COMPARING THE LIMITS OF FEDERAL GOVERNMENT LIABILITY IN BRAZIL AND IN THE UNITED STATES

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1. INTRODUCTION

Brazil and the United States have very different approaches to federal government liability. In Brazil there is a clear tendency to hold the federal government liable for torts as broadly as federal budget will allow. The idea of distributive justice prevails. According to this idea, government is the entity that can more adequately support the cost of injury related to the governmental activity regardless of whether there is negligence. As a result taxation is constantly increasing to bear the costs of public activity. In the United States, the opposite happens. The concern with solvency of public treasury is constant and non-liability is the rule, waiving government immunity is the exception. On the other hand, there is severe criticism on the fairness of the system, which leaves injured individuals without compensation.¹

This article features and compares the common points and differences between the two country systems in light of limitations, application and meaningful courts precedents. In Brazil, federal government is broadly liable for torts. In the U.S., federal government is limitedly liable for torts.

2. THE CONCEPT OF GOVERNMENT LIABILITY

Liability is the obligation to compensate damages, in order to restore the *status quo ante* a person had.\(^2\) Government and persons (private and juridical) can be liable for torts. Liability allows claims for damages, related to injury, loss of property, personal injury or death.\(^3\)

### 3. HISTORICAL PROCESS

The Federal Tort Claims Act (FTCA) is the liability statute in the U.S. while the Brazilian Federal Constitution (C.F.B) is the most important law concerning federal liability.

The federal liability in the U.S. derives from a long and disputed historical process until the outcome FTCA, in 1946. In Brazil, the concept is an outcome of a constitutional guarantee\(^4\), which started with the liberal constitution of 1946.

In order to understand and compare the construction and interpretation of government liability in the U.S., the doctrine of sovereign immunity shall be reported. The sovereign immunity comes from the English common-law that the “King can do no wrong”.\(^5\) While the King was inseparable from the State, the State was the font of justice


\(\text{\footnotesize Os grandes mestres da responsabilidade civil, em suas obras sistemáticas, procuram sintetizar o conceito, deslocando a noção abstrata da responsabilidade civil para a configuração concreta de quem seja responsável,dizendo que "uma pessoa é civilmente responsável quando está sujeita a reparar um dano sofrido por outrem" (Mazeaud, Mazeaud e Mazeaud, Leçons de Droit Civil, vol. II, nº 374).}\)

\(\text{\footnotesize Orlando Guimaro Junior, Responsabilidade Civil, Noções Basilares e Evolução Histórica, http://www.ufac.br/ensino/cursos/curso_direito/docs/ufac_artigo_e11.doc}\)

\(\text{\footnotesize \(^3\) 28 U.S.C. § 1346(b)(1976), Constituição Federal C.F.[Constitution] art. (Braz.)}\)

\(\text{\footnotesize \(^4\) Constituição Federal C.F.[Constitution] art. 37 §6º (Braz.).}\)

\(\text{\footnotesize \(^5\) K.Davis, Administrative Law Treatise § 25.01 (1958) referred in Krotseng, supra.}\)
and law. No wrong could be made. At first the federal government was immune to liability. As Mark C. Niles\textsuperscript{6} summarizes:

“In other words, sovereign immunity meant that the Crown could not be subject to suit in courts of law (without consenting to such suit) because it was the law (and therefore could not be said to have acted “unlawfully”), and/or because the courts of law were merely extensions of the authority of the Crown, and could, therefore, play no plausible role in limiting the activities of the Crown, or obliging it to act.”

Until 1946, limited responsibility was the logical result of the application of the sovereign immunity in the U.S. which the FTCA came to challenge. When the FTCA was enacted, it represented a revolutionary statute which aimed to “waive the sovereign immunity of the United States in cases arising out of torts committed by its employees and officers.”\textsuperscript{7}

The FTCA provides the possibility to sue federal government in the federal courts. The statute challenges compensation for damages that before were subject to the enactment of a private bill.\textsuperscript{8} Still, the statute provides limitations to the waiver of immunity. For example, section 2680 of the FTCA limits its applications when the claim


\textsuperscript{7} Id. Niles, supra.

\textsuperscript{8} See Harz, referred in Niles, supra.

For over 150 years, prior to the enactment of the FTCA… the sole remedy available to the victim of a federal government employee’s negligent or wrongful act or omission was relief by private bill. The individual would have to embark on a lengthy and uncertain path of petitioning his local representative to introduce a bill that would grant him monetary relief. Hearing before congressional committees were mandatory and the bill had to be passed by both branches of the legislature. Because Congress was not well equipped to evaluate and adjudicate these private matters, most of these claims were never addressed or improperly investigated.
is based upon an act or omission of an employee of the Government, exercising due care, or performing a discretionary function; any claim arising out of the loss, miscarriage or negligent transmission of letters; any claim concerning collection of tax and customs duty or the detention of goods and merchandise; any claims concerning of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; etc. Such limitations have been interpreted by the Supreme Court limitedly in terms of advances while considering federal government responsible for its harms. As a result, the federal government became liable only under certain circumstances.

At first, in Brazil, state was not liable at all. Brazil was a kingdom and the Crown would never be liable for wrongful acts of its agents - this philosophy was inspired by the idea of “the king can do no wrong” and prevailed until the Nineteenth siècle. As a civil law country, Brazil moved toward the French inspired ideas of the Conseil d’Etat. Nowadays, government liability originates from the evolution of the doctrine named state subjective responsibility to the doctrine named state objective responsibility. According to the subjective doctrine the State was liable once proved the culpability of its employees. The Brazilian liability process passed through what was named “anonymous culpability”. In other words, to be compensate the claimant should prove the harm and the culpability, but there was no need to name a responsible employee. The objective responsibility was adopted by the Federal Constitution (C.F.) enacted in 1946. That Constitution ruled as well as the 1988 C.F. (today’s C.F.) that in order to be compensated

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10 For more details on both theories, see Pereira, 33-38, 46, supra.
11 Alexandre Mendes e Paulo Rogério Cirino, Responsabilidade Civil do Estado, artigo.
the party shall prove the damage caused by an action of the public employee and the link between his conduct and the damage. There is no need to investigate the culpability. Consequently, the federal government is broadly liable as far as claimants are able to prove the damage connected to a public employee’s action or omission.

The United States adopted narrow liability and Brazil adopted broad liability. The first one is concerned with government officials’ protection while acting in “good faith”. The U.S. government is concerned with “the impact that exposure to civil liability would have on the performance of discretionary policy” and avoiding decisions made on fear of liability is also U.S. federal concern. For Brazil, distributive justice calls for “socializ[ing] losses arising from accidental harm through taxes and other potentially equitable means of community cost sharing […]” In sum, the U.S. and Brazil took distinct paths in the matter of limiting federal government responsibility.

4. HOW U.S. AND BRAZILIAN SUPREME COURTS HANDLE THE GOVERNMENTAL LIABILITY – LIMITATION AND EXPANSION

4.1 Meaningful cases in the United States

The U.S. Supreme Court first meaningful interpretation of the FTCA was held in Brooks v. United States. The case was about damages resulting from a truck collision. The driver was a civilian employee of the army. The plaintiff alleged negligence of the truck’s driver causing him injuries. The Supreme Court acknowledged that the District

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12 Id. Niles, supra.
13 Id. Niles, supra.
14 337 U.S. 49 (1949) (the case is referred in Krotseng, supra).
Court had jurisdiction over the case and that none of the exceptions of the immunity waivers were present. There was a first sign toward broadly interpretation of government liability. The Court was experiencing the new statute.

Following this decision, the Court went back to narrow the interpretation of governmental liability in *Feres v. United States*\(^{15}\). The case concerned damages because of a fire in a military facility. The Court held that FTCA was not applicable for servicemen in the line of duty.\(^{16}\) The Court then retreated.

In *United States v. Yellow Cab Co.*,\(^{17}\) the Supreme Court resourced *Brooks* and held that claim was covered by the FTCA. In *Yellow Cab Co.*, the issue was whether the United States were liable for indemnity or contribution. The Court rejected the legislative history that could have excluded the claims.\(^{18}\) The Court moved forward.

In the meantime, a significant case toward extending the governmental immunity was held, *Dalehite v. United States*.\(^{19}\) In that case, the plaintiffs claimed for damages because of an explosion resulting from ammonium nitrate fertilizer produced under United States control. The District Court granted compensation holding that the explosion was due to government negligence. The Fifth Court of Appeals reversed and the Supreme Court sustained the Court of Appeals 4-3 decision. The Court held that the actions were performed under the discretionary function and therefore were exempt from liability.\(^{20}\)

\(^{15}\) 340 U.S.135 (1950) (the case is referred in Krotseng, supra).
\(^{16}\) Id. at 273.
\(^{17}\) 340 U.S.543 (1951)
\(^{18}\) Id.Krotseng, at 274 supra.
\(^{19}\) 346 U.S.15 (1953) (the case is referred in Krotseng, supra)
\(^{20}\) Id.Krotseng, at 274, supra.
Only In 1963, The Supreme Court acknowledged another case on FTCA. The case was *United States v. Muniz*\(^{21}\) concerning claims of prisoners for torts caused by federal employees. The Supreme Court granted the claims expanding the interpretation of the waiver of immunity to note that it provided a “general waiver of immunity” and “much-needed relief to those injured by the negligence of government employees.”\(^{22}\)

Lately, the Supreme Court retreated again, choosing once more to narrow the governmental liability as seen in *Stencel Aero Engineering v. United States*\(^{23}\). The case was about a captain of the air force reserve who was injured because of a malfunction in his “life-support” system in an emergency situation. In *Stencel*, the defendant claimed that the product was under control of the United States and cross-claimed against the country. The argument was that the government had been actively negligent. The Court dismissed the case under the three major fundamentals: the first, that the “relationship between the government and its suppliers of ordnance, like the relationship between the government and its military, is ‘distinctively federal in character.’” The second, that “even though the claimant had no remedy at all if it could not recover under FTCA, unlike the claimant in *Feres*, Congress intended the military compensation scheme to be the “upper limit of liability for the Government as to service-connected injuries.” The third fundament was the “deleterious effects of suits by servicemen against their officers on military discipline.”\(^{24}\)

From the cases above, it is worthy to note that the U.S. Supreme Court in comparison to Brazil Supreme Court (S.T.F.) tends to limit the waiver of statute inconsistently.

\(^{21}\) U.S.150 (1963) Id. Krostseng at 277

\(^{22}\) Id. Krotseng, at.278, supra.

\(^{23}\) 431 U.S.666 (1977) Id. Krotseng at 289, supra.

\(^{24}\) Id. Krotseng at.289, supra.
reasons are sometimes strictly attached to the statute. But most of the times, the Court seems to be making a sort of public policy-formulation in order to protect the United States from liability. It turns into a charade to determine which claims are actionable under FTCA.

4.2. Meaningful cases in Brazil

The Constitution of Brazil was so generously broad in relation to state liability that it is possible to affirm that the hard task is to determine whenever the liability is limited and within any patterns.

Considering that Brazil is not a common-law country, in order to do the analysis of its liability system, the first thing to read is the law. The governmental liability is said to be basically a constitutional matter. There is no specific law for state responsibility as it happens in the U.S. The C.F. states:

Public legal entities and private legal entities rendering public services shall be liable for damages that any of their agents, acting as such, cause to third parties, ensuring the right of recourse against the liable agent in cases of malice or fault.25

Differently from the FTCA, the C.F. rules that the government is liable as far as the damage or is proved and the link (causal nexum) between the damage and the agent conduct is consistent. The government has claims back against the public agent once proved his fault, as well. Because the constitution is so generic and broad, while stating the government liability, all sorts of claims are acknowledged by courts. Courts grant claims concerning assets and persons. In relation to persons, courts grant claims on

25 C.F. art.37 § 6º.
material and immaterial rights. For example, besides providing compensation because of damages to property, courts also estipulate torts for offenses of honor published in an official paper.

In fact, despite not being a common-law ruled country, decisions made by Brazilian courts, specially the Supreme Court (S.T.F.) lying on its website\textsuperscript{26}, play as a guide to picture the scene of governmental liability. The S.T.F. provides a list of meaningful cases from which it is possible to illustrate some of the differences between U.S. governmental liability and Brazilian governmental liability in relation to the pattern of protection each country concedes to governmental agents.

In an appeal, Recurso Extraordinário 237.561-0 \textsuperscript{27}, the S.T.F. granted state liability because of the omission of the state in preventing a invasion of private property that caused torts. In the case, plaintiffs argued that the government did not prevent the invasion of the São Pedro farm, a private property. The invaders were from so-called “landless movement”. The protesters entered the property, killed animals and even kept the owners as hostages. The plaintiffs argued that despite their protection request, the government did not provide any protection. The Court held that the government was liable and granted the compensation.

In an appeal, Agravo Regimental no Agravo de Instrumento 766.051\textsuperscript{28}, the Court ruled that the government was liable not only for actions that cause damages, but also for omission. In the case, the plaintiff argued \textit{faute de service} because the government did

\textsuperscript{26} See http://stf.com.gov
\textsuperscript{28} S.T.F., Ag.Reg.AgI 766.051, Relator Min. Gilmar Mendes, 14.06.2011, 374, Diário da Justiça [D.J.], 29.06.2011 (Braz.).
not provided safe road resulting a car accident. The Court ruled that the government was liable because the road had not been correctly maintained and granted compensation for the torts.

Differently from the U.S. case *Feres*, the S.T.F. granted torts for a case in which the military servant was killed on duty. In Recurso Extraordinário n. 140270-9, the spouse of the decedent claimed for torts because of the military death on a troop training. She argued that the military facility physician considered her spouse fit for the training despite his cardio condition. The court granted the compensation for the death under the basis of the suffer caused by the governmental activity.

In contrast with *Muniz*, cases related to the death of inmates are almost all granted compensation under the state liability in S.T.F. For example, in Recurso Extraordinário n. 179.147-1, the S.T.F. ruled that the state was responsible for the death of an inmate who was killed by another one in the prison. The mother of the inmate argued that he had asked for being transferred for another facility, but the government did not take in consideration his request. The court granted torts. It is worthy to note that the justice in writing his opinion featured the need to share the burden of the damage with the whole society by means of paying taxes. Such viewpoint, affirmed in 1997 has been prevalent in the Court.

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29 S.T.F., RE 140.270-9, Relator Min. Marco Aurélio, 15.04.1996, 475, Diário da Justiça [D.J.], 18.10.96 (Braz.).

30 S.T.F., RE 179.147, Relator Min. Carlos Velloso, 12.12.97, 589, Diário da Justiça [D.J.], 27.02.98 (Braz.).

31 Id. at. 596

George Vedel leciona que o dano causado pela Administração ao particular ‘é uma espécie de encargo público que não deve recair sobre uma só pessoa, mas que deve ser repartido por todos, o que se faz pela indenização da vítima, cujo ônus definitivo, por via
One more pattern of cases in the S.T.F. must be brought in order to have the current picture of the federal government liability. It is related to the claims concerning health care. First it is necessary to explain that the C.F. provides the right to health as a fundamental right. Also health care should be provided by govern. 32 According to these constitutional precepts the governmental liability in order to provide high cost medical care has been granted by S.T.F. In Agravo Regimental no Recurso Extraordinário 627.411 33 the court granted not only that government should provide the treatment but also that government should pay torts for the delay in providing treatment. The plaintiff argued that federal governmental should pay for the medicine and also for the torts in delaying to provide the medicines for her illness. The Court granted the opinion of the small claims court 34 including the damages for the delay.

The approach of the S.T.F. is to socialize the burden of the damages, no matter how much it costs to the tax payers. The tax burden in Brazil reached 35.13% in 2010 while it was 30.03 in 2000. 35 In Brazil, S.T.F. faces the challenge of making distributive justice without ruling beyond its jurisdiction. Hence, the Court tries to socialize the damage without submitting tax payers to more burden. 36

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32 C.F. 196-199
33 S.T.F., RE 627.411, Relatora Min. Rosa Weber, 18.09.12, 1-7, Diário da Justiça [D.J.], 02.10.12 (Braz.)
34 The decision was first held by the small claims court i.e. juizado de pequenas causas.
36 In Repercussão Geral em Recurso Extraordinário 571.184-6, S.T.F. debates the possibility of is possible to notice the effort of the Court in order to restrain the possibility of creating new taxes to face the burden of objective liability of federal agencies.
5. LIMITATIONS OF THE WAIVER OF IMMUNITY

5.1. In United States

The Supreme Court in the U.S. struggles with inconsistency concerning the limitation of the waiver of immunity. However, the Supreme Court’s tendency is to restrain claims against federal government. Such restrict approach as pointed before leads to unfairness, because individuals are deprived from compensation to injuries resultant of the governmental activity. In addition to the cases and exemptions mentioned before, there is an exception in FTCA to the waiver of immunity that is particularly perverse to claimants. This exception works in a great deal to enlarge the sovereign immunity of the U.S. This exception is stated by what the “discretionary function or duty on the part of a federal agency or an employee of the Government.”

The discretionary function provides a broad interpretation exempt to the waivers of immunity, because its interpretation is extremely subjective. The inclusion of this exempt in the FTCA has to do with the idea of “preventing liability arising out of ‘acts of a governmental nature or function’ or in other words, ‘claims arising out of certain acts of administrative discretion’.” This shield from liability is some way justified by governmental policymaking or its administrative discretion. It is been known as “

38 Niles at 1303 supra.
‘absolute’ immunity, serv[ing] as a drastic limitation on the liability of government officials.”

The basis for the “discretionary immunity” relates to the need of keeping government functions while acts are practiced in “good faith” so that government official would not make decisions in self-preservation. Also it happens because waiving the immunity would restrain Government from acting. Lastly the aim is to protect Government from being “inundated” with so many claims that it would avoid performing normal duties.40 This exemption is the most criticized among the authors mentioned, because results in unfair holdings like Berkovitz41 by the Third Court of Appeals.

In Berkovitz, the parents of an infant claimed for torts against U.S. agencies, because their son, after having polio vaccine (Orimune), developed a severe case of polio. The child became paralyzed and incapable of breathing without the aid of a respirator. Government filed a motion to dismiss under the argument of discretionary function exception. Although denied by the district court, the motion was granted in a reversal decision of the Third Circuit of the Court of Appeals. At the end and fortunately for the injured family, the Supreme Court narrowed the limitation. The Court reversed the court of appeal’s opinion, under the argument that there was no discretion in producing safe vaccines, therefore there was no choice to be made.

39 Niles at 1306 supra.
40 Niles at 1306 supra
Another significant case in the matter of discretionary immunity is *United States v. S.A. Empresa de Viação Aerea Rio Grandense (Varig Airlines)*\(^42\) in which the Court held that “the exception bars claims on FAA’s decision to initiate a spot checking program.” In that case, Varig Airlines and the families of the decedent passengers claimed for torts from a fire in a 707 Boing plane which had an emergency landing. The passengers were killed in a fire that started because of a cigarette thrown in the towel spot. The argument was that the federal agency failed while approving the design of the jet as meeting the “minimum safety standards”. Those standards required the trash cans to be made of fire resistant materials. The agency, however, approved the jet without the requirement. The district court dismissed the claim under the discretionary function exception. The Court of Appeals reversed, but the Supreme Court held that the exception applied. The Court decided that the agency had the discretion to discern how the inspection should be conducted.

Differently from *Varig Airlines*, the S.T.F. in the Agravo Regimental no Agravo de Instrumento 742.555\(^43\), held that the lack of due inspection results liability. The Court held that the government was liable because of the lack of due inspection. The Court concluded that there was no discretion in not accomplishing the duty as it should be done. In the case, the government was held responsible for damages because of lack due inspection of a site which was used for selling alcoholic beverages. The Court granted the compensation.

\(^42\) 467 U.S. 797, 819-20 (1984) referred in Nathan at 1022 *supra*.
\(^43\) S.T.F., Ag.Reg.no AgI 742.555, Relatora Min. Ellen Gracie, 24.08.2010, Diário da Justiça [D.J.] 09.09.2010 (Braz.)
Indeed the criticism towards the narrow absolute immunity occurs over the Judiciary taking functions that are proper of the Legislative. While enacting the FTCA, the Legislative offered what was supposed to be the people’s will in terms of liability. Instead, the Supreme Court keeps narrowing the waiver of immunity. According the critics judges are not elect for such purpose. As John Hart Ely teaches:

It is true that the United States is not run town meeting style. (Few towns are either for that matter). But most of the important policy decisions are made by our elected representatives (or by people accountable to them). Judges, at least federal judges – while they are not entirely oblivious to popular opinion – are not elected or reelected. Nothing can finally depreciated the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy making power of representative institutions, born of electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.


In summary, the most severe limitation of the waiver of immunity in the FTCA resides in the discretionary application of the legislative will by the judges while saying what and when limitations should be applied.

5.2 In Brazil

As discussed above, in Brazil the issue that the S.T.F. faces is the opposite. Limiting the liability is the issue. The limitations of liability are still in construction. The most evident limitation consists of the lack of constitutional liability requirements, such as the damage or the lack of linking between damage and official action. Many of the
S.T.F. cases held opposite opinion to the ones held in the U.S. Supreme Court despite very similar fact patterns. From the list of the meaningful cases of the S.T.F., the path can be traced of the few times when the S.T.F. sustained the limitations. Two of these cases are significant.

In Recurso Extraordinário 121.130-0\textsuperscript{44} the plaintiffs of decedent, an inmate of a prison in Sao Paulo, who hung himself after being transferred to a solitary cell, claimed for torts because of his death. The plaintiffs argued that under the C.F.\textsuperscript{45} the government has to keep the prisoners safe because they are under its custody. The government replied that the culpability for the event was sole of the prisoner avoiding the object responsibility. The S.T.F. denied the claims under the fundament that the prisoner acted by himself to suicide. The government did not practice any action that directly had led the prisoner to death. The liability was avoided.

A S.T.F. precedent worthy to note is Inquérito 2.664\textsuperscript{46} in which the Court almost lack the path of good sense in expanding the governmental liability. The Court acknowledged the possibility of a governmental agent to be criminal liable for damages to a town’s treasure because of the objective responsibility. At first the justice who was writing the case understood that it was possible. Then, the dissenting majority ruled that it was not possible to condemn the sole government official for damages to the treasure of a municipality without granting her the right of defense. In the case the mayor of a town in Rio de Janeiro, after a court of account’s inspection, was considered responsible for

\textsuperscript{44} S.T.F., R.E. 121.130-0, Relator Min. Francisco Rezek, 12.04.1994, 607-627, Diário da Justiça [D.J.] 09.05.1997 (Braz.)
\textsuperscript{45} C.F. art. 153, § 14.
\textsuperscript{46} S.T.F. Inquérito 2.664, Relator para o acórdão Min. Gilmar Mendes, 06.05.2010, Diário da Justiça [D.J.] 23.02.2011 (Braz.)

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buying medical supplies overpriced. The Court granted the immunity. The justice who at the end wrote the opinion pointed that the Court was about to track a waiver of the right of defense, in order to consider the public agent’s liable\textsuperscript{47}.

In sum, in Brazil the S.T.F. propends to acknowledge and grant most of the liability governmental cases.

6. CONCLUSION

From the discussion above, results quite evident that both the U.S. approach on governmental liability limitation and Brazil approach on governmental liability expansion shall find better balance. The U.S. shall find a fair solution to ensure compensation for injured individuals who had suffered damages from the governmental activity. Brazil shall find means not to put all the burden of governmental liability on the tax payers’ shoulders. The study of both systems is no doubt a start for profitable solutions on how to managing the tension between the need to compensate the persons who suffer damages out of the governmental activity with the need of solvency of the public budget. Both countries could certain profit from an interexchange of knowledge and experiences.

\textsuperscript{47} Id. at. 22-23

[] é preciso que haja, de fato, a demonstração da participação, a responsabilidade. É preciso inclusive fazer um distinguishing quanto aos quadros de responsabilidade. Uma coisa é a responsabilidade política, é a responsabilidade administrativa; outra é a responsabilidade penal. Tenho a impressão de que – a não ser que a gente comece a identificar aqui, e ai é ir realmente de forma muito clara para um modelo de responsabilidade civil, de responsabilidade penal objetiva – o superfaturamento, por sis ó, o tipo penal.