according to several human rights reports.[2] Civil statutes, in contrast, evolved through time in accordance with the inclusive nature of the 1988 Constitution. This re-interpretation of older laws in accordance with constitutional law thrived in the 1990s, when the 1916 Civil Code was still in force, amidst a long-lasting battle to issue a new statute. The 2002 Civil Code also

[1] Brazil's Criminal Code (Law 2,848; Brazil, 1940) emerged during the Estado Novo (1937-1945), an authoritarian period in which then-president Getúlio Vargas centralized state bureaucracies, persecuted opponents and attempted to lure social movements and labor unions into his sphere of influence. With Congress inoperative, Vargas issued the code by decree, as authorized by the dictatorial 1937 Constitution. In the following year, he also decreed a separate law covering minor offenses (*Lei de Contravenções Penais* or Law 3,688; Brazil, 1941). Despite amendments and the changing role of jurisprudence over time, these two statuses constitute a legacy of a non-democratic regime that survived various periods, including the current legal order enshrined in the 1988 Constitution.

[2] According to the 2021 Organization of American States report on Brazil, "structural discrimination and inequality are also rampant in prisons, rehabilitation centers and therapeutic communities" (Inter-American Commission on Human Rights, 2021, p. 11). The report goes on to state that "deplorable prison conditions typical of institutions for deprivation of liberty in Brazil," constituting "cruel, inhuman, and degrading treatment" (idem, p. 61). In UN materials, Brazil prisons frequently appear as a case for reform because of their low standards. Per a recent press release on a UN team visit to Brasilia, "Brazil has the third largest population of people deprived of liberty in the world with over 750,000 detainees and overcrowded prisons" (United Nations Human Rights Office of the High Commissioner, 2022).

incorporated the constitutional spirit by further enforcing constitutional provisions. The 1990 Consumer Code effectively gave Brazilian consumers a voice for the first time. While criminal law has evolved poorly in Brazil, civil law has gone through major transformations. The avant-garde nature of civil law, therefore, favors scholarly examinations that also consider the dynamics of civil reparations in a world that seems more concerned with criminal punishment. This article addresses the civil and constitutional implications of indemnification, taking the case of the Kiss Nightclub fire both as an example of the limitations of civil indemnity in Brazil, as well as illustrative of the disputes caused by overlapping constitutional attributions, which force public stakeholders to compete for securing the general wellbeing of the population.

The particularities of Brazilian law make the Santa Maria case unique when compared to similar incidents elsewhere. Established in the aftermath of the 1964-85 military dictatorship, Brazil's cooperative federal system has prescribed an equitable distribution of duties among jurisdictions: municipalities, states, the Union and the Federal District (DF). This has strengthened healthcare, education and transportation by fostering cooperation among states, municipalities and the federal government to

provide services,[3] all in accordance with the lengthy 1988 Constitution. The text also enshrined consumer rights, which are listed alongside fundamental rights. Notably, the Constitution called on the Legislature to issue a specific statute for consumers to have their rights enforced (Marques, 2004, pp. 15-54), with Congress issuing the Código de Defesa do Consumidor in 1990. While this article acknowledges that Brazil's progressive and inclusive legal order set forth a range of rights seeking to include disenfranchised Brazilians, I argue that the case of the Kiss Nightclub fire exposes the limitations of shared accountability, as state entities engaged in a "blame game" of accusing one another of omission or misconduct. These overlapping accountabilities contributed to a lack of proper inspection of the nightclub. Further, I argue that the cooperative spirit of the constitution fomented or allowed for this blame game to take place between the State of Rio Grande do Sul and the City of Santa Maria, whereby both entities refrained from fully addressing their responsibilities. Finally, this article also argues that the lack of clear, objective guidelines for the arbitration of indemnity values has led to divergent interpretations by legal scholars and judges in Brazil, frustrating

[3] Initiatives such as popular budgeting in major cities like Belo Horizonte and Porto Alegre drew from inclusive constitutional provisions. Kathryn Lacy (2010, p. 13) examines results in the latter. The text also addressed specific demographics, such as consumers, women, Black and Indigenous Brazilians and maroon communities.

those who experience trauma and are left with quasi-symbolic indemnities, as seen in the Kiss Nightclub case.

Extensive constitutional and legal provisions failed to reflect the post-fire context of Santa Maria. Lived experiences diverged even from the far-reaching, inclusive nature of the 1988 constitutional order and civil statuses.[4] I draw such conclusions from six extensive civil lawsuits filed by survivors and relatives of victims. Omission by public officials certainly did not cause the fire itself, as the defendants argued. But it did provide conditions for a miscalculated pyrotechnical-based music performance to occur. Evidence of blame-gaming is seen in non-criminal cases brought to court by survivors and victims' family members.

[4] Before the constitution emerged, legal scholars debated what kind of federal model Brazil should adopt in its dawning new state. Federalism was not new—it was even in the official name of the country—but it had historically varied since the First Republic's 1891 Constitution. In addition to that, foreign examples had forged varying forms of non-US federalism. In 1985, at the beginning of the transition to democracy, Raul Machado Horta (1985) suggested that postwar Germany had effectively constructed a modern federal system by which the federal state drew general rules complemented by states, which did not preclude either from collaborating in matters of national interest. Unlike the eighteenth-century US model, in which states have the right to legislate on certain issues with a more reserved role for the federal government, twentieth-century post-World War II Germany understood regional differences could be acknowledged and preserved. Yet, the national government and states could still cohesively collaborate in favor of general welfare. The 1987-88 constitutional assembly incorporated some of these traits into the Brazilian constitution. It distributed responsibilities to municipalities, states, the Federal District, and the Union while foreseeing the issues with their overlapping and complementary responsibilities.

Methodological Interlude

This article results from the examination of thousands of pages from dockets of civil proceedings filed in the State of Rio Grande do Sul, obtained through a contractor in the legal sector. All but one of the motions were filed by survivors of the incident, who claimed they needed to be compensated for the psychological damages they suffered. As a recent historical event, the Kiss Nightclub fire is subject to historical analysis. Therefore, the dockets cited and examined herein not only constitute pieces of a legal battle with national and international repercussion, but also as evidence of what actually happened within the club and in its adjacencies. They help us understand issues of trauma in the first person, and the implications of the incident beyond the widely-televised criminal proceedings, which inevitably contribute to greater prominence for those accused than those who survived. The documents and lengthy court proceedings also help us to understand the limitations of civil reparations, given the relatively small amounts of money each survivor received. As an interdisciplinary article, it also conveys legal doctrine with accessible language. It does not, however, abide by conventions regarding the level of depth of legal discussions expected in journals that specialize in law and cater to more specialized audiences (to the detriment of the legally lay public). Conversely, as a legal-historical piece of scholarly work, it

narrates and analyzes the Kiss Nightclub case based on evidence, without losing sight of history's own goal of educating the general public and serving as a secondary source on matters of the past.

Constitutional Law in Brazil

Both the Kiss incident itself *and* the legal arguments adopted by plaintiffs and defendants are deeply intertwined with Brazil's 1988 Constitution. Constitutional texts have varied worldwide since the emergence of the archetypical US Constitution in the late eighteenth century. While the US Constitution has been associated with resilience over time—possibly tied to a relatively stable American state as well as its succinctness—, other countries have demonstrated that constitutions can correlate to disruption in the political order. Brazil went from being a monarchy (1822-89) to an elite-directed voter-suppressed republic (1889-1930), which in its turn gave way to a populist regime (1930-37) led by Vargas. The *varguista* model became more authoritarian in the subsequent period (1937-45), and was replaced by a short-lived democracy (1945-64). This democracy was then overturned by a military dictatorship (1964-85), which eventually led to the current "New Republic" (1985-present). All these shifting regimes had sustaining constitutions, issued in 1824, 1891, 1934, 1937, 1946,

1967 (with substantial amendments in 1969), and 1988. Because constitutions have also been frequently replaced in continental Europe, European legal doctrine has inspired Brazilian constitutionalism, whose mainstream authors have often relied on German, French and Iberian scholars as a point of departure. Scholarship from Germany in particular has been quite influential among Brazilian scholars, including Supreme Court justices Luis Roberto Barroso and Gilmar Mendes, possibly due to the fact that Germans confronted various democratic transitions in the twentieth-century, the more recent of which overlapped with ongoing democratization processes in Latin America.

Portuguese and Spanish constitutional experiences have also been a source for Brazilian scholars, who identified with the Iberian challenge of asserting rights after long periods of dictatorship following the collapse of the Salazar and Franco regimes. When discussing the adjustment of new constitutions in relation to pre-existing laws–a quotidian challenge in countries with shifting constitutions–Brazilian jurist and Supreme Court justice Luís Roberto Barroso based his analysis on Portuguese and Spanish examples. In his words, the "Spanish Constitution of 1978 is a perfect example of a characteristic of contemporary constitutionalism" as it "is not limited to a catalog of State principles, fundamental rights, accountabilities of public powers, and rules for its

revision" (Barroso, 2023, p. 310; author's translation[5]). In general, laws and regulations adopted in dictatorships are technically still valid despite the emergence of a new constitution at the top of legal hierarchy. These may also be narrowly-written, disregarding the rights of the population. Due to these two factors, post-dictatorship constitutions in Iberia and Brazil ended up encompassing many more branches of law than organizational norms and basic principles compared to other European constitutions, as well as liberal constitutions such as that of the US. In addition, the Brazilian 1988 text also contains a series of open-ended binding principles, such as the protection of the "dignity of a human being". This effectively means that new and old laws must be interpreted *through* constitutional lenses and not merely *according* to them. This phenomenon, known as "constitutionalization of the law" (Barroso, 2023, pp. 310-322), appears in both Brazilian courts and academic debates.

Brazil's 1988 Constitution has provisions across virtually all branches of the law. It details rules on criminal law, taxation, consumer rights and social security, among many other topics. Even enthusiasts of the 1988 text such as Luís Roberto Barroso himself concede that the "euphoria" of democratic transition produced a "corporatist and prolix" constitution (Barroso, 2023, p. 317). From a more optimistic view, the 1988

[5] Unless otherwise stated, any translations are the author's own.

Constitution envisioned a Brazilian state aware of its own fractures while also determining the enactment of specific legal provisions to protect vulnerable groups. As author and Supreme Court justice Gilmar Mendes stated, the text set forth "compromises of social welfare" for "a cojoined action to eradicate great social and economic inequalities" (Mendes and Branco, 2020, p. 747). This required the writing of several inclusive constitutional articles, many of which recalled the language of human rights seen in international law. The constitution's more than two-hundred provisions cover groups ranging from Black and Indigenous communities to the rising consumer class.[6] This process of constitutionalization means that the constitution not only enshrines a long list of rights and other provisions, but also has an extensive number of principles to be observed. In Barroso's own terms, "the Constitution is not only a system in itself, but also a mode of interpreting all other branches of law" (Barroso, 2023, p. 319).

The level of detail of numerous principles listed in the constitution also affect basic provisions, including rules on federalism. Unlike the archetypical federative model of the United States, Brazil follows a model in which certain legislative,

[6] For example, Article 211 states that "the Union, the states, the Federal District and the municipalities shall cooperate in the organization of their educational systems," whereas Article 30, item VII, determines that municipalities shall "provide, with the technical and financial cooperation of the Union and the state, health services to the population" (Brazil, 1988).

administrative and judicial accountabilities remain under the auspices of the union. The constitution also granted municipalities a certain degree of autonomy.[7] On other matters, as specified by Articles 23 and 24, the union, states, municipalities (in some interpretations) and the federal district may cooperate by acting on issues such as healthcare and education. It is little surprise, therefore, that Brazil has so many federal universities *and* state campuses, as well as healthcare provided by municipal, state, *and* federal hospitals and clinics. In the recent case of the Covid-19 pandemic, the ability to establish a coordinated vaccination process was crucial for one of the world's largest populations and land masses, even with early delays. Doctrine calls this a form of "cooperative federalism" (Brasileiro, 1974; Velloso, 1992, p. 51; Rovira, 1996) which, in the case of Brazil, acknowledges a call for solidarity among federal entities to address welfare, while recognizing inequalities between richer states in the South/Southeast and peripheral jurisdictions in the North/Northeast.

This subtype of federalism is not unique to Brazil. As mentioned earlier, Germany's recent history has impacted legal scholarship in Latin America's democratizing nations. On this topic, Barroso states that "federal entities depend on one

[7] The theme of alter-federalisms has been observed elsewhere, particularly in European countries where recent supranational and subregional rules and dynamics also discourage monolithic understandings of federalism as a uniform, US-inspired system (Gamper, 2005).

another and must cooperate as partners" and that this corresponds to "a duty of federalist loyalty…mandatory for political entities, as observed by the German Federal Constitutional Court, and the Brazilian Supreme Court" (Barroso, 2023, p. 516). From a comparative perspective, legal doctrine has also classified federations as "centripetal" or "centrifugal". When discussing the 1988 Constitution, José Afonso da Silva claimed it "recalled the federalist principle and structured a system of accountabilities [*repartição de competências*]" aimed at "balancing relations between the central power and states/municipalities" (Silva, 2005, p. 102). While Silva defines "centripetal federations", including Brazil, as more decentralized, centripetal ones are those which are more centralized (ibid). While promising in terms of its forward-looking nature, the 1988 Constitution's parallel or converging accountabilities for the provision of certain services (including the inspection of entertainment facilities in the Kiss Nightclub case) may lead to undesirable scenarios. Before addressing these specific accountabilities, the following sections will discuss general civil and administrative law particularities in Brazil, as well as the cases themselves, before returning to an analysis of the legal implications of the fire incident.

Consumer and Administrative Law in Brazil

Brazil's constitution sets rules concerning all branches of law, with very specific guidelines on the accountabilities distributed to the union, states, municipalities and federal district. The constitution mandated that the union has authority over legislation on criminal law (Article 22, I), whereas the National Congress had to issue a consumer's rights code (Article 48 of the Transitional Constitutional Norms, an appendix to the 1988 Constitution). After 1988, federal laws enacted specific rights that echoed constitutional principles and established innovative mechanisms to enforce these rights. Other laws, such as the 1916 Civil Code, remained in force until the establishment of a new statute – the 2002 Civil Code in this case – but were still subject to constitutional interpretation as per the earlier section on constitutional law. The 1990 Consumer Code, a federal law, exemplifies Silva's reference to "centripetal" federation (Silva, 2005, p. 2005) as a clear case of a topic that is generally under states' accountabilities in "centrifugal" federations such as the United States, but is under federal authority in Brazil.[8]

[8] The passing of the bill complied with Article 5, item XXXII of the 1988 Constitution, which calls the State to "provide, as set forth by law, for the defense of consumers" as well as with Article 48, which determined a consumer code had to be issued following the enactment of the Constitution (Brazil, 1988).

As a safeguard of particular rights through innovative solutions, the 1990 Consumer Code became a concrete example of a progressive law that enforced constitutional rights. It foresees two significant mechanisms aimed at favoring consumer litigants in court: it allows magistrates to invert the burden of proof and it holds that producers and service providers must indemnify consumers regardless of their intent or lack thereof to inflict damages onto people (*responsabilidade objetiva*). "Objective responsibility" is the standard rule in the Consumer Code (Tartuce, 2023, p. 540). The first mechanism is relatively straightforward. As a general rule, plaintiffs bear the burden of proof. In other words, plaintiffs must provide evidence of the defendant's misconduct. However, when the parties involved have a drastic power or expertise differential, providing evidence may be challenging. If the plaintiff is a consumer, providing technical evidence to support their claim would be costly or even inaccessible because key documents and other sources of evidence would be in the defendant's custody. In those cases, the Consumer Code allows judges to "invert the burden of proof" so the defendant, *not* the plaintiff, must produce evidence *against* the claims made by the consumer.

Regarding the Kiss Nightclub fire, the second mechanism set forth by the Consumer Code was significant for the resolution of cases in favor of victims. The

standard form of civil indemnification in Brazil and other legal systems is structured through what Brazilian law calls *responsabilidade subjetiva,* or subjective responsibility. This means that defendants can be ordered to pay damages to a plaintiff, if certain criteria are met. Among these criteria, evidence must suggest the defendant acted intentionally (*dolo*) or not (*culpa*), to produce the damaging event. However, the Consumer Code determines that this is not applicable in consumer relations. In those particular relations, it does not matter whether the service provider or producer's action or negligence caused damages. If a damaging situation occurs, regardless of who perpetrated it, and the victimized consumer/plaintiff provides evidence that they were affected, a magistrate may determine the payment of moral, material and aesthetic damages as applicable (*responsabilidade objetiva*)[9]. This "objectivity" means that if a provider hired someone who acted in unlawful ways and caused damages, consumers

[9] The theoretical basis for *responsabilidade objetiva* is possibly rooted in European debates of the eighteenth and nineteenth centuries, when the emergence and advancement of industrialism and urban environments made it more difficult for victims to prove the perpetrator's intent or negligence to cause damage (Souza, 2015, pp. 19-30). Francisco José Marques Sampaio (2017) underscores the relevance of technology and labor developments post-Industrial Revolution, which led to greater human involvement with machines and machinery. This interaction led to damaging events whose reparations were difficult to arbitrate with *responsabilidade subjetiva.* Defining the perpetrator of damage requires the definition of one's intent or negligence. With greater mechanization and the modern-day setting of relations, this task became harder or blurred, favoring the legal incorporation (in some circumstances) of *responsabilidade objetiva,* or one's liability regardless of that person or entity's intent or gross negligence. In Sampaio's terms, "the industrial revolution, with the introduction of machines in the production process–which, on the one hand, increased the production of goods but on the other hand, caused an extraordinary increase in the number of accidents at work–and the arrival of motor vehicles–which many consider the great assassin of the twentieth century–were determinants for the objective theory to propagate in fields belonging to the subjective" (idem, pp. 78-79). When examining Spanish law, Charles Zeno Santiago (2015) cites the case of workplace accidents, for which the employer is liable regardless of their intent or negligence: "according to the objective perspective, objective liability exists when damage occurs in the work environment and within the employee's shift" (Santiago, 2015, p. 61).

can sue the provider, in this case Kiss Nightclub, which may be held liable even if the venue itself did not act to produce a damaging event.[10] Several such cases have been ruled based on *responsabilidade objetiva.*[11] Survivors sued the nightclub, along with the municipality and the state government, demanding civil reparations for the emotional damages they suffered. Family members of deceased patrons also filed lawsuits. Yet the case also shows that despite the progressive provisions of these legal documents, which are extensive and often prolix, Brazilian legislation has not been specific enough on legal indemnification.

Legal Landscape

The article now examines civil court cases filed before the state court in Santa Maria. Each case is composed of several volumes, totaling more than 1,000 pages each on average. They share similarities in terms of arguments, but also in the ways that the Judiciary handled them. Given the relatively small size of the city and the limited size of

[10] The nightclub can also sue the actual person who effectively caused damages in order to retrieve the indemnity costs paid to that consumer (a lawsuit known as *ação de regresso*).

[11] The State Court of Rio de Janeiro ruled on an appeal in a case in which fire ignited inside a Carrefour supermarket (Carrefour Comércio e Indústria Ltda & Paula Ferreira Sousa de Jesus Almeida, 2009). Neighbors sued the company arguing they had been intoxicated with the smog, and that stench had lingered around for long after the incident. They also claimed that the perishable items rotting in the supermarket attracted rats and insects to the vicinity. The supermarket chain's defense claimed that Carrefour had hired specialized trash collecting companies to remove all debris and covered material damages claimed by some of the residents. The appellate court maintained an indemnity of R$2,500.00 per person (roughly US$1,400.00 at the time).

its local court, all Santa Maria cases were tried by the same magistrate. The Kiss Nightclub incident took place decades after the enactment of the 1988 Constitution and the adoption of an inclusive Consumer Code (1990), and eleven years after the emergence of a new Civil Code (2002). These three documents have provided solid foundations for a democratic order, enacted after twenty-one years of dictatorship (1964-85) and a three-year transition to democracy. A significant number of court decisions have been issued over the past decades, however, democratized Brazil has had a culture of low indemnification for civil cases. Legal doctrine rarely adheres to the Anglo-American form of "punitive damages", by which courts set high sums of money in indemnity lawsuits. Legal cases of the past (*jurisprudence*) have contributed to the consolidation of an understanding of rather symbolic damages that do not compensate victims with large sums of money.

From the perspective of public services/authority, parallel or overlapping accountabilities may be productive in the case of healthcare and education, but can also lead to omissions and misconduct, as observed in the case of the Kiss Nightclub fire. In court arguments, the State of Rio Grande do Sul and the City of Santa Maria pointed fingers at one another, each accusing the other of failing to provide inspection services and shutting down the venue to avoid a tragic occurrence. From the perspective of

administrative law, the six civil cases examined below provide evidence of the blame game between the municipality and the state. Brazil's promising "cooperative" rules and the complex constitutional framework, which lie within Barroso's critique of the constitution as "prolix," can also lead to unfavorable scenarios like the Kiss Nightclub incident.

Six Tragedies, Six Court Cases

All six cases narrate complicated attempts to exit the venue after the fire. The fire ignited when pyrotechnical sparks came into contact with an inflammable foam-like ceiling, the incineration of which created a cloud of toxic smog. The building's layout worsened the scenario, as exits were blocked by obstacles, evidencing a failure to adhere to safety guidelines, some of which involved billing practices. In Brazil, nightclub patrons are usually given a consumption card (*comanda*), in the shape of a credit card or paper form, on which bartenders register beverage and food orders. Clubs require patrons to pay for their consumption at the end of the night, at a specific cashier located by the exit doors. The practice occurs across the country and is so widespread that scholars have examined its prevalence and consumer attitudes towards it (Bezerra & Silva, 2013). Owners of the Kiss Nightclub therefore placed barricades at

the cashier area, allegedly to prevent dodgers from leaving the venue without paying for what they had consumed. With hundreds of patrons trying to leave the venue due to the fire, these blockades contributed to the scale of the death toll as well as the number of avoidable injuries. Untrained security guards reacted by holding the crowds, which struggled to move across metal bars. All examined cases allude to this particular feature as damaging, along with the absence of extra emergency doors, poor signaling, overcrowding and other correlated issues. Plaintiffs filed these lawsuits against the Kiss Nightclub, the City of Santa Maria, and the State of Rio Grande do Sul; all three of which were thus co-defendants in the cases.

Five of the six cases share similar stories: young professionals who arrived quite late at the club and found their way out, surviving the toxic smog but carrying with them the trauma of a never-ending nightmare. That was Andressa da Rosa Pinto's (2015) experience. She arrived at the club at 2am, just one hour before the fire. Due to the blockades at the entrance, she struggled to leave the club, and therefore inhaled a considerable amount of smoke. In court, she claimed the experience had long-lasting physical and mental health repercussions. Andressa's case illustrates how survival often encompassed a long journey through crowds and malfunctioning architecture. She managed to escape because she was in a restroom next to the exit. Her presence inside

the restroom may have helped her survive; according to another case, others mistakenly went into the bathrooms when the fire started, confusing them with emergency exits due to poor signaling (Balconi, 2015, pp. 2-14). Due to the lack of emergency exits and the presence of metal bars blocking the main entrance and exit, Andressa's struggle to leave the venue was also a fight for her life. For this near-death experience, the plaintiff requested the judge to arbitrate a value for indemnity within a margin of R$ 50,000.00 (approx. US$ 22,000.00 at the time).

The local college campus congregated numerous Kiss patrons. Silvana Bortoluzzi Balconi worked at the prestigious Federal University of Santa Maria, a major university in the country. Like many other young professionals in the town, she decided to enjoy a late-night concert at the nightclub (Balconi, 2015). After registering two bottles of Budweiser on her consumption card, Silvana and hundreds of others found themselves jostling against each other in an attempt to escape the fire and its toxic smog, as well as the deadly exit blockades placed to make sure patrons paid their *comandas.* Of those that managed to escape, some retained their consumption cards intact. In court, these became documents asserting the presence of the plaintiff in the club. Silvana presented hers, alongside medical and work documentation corroborating the fact that the incident had led her to undergo care for a long period with many sick-day absences at

work. Silvana did not request a specific amount. This was a possibility under the 1973 Civil Procedure Code, revoked by a new 2015 statute determining that parties must state the exact amount they wish to be awarded. Given the notorious nature of the Kiss incident, it is possible that Silvana's attorney believed the case would be awarded a fair sum of cash. In fact, not only did the press advocated for a just compensation, but so did the legal world (Guglinski, 2013). In other words, Silvana did not wish to limit possibilities by arbitrating herself an amount that could be lower than what a magistrate could order.

Other cases corroborate the war-like scene as the fire emerged. Jeanine Oliveira Soares and three friends arrived at Kiss at 1am, only to find themselves fighting for their lives two hours later (Soares, 2015). Upon exiting the furnace-like venue and inhaling the chemical smog that had impregnated the room, Jeanine managed to call friends who had not gone to the club asking for help. The plaintiff described a tumultuous scene. Both public officials and impromptu volunteers (some of whom had not been to the club that night) entered the heated venue attempting to rescue trapped patrons. In doing so, as Jeanine narrated in court, they were also injured by the smog and heat. Jeanine survived, but the enduring trauma of that night led her to seek compensation as a hurt consumer, and as a civilian whose ruling officials did not properly enforce fire

prevention regulations. To compensate for her traumatic experience, Jeanine asked the court to establish an indemnity of R$ 579,200.00 (approx. US$ 258,000.00 at the time).

Felipe de Souza Freitas and Jonatas Krug Castilhos, friends who attended the concert together, filed a joint lawsuit. Their case brought new elements to the story. They narrated how security guards held the customers for almost two minutes, allegedly impeding the audience from leaving without paying their *comandas.* Felipe also lost his friend Martim, whose name he recalls yelling out in vain. Later that night, he found out that Martim had passed away. Felipe attached written documents, social media posts indicating his proximity to Martim, and a *comanda* (consumption card) with his name. Jonatas, in turn, had been one of the first clients to exit the venue. As per a story he told a local newspaper, he had been coerced to give his *comanda* to security personnel before being allowed to leave. Felipe and Jonatas demanded an indemnity corresponding to 300 monthly minimum wages, then R$ 200,000.00 (roughly US$ 90,000.00).

Having a *comanda* was not a prerequisite for going to court. Leonardo Balconi Scaramussa (2015) attached to his claim a police report, medical documentation attesting the effects of inhaling toxic smoke for five minutes, and written evidence of ongoing treatments for physical and mental trauma. Based on the *responsabilidade*

objetiva, Leonardo drew a connection between the damages he suffered and his presence at the club, demanding reparations as a consumer. Like his peers, he also claimed that state and municipal authorities' omission had directly led to the incident. Leonardo stated that, under *responsabilidade subjetiva,* these authorities should pay their share as a form of reparations. Like Silvana, Leonardo did not determine the amount he expected to earn as indemnity, leaving this task to the judge.

A sixth case, filed by a family in June 2013, considered the occurrence of death as a justification for higher compensation. Parents José Diamantino Fricks and Rosane Portela Fricks sought legal damages for the death of their son Bruno Portela Fricks, who was one of the more than two hundred casualties of the night (Fricks & Fricks, 2015). José's humble occupation as a construction worker, or *mestre de obras,* and Rosana's job as a shop clerk contrasted with the promising social ascension of Bruno, a 22-year-old with an undergraduate degree in business administration who had been employed in his field. Bruno's grandparents had been rural workers, maids and a security guard, as per the marriage certificate attached to the dockets. The victim's rise to the middle class, encapsulated in Bruno's admission to UFSM, also illustrates a broad demographic change in Brazil, which saw a significant number of underprivileged citizens enter college in the 2000s and 2010s as a result of increased investments in education, welfare

and new affirmative action laws. Just as this macro socio-economic process stalled in the 2010s, Bruno's death echoed the anxiety-inducing decline of Brazil's once-rising poor (Klein et al, 2018). His parents claimed in court that their son's premature death should result in a higher indemnity to compensate their irreparable loss and Bruno's potential future earnings with his college degree. As Brazilian law allows for plaintiffs to demand monetary compensation for what they were prevented from earning; i.e. Bruno's unrealized achievements, whose college education meant the promise of a better future for him. The plaintiffs attached records of his education, including his UFSM diploma. The Fricks demanded an indemnity of R$ 1.3 million (US$ 595,500.00 at the time).

Despite vast evidence of omissions on behalf of both the State of Rio Grande do Sul and the City of Santa Maria, the Civil Court in Santa Maria ruled that these public entities could not be liable for the events. The following sections examine court arguments, and the Judiciary's reasoning.

Lower Court Arguments

The deadly incident could not be questioned in itself by the defendants, nor could they deny the death of Bruno Fricks, but they engaged in a blame game

conversation. They attempted to exempt themselves from accountability by blaming one another for the carelessness surrounding the incident. They also sought to redirect accountability to Gurizada Fandangueira, the evening's performing band who had used pyrotechnical machinery as part of their performance. Both strategies will be examined in this section.

Due to the more explicit dual interpretations of public accountabilities, the dispute between state and municipal governments deserves initial considerations. In Brazil, police and fire departments are part of the state bureaucracy, not part of a municipality's civil service. Nevertheless, the municipal civil service can enforce building codes, organize a municipal guard to (allegedly) maintain order in public spaces, and take charge of other duties concerning public welfare. Municipal and state laws reflect the constitution's call for cooperative federalism, particularly in matters of healthcare, education and the provision of other services, including those relating to safety. The existence of such a shared duty to protect the citizenry is complicated when both cities and states enact laws with similar language. When convenient, a municipality can de facto delegate their responsibility to the state, and vice-versa.

In court, disputes on the interpretation of these varying but converging laws and regulations gained particular contours. Given the similarity of cases, written arguments were basically facsimiles of the same argumentation, and corroborated the blame game that emerged in the aftermath of the Kiss incident. The City of Santa Maria attempted to blame the State of Rio Grande do Sul, band members and intoxicated patrons themselves (Pinto, 2015, pp. 126-152; Balconi, 2015, pp. 47-76; Freitas & Castilhos, 2015, pp. 281-309; Soares, 2015, pp. 532-558; Scaramussa, 2015, pp. 113-139; Fricks & Fricks, 2015, pp. 64-95). It essentially argued the City was merely accountable for issuing three different permits, and that while one of them required compliance to fire regulations, it was the state's duty to pass on information regarding the inobservance of such rules.[12] In other words, the City blamed the state (accountable for the fire department) for not providing accurate information or conducting fire prevention inspections. Santa Maria's public attorney stated that these arguments were in accordance with local law.[13]

[12] According to the written arguments in Andressa Pinto's case, the City alluded to three permits: the *alvará de localização* (a permit that allows a business to operate in a given category, i.e. nightclub); *alvará sanitário* (sanitary certificate); and *alvará ambiental* (environmental certificate) (Pinto, 2015, pp. 126-152). By issuing the first of those certificates, the city claimed it simply attested that the business met the criteria set forth by Municipal Decree 32/2006 and, therefore, that the city's administration could not deny the issuance of such a document due to a legal principle. Whereas it is true that when applying for the afore-mentioned certificate businesses are required to attach the fire department certificate (issued by the fire department, a state body), such a document was valid when the municipality examined the nightclub's application for the *alvará de localização*. Whereas it is true that the *alvará de localização* could have been rescinded by City Hall for fire prevention-related issues, the city claimed it was the fire department's duty to inform the municipality of such failures according to Municipal Decree 32/2006, which they allegedly did not In this case, the City argued the prosecutor's office dropped civil and criminal investigations against public officials working at City Hall.

[13] The municipality alluded to the Constitution of Rio Grande do Sul, in which Article 130 determines that the fire department was accountable for preventing and combating fire events, as well as to State Law 10,987/1997, State

Regarding damages sought by plaintiffs, the City also argued that the incident had been caused by a band member, and that many patrons had died due to alcohol intoxication. Santa Maria thought of itself as a mere bureaucratic processor of business applications, taking for granted that fire information was accurate unless stated otherwise by the fire department. This is to say that plaintiffs could not have proven omission by the city, as required by *responsabilidade subjetiva.*

The State of Rio Grande do Sul, which oversees the fire department, had a different perspective on duties and responsibilities derived from local and national law.[14] First, it argued that the fire department issues fire licenses, but that the municipality should have made sure businesses held those licenses. The club's license had been issued in 2011, and at the time of the incident, it was no longer valid. According to the State, the City of Santa Maria had failed to demand that Kiss provide proof of an updated and valid certificate. Second, the State argued that the owners of Kiss substantially altered the space without authorities' permission, essentially invalidating the previously issued fire safety certificate. Third, the State argued that the criminal investigation conducted under the auspices of military police had not led to the

Decree 37,380/1997, and Municipal Decree 32/2006. According to the city's narrative, these different statuses determined that the state was accountable for fire prevention.

[14] As per Rio Grande do Sul's defense motions in the cases filed by Andressa Pinto (pp. 428-462), Silvana Balconi (pp. 148-181), Felipe Freitas and Jonatas Castilhos (pp. 69-108), Jeanine Soares (pp. 246-280), Leonardo Scaramussa (pp. 209-243), and José and Rosane Fricks (pp. 209-243).

incrimination of fire department personnel regarding inspections or lack thereof. Fourth, they pointed to the City of Santa Maria's municipal legislation, which assigned the duty to inspect entertainment venues to municipal bodies.[15]

Appellate Rulings

All lower court decisions were subject to appeals submitted to the state upper court in Porto Alegre. Unlike the first instance court cases, appeals were distributed to different upper court chambers for review.[16] While upper-court magistrates came to similar conclusions, their arguments varied in tone and emphasis. When ruling on appeals, the Sixth Chamber of the State Appeal Court in Porto Alegre underscored that the backlog of inspections within the Santa Maria electronic system had been acknowledged by the state.[17] All upper-court decisions, however, alluded to existing

[15] In its defense statements, the State of Rio Grande do Sul claimed that the City of Santa Maria should be held liable for the events, according to its municipal constitution (*lei orgânica*), the ninth Article of which determines that city officials have the duty of inspecting sports, spectacles and public entertainment, as well as to award and revoke business licenses. See Silvana Bortoluzzi Balconi, Civil Lawsuit No. 027/1.13.0015599-0 (national number 0032652-76.2013.8.21.0027), and No. 0032652-76.2013.8.21.0027 (1st Civil Court of Santa Maria August 14, 2015), 148-181.

[16] Chambers (either known as *câmaras* or *turmas*) are subdivisions of the appellate court, formed by groups of second instance judges. These are known as *desembargadores*, who issue a collective ruling known as *acórdão*.

[17] The Sixth Chamber of the State Appeal Court in Porto Alegre received appeals from Felipe and Jonatas, as well as from the Kiss nightclub and Mauro Hoffman. The court dismissed the appeals from the last two, while ruling on the appeal filed by the plaintiffs. The court recognized the liability of the State of Rio Grande do Sul and of the City of Santa Maria due to their omissions, determining that they should split the aforementioned value with Kiss Nightclub (Freitas & Castilhos, 2015, pp. 1057-1077). Appeal Judge Thais Coutinho de Oliveira wrote the court's opinion, underscoring that the military investigation (see specific memo) acknowledged the fire department's omission in issuing a new certificate under the excuse that there was a large backlog of requests in Santa Maria (idem, p. 1067). The City of Santa Maria, in turn, failed to inspect the venue, their duty according to local law, and issued a business permit without caution (idem, 2015, p. 1069). Kiss nightclub filed an appeal to the Superior Court of Justice in

overlapping laws and regulations, which effectively meant the state and the city shared responsibilities to protect their citizenry, and had both failed in doing so. As a result, all upper-court rulings determined that the payment of the damage indemnity arbitrated by the lower court had to be shared by the nightclub, as well as Rio Grande do Sul and the City of Santa Maria. The *desembargadores* (upper-court magistrates) did not change the value of damages compensation set in each case examined in this article, for reasons discussed in the following section.

Legal Implications

The compensations set by the Santa Maria court, which the upper-court upheld, indicate Brazil's culture of meagre indemnities. The fact that the Santa Maria court exempted the State and the City from accountability also suggests a greater complacency towards state officials' misbehaviors. Both the meagre compensation and the complacency of the State and City made headlines.[18] However, determining the value of moral damage compensation is not a straightforward process. There are no

Brasilia (STJ), which was dismissed by the upper court (idem, 2015, p. 1264) on the grounds that the entity did not indicate sufficient jurisprudent divergence in order to sustain its arguments before the court (a procedural rule in Brazil, since the STJ is accountable for uniformizing legal understandings when it comes to the application of infra-constitutional laws in Brazil). Dockets were returned to Rio Grande do Sul electronically on January 30, 2019.

[18] Gaucho newspaper GZH stated that "in all cases, Santo Entretenimento Ltda, business name of the Kiss Nightclub, was ordered to pay compensation, whereas the Municipality of Santa Maria and the State were exempted in the proceedings" (Pagno, 2015).

specific written guidelines for this task, which is left solely to the discretion of the courts. While extensive in their scope and size, neither the 1988 Constitutional nor the 1990 Consumer Code established rigorous guidelines for duly compensating victims of serious damages, such as the ones triggered by the fire. In theory, magistrates follow guidelines set forth by the open language of Brazil's civil legislation, precedent (jurisprudence) and legal doctrine. The Civil Code generically states that indemnities shall be determined according to the "extension of the damage" (Article 944).[19] The Consumer Code does not bind judges to specific criteria for quantifying a given indemnity, rather, the generic reading delegates the duty to interpret boundaries or extent of indemnification to legal practitioners. Judges, based on concrete cases, assess a value to compensate the plaintiff for the damages they suffered. While magistrates are not bound to limits due to the lack of an objective approach to their assessment of textual law, they may be guided by the discussion brought up by legal scholars (legal doctrine) and often follow legal precedents.

Three problems emerge in this scenario: the unbinding nature of precedents concerning moral damage, divergences on the role of damages, and concerns with

[19] In the original language, "indenização mede-se pela extensão do dano" (Brazil, 2002). This clause is not unique to Brazilian law, with similar writings in other legal systems. They echo the Roman Law principle of *restitutio in integrum* (Taliadoros, 2016, p. 253).

damages as potential stimuli for new lawsuits. Regarding the first concern, magistrates may or may not follow precedents concerning moral damages indemnification, as they are not required to do so. In lawsuits filed before the enactment of the 2015 Civil Procedure Code, plaintiffs could demand that the court set any amount as a form of compensation. In some instances, parties requested a specific value, asking the court to determine a fair amount. Unsatisfied plaintiffs may then appeal decisions that set values lower than what was expected. Plaintiffs often appealed under the argument that the court disregarded the particularities of the case. The Fricks received a R$100,000.00 compensation, less than 10% of their request for R$1,350,000. They appealed in November 2015 to the state court in Porto Alegre. Appellants argued the indemnification had disregarded the particularities of their case, and that the damages did not consider the economic power held by the defendants (Fricks & Fricks, 2018, pp. 836-874).

A second and perhaps more relevant issue pertains to divergences in scholarly literature regarding the role of indemnity itself. Scholarship diverges on the "pedagogical nature" of indemnity, or whether the assessment of a higher indemnity may act as a form of punishment to the offender, disfavoring similar conduct in society. The Fricks pushed for that extralegal understanding, stating the upper court should

reevaluate the indemnity by setting a higher amount alongside punitive measures. In the United States, "punitive damages" are often quotidian part of legal practice.[20] In Brazil, the absence of specific legal guidelines, as well as magistrates' conservative interpretations and existing legal doctrine have made this topic controversial. This may be related to divergences between the Common Law and Civil Law branches of legal tradition. In the latter, the main source of law is written law, not jurisprudential provisions or precedents (though the latter are relevant). In Brazil, there is no legal provision for punitive damages. There are Civil Law countries where written laws do allow for punitive damages.[21] In any case, US law developments concerning punitive damages have influenced some Brazilian jurists' comprehension of damages as a sum of cash that should fairly compensate a victim, while also serving as an incentive for behavioral change. In Antonio dos Reis Júnior's words, punitive damages in their original US sense "serve not only for punishing the offender" but also as a form of

[20] An exception to the US culture of punitive damages can be found in the civil legislation of the state of Louisiana. The influence of French Civil Law in its legal tradition can be inferred from the existence of a Civil Code. Article 3,546 of the Louisiana Civil Code states: "punitive damages may not be awarded by a court of this state unless authorized: (1) by the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or (2) by the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled" (Louisiana State Legislature, 1991).

[21] In French Canada, which, like Louisiana, also inherited the Civil Law tradition, civil legislation allows punitive damages. For instance, Quebec's Civil Code alludes to them in various articles. Article 1621, however, suggests prudence in its application: "Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose. Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the reparatory damages is wholly or partly assumed by a third person" (Parliament of Quebec, 1991).

"general prevention," as they "incentive potential offenders not to behave in a similar way" (Reis Júnior, 2022, p. 56). This fits the notion of "deterrence" or *caráter dissuasório* (ibid), which allegedly deters people from triggering damaging situations, because of the potential financial consequences, in addition to any criminal or administrative ones. While not unanimous, the expression *caráter dissuasório* does appear in myriad court decisions in Brazil.

Scholars and magistrates who criticize high indemnities often do so on the grounds that Article 944 of Brazil's Civil Code does not authorize punitive damages (Püschel, 2007). Scholars who generally oppose punitive damages concede that they may be considered in serious cases (Pinto Júnior, 2012, pp. 44-45). Sérgio Cavalieri Filho, a prominent liability scholar, claimed that despite the absence of a legal provision on punitive damages, constitutional principles could be used as the basis for their adoption (Cavalieri Filho, 2014, pp. 125-127). Writing just a couple of years before the Kiss incident, Yusef Said Cahali alluded to excerpts of French and Italian doctrines on the plausibility of punitive damages (Cahali, 2011, pp. 30-38). According to Cahali, the Brazilian legal system permitted a punitive approach, which also should consider the defendant's class or economic situation (idem, p. 223).[22] In other words, while the law

[22] Cahali proposes that the offender's situation should be considered both in terms of their wealth and their poverty. This is to say that high punitive indemnities can be proportional to the offender's social status.

itself does not provide a basis for punitive damages, other sources of law—doctrine, jurisprudence, principles—could be used to sustain them in court. While Brazil's Civil Law system may indeed be a challenge to the adoption of punitive damages in court cases, it has been adopted and thoroughly discussed prior to the Kiss incident.

Third, an overwhelmed Judiciary such as Brazil's is concerned with potential waves of new lawsuits triggered by generous indemnities—even if in the longer term harsher arbitrations could deter inappropriate actions by service providers or at least favor extrajudicial settlements. In an interview to *O Globo*, a Rio de Janeiro magistrate named Flávio Citro stated that "some judges understand lower indemnities discourage frivolous lawsuits" and that moral damages were "banalized" in the process (Casemiro, 2008, p. 20). Judge Citro stated that he believed "in a pedagogical effect of indemnity" (ibid).[23]

Whether moral damages had become banal or not, by the time of the incident, Brazilians had indeed normalized filing lawsuits based on their right to indemnity facilitated by greater access to justice since democratization. This included the Consumer Code's (1990) pro-consumer provisions. National Justice Council data from

[23] This January 2008 article was published in a context of economic growth and high consumption observed in Lula da Silva's tenure, both of which correlate to a wave of lawsuits discussing consumer rights. The article compiles different views on the theme, including the one espoused by Rio de Janeiro judge Flávio Citro.

2012 projected 92,234,282 active legal cases across Brazil, which then had a population of 200 million (Conselho Nacional de Justiça, 2013, p. 11). That year alone, twenty million new cases were filed before courts across the country (ibid). The Kiss incident occurred in a context of a booming Brazilian economy, in which millions sought justice through formal judicial means.

In April 2018, the upper court in Porto Alegre dismissed the Fricks' request for higher compensation. The *câmara* stated the value was in accordance with the circumstances of the case. The reasoning mentioned the lack of an objective criteria for valuing damages, and that the R$ 50,000 (approximately 15,000 USD) indemnity for each parent constituted a reasonable amount:

> In the absence of legal, mathematical, or exact rules, the judge uses their prudent arbitration, good sense, proportionality or reasonability, to set a value for moral damages. The judge must find a sum that is not tiny, symbolic, that does not merely represent a judicial disapproval, or which is reduced to the point that it devalues the legal value of the rights violated (rights of the person). From another standpoint, the judge cannot determine a value for moral damages that enriches the victim, leading them to obtain an unjustifiable patrimonial increase, or that is contrary to the economic conditions of the perpetrator that could lead the offender to their own ruin (Frick et al, 2018, p. 1203).

The state court thus maintained the lower indemnity values, while extending the responsibility of paying them to the State and the City of Santa Maria. It alluded to the

lack of objective parameters for indemnification as a reason for not raising the amount set for compensation. To victims, this may have sounded like a symbolic gesture, which acknowledged public officials' malpractices. But the low amount received further exacerbated their grief.

Beyond the issue of low indemnification and the problems arising from it, including the lack of legal provisions regarding this kind of approach, the Kiss fire also put a spotlight on problems concerning Brazil's celebrated cooperative federalism. When discussing the potential problems of this subtype of federalism almost two decades before the Kiss fire, Enoch Alberti Rovira (1996) asserted that cooperative federalism implies the substitution of "freedom and independence of each party" for the exercise of its powers "by the participation of all of them in a single decision-making mechanism, which requires unanimity" (Rovira, 1996, p. 67). This scenario may also lead to "difficulties in acting with speed and agility, when not true paralysis of public action" (ibid). This is precisely what seems to have happened in Santa Maria. The State of Rio Grande do Sul and the municipality could not coordinate their shared accountabilities for protecting the people of Santa Maria from damaging events. Not only did these entities fail to agree on safety responsibilities, but they also assumed the other was accountable for them. Even the Judiciary, when examining the court cases at

the Santa Maria court, did not have a clear vision of how accountabilities worked under Brazil's constitution. It was up to appellate magistrates to emphasize the cooperative nature of Brazilian federalism, but without considering higher indemnities.

Conclusion

Following the Kiss Nightclub fire, sources evidence a number of pro-consumer judicial rulings in fire indemnity trials. In 2001, a concert hall in Belo Horizonte called Canecão Mineiro caught fire, resulting in seven casualties and hundreds of injured patrons. The state court ruled that the city had been derelict in its duty to guarantee safe facilities. Because the speed at which cases are tried in Brazil varies dramatically from court to court and state to state, appeals filed by victims or their relatives took years to be ruled on by the Minas Gerais State Court (Moreira et al, 2014).[24] Before and after the fire, representatives in Brasília proposed bills to codify damage compensation with a punitive character as a way to increase indemnification values, but these have not yet

[24] In September 2014, a case brought against the City of Belo Horizonte by survivors was finally ruled by the state appellate court, which in a majority vote determined that the city had been negligent (Aparecido et al, 2014). The appellate court ruled that if the city charged a fee to authorize the venue to operate, such as the duty for the municipal administration to make sure the concert hall complied with safety guidelines. In doing so, the court dismissed the appeal of the municipality and increased the value of damages to R$15,000.00 per person (US$ 6,575.00 at the time). The sum was close to that arbitrated by the gaucho courts, and so was the understanding that municipalities are accountable for consequences of their inaction. The case also illustrates the continuous debate on indemnification.

taken hold.[25] The decision to adhere or not to a "pedagogical" approach to indemnities still relies on individual judges and appellate courts, based on the circumstances of each case and the doctrinal inclination of the magistrates.

Criminal proceedings involving the Kiss case remain under scrutiny due to the courts' slow pace, the existence of many appeals and loopholes in Brazilian law, and breaches of due process rights in jury trials. Civil cases seem to have been resolved more quickly. By affirming the accountability and liability of the state and the city, the Rio Grande do Sul court set a precedent that authorities are accountable for making safety guidelines work, as prescribed by national and local laws.

The cooperative form of federalism enshrined in the 1988 Constitution fomented a solid healthcare system, among other contributions to the general population. Despite regional inequities, occasional understaffing and underfunding, it is effectively open to all Brazilians and even non-resident foreign visitors. Examples such as the Unified Healthcare System (SUS) represent a positive change, but they are not representative of all the changes that have come out of the 1988 Constitution. Overlapping

[25] In 2012, congressman Domingos Aguiar Neto proposed Bill 3,880/2012, which aims to codify punitive damages (Aguiar Neto, 2012). According to the statement submitted alongside the proposed document, the "punitive character would avoid the repetition of damaging conducts, benefiting society as a whole" (Aguiar Neto, 2012). Representative Wilson Filho (2017) also filed a similar proposition. He stated in his justifications for Bill 8,704/2012 that a punitive character would make no one "find it convenient to pay for compensation" and that whereas some criticize the "American system largely due to the arbitration of excessive values" (Filho, 2017), this criticism should not be automatically transferred to the Brazilian case.

accountabilities of municipal, state, and federal bodies lead to challenging scenarios. This article provides a case for decentering successful examples such as the SUS when examining implications of shared accountabilities among entities of a federation. The Kiss case suggests that overlapping accountabilities favored the omissive reactions of the City of Santa Maria and the State of Rio Grande do Sul, which ultimately contributed to the deadly nightclub incident.

References

Aguiar Neto, D. de G. (2012) Projeto de Lei nº 3.880, de 2012 (Do Sr. Domingos Neto) Altera a redação dos arts. 186 e 944 da Lei nº 10.406, de 10 de janeiro de 2002 - Código Civil. https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=998458&filename=Avulso%20PL%203880/2012 [last accessed 30/03/2023]

Balconi, S. B. (2015) Civil Lawsuit #027/1.13.0015599-0 (1st Civil Court of Santa Maria August 14, 2015).

Barroso, L. R. (2023) *Curso de direito constitucional contemporâneo: os conceitos fundamentais e a construção do novo modelo*. São Paulo: Saraiva Jur.

Bezerra, E. D. and da Silva, D. E. P. (2013) "Adoção de inovações em serviços turísticos: um estudo de múltiplos casos em bares e restaurantes da orla de Aracaju (SE, Brasil)."

Revista Brasileira de Pesquisa Em Turismo 7(1), pp. 14–34. https://doi.org/10.7784/rbtur.v7i1.545

Brasileiro, A. M. (1974) "O Federalismo Cooperativo." *Revista Brasileira de Estudos Políticos* 39, pp. 83-128. https://heinonline.org/HOL/P?h=hein.journals/rbep39&i=83

Brazil (1988) 1988 Constitution. https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm

Brazil (1940) Decree-Law 2,848 of December 7, 1940 (Penal Code). https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm

Brazil (1941) Decree-Law 3,688 of October 3, 1941. http://www.planalto.gov.br/ccivil_03/decreto-lei/del3688.htm

Brazil (1990) Law 8,078 of September 11, 1990 (Consumer Code).

Brazil (2002) Law 10,406 of January 10, 2002 (Civil Code) https://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406compilada.htm.

Cahali, Y. S. (2011) *Dano Moral*. 4a edição revista, Atualizada e ampliada. São Paulo: Editora Revista dos Tribunais.

Carrefour Comércio e Indústria LTDA; de Jesus Almerinda, P. F. S. et al. (2009) Civil Appeal 59,235/09, Desembargador Nascimento Póvoas (14th Civil Appeal Court of the State of Rio de Janeiro 2009). http://www1.tjrj.jus.br/gedcacheweb/default.aspx?UZIP=1&GEDID=0003C5332B93D5525961FF2976015AE29B3812C402330558 [last accessed 16/01/2023]

Casemiro, L. (2008) "Cai valor de indenizações por dano moral." *O Globo*, January 2, 2008, sec. Economia. Acervo O Globo.

Cavalieri Filho, S. (2014) *Programa de responsabilidade civil*. São Paulo: Atlas.

Conselho Nacional de Justiça (2013) "Courts in Figures 2013: Executive Summary." Government Report. Brasília: National Council of Justice. https://www.cnj.jus.br/wp-content/uploads/2011/02/relatorio_jn2013.pdf. [last accessed 17/12/2023]

Filho, W. (2002) Projeto de Lei n. 8704/2017, pelo Deputado Wilson Filho (PTB-PB), que: 'Altera o Art. 944 da Lei Nº 10.406, de 10 de Janeiro de 2002 - Código Civil -, para dispor sobre as funções punitiva e preventiva da indenização por danos morais.'" https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1602169 [last accessed 03/04/2023]

Freitas, F. d. S and Krug Castilhos, J. (2015) Civil Lawsuit # 02711300005563-4 (national number 0006064-32.2013.8.21.0027), No. 0006064-32.2013.8.21.0027 (1st Civil Court of Santa Maria September 9, 2015).

Fricks, J. D. and Fricks, R. P. (2018) Appeal Ruling in case #02711300005563-4 (national number 0006064-32.2013.8.21.0027), No. 0006064-32.2013.8.21.0027 (Sixth Civil Chamber of the State Court of Rio Grande do Sul April 2, 2018).

Gamper, A. (2005) "A 'Global Theory of Federalism': The Nature and Challenges of a Federal State." *German Law Journal* 6(10), pp. 1297–1318. https://doi.org/10.1017/S2071832200014334

Guglinski, V. V. (2013) "Tragédia em Santa Maria: da compensação pelo dano moral em tutela antecipada." *Revista Jurídica Consulex* 17(386), pp. 38–42.

Inter-American Commission on Human Rights. (2021) "Situation of Human Rights in Brazil." Washington D.C.: Organization of American States. https://www.oas.org/en/iachr/reports/pdfs/Brasil2021-en.pdf [last accessed 03/04/2023]

Klein, C. H.; Mitchell, S. T. and Junger, B. (2018) "Naming Brazil's Previously Poor: 'New Middle Class' as an Economic, Political, and Experiential Category: Naming Brazil's Previously Poor." *Economic Anthropology* 5(1), pp. 83–95. https://doi.org/10.1002/sea2.12104.

Lacy, K. (2010) "Measuring Empowerment and Social Inclusion in Favela Upgrading Belo Horizonte, Brazil." Master's Thesis, University of New Orleans. University of New Orleans Theses and Dissertations. https://scholarworks.uno.edu/cgi/viewcontent.cgi?article=2128&context=td [last accessed 05/02/2023]

Louisiana State Legislature (1991) Louisiana Civil Code (1991). https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=67&level=Parent. [last accessed 05/02/2023]

Marques, C. L. (2004) "Superação das antinomias pelo diálogo das fontes: o modelo brasileiro de coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002." *Revista da Escola Superior da Magistratura de Sergipe*, 7, pp. 15–54.

Mendes, G. F. and Branco, P. G. (2020) *Curso de direito constitucional*. São Paulo: Saraiva Educação.

Moreira, D. A.; Matias, G. G.; Pereira Xavier, J. C.; Duarte Júnior, A. B.; dos Anjos Reis, M. C.; dos Santos, A. V. and de Jesus Rodrigues, Ê. (2014) Civil Appeal 1.0024.02.860099-7/002, Alberto Vilas Boas (minority opinion), Eduardo Andrade (majority opinion) (1st Civil Appellate Court of Minas Gerais 2014). Available at https://www5.tjmg.jus.br/jurisprudencia/pesquisaPalavrasEspelhoAcordao.do?&numeroRegistro=2&totalLinhas=8&paginaNumero=2&linhasPorPagina=1&palavras=inc%EAndio%20casa%20noturna&pesquisarPor=ementa&orderByData=2&referenciaLegislativa=Clique%20na%20lupa%20para%20pesquisar%20as%20refer%EAncias%20cadastradas...&pesquisaPalavras=Pesquisar& [last accessed 16/01/2023]

Pagno, M. (2015) "Justiça concede mais 6 indenizações a parentes e vítimas do caso Kiss." *GHZ*, September 11, 2015, sec. Geral. https://gauchazh.clicrbs.com.br/geral/noticia/2015/09/justica-concede-mais-6-indenizacoes-a-parentes-e-vitimas-do-caso-kiss-cj5w2oprx184txbj0mgcei1qe.html [last accessed 10/01/2023]

Parliament of Quebec (1991) Civil Code of Quebec. https://www.legisquebec.gouv.qc.ca/en/version/cs/CCQ-1991?code=se:1621&history=20230403#20230403

Pinto, A. d. R. (2015). Civil Lawsuit 027/1.14.0001838-2 (national number 0003330-74.2014.8.21.0027), No. 0003330-74.2014.8.21.0027 (1st Civil Court of Santa Maria October 9, 2015).

Pinto Júnior, A. R. (2012) "A função social dissuasória da indenização por dano moral coletivo e sua incompatibilidade com a responsabilidade civil objetiva." *Revista do Tribunal Regional do Trabalho da 3ª Região* 56(86), pp. 37–52.

Püschel, F. P. (2007) "A função punitiva da responsabilidade Civil no direito brasileiro: uma proposta de investigação empírica." *Revista Direito GV* 3(2), pp. 17–36.

Reis Júnior, A. d. (2022) *Função promocional da responsabilidade civil: um modelo de estímulos à reparação espontânea dos danos*. Indaiatuba: Foco.

Rovira, E. A. (1996) "El federalismo actual como federalismo cooperativo". *Revista Mexicana de Sociología* 58(4), pp. 51-68 https://doi.org/10.2307/3541041.

Sampaio, F. J. M. (2017) *Evolución de La Responsabilidad Civil y Reparación de Daños Ambientales*. J.M Bosch. https://doi.org/10.2307/j.ctvr339mx.

Santiago, C. Z. (2015) "La Responsabilidad Civil Extracontractual de Los Empresarios. Estudio Comparado Entre España y Puerto Rico." In *La Responsabilidad Civil Extracontractual de Los Empresarios. Estudio Comparado Entre España y Puerto Rico*, pp. 2–12. Dykinson, S.L. http://www.jstor.org/stable/j.ctt1k231wt.1

Scaramussa, L. B. (2015) Civil Lawsuit #027/1.13.0015601-5 (national number 0032656-16.2013.8.21.0027), No. 0032656-16.2013.8.21.0027 (1st Civil Court of Santa Maria September 9, 2015).

Silva, J. A. d. (2005) *Curso de direito constitucional positivo*. São Paulo: Malheiros.

Soares, J. O. (2015) #027/1.14.0008187-4 (national number 343384-03.2018.8.21.7000), No. 343384-03.2018.8.21.7000 (1st Civil Court of Santa Maria September 9, 2015).

Souza, W. L. B. d. (2015) "A perspectiva histórica da responsabilidade civil." In *Responsabilidade Civil*, edited by Alexandre Dartanhan de Mello Guerra e Marcelo Benacchio, pp. 9–32. São Paulo: Páginas & Letras Editora e Gráfica.

Taliadoros, J. (2016) "The Roots of Punitive Damages at Common Law: A Longer History." *Cleveland State Law Review* 64(2), pp. 251–302.

Tartuce, F. (2003) *Responsabilidade civil*. Rio de Janeiro: Forense.

United Nations Human Rights Office of the High Commissioner (2022) "Brazil Must Abide by International Obligations and Strengthen Its Torture Prevention System, Say UN Experts." *United Nations Human Rights: Office of the High Commissioner*, February 11, 2022. https://www.ohchr.org/en/press-releases/2022/02/brazil-must-abide-international-obligations-and-strengthen-its-torture [last accessed 03/04/2023]

Velloso, C. M. (1992) "Estado federal e estados federados na Constituição Brasileira de 1988: do equilíbrio federativo." *Revista Brasileira de Estudos Políticos,* 74–75, pp. 41–90.