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NON-ECONOMIC LOSSES UNDER JAPANESE LAW FROM A COMPARATIVE LAW PERSPECTIVE

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CHAPTER 1 INTRODUCTION

I. OVERVIEW

The main topic of this thesis is the law of non-economic losses under Japanese law. Particularly, it explores the concept through both traditional Japanese scholarship regarding the concepts of harm and loss and their emphasis on the monetary value and approach of countries with similar civil liability systems, such as France and Latin America. Furthermore, by examining the drafting process of the Japanese Civil Code, this thesis questions the view that Japanese law, at least in the area of delictual liability, was influenced by German law. It also addresses how, in cases of non-economic losses, Japanese scholarship has focused on the issue of calculating damages rather than developing a concept for these types of losses. The result is that, while the system works as a whole, there are some places where the logic is not clear and others where the path taken to reach a conclusion does not necessarily follow the traditional rules set by the delictual liability system.

This thesis contains six chapters. Chapters 2 and 3 introduce the concepts of harm and loss and non-economic losses, respectively, under Japanese law. They especially consider the ideas of the drafters, as well as the case law development. Following this model, Chapters 4 and 5 address the same issues, but from a comparative law perspective. They emphasize how various jurisdictions approach the differences between harm and loss and how they developed the concept of non-economic losses. Chapter 6 analyzes the ideas and theories presented in Chapters 2 and 3 under the doctrines introduced in Chapters 4 and 5.

Civil liability, especially that which deals with torts and delicts, is based on the fact that victims have suffered a legal loss that grants them the right to seek redress. In most civil law countries, the other elements of civil liability, such as negligence and causal link, are dependent on the existence of a loss. Though the term “non-economic losses” is comparatively new, rules regarding defamation can be found even within ancient legal systems. Madden has noted that “*several ancient cultures evidently considered defamation or false witness to have such a corrosive effect on the public peace and order as to require*

the most severe punishments."[1]

In modern times, non-economic losses are an area of law that is subject to debate regardless of the system. Issues range from whether certain losses should be granted legal protection to the amount victims receive as compensation, and there is no one way to adequately measure all the elements encompassed under the category of loss in a non-economic sense. However, in today's capitalist society, the idea of a harm that cannot be quantified is certainly less preposterous than it was centuries ago. Furthermore, in contrast to economic losses, such as lost wages, non-economic losses usually illustrate the significance of individual rights under a particular legal system. Property rights are necessary for the economic and legal development of a society and serve as an incentive for individuals to produce more goods and services under the assurance that they will not be taken from them indiscriminately. These are "legal rights" in the sense that most individuals understand them today. They are also addressed differently in court. In the event that a victim has suffered an economic loss, the question can be approached by using either the concepts of causal link or foreseeability. There are no elements of the loss that cannot be neatly applied to a mathematical formula. Non-economic losses, however, tend to focus on those elements of the human psyche that everyone possesses, yet are difficult to pinpoint.

The basis for the legal protection of economic rights is the effort that the right holder has expended to obtain such a right. However, individuals possess liberty, feelings,

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[1] M. Stuart Madden, *The Cultural Evolution of Tort Law*, 37 Ariz. St. L. J. 831, 851 (2005)
Similar laws have existed throughout history in various civilizations and legal systems. Examples in Jewish law are the prohibition against false witness under Exodus1:16 and the rule that if a man entices a maid and sleeps with her, he must make her his wife, and in the case that the father does not allow the marriage, the father must pay the same dowry as for a virgin, which is under Exodus 22:16-17. The Talmud also recognizes offenses against honor as valid claims.
The Greeks also recognized that some misdeeds originated in non-economic offenses. Gagarin has illustrated this with a passage from Iliad in which Menelaus considered himself wronged by Antilochus, who maneuvered his horses during a race in such a way as to cut Menelaus' path and win the race. Menelaus suffered no injury – he was bested in the competition – yet he believed he was the victim of an offense. If he indeed suffered from an offense, it could be called a non-economic or moral offense. Michael Gagarin, *Writing Greek Law* 22 (2008*).* Though Gagarin has cited this example in order to illustrate ancient legal procedure.
According to Vinogradoff, Athenian plaintiffs had a free choice of remedies. They were not obliged to bring a criminal accusation in order to claim damages. It seems they preferred a simple action that could bring them a substantial compensation. Paul Vinogradoff*, Outlines of Historical Jurisprudence, Volume Two the Jurisprudence of the Greek City* 192-195(1922).

or the right to pursue happiness from the moment they are born. Thus, with these rights, there is no sense of effort because these entitlements arise from the fact that the individual is a human being. Since these "moral rights"[2] are not based on an individual's effort to obtain them, but rather are a product of a person's most basic set of rights, they can be breached more easily than other economic legal rights. Although traditionally linked to the idea of natural law, and particularly to Catholic influence, the societal changes that began in the 19th century allowed for these interests to be granted a broader scope of protection.

While Japan has protected these types of interests since the enactment of the Civil Code, it did not follow the same path as other Western countries in their development. For one, the enactment of the Civil Code was the result of historical necessity in order to advance Japan to the same level of social development as European countries. This largely meant that the goal of the code was not to unify Japanese law, but rather to signify the development of the country. Therefore, the background of European scholars in both *ius commune* and canon law was not part of the education of most Japanese scholars during the period wherein the drafting took place. The ideas and concept within the code were adopted after researching the end result, not the origins.

As this paper addresses later, there are discussions of whether the Japanese law of delictual liability is more similar to the French model of a general clause or the German model. General delictual liability is established in Section 709 of the Civil Code, which requires that there is an infringement of a legal right or interest as the consequence of an intentional or negligent act, and that the victim suffers a loss as a result. Section 710 regulates non-economic losses, a departure from the custom of civil codes that followed the French model at the time the draft was written, which included non-economic losses under the general concept of *dommage.*

Section 711 grants the next of kin a claim for non-economic losses, and Sections 712 and 713 concern the legal capacity for delictual liability. Next, the code introduces some specific types of liability, such as the liability of guardians (Section 714), employers

[2] The term "moral right" has different meanings depending on jurisdiction and the area of the law in which it is used. In this thesis, it is used as a placeholder for the protected rights or interests that, if infringed upon, are considered non-economic harm.

(Section 715), persons commissioned for a work (Section 716), the owner of a structure (Section 717), and the owner of animals (Section 718), as well as cases of joint liability (Section 719). The code also establishes a defense in cases of self-defense and to avoid imminent danger (Section 720) and grants an unborn child a claim for damages (Section 721). Moreover, it regulates the matter of comparative negligence (Section 722) and grants a special remedy in cases of defamation to the victim, under which an apology can be requested in addition to or in lieu of damages (Section 723). The last provision (Section 724) sets a three-year statute of limitations in cases of delictual liability, counted from the date of the loss and when the victim became aware of the identity of the perpetrator. It also sets an absolute limit of 20 years from the time the delictual act occurred.

A. NON-ECONOMIC LOSSES AND JAPANESE LAW

The study of Japanese law from a comparative law perspective is not an easy endeavor. Colombo has indicated that it is highly uncommon for a researcher to have even an average knowledge of Japanese law.[3] Since issues can arise from language barriers and the lack of scholarship in English, a comparative scholar may be hard pressed to learn about Japanese law, except from the most well-known sources. As a result, deep and comprehensive knowledge of the Japanese system is usually reserved for a select few.[4] In the matter of non-economic losses, this situation is exacerbated. It is not rare for the specific chapter referring to delictual liability to address the topic just by referring to some cases after introducing the relevant section of the Civil Code.[5]

Japan is also a special case in regards to non-economic losses. It is one of the few civil law countries in which the civil code has a provision (Section 710) that deals with non-economic losses in a detailed manner. Additionally, Section 711 addresses the issue of non-economic losses of a close relative of a victim in the case of death of the victim. A cursory reading of Japanese literature regarding the topic reveals that Japanese scholars are

[3] Giorgio Fabio Colombo, *Japan as a Victim of Comparative Law,* 22 Michigan State International Law Review 731, 733 (2014)
[4] *Id.* at 734
[5] See: Curtis Milhaupt, J. Ramseyer & Mark West, The Japanese Legal System (University Casebook Series) (2nd. Ed., 2012)
J. Mark Ramseyer & Minoru Nakazato, *Japanese Law: An Economic Approach* (2001)

usually more interested in discussing the function of the monetary award, or *isharyo*. However, that is not to say that there are no discussions about legal doctrine, as the concept of personality rights has been part of the legal discussion since soon after the enactment of the code.

This leads to a second issue: even within Japan, the concepts of harm and loss are not often subjects of study. Indeed, scholarship regarding loss in Japan has been notably poor.[6] This is a result of an influx of German ideas that began during the early 20th century, which led to harm and loss being treated under the amount difference theory or *sagakusetsu* theory, based on the German *differenztheorie* However, Zimmerman has argued that the *differenztheorie* works only because "*as a rule, only material damages are recoverable, this involves a comparison of the hypothetical value, established on the assumption that the event had not occurred."*[7] Hence, this theory is not suitable to address non-economic losses. In addition, other theories that attempt to explain the concept of harm within the Japanese system strongly emphasize the "quantification" of the loss, meaning they do not completely address the problems of the *differenztheorie* in the case of non-economic losses. Nevertheless, this was not the intention of the drafters.

Western and Japanese scholars consider that Japanese Civil Code was influenced by the first draft of the German *Bürgerliches Gesetzbuch* or BGB. While it is true that the drafters had access to this document, it is also true that their education was mainly in French or English common law. Moreover, an examination of the discussion regarding Section 709, which governs delictual liability, reveals that the drafter used only French and English ideas when discussing harm and loss. This also extends to discussions of Sections 710 and 711, which concern claims for non-economic losses. The fact that the German drafter and scholarship of the time were opposed to the idea of granting remedy for non-economic losses casts further doubt on a German influence, at least in regards to delictual liability and non-economic losses. However, the fact remains that support for German ideas among Japanese scholars increased after the death of one of the drafters, Kenchiro Ume,

[6] Yoshio Hirai, *Saiken Kakuron II Fuhokoi* 75 (2010) (Japan)
[7] Reinhard Zimmermann, The Law of Obligations Roman Foundations of the Civilian Tradition 824 (1996)

who was a strong supporter of the French school of legal thought.

This also influenced how scholars and the courts addressed loss. The amount difference theory was founded on the premise that loss is a monetary issue, and therefore its quantification was central to the discussion. This stance is incompatible with the concept of non-economic losses. Other theories, such as the loss-as-fact theory or *songai jujitsu setsu*, have somewhat departed from the issue of monetary quantification. However, regardless of the theory, scholarship seems unable to completely separate losses and damages. Thus, for non-economic losses, any discussion of the topic is typically from an economic perspective. A scholar from Latin America or France would make no distinction between the legal doctrines that rule loss, as both economic and non-economic losses would be covered under the general concept of loss.

In contrast, Japan approaches the issue via the problem of causal link. Loss lies at the end of the causal chain.[8] Therefore, theories concerning the nature of the causal link, such as whether it should be sufficient or should include all of the real consequences of the act, are one of the pillars for establishing the concept of loss under Japanese law. In countries following the French model, the issue of causality is an element of loss. Conversely, under Japanese law, loss is subservient to causality to the extent that an abstract concept of loss has consistently been of secondary importance. An example of this is Hirai's theory that legal losses are those that fall within the area of protection, or *hogo han´i.* However, this area of protection is established mainly by following an idea of real causality. In addition, since these types of losses were usually based on a sense of natural right, a positivistic approach tends to be restrictive. However, Chapter 5 discusses an Italian example, which demonstrates that courts and scholars can find a way to expand the list of legal interest.

The Japanese system is no different in this regard, as Section 710 lists three legal interests that are granted protection: body, liberty, and reputation. The courts have never interpreted this list as being *numerus clausus.* Rather, new interests have been granted legal

[8] Masayuki Kato, *Kihanteki Songai Gainen heno Tenbo*, 61 Journal of Law and Political Studies 195, 196 (2004) (Japan)

protection thorough the years. However, there is clear divide between the study of these interests under the umbrella of personality rights and the monetary compensation, or *isharyo,* with the latter being far more prevalent. This affects not only scholarship, but also practical matters during the trial process. Saito[9] has asserted:

> *[B]ecause judges can freely determine the amount, lawyers do not know if their request is going to be granted even if they advocate for it, and even if their request is granted, the amount is usually low and the burden on the lawyer is very heavy, therefore, they do not press for the emotional pains of the victim too strongly, and because of that their understanding of this type of pain diminishes, as a result the amount in non-economic damages cases has stayed low. Furthermore, because the amount is low it has become a vicious circle*.

Furthermore, since Japanese Civil Code requires the infringement of a legal interest or right in order to grant damages, the discussion regarding unlawfulness and the concept of rights is far more significant than in other countries.

B. NON-ECONOMIC LOSSES IN COMPARATIVE LAW

Since these types of losses are highly dependent on the level of development of a country in regards to individual liberties, and since they are further affected by an array of socio-cultural factors, studying them requires a deeper knowledge than just the letter of the law. Nevertheless, most modern legal systems grant legal protection to these moral rights, although the manner in which they do so is not necessarily the same. At a doctrinal level, non-economic losses have traditionally been defined in relation to economic losses in what Dominguez[10] calls a "negative approach." Under this view, the first step is to define economic losses, after which any losses that do not fit that category are defined as non-economic.[11]

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[9] Osamu Saito*, Isharyo no Santei no Riron*, 164 Ho no Shihai 5, 11 (2012) (Japan)
[10] 1 Carmen Domínguez Hidalgo, *El Daño Moral* 33 (2000) (Chile)
[11] De Cupis also proposed this approach when he said that non-economic losses can only be defined in contrast to economic losses, as any loss that cannot be considered pecuniary. Adriano de Cupis*, El Daño* 124

However, non-economic losses have also been defined in a positive manner, *i.e.*, regardless of their relation to economic losses. Under this approach, non-economic losses are ascribed a specific meaning, such as *pretium doloris*, or as an infringement on the personality rights of an individual. The latter approach has resulted in the creation of the terms *patrimonio moral* or *patrimoine moral* within civil law countries, which refer to all the cultural, social, and spiritual interests of an individual[12] and have in turn produced a new interpretation the term *patrimoine* that forgoes its Latin origins. To further complicate matters, the concept is not clear under common law either. In common law countries, the issue instead concerns the nature of the claim and the name applied to the remedy, *i.e.*, punitive damages, nominal damages, etc. Kritzer *et al.* has offered a list of the legal interests covered under non-economic damages. These include disability, disfigurement, emotional distress, loss of consortium, loss of normal life, loss of society, pain, and suffering.[13]

II. THE QUESTION

The main question of this thesis is how Japanese courts and scholarship view the concepts of harm and loss, especially in regards to non-economic losses. In particular, it discusses how these concepts have evolved and potential influences of foreign legal ideas on their development. In addition, it seeks to address how the concept of non-economic losses has been affected by the development of a theory of loss that is centered on economic losses, as is the case in Japan. Finally, it inquires how the Japanese approach compares to the approaches of other countries when viewed from a comparative law perspective, and specifically how harm and loss, both economic and non-economic, relate to more traditional views on the subject.

In the case of non-economic losses, an individual is granted a certain level of protection, either via a general clause, a list of protected interests, or the prohibition of specific acts. However, the level of protection does vary depending on the path taken. In

(Angel Martínez Sarrión trans. Bosch 1975) (Spain trans. It. original)

[12] In Mexico, Section 7 of the Ley de Responsabilidad Civil para la Protección del Derecho a la Vida Privada, el Honor y la Propia Imagen en el Distrito Federal uses this term.

[13] Herbert M. Kritzer, Guangya Liu, Neil Vidmar, *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 Wm. & Mary L. Rev. 971, 993 (2014)

Japan, for example, the general clause of Section 709 of the Civil Code is complemented by Section 710 of the same code, which governs non-economic losses. Nevertheless, a review of the literature reveals that discussions surrounding Section 710 are of a more general matter, *i.e.*, they are discussions that address questions that could be considered part of general discourse on the law of delict, its function, and its nature.

Considering the structure of discussions surrounding Section 710, another valid question is whether the concept of harm under Section 710 is the same as that which Section 709 enshrines. To answer these questions, it is necessary to first understand the factors that have influenced Section 709 and the civil liability system. Japan is, after all, a civil law country. The influence of French law is undeniable, and the general clause structure of Section 709 is one result. Yet, a strong German influence has been present, not only in the text of the Japanese Civil Code, but also among Japanese scholars, many of whom have studied in Germany. Finding articles regarding German law in any Japanese law journal is highly common, with French and American law being the other two popular systems to study. However, if one is to study the French legal family, the law of Latin America could provide a much richer environment, as it illustrates how countries that share a common legal root have developed their legal institutions in order to address the challenges of their respective societies. Japan, on the other hand, cannot be thought of as having the same legal traditions as France or Germany, nor can its legal culture be clearly defined within the framework of other Asian countries.

Nevertheless, it is undeniable that Japan was influenced by countries other than France and Germany when its code was first written. Therefore, limiting a comparative analysis to these two countries is counterintuitive, both under the general prism of comparative law and to the extent that this thesis intends to identify a general theory of non-economic harm, if one exists, and the position of Japan within it. The first obstacle in achieving this is not legal, historical, or even cultural. Rather, it is much more basic, though not simpler by any means.

III. METHODOLOGY

In order to answer the research questions of this thesis, it must first address some areas that the literature has failed to engage with in a deep and comprehensive manner. For example, it must more closely examine the drafting process on Sections 709, 710, and 711 of the Civil Code. It must also analyze the influence of German legal thought throughout the years and how this has affected the development of the concepts of harm and loss. This thesis argues that, in fact, an overreliance on German scholarship has cultivated a special relationship between economic and non-economic losses, which focuses on monetary awards over any abstract considerations. This has consequently led to some cases, such as non-economic awards for foreigners, which focus on the monetary award rather than the implications of the ruling *per se.*

At first glance, comparative law might not seem useful when discussing non-economic losses. After all, among the various types of legal losses, those arising from non-economic losses can be considered to be strongly affiliated with the culture and ethos of a society. However, as Wagner has noted, *"the law of delict or torts is particularly amenable to comparatist endeavor as the patterns of cases are almost identical across different societies, provided that they are at the same level of economic and technological development."*[14] In addition, systems from the same legal family, but which have clearly distinct levels of economic and technological development, are excellent for the comparison of differences. Cultural differences are even more marked than those of an economic nature. Thus, the result ought to be different, even if they are based on the same principles.

The functional approach and its search for similitude that significantly impacted the study of comparative law was slowly replaced after the mid-20th century by a critical approach, which focuses on differences between the systems.[15] As far as this thesis is concerned, it uses the functional approach to help explain how the current state of affairs came to being, especially within the context of the Japanese system. Once it establishes

[14] Gerhard Wagner, *Comparative Tort Law*, in The Oxford Handbook of Comparative Law 1004 (Mathias Reimann & Reinhard Zimmerman eds., 2006)
[15] For a summary see: Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?,* in The Oxford Handbook of Comparative Law 384*ff.* (Mathias Reimann & Reinhard Zimmerman eds., 2006)

this, it analyzes several cases through a critical approach to determine the results of these differences or similarities.

Comparative law is useful when the objective is not an integral reform of a system, but rather a search for answers to challenges that are not being addressed through the traditional means. Curran has asserted:

> *Just as an understanding of foreign legal cultures can enrich our grasp both of the significance and of the contingent nature of our own legal culture, so too increased comparative work within our own legal culture elucidate previously unobserved connections which allow for new understandings.*[16]

Furthermore, Curran has argued:

> *[T]he comparatist will fail to grasp a foreign legal culture from within… the benefits lie in illuminating the observed legal culture in ways that are new for those within it, and in providing valuable insights for the comparatist as well, both about the target legal culture and the culture of origin.*[17]

Nevertheless, this might prove to be an arduous endeavor depending on the intended public and the societal and cultural contexts. The role of comparative law is not to convince a lawyer of a certain country that his or her system is the best or the worst, nor is it to apply the same tools that are used within national discourse to address the challenges that manifest from interpretation of the law. If a comparative lawyer requested these goals, it would defeat the purpose of the comparative aspect.

By definition, a comparative lawyer is, and must be, aware of aspects of the law that simply are unaddressed in normal literature. Legal customs, obscure backgrounds, mistranslations that lead to the development of certain legal rules, and even interpretations of certain theories transplanted to a specific system are all elements that a comparative lawyer takes into account when generating a hypothesis. Yet, to a scholar who is

[16] Vivian Grosswald Currian, *Cultural Immersion, Difference and Categories in U. S. Comparative Law,* 46 The American Journal of Comparative Law 43 (1998)
[17] *Id.* at 58

accustomed to engaging with more specific problems within a system, such knowledge could seem interesting at best, and unworthy of research at worst. If the response to a new idea is "this is not the way it is done in our country," then it is safe to assume that the reader is not the intended audience for that publication. Such reactions halt discourse in its tracks, as there is no way to completely address them. Nevertheless, comparative law is a discipline that repeatedly encounters such challenges, and when writing a paper or giving a presentation, comparative lawyers do not only address the specific legal question at hand, but also make a case for the necessity of comparative law as a discipline.

A. SCHOLARSHIP AND CASE LAW

As mentioned above, the approach to non-economic losses in Japan can be divided into a general study under the term of personality rights, and the more specific study of each claim under the concept of *isharyo*. However, the latter issue, *i.e.*, how to calculate damages, is beyond the scope of the present work. Therefore, this thesis only briefly engages with it. Instead, it has given special attention to any literature that pertains to the concepts of harm, loss, unlawfulness, and non-economic losses. In the case of Japan, literature that exclusively concerns the theory of harm and loss has been prioritized over that which delves into questions of how to calculate damages or the importance of the casual link.

In regards to case law, there are a great number of different claims on the matter, but the analysis is limited to three in particular: claims from the relatives of a victim, especially theories on determining who can become a plaintiff; claims from foreigners; and claims for loss of chance, or the closest Japanese equivalent for the infringement of the substantial probability, or *soto teido no kanosei*. These cases were selected because these claims appear in almost every country that served as a basis for this research, and yet the results vary somewhat when comparing Japan to other jurisdictions. Although rulings from the Supreme Court have been prioritized, most of the legal developments have been initiated or decided by the lower courts. Regarding foreign case law, case selection was based on two criteria: either they reach the same conclusion as their Japanese counterparts, but in a divergent manner, or the court adopted a different stance altogether, with emphasis

on how the courts viewed the victim's loss.

B. TERMINOLOGY

Terminology presents a challenge for any comparative law scholar, particularly when writing about the laws of countries with different languages. In the specific case of civil liability, a writer's home jurisdiction exerts a great deal of influence on language. The language used in legal research is, by nature, significantly complicated in the context of national law. However, when it is extrapolated to address how various systems approach a problem, it can become truly staggering, moreso when the languages involved do not share a common origin. In the past, this has not been an obstacle for comparative lawyers. Curran has noted:

> *The generation of comparatists immediately following the Second World War was steeped in many languages, products of classical educations strong in the tradition of multilinguism, including Greek and Latin… Post-war comparative law thus was conducted by those who were well equipped to understand the nature of translation, the challenges to conveying meaning from one community to another, the disguises of the seemingly similar, and the depth and nature of differences.*[18]

The law of obligations is a prime example. Civil law countries that follow the French model classify interactions between two parties that produce a legal obligation under the title of the "law of obligations." Japan, however, categorizes them under the term "saiken ho," or the law of credit.

It is tempting to think that such a miniscule difference is irrelevant. After all, the existence of credit requires that someone maintains responsibility for it. However, these two words have different nuances. Obligation expresses a legal position: what must be done and by whom; when, where, how the obligation is fulfilled; what types of obligations exist, and so on. It is a word with a passive quality, implying that debtors are at the mercy of their

[18] Vivian Grosswald Currian, *Comparative Law and Language,* in The Oxford Handbook of Comparative Law 675, 686 (Mathias Reimann & Reinhard Zimmerman eds., 2006)

creditors and yet must be able to know their exact obligations. Many codes begin their chapters on obligation by clearly stating that an obligation consists of handing an object to the creditor, doing, or refraining from doing a certain act. The law of credit, on the other hand, refers to the active aspect of a legal obligation. The content of the obligation, its type, and the manner in which it is performed is not as important to a creditor, who might decide that a debtor's performance is satisfactory even if the obligation has not been performed to the letter of a contract. The term conveys a right, and as such, its study is centered on how to enforce such rights, rather than on the specific conduct of a debtor. Upon opening a Japanese civil law book, a reader finds that the study of the law of credit begins by comparing it to property rights, and that the basic rule is that a credit is the right to require the performance of a certain conduct from an individual.

However, the entry of other languages into the discussion, such as English, complicates the matter. Martin Weitenberg[19] has asserted when referring to the terminology of EC Tort Law, and to damages in particular:

> *The notion of damages seems to be susceptible of two different meanings. Usually it describes the fact of compensation or reparation of a loss or injury which a person may claim for. In this case the English term "damages" corresponds to the French "Dommages-intérêts" and the German "Schadensersatz"... However, "damages" is also used as a "normal" plural of the notion "damage", i.e., without the special meaning of remedying damage. It then corresponds to the French "Dommages" and the German "Schaden."*

This, in turn, means that a simple "s" can completely change the meaning of a legal provision. In addition to expressing the concept of a remedy or a loss, these terms also carry a cultural and historical meaning that is usually impossible to fully express correctly. Japanese is not an exception, as the word for "damages," the legal remedy, and the words

[19] Martin Weitenberg, *Terminology*, in *Tort Law of the European Community* 312-313 (Helmut Koziol & Reiner Schulze eds., 2008)

for harm and loss – the detriment suffered by the victim – *are* different, as is the case in French.

Some authors have utilized the term "torts" in a general sense to refer to civil liability under both common and civil law. However, it is clear that while they might address similar issues, torts and delicts are essentially two distinct approaches. Ward has illustrated their differences by specifying that tort liability under common law is determined on the basis of *a posteriori* arguments, while in contrast, civil law relies on *a priori* logic.[20] In a similar manner, Zimmerman has explained that the continental civil law of delict is based on general principles and abstract concepts.[21]

Following the above, the term delictual liability refers to civil liability systems under continental civil law, including Japan's, and tort is used only to reference those under common law. However, a matter more urgent than the term used to refer to the legal systems is that of harm and loss. The *a priori* approach of civil law is the reason harm and loss are such an important focus of civil liability, and the abstract concept of harm is the most crucial element in establishing liability under the law of delicts. Therefore, scholars and judges must first grapple with abstract ideas in order to be capable of applying them to specific cases. In doing so, the elements of what is considered redressable harm or redressable losses naturally become the main point of inquiry. On the other hand, since the the law of torts emphasizes *a posteriori* arguments over abstract concepts, this may preclude concepts, such as loss and harm, from developing as they do under the logical rules of civil law.

Aside from the comparative law aspect of legal interpretation and translation, the terms harm (*dommage, danno, daño*) and loss (*perjuicio, prejudice*) have been traditionally used as synonyms in civil law literature. However, as Mazeud has revealed, this was not the case in Roman law. The Roman *dannum* referred to the integrity of an object, which in turn yielded a sanction, regardless of any loss suffered by the owner.[22] This was a result of the

[20] Peter Ward, *Tort Cause of Action*, 42 Cornell L. Rev. 28, 30 (1956)
[21] Zimmermann *supra* note 7 at 907
[22] Henri Mazeud, Leon Mazeud & André Tunc, 1 *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 261 note 208 (6 ed., 1965) (France)

form and function of Roman law, which in most cases emphasized the sanction of an aggressor rather than the loss suffered by the victim. Therefore, *dannum* suggested that the aggressor had indeed affected a certain object. However, the mere fact that an object has been negatively affected is no longer sufficient to offer its owner a claim against an aggressor. Now, it must result in an actual loss. Once the victim's situation is evaluated, separating the loss from the acts of the aggressor, it is evident that harm and loss are two concepts that are deeply related, but distinct.

However, harm and loss share a commonality. In order to be taken into account by a judge, neither the harm nor the loss needs to be expressed in monetary terms. In other words, the harm has its basis in reality, while the loss is an abstract concept of being disadvantaged in a specific manner. A judge approaches the issue of quantifying damages only after these two elements have been successfully demonstrated by the plaintiff. Therefore, monetary quantification of the loss is not and cannot be a requirement for defining loss and harm for the purpose of establishing liability.

It follows that harm and loss are terms that express two unique concepts. The former signifies a legal event based on physical phenomena that may or may not result in a loss. The distinction is not new,[23] and French scholars who have been debating it for many years are divided into two clear camps. Those who recognize the distinction have argued that it allows for a more accurate understanding of these two concepts. In contrast, other scholars have asserted that this distinction has no basis in statute or case law and only seeks to address an unanswerable question.[24] In addition, if the distinction between harm and loss is accepted, then it is not adequate to qualify harm as either economic or non-economic. Since harm comprises a change in the physical world, regardless of the existence of legal rules, any harm yields possibility for an individual to suffer both economic and non-economic losses.

[23] ([dommage] la lésion d´intérets patrimoniaux ou extrapatimoniaux… [préjudice] conséquences qui résultent de cette lésion) Manuella Bourassin, *Droit des Obligations - La Responsabilité Civile Extracontractuelle-* 67 - 68 (2nd ed., 2014) (France)

[24] Geneviève Viney & Patrice Jourdain, *Les Conditions de la Responsabilité* 4 (3rd ed., 2006) (France)

The Italian Civil Code offers an example of the confusion caused by the use of these terms. Section 2043 reads "*Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno"*; the word *danno* is used twice within the same provision. According to Franzoni,[25] this is a result of the poverty of the Italian language. These two instances of *danno* have been construed as having different meanings. The first *danno* is the actual, factual situation caused by the aggressor, *i.e.*, *an unlawful infringement of the victim's rights,* while the second *danno* refers to the result of the first one, the actual loss for which the aggressor must compensate.[26] These two instances of the word *danno* help illustrate the importance of terminology and why using different terms for harm and loss results enables much clearer understanding of legal rules. Moreover, the second *danno* had a highly specific meaning within the context of the Italian law of delicts. It referred only to patrimonial loss, as the Italian Civil Code does not grant general protection to all types of non-economic losses. From a methodological standpoint, harm and loss are two distinct elements, and both are required in order to establish delictual liability under the civil law system of general clause. Therefore, harm is used to refer to the physical phenomena, and loss to refer to the consequences of that phenomenon, provided they produce a legally relevant effect.

Nevertheless, some sections of this thesis make use of the term presented in the original language – in particular, the Japanese term *songai*. Since Japanese scholarship does not differentiate between harm and loss in the same manner as with *dommage* and *prejudice*, it is thus difficult to ascertain whether a particular writer is referring to an event or its result. Therefore, for the sake of clarity and precaution, the term *songai* is used unless the context is sufficiently clear to convey the meaning of the term.

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[25] Massimo Franzoni, *Danno Ingiusto e Danno Risarcible nella Responsabilitá Civile* (2002) (It.) http://www.aci.it/fileadmin/documenti/studi_e_ricerche/monografie_ricerche/franzoni.pdf
Massimo Franzoni, *Trattato della Responsabilitá Civile - Il Danno Risarcibile 3* (2010) (It.)

[26] Paolo Cendon, Commentario al codice civile. Artt. 2043-2053 187 (2008) (It.)
Francesco Caringella, Responsabilità Civile e Assicurazioni. Normativa e Giurisprudenza Ragionata 88 (2008) (It.)

IV. REVIEW OF THE LITERATURE

In navigating the topic of non-economic losses in Japan under the view of comparative law, two challenges emerge. The first is the number of comparative law papers on Japanese law in general. There are several books that engage with the matter in an introductory manner. Oda´s *Japanese Law*[27] introduces the reader to the Japanese legal system, though this introductory approach sacrifices the potential for an in-depth examination. The second challenge arises from the Japanese sources themselves. On one hand, literature regarding harm and loss usually relates to either damages or theories regarding the causal link. Indeed, papers and books regarding damages, or *songaibaisho,* far outnumber those related to the theory of loss, or *songairon.* This extends to sources dealing with non-economic losses. With the exception of sources that address personality rights, literature has focused on both the nature and function of *isharyo* or a case law analysis of the standards for calculating damages, rather than a doctrine of non-economic losses.

A. COMPARATIVE LAW AND JAPAN

The first hurdle for a comparative scholar when studying Japanese law is the limited availability of sources. Undoubtedly, a mastery of the language is a crucial step for the comprehensive study of any given legal system. However, since the English language is a key source of comparative scholarship, the first step is to browse the literature. However, as Colombo has noted, the number of texts on the subject that are available to the general public has long been limited.[28] Of the Japanese scholars who wrote in Western languages, Kawashima,[29] Noda,[30] and Oda[31] deserve a special mention. As the few Japanese scholars who have written in English, they were thought to be objective, and as result, have exerted a great deal influence and impact on general scholarship.[32] Colombo has illustrated this challenge by stating that the number of law articles that analyze Japanese law in a

[27] Hiroshi Oda, *Japanese Law* (3rd ed., 2011)
[28] Colombo *supra* note 3 at 746
[29] Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan* in Law in Japan: The Legal Order in a Changing Society 41 (Arthur Taylor von Mehren ed., 1963)
[30] Yoshiuki Noda, *Introduction to Japanese Law* (Anthony h. Engelo ed., trans. 1976) (1966)
[31] *Supra* note 27
[32] Colombo *supra* note 3 at 746

comparative law perspective is rather low. For example, in continuing the work of Frank Upham,[33] Colombo has perused 16 years (1997-2013) worth of publications in the American Journal of Comparative Law and discovered that there had been only 15 articles on Japanese law, 8 of which were included in a special issue, "Law in Japan."[34] Repeating this exercise for the UK-based International Law Quarterly in the period from 1952 to 2013 yielded only 10 articles on Japan,[35] even fewer than on the People's Republic of China, to which 18 articles were dedicated. To further complicate matters, most articles tend to study socio-cultural aspects of Japanese law, such as the low litigation rate, or conduct an overview of the system in general.[36] However, that is not to say these articles deal exclusively with general issues. A glance at the Journal of Japanese Law of the University of Sydney or the Social Science Research Network database shows that corporate governance, business law, and copyright law are also prime research subjects.

However, papers on non-economic losses are even rarer, especially those on the three main axes that serve as the basis of the arguments presented here. The first axis is an analysis of the drafting process that preceded the enactment of the Civil Code, particularly regarding Sections 709, 710, and 711. Soon after the promulgation of the Japanese Civil Code, Kazuo Hatoyama wrote a series of papers for the Yale Law Journal in which he compared the new code with the French Code.[37] Although Hatoyama briefly addressed the drafting process, the nature of the papers precluded any analysis beyond an overview.

[33] Frank Upham, The Place of Japanese Legal Studies in American Comparative Law, 1997 Utah L. Rev. 639 (1997)
[34] Colombo *supra* note 3 at 737
[35] Colombo *supra* note 3 at 738
[36] See: Donald L. Uchtmann, Richard P. Blessen, Vince Maloney, *The Developing Japanese Legal System: Growth And Change In The Modern Era,* 23 Gonzaga Law Review 349 (1987), Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. Legal Stud. 31 (2006)
Luke Nottage, Stephen Green, *Who Defends Japan?: Government Lawyers and Judicial System Reform in Japan*, 13 Asian-Pacific Law &Policy Journal 129 (2011),
Feldman, Eric A., *Law, Culture, and Conflict: Dispute Resolution in Postwar Japan*. U of Penn Law School, Public Law Research Paper No. 07-16. Available at SSRN: http://ssrn.com/abstract=980326
[37] Kazuo Hatoyama, The Civil Code of Japan Compared with the French Civil Code, 11-6 The Yale Law Journal 296 (1902)
Kazuo Hatoyama, The Civil Code of Japan Compared with the French Civil Code, 11-7 The Yale Law Journal354 (1902)
Kazuo Hatoyama, The Civil Code of Japan Compared with the French Civil Code, 11-8 The Yale Law Journal 403 (1902)

Another important source is a book written by one of the drafters, Nobushige Hozumi, titled Lectures On The New Japanese Civil Code As Material For The Study Of Comparative Jurisprudence.[38] Unfortunately, Hozumi did not engage with the subject of delictual liability in this work. Shusei Ono authored another series of papers for the Hitotsubashi Journal of Law and Politics that analyzes various aspects of the Civil Code. The first two issues introduce a meticulous recounting of the background and composition of the drafting committee,[39] while the third and fourth issues concern delictual liability.[40] However, sections regarding the drafting process are short.

There are some limited sources on case law. One is the translation available at the Supreme Court website,[41] and another is the casebook edited by Milhaupt, Ramseyer, and West.[42] However, the former is usually limited to notable Supreme Court rulings, while the latter incorporates other cases besides those of delictual liability. Given this situation, there is no current English source that focuses solely on the drafting process of the section regarding delictual liability and non-economic losses[43] in the Japanese Civil Code or the specific legal doctrines that developed from it, or that more closely examines the law of non-economic losses.

B. HARM AND LOSS IN JAPANESE SCHOLARSHIP

Although sources in Western languages are useful for disseminating information and research, only sources in the original language are capable of providing sufficient

[38] Nobushige Hozumi, Lectures On The New Japanese Civil Code As Material For The Study Of Comparative Jurisprudence (2nd ed.,1912) (Japan)
[39] Shusei Ono, *Comparative Law and the Civil Code of Japan (I),* 24 Hitotsubashi Journal of Law and Politics 24 (1996) (Japan)
Shusei Ono, *Comparative law and the Civil Code of Japan (II),* 25 Hitotsubashi Journal of Law and Politics 25(1997) (Japan)
[40] Shusei Ono, The Law of Torts and the Japanese Civil Law (I): Comparative Law and the Civil Code of Japan (III), 26 Hitotsubashi Journal of Law and Politics 24 (1998) (Japan)
Shusei Ono, The Law of Torts and the Japanese Civil Law (II): Comparative law and the Civil Code of Japan (IV), 27 Hitotsubashi Journal of Law and Politics 25(1999) (Japan)
[41] http://www.courts.go.jp/english/
[42] Curtis Milhaupt, J. Ramseyer & Mark West, *The Japanese Legal System (University Casebook Series)* (2nd. Ed., 2012)
[43] However, there are some articles that address specific developments. See: Hsiao, Philip, *Power Harassment: The Tort of Workplace Bullying in Japan* (September 28, 2014). 32 UCLA Pacific Basin L.J. 181 (2015).

information to explore and address any perceived issue, and this is true for any endeavor in comparative law. In regards to the specific subject of this work, Japanese sources can be divided into three groups. The first is sources that engage with the drafting process. Among these, committee records[44] are the main primary source. Written in old Japanese, these records involve not only the introduction of each specific provision, but also the discussion between drafters and other members of the committee, as well as a background explanation of the Civil Code. Secondary sources are mostly limited to articles written for the specific purpose of discussing the drafting process. Though not rare, referencing the ideas of drafters or the legislative story is not typical in the writing of Japanese scholars. The *Minpoten no Hyakunen,*[45] a four-volume treatise written for the 100th anniversary of the Civil Code, is of particular interest. While data regarding case law and doctrines has not been updated, it provides a solid background as an analysis of the historical process.[46] Some papers have approached the topic of the influence of foreign codes, the legal education of the drafters, or the meanings that drafters ascribed to various terms, such as fault, right infringement, or delictual liability.[47] However, with the exception of two papers written by Ippei Osawa,[48] there are no papers that present an in-depth examination of the legislative process of Sections 710 or 711. Another important historical document is the commentaries of the drafter Kenchiro Ume, as he was the only drafter to record a complete

[44] Available in digital form at the National Diet Library Collections: http://dl.ndl.go.jp/

[45] Volumes I and III are of particular interest to the subject at hand.
I Minpoten no Hyakunen Senpanteki Kansatsu (Toshio Hironaka, Eichi Hoshino eds., 1998) (Japan)
III Minpoten no Hyakunen Kobetsuteki Kanstatsu (2) Saiken Hen (Toshio Hironaka, Eichi Hoshino eds., 1998) (Japan)

[46] However, in some cases the information must be read while taking into account the influence of the authors.

[47] See: Teru Okubo*, Minpo Kisosha no Kangaekata no Chigai ni tsuite*, 26 Chuo-Gakuin University review of Faculty of Law 113 (2013) (Japan), Takashi Oka, *Meiji Minpo Kiso Katei ni okeru Gaikoku Ho no Eikyo,* 4 Journal of International Philosophy 16 (2014) (Japan), Yoichi Sakaguchi, *Minpoten Kiso no Hoko: Hozumi to Ume ni okeru Doitsu Minpo Keiju no Ronri,* 22 Area and Culture Studies 107 (1972) (Japan), Tomoya Sano, *Minpo Kisoji ni okeru Sansho Gaikokuho Bunseki Kiban no Kochiku,* 263 Journal of Law and Politics 37 (2015) (Japan)、Zhang Zhihui, *Meiji Minpo no Seiritsu to Kinmochi Saionji – Minpo Chosakai no Giron wo Chushin ni-*, 93 Ritsumeikan Daigaku Jinbungaku Kenkyusho Kiyo 207 (2009) (Japan), Akihito Kushihi, *Meiji Minpo [Fuhokoi] ni okeru Kisosha Ishi no Tankyu: Meiji Minpo 709 Jo no Shisoteki Haikei ,* 66 Journal of Law and Political Studies 289 (2005) (Japan)

[48] Ippei Osawa, *Minpo 711 ni okeru Hoeki Hogo no Kozo II Fuhokoi Sekinin no Seisakuteki Kaju ni kansuru Ikkosatsu*, 128 (2) Journal of the Jurisprudence Association the University of Tokyo 453 (2011) (Japan)

commentary on the Civil Code.[49]

The second type of source is those that approach the issue of delictual liability, and particularly the concepts of harm and loss. In traditional scholarship, textbooks are not usually granted the same weight as peer-reviewed journals. However, any comparative scholar studying Japanese civil law discovers almost immediately that this is not necessarily the case in Japan. Japanese scholars who write textbooks tend to include discussions of law-related issues in them. Sakae Wagatsuma[50] and Ichiro Kato [51] are two of the classic legal scholars who have influenced generations of legal professionals in Japan. Yoshio Hirai has also published a prominent book regarding the theory of compensation.[52] The variation of the German *differenztheorie*, which was introduced to Japan by Otoshiro Ishizaka[53]and Tamakichi Nakajima[54] and which requires losses to be expressed as money, has influenced scholarship to the point that harm and loss as independent legal concepts have ceded center stage to the law of damages.

An example of this is a symposium titled "Theory and Reality of The Law of Damages (*Songai Baishoho no Riron to Genjitsu).*"[55] The second presentation of the symposium, titled "Theory of Loss (*Songairon),"* was only six pages long and began by discussing the procedural aspects of claims in the case of wrongful death, the monetary awards for non-economic losses, and transferability via *mortis causa*, before moving to the realities of damages calculations. In a symposium concerning the law of damages, in a topic titled "Theory of Loss," there was no conversation about the criteria for a loss to be considered legally protected and no normative discussion on the importance of the formal or material aspects of the concept. Another example is the article "*Songai to sono Shuhen"* by Mina Wakabayashi,[56] which briefly engages with some theories regarding harm and loss

[49] Kenshiro Ume, *Minpo Yogi Maki sono San Saiken Hen* (reprint 1984) (Japan)
[50] Sakae Wagatsuma, *Jimu Kanri Futo Ritoku Fuhokoi* (1988) (Japan)
[51] Ichiro Kato, *Jimu Kanri・Futo Ritoku・Fuhokoi* 148 (1957) (Japan)
[52] Yoshio Hirai, *Songai Baishoho no Riron* (photo. reprint 2011) (Japan), Yoshio Hirai, *Saiken Kakuron II Fuhokoi* (2010) (Japan), Yoshio Hirai, *[Songai] Gainen no Saikosei,* 90 Journal of the Jurisprudence Association The University of Tokyo 1515 (1973) (Japan)
[53] Otoshiro Ishizaka, *Nihon Minpo Saiken Soron Jokan* (1911)
[54] Tamakichi Nakajima, *Minpo Shakugi Maki Sono III Saiken Soron Jo* (1911) (Japan)
[55] *Songai Baishoho no Riron to Genjitsu,* 55 Shiho 3 (Masamichi Okuda, Takehisa Awaji eds., 1993) (Japan)
[56] Mina Wakabayashi, *[Songai] to sono Shuhen,* 29 Kyoto Gakuen Law Review 243 (1999) (Japan)

before focusing in the concept of causal link.

That is not to say that discussions regarding loss in an abstract manner are unknown. Rather, most researchers in Japan connect the concept of loss to either the casual link or the monetary award. Some papers have addressed the matter of loss and harm in an abstract manner without approaching it from a monetary perspective.[57] Of particular importance is Makoto Takahashi's *Songai Gainenron Josetsu,*[58] which tackles the multiple theories used to address the idea of loss and harm in Japanese law. It is also notable that harm and loss are studied under the concept of unlawfulness, or *ihosei*, as well.

Finally, the third type of source is those that regard non-economic losses. The challenge in gathering these sources is that most of the literature focuses on either the method for calculating damages or the nature, function, or other aspects of the monetary award.[59] Two prime examples are Osamu Saito's *Isharyo no Santei no Riron*[60] and the *Isharyo Santei no Jitsumu*, which was published by the Lawyers' Association of Chiba (*Chiba ken Bengoshi Kai)*.[61] Empirical research on this topic is almost nonexistent, which the exception of articles published by Professor Momioka regarding non-economic damages in the case of medical malpractice[62] and defamation cases.[63] Daisuke Shimoda has published a paper[64] in three[65] parts[66] that studies the development of the claim for infliction

[57] Masayuki Kato, *Kihanteki Songai Gainen heno Tenbo,* 61 Journal of Law and Political Studies 195 (2004) (Japan)
Masayuki Kato, *Songai* Yoken Saitei (1): Fransuho ni okeru Baisho Genri to *Songai* Gainen no Kankei, 38 The Law and Politics Review 949 (2009) (Japan), Joji Namba, *Songai no Chushousei to Gutaisei: Songai no Kaidan Koso ni kansuru Oboegaki,* 1 Rikkyo Homukenkyu St. Paul's Law Review 105 (2008) (Japan)
[58] Makoto Takahashi, *Songai Gainenron Josetsu* (2005) (Japan)
[59] Hiroshi Uebayashi, *Isharyo no Santei no Riron* (1962), Munehiko Mishima, *Isharyo no Honshitsu*, 5 (1) Kanazawa Law Review 1（1959）(Japan)
Hirofumi Itou, *Isharyo no Seishitsu wo Meguru Giron ni Tsuite*,7 Bulleting of Toyohashi Sozo College 141 (2003) (Japan), Isamu Goto, *Saikin ni Okeru Isharyo no Shomondai*, 145 Ho no Shihai 31 (2007) (Japan), Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 1,* 50(2) Hogaku Kyoukai Zasshi, 18 (1932) (Japan), Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 2 Kan*, 50 (3) Hogaku Kyoukai Zasshi 116 (1932) (Japan), Saito *supra* note 9
[60] *Isharyo Santei no Riron* (Osamu Saito ed., 4ed., 2013) (Japan)
[61] *Isharyo* Santei no Jitsumu, Chiba ken Bengoshi Kai (ed.) 1 (2013) (Japan)
[62] Horinari Momioka, *Iryo Kago Sosho ni Okeru Isharyo no Kino ni Kansuru Jisshoteki Kenkyu,* 63 Journal of Hokkaido University of Education 83 (2013) (Japan)
[63] Horinari Momioka, Meiyo Kison Sosho ni Okeru Isharyo no Seisaiteki Yokushiteki Kino –Hodo Kikan ga Hikoku to Natta Jirei no Tokeiteki Bunseki, 119 The Chuo Law Review 583(2013) (Japan)
[64] Daisuke Shimoda, *Amerika ni Okeru Seishinteki Kutsu Baisho no Hatten (1),* 19 The Okayama-Shoka Law Review 136 (2011) (Japan)

of emotional distress in the US. While these papers are intriguing, they exhibit the same problems as other research – that is, a focus on the nature and function of the claim. Because of this, they can be perceived as basically the same research with an empirical basis, but they neglect to address the relation between economic and non-economic damages and favor finding answers to more theoretical questions. A key source is Kato Ichiro's *Chushaku Minpo*, which has highly detailed, extensive sections about non-economic damages written by Hiroshi Uebayashi. Unfortunately, it has not been updated since its publication in 1965.[67]

Next, there is the issue of the influence of foreign scholarship, particularly German scholarship, on the legal thinking in Japan. Perhaps one of the first lessons for comparative scholar when studying Japanese law is that German law has an exerted a great deal of influence over civil law scholarship. Indeed, it is almost common knowledge that the German code influenced the drafters. This thesis tries to dispel this idea – at least in regards to the law of delicts, and in particular, non-economic losses. The importance of German influence must be discussed in two fronts. The first is whether German law influenced the drafters with regards to loss and harm under delictual liability. While it is true that the drafters had access to the first draft of the BGB, it is also true that they consulted the civil codes from France, Spain, Belgium, the Netherlands, Italy, Portugal, Montenegro, and Austria.[68]

However, above all, during the discussion of the requirement of delictual liability, rights infringement, and loss, the drafters were clear that these two concepts represented English common law and the French Code, respectively. Nevertheless, most scholars have attempted to identify links between Section 709 and the BGB. An excellent example is the *Minpoten no Hyakunen* mentioned above, which discusses the legislative history of Section 709 with the corresponding section of the BGB, apparently ignoring the fact that the BGB

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[65] Daisuke Shimoda, *Amerika ni Okeru Seishinteki Kutsu Baisho no Hatten (2),* 20 The Okayama-Shoka Law Review 116 (2012) (Japan)
[66] Daisuke Shimoda, *Amerika ni Okeru Seishinteki Kutsu Baisho no Hatten (3),* 21 The Okayama-Shoka Law Review 21 (2013) (Japan)
[67] Hiroshi Uebayashi, *Seishinteki Songai* ni taisuru Isharyo in Chushaku Minpo (19) Saiken (20) Fuhokoi 193, 203-211 (Ichiro Kato ed., 1965) (Japan)
[68] http://www.law.nagoya-u.ac.jp/jalii/arthis/1896/table3.html#id900

was promulgated years after the Japanese Civil Code and the very words used by the drafters.[69] Later in the same section, the author quotes Hozumi and Tomii to posit that the requirement of right infringement is not based on German law. However, the author again seems to ignore that Hozumi utilized the term "existing codes" (*Kizon Hoten)* when explaining that certain countries had this requirement, which would preclude the possibility of any influence from the BGB draft. Hozumi has commented on the matter:

> *At first sight, it may appear that the new Code was very closely modeled upon the new German Civil Code; and I have very often read statements to that effect. It is true that the first and second draft of the German Code furnished, very valuable material to the drafting committee and had a great influence upon the deliberations of the Committee. But, on close examination of the principles and rules adopted in the Code, it will appear that they gathered materials from all parts of the civilized world, and freely adopted rules or principles from the laws of any country, whenever they saw the advantage of doing so. In some parts, rules were adopted from the French Civil Code; in others, the principles of English common law were followed; in others again, such laws as the Swiss Federal Code of Obligations of 1881, the new Spanish Civil Code of 1889, the Property Code of Montenegro, Indian Succession and Contract Acts or the Civil Codes of Louisiana, Lower Canada or the South American Republics or the draft Civil Code of New York and the like have given materials for the framers of the Code. In January 1896, the report of the Committee on Book I, " General Provisions," Book II, " Rights in rem" and Book III, " Rights in personam" was submitted to the Imperial Diet and was adopted with only a few unimportant modifications.*[70]

[69] Nobuhige Segawa, *Minpo 709 Jo (Fuhokoi no Ippanteki Seiritsu Yoken)* in III Minpoten no Hyakunen Kobetsuteki Kanstatsu (2) Saiken Hen 559, *560ff.* (Toshio Hironaka, Eichi Hoshino eds.,1993) (Japan)
[70] Hozumi *supra* note 38 at 22-23

To be fair, the author was following a tradition that began in the early 20th century. The German influence is not a result of the drafters' intent, but rather of changes in the balance of power within the law school of the Tokyo Imperial University, now Tokyo University. In addition, the death of Ume in 1910 further shifted this balance towards favoring the introduction of German ideas. In other words, the influence of German law in later generations is real, although such influence was not intended by the drafters.

Therefore, this thesis approaches the issue of non-economic losses without relying on the traditional tools used by Japanese law, such as German ideas or an approach based on economic valuation. Instead, it analyzes the development of the law, starting with the drafting process and continuing through many of the doctrinal and practical discussions that arose from it. By arguing that the German influence is merely the result of historical circumstances, rather than a deliberate attempt to modernize the law, this thesis presents a new perspective of the realm of civil liability under Japanese code, particularly regarding the issue of non-economic losses under a more general scope than past research has done, either in Japanese or English literature.

CHAPTER 2 HARM AND LOSS UNDER JAPANESE LAW

I. HARM AS AN ELEMENT OF DELICTUAL LIABILITY UNDER SECTION 709 OF THE JAPANESE CIVIL CODE.

This chapter explores the concepts of harm and loss as they appear in Section 709 of the Japanese Civil Code and their role as one of the requirements for delictual liability under Japanese civil law. For context, Section 709 of the Japanese Civil Code reads:

> *"A person who has intentionally or negligently infringed any right of others,or legally protected interest of others, shall be liable to compen sate any damages resulting in consequence."*[12]

While the language appears clear enough, it belittles the fact that the concept of loss, as understood by Japanese scholars, does not carry the same weight as it does in other civil law countries. On the one hand, a review of the literature reveals that scholarship has been focused on the concepts of damages, referring to the monetary amount a victim receives.[3]

Moreover, there are some discussions of whether Section 709 of the Japanese Civil Code reflects the French model or the German model of civil liability.[4] Supporters of the German model[5] have noted that an early draft of the Civil Code that only required negligence or carelessness (*kashitsu matawa taiman*) as a single element of delictual liability was replaced by a two-step system, *i.e.*, intent or negligence and the infringement of a legal right. Those who follow the German school of thought have argued that this

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[1] Translation from: http://www.moj.go.jp/content/000056024.pdf
The original text of the Civil Code, as it was promulgated in 1896, did. not include the phrase *"or legally protected interest of others,"* which in turn led to a prolonged discussion, both in scholarship and case law, regarding the concept of unlawfulness under Section 709. This phrase was added to the Japanese Civil Code in the 2004 reforms, which were aimed at modernizing the language in the text and complementing the provisions with precedents set by the Supreme Court. In the case of delictual liability, the phrase was added to align the code with the general view that rights should not be construed in a limited manner.

[2] For the purposes of this chapter, the term "loss" refers to damages, as it appears in the above translation.

[3] Indeed, a fixation on *monetary quantification* is found in almost any discussion regarding losses, even those related to non-economic losses.

[4] Ippei Osawa, *Minpo 711 ni okeru Hoeki Hogo no Kozo I Fuhokoi Sekinin no Seisakuteki Kaju ni kansuru Ikkosatsu*, 128(1) Journal of the Jurisprudence Association the University of Tokyo 157,169 (2011) (Japan)

[5] See: Seishi Nishigori, *Ihosei to Kashitsu,* in Minpo Kosa 6 134, 139 (Eichi Hoshino ed., 1985) (Japan)
Masunobu Kato, *Shin Minpo Taikei V Jimu Kanri・Futo Ritoku ・ Fuhokoi* (2ed., 2005) (Japan)
Tatsuaki Maeda, *Minpo VI (Fuhokoiho) 3* (1982) (Japan)

change bears a clear resemblance to Section 823 of the BGB.[6] On the other hand, advocates for the French model[7] have asserted that both Section 709 of the Japanese Civil Code and Section 1382 of the *Code Civil* present a uniform system of delictual liability. In addition, they have highlighted that the infringement of a legal right requirement is broader than the list of rights established under Section 823 of the BGB. Finally, during discussions regarding delictual liability prior to the enactment of the code (the *Hoten Chousakai*), there were no references to German law.[8] The influence of German scholarship in Japanese law is evident; however, at least to the degree that the original draft and the Civil Code as it was enacted is concerned, historical evidence lends more support to the French model.

Kato has assessed that under Japanese law, the concept of loss is understood as that which lies at the end of the causal link. Many theories divide the issue of the causal link and the field of compensation. Approaching the issue of loss under the causal link is a *but-for-cause* type of approach, which does not include normative considerations.[9] In contrast, in the *Code*, the issues of the causal link and the extent of compensation are not independent, but rather interrelated. Furthermore, under the principle of *reparation intégrale,* the loss, as a requirement for delictual liability, is not to be limited by external factors, but rather completely compensated. Hence, under the French system, the issue centers on how to identify these losses[10]. While there are no doubts that the existence of a loss is required under Section 709, Kato has noted that discussions of the concepts of harm and loss tend to be limited to the amount of the compensation, rather than the legal requirement of loss.[11] In this regard, the main issues are the relation between the first half of Section 709, *i.e.*, the infringement of a legal right, and the second half, *i.e.*, that the victim suffers a loss as a result of said infringement.

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[6] Osawa *supra* note 4 at 169
[7] See: Yoshio Hirai, *Songai Baishoho no Riron* 361 (photo. reprint 2011) (Japan)
Eichi Hoshino, *Minpo Ronshu 6* 317 (1986) (Japan)
[8] Osawa *supra* note 4 at 169
[9] Masayuki Kato, *Kihanteki Songai Gainen heno Tenbo,* 61 Journal of Law and Political Studies195, 196 (2004) (Japan)
[10] *Id*. at 197
[11] Kato *supra* note 9 at 950

The discussion of the infringement of rights that resulted from the construction of first half of Section 709 allowed for an expansion of both the concept of rights and the idea of unlawfulness. This also meant that the concepts of harm and loss were relegated to a secondary role, regardless of their actual importance. Thus, the loss as a requirement and the concept of loss as the final step in the causal link were not considered connected. Instead, scholarship has advanced them as two separate issues. Furthermore, the relation between these two requirements has been a controversial issue since the draft's inception. Perhaps one of the most salient issues is the introduction of German scholarship, regardless of its degree of influence on the delictual liability system under Sections 709, 710, and 711. This has led to the adoption of a concept of loss that is linked to the idea of monetary valuation, following the German *differenztheorie*.

However, as is discussed in the next section, the *differenztheorie* was never intended as anything more than a means to quantify the loss suffered by a victim, and is not a tool for granting the concept of loss any legal meaning. In this context, Namba has attempted to explain the concept of *songai* as a spectrum that ranges from "abstract harm" to "specific harm." This spectrum is divided into three stages: the first involves the concept of harm itself, the second concerns the types of losses (*e.g.*, economic or non-economic), and the third regards the specific loss, which is the economic valuation of such losses.[12] Namba has further argued that while specific losses should be held as the principle, understanding loss as an abstract concept is necessary to a certain degree. Although, regardless of which end of the spectrum is chosen, only those items that can be specified can be considered as loss.[13] Nevertheless, a close analysis of Namba's argument reveals that the proposition includes more than a simple distinction between abstract and concrete concepts. Namba has advocated for a division of the term *songai*, which is used to refer to both harm and loss within Japanese Civil Code, case law, and scholarship. In a rather roundabout manner, Namba recognized that loss, as an abstract idea that refers to an event that occurs in the world and is detrimental to a victim's favorable situation, is not the same concept as harm

[12] Joji Namba, *Songai no Chushousei to Gutaisei: Songai no Kaidan Koso ni kansuru Oboegaki,* 1 Rikkyo Homukenkyu St. Paul's Law Review 105, 107 (2008) (Japan)
[13] *Id.* at 118

as damages. In a sense, Namba has referred to the distinction between harm and loss that is common among the scholarship of civil law countries under the French model. However, the fact that he is bound by the word *songai* means that, in a way, he cannot properly define the phenomena he has correctly observed.

Arguably, Namba – and Japanese scholarship in general – has encountered two significant challenges when studying harm and loss in a legal context. The first is language. The Japanese language has several terms to describe harm and loss. The original draft by Boissonade utilized the terms *dommage, prejudice,* and *perte* in various sections, and did so in a remarkably distinct manner. However, the translation applied the terms *songai* and *sonshitsu* and referred to their French counterparts without any clear rules. Thus, Japanese scholars are chained to the term *songai* in a way that is not commonly observed in comparative law. In a sense, the main issue can be presented in mathematical terms: scholarship is attempting to assign multiple meanings to a single variable, which results in confusion and a misunderstanding of the topic as a whole.

There is no doubt that under Japanese Civil Code, the existence of a loss is an integral element of delictual liability. However, Kato [14] has stated that "*discussions regarding the concept of harm tend to be about the content and extent of the damages."* However, the topic has not been researched as much as an element of delictual liability. The relation between the infringement of a legal right or interest and the existence of harm under Section 709 is ambiguous. Since, in reality, an infringement of a right naturally leads to the emergence of harm, discussions inevitably shift to the content of harm instead. Wagatsuma[15] had asserted that an act that infringes on a third party's right is not necessarily an unlawful one – nor can it be said that every unlawful act causes a loss to a third party. In the same sense, Ichiro Kato [16] has admitted that even if an unlawful culpable act took place, a victim cannot claim damages in the absence of harm.

However, Japanese literature has tied the concept of harm to the concept of unlawfulness, and the content of harm, expressed in a monetary sum, is more important

[14] Kato *supra* note 9 at 950
[15] Sakae Wagatsuma, *Jimu Kanri Futo Ritoku Fuhokoi* 152-153 (1988) (Japan)
[16] Ichiro Kato, *Jimu Kanri・Futo Ritoku・Fuhokoi* 148 (1957) (Japan)

than its definition or characteristics. Japanese Civil Code does not provide a statutory definition of harm or loss. In this regard, Japan is reflective of most civil law countries. However, Japan is arguably an exception within the group of countries that follow the French legal tradition in the sense that it does not follow the traditional "characteristics of loss" approach. In turn, there are a number of theories that seek to situate harm and loss within the context of the Japanese system.

Japanese literature has tended to denounce a concept of loss like that presented under the French system, *i.e.*, the decrease in a favorable situation of the victim as empty and of no use.[17] However, this stance disregards the fact that such a definition is accompanied by discussions regarding the nature of harm and loss, as well as requirements for a loss to be legally protected. This attitude towards such a definition seems to stem from an overreliance on the German model even though the Japanese law of delict is clearly modeled after the French *Code*. The concept of infringement and unlawfulness are thoroughly rooted in the mentality of Japanese lawyers.

Hirai[18] has highlighted that legal techniques for defining harm in Japan are poor, and that failing to define the concept of harm is not solely a Japanese idiosyncrasy, but rather one that can also be observed in American common law and the French *Code*. Indeed, there are few codes that provide a statutory definition of loss.[19] However, Hirai does not take into account two key elements regarding harm and loss in the example he provides. First, American common law, especially the law of torts, ascribes more importance to the conduct and duties of the tortfeasor than to the loss of the victim, at least at an abstract level. Loss and harm are elements involved in determining the amount of damages, and as such, they cannot be abstract concepts, but rather must be assigned a clear value. Therefore, defining harm or loss in an abstract manner could prove incompatible with *a posteriori* rules of tort law. Second, while it is true that there is not statutory

[17] Makoto Takahashi, *Songai Gainenron Josetsu* 199 (2005) (Japan)
Yoshio Hirai, *Saiken Kakuron II Fuhokoi* 75 (2010) (Japan)
[18] Hirai *supra* note 18 at 75
[19] Exceptions are found within the Argentinean and Paraguayan Civil Codes. Section 1835 of the Paraguayan Civil Code defines harm as any loss regarding the person, rights, faculties, or property of an individual. Existirá daño, siempre que se causare a otro algún perjuicio en su persona, en sus derechos o facultades, o en las cosas de su dominio o posesión.

definition of harm or loss in the French *Code*, Hirai seems to have neglected the fact that the concepts of harm and loss occupy center stage in discussions of the law of delicts – not only in French scholarship, but also in countries that have received its influence.

The second common theme in Japanese literature and theories regarding harm is a fixation on monetary quantification. This derives from the fact that Japanese civil liability adheres to a theory called *kinsen baisho gensoku*,[20] or the principle of monetary compensation, under which compensation for civil liability must be provided in the form of monetary damages. The influence of this principle in Japanese legal thinking is apparent in the presentation of the various theories regarding harm later in this thesis. Under such circumstances, the study of the concept of loss and harm under Japanese law must be approached via the drafting process that took place in the late 19th century in order to better understand its relation to the idea of non-economic losses, which is addressed in the next chapter.

II. THE DRAFT OF THE CIVIL CODE

A. THE BOISSONADE DRAFT

As a result of the rapid changes that the Meiji era (1868-1912) incited in Japan, the Japanese government under Emperor Meiji urged for a complete reform of the legal system in order to align it more closely with those of Western countries.[21] In 1873, the French jurist Gustave Émile Boissonade de Fontarabie, under the invitation of the Japanese government,

[20]Specifically, section 417 of the Japanese Civil Code states
"Unless other intention is manifested, the amount of the damages shall be determined with reference to monetary value"

[21]For a more complete study: Teru Okubo*, Minpo Kisosha no Kangaekata no Chigai ni tsuite*, 26 Chuo-Gakuin University review of Faculty of Law 113 (2013) (Japan), Takashi Oka, *Meiji Minpo Kiso Katei ni okeru Gaikoku Ho no Eikyo*, 4 Journal of International Philosophy 16 (2014) (Japan), Yoichi Sakaguchi, *Minpoten Kiso no Hoko: Hozumi to Ume ni okeru Doitsu Minpo Keiju no Ronri,* 22 Area and Culture Studies 107 (1972) (Japan), Tomoya Sano, *Minpo Kisoji ni okeru Sansho Gaikokuho Bunseki Kiban no Kochiku,* 263 Journal of Law and Politics 37 (2015) (Japan)、
In English: Nobushige Hozumi, Lectures on the New Japanese Civil Code as Materials for the Study of Comparative Jurisprudence (1912) (Japan)
Shusei Ono, *Comparative Law and the Civil Code of Japan (I),* 24 Hitotsubashi Journal of Law and Politics 24 (1996) (henceforth Ono I) (Japan)
Shusei Ono, *Comparative law and the Civil Code of Japan (II),* 25 Hitotsubashi Journal of Law and Politics 25(1997) (henceforth Ono II) (Japan)
Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code,* 11 The Yale Law Journal 296,303 (1902) (Japan)

arrived in Japan to participate in the drafting of the first Japanese Civil Code.[2223] Many members of the First Drafting Committee were judges who were educated under the Ministry of Justice. Hence, they were influenced by French law, and as a result, the committee rarely questioned the principles set forth by the Boissonade code or French law.[24]

Under the Boissonade draft, delictual liability was designated as *dommages injuste.* However, Boissonade did not address the issue of unlawfulness or infringement of legal rights.[25] Delictual liability, Boissonade argued, was based on the ideas of natural law.[26] Moreover, Boissonade limited the concept of *dommage* to material losses and explicitly rejected the idea of non-economic losses as a subject of the law of delicts.[27] For example, in cases of personal injury, it applied only to medical expenses and losses resulting from an inability to work and a pension to the family of the victim in cases where the victim died.[28] Boissonade based his rejection of non-economic losses on two points. The first was the idea that any type of monetary award is insufficient to compensate the victim for these types of losses, rather than the difficulty of a monetary valuation.[29] Second, Boissonade described the delictual liability as a two-step process, making a distinction between harms, such as personal injuries or defamation, and any economic losses that result from them.[30]

Throughout the draft, Boissonade used the terms *dommage* and *prejudice* as synonyms. There is no evidence that he would have ascribed these terms two different meanings, at least not within the statute. Boissonade did use the term *dommage* far more

[22] A Drafting Committee of the Civil Code Codification was founded in April 1880 and Abolished in March 1886

[23] Boissonade was not an official member of the commission, but the draft produced by the commission was, for all intents and purposes, the same as the one proposed by Boissonade. He was invited to Japan because Rinsho Mitsukuri, the translator of many Western codes, was not sure his translations were true to the original material. Thus, he asked the Minister of Justice for permission to go abroad in order to study law and become familiar with the Western systems. The Minister rejected his request, deeming Mitsukuri too important to the codification process, and Boisonnade was invited to help answer any questions Mitsukuri might have had. See: Ono I *supra* note 21 at 28 , Ono II *supra* note 21 at 41

[24] Ono II *supra* note 21 at 40-41

[25] Osawa *supra* note 4 at 170

[26] Osawa *supra* note 4 at 171

[27] Osawa *supra* note 4 at 173

[28] Osawa *supra* note 4 at 171

[29] Osawa *supra* note 4 at 173

[30] Osawa *supra* note 4 at 173

frequently than the term *prejudice*; however, both seem to refer to the infringement of a legal interest of the victim and the actual loss suffered. However, in the Japanese version of the draft, these terms are both translated as *songai* and *sonshitsu,* and their use is not consistent. In some instances, *prejudice* is translated as *songai*, only to be later translated as *sonshitsu*.[31] In addition, the term *perte*, used by Boissonade to refer to a loss, was also translated as *sonshitsu*, further compounding the confusion. It is possible that while Boissonade did not intend for *dommage* and *prejudice* to be construed as two different concepts, he did not consider *perte* to be their synonym. It is unlikely that it could be a simple error, as Boissonade was a professor of law and would be fully aware of the consequences of such a mistake.

The Japanese Civil Code was enacted in 1890 and was expected to take effect in 1893. However, there was some controversy regarding certain parts of the code, particularly those related to family law. This *hoten ronso,* or controversy on the Civil Code codification, resulted in postponing enforcement of the Civil Code in 1892, and finally to its abolishment in 1898, before it was even enforced.[32]

B. THE JAPANESE DRAFT

The Second Drafting Committee was established in 1893 to address criticism that was directed at the first committee. It consisted of 33 members and was presided over by Ito Horobumi, who was so supportive of the German style that, under his insistence, the new draft was written in the *pandekten system.*[33][34] Many members were either judges or high-ranking government officials, and the time that had passed since the composition of the first draft had allowed Japanese scholars, judges, and officials to improve their

[31] In the current Civil Code, the preferred term for ham is "*songai.*" A quick search of the Civil Code reveals that the term is used more than 100 times. In contrast, the word "*sonshitsu,*" or loss, is only used 9 times within the actual Japanese Code.
[32] Ono I *supra* note 21 at 29
[33] While Ito supported a German model of codification, the leaders of the government were only interested in a code without any particular leanings towards the origins of the rules within. This allowed for the inclusion of institutions from various sources. See: Ono II *supra* note 21 at 45
[34] The German ideas of government and state in general were very influential during the restoration. For one, Germany was considered in its Golden Age of development, an underdeveloped society that caught up with other Western powers, which was the same thing that Japan was trying to achieve at the time. On the other hand, German ideas were of a conservative nature, which was very attractive to the political leaders of Japan. Ono I *supra* note 21 at 31

knowledge of comparative law.[35]

However, the task of writing the actual draft was delegated to three scholars: Kenshiro Ume, Nobushige Hozumi, and Masaakira Tomii.[36] Each had strong comparative law roots, having studied in France, Germany, or England. Surprisingly, the drafter who referenced German law and ideas the most was neither Ume nor Hozumi, who had both studied German law in Germany, but was actually Tomii. Ume did consider that since the German BGB was the product of new legal principles, it was necessary for the legal future of Japan.[37]

In contrast with the Boissonade draft, which was based on the concept of natural law, the drafters and the commission in general rejected the idea of rights having a basis in the natural world. Instead, laws were a manmade construct, and rights and duties were established by law. Therefore, natural rights could not be legally enforced or classified as rights under the Japanese code at the time of the draft.[38] The drafters also opposed the belief that the code should be redacted in a clear manner, except for the inclusion of definitions that were part of Boissonade's draft, permitting opportunities for future

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[35] Ono II *supra* note 21 at 41

[36] Kenshiro Ume obtained his Ph.D. at the University of Lyon after studying for three years in 1889, after which he moved to Germany. There, he was able to attend lectures at the University of Berlin until 1890, returning to Japan in 1891. Ume was also the only drafter who had supported the original draft as presented by the First Committee, as well as the only drafter to write a complete commentary on the Civil Code, *Minpo Yogi*, which consisted of more than 300 pages and spanned five volumes.
Nobushige Hozumi studied at the University of London and graduated in 1879. After obtaining his barrister license, he moved to Germany to attend the Berlin University before returning to Japan in 1881. Together with his brother, Yatsuka Hozumi, he was very critical of the first code, raising the issue of national pride, but not rejecting foreign influences completely.
Finally, Masaakira Tomii also attended the University of Lyons, where he obtained his Ph.D. degree in 1883, and returned to Japan in 1885. In contrast with Nobushige and Kenshiro, he did not move to Germany or study German law. In 1892, he gave speeches advocating for the repeal of the first Civil Code. For more see: Oka *supra* note 21 at 16, Okubo *supra* note 21 at 116 *ff.*
Ono I *supra* note 21 at 32-36

[37] Okubo *supra* note 21 at 119
Ume, on the other hand, placed a great deal of importance on French law. In contrast to Ume, Tomii never had the opportunity to study German law directly, and his comparative law works did not deal with German law, most of them being written in French. However, he was very critical of French law and supported the idea that German law was the best representative of European Law. See: Ono I *supra* note 21 at 35-36, Ono II *supra* note 21 at 33

[38] Hatoyama *supra* note 21 at 303

development of legal theory via interpretation.[39]

This discussion regarding the codification process in Japan, especially the influence of foreign codes and legal theories, is imperative to understand the situation after the promulgation of the code. Although two of the drafters studied in Germany, the short duration of their stays and the time period in which they took place made it unlikely that they were influenced to such an extent as to negate their formal education. This is evidenced by the discussion of delictual liability and the fact that the drafters included a remedy for non-economic losses, which was rejected by the legal thinking that led to the creation of the BGB.[40] The drafters opted to adopt the French model of delictual liability and chose not to follow a *numerus clausus* like that adopted by the BGB years later. Section 709 does not limit or categorize harm or loss in any way, unlike the BGB. One of the changes the drafters made in comparison to the Boissonade draft was the term for delictual liability. Originally, Boissonade had used the term *dommage injustes*. Instead, the drafters decided to use the term "unjust conducts" (*fusho shoi),* and finally, "unlawful acts" (*fuhokoi*).

However, drafters were divided on the requirement of delictual liability. Ume explained that the term *shoi* in the expression *fusho shoi* represented the French *fate*. On the other hand, the term *koi* from the expression *fuhokoi* referenced the French word *acte.*[41] Moreover, this spurred a discussion among the drafters on the meaning of the term *koi*, since it signified actions to which the law granted a certain effect. Therefore, there was a

[39] Ono II *supra* note 21 at 46

[40] The theories presented by Frederich Von Mommsen in his work *zur lehre von dem Interesse* were the starting point for what later came to be the *differenztheorie*. For Mommsen, the scope of the infringed interests is an issue that should be solved under the rules of causality. However, Mommsen's theory was not applied to non-economic losses, as the general public in Germany at the time was opposed to granting remedy in those cases.
See: Yumiko Kashimi, *Doitsu ni okeru Songai Gainen no Rekishiteki Hatten: Doitsu Minpoten Seiritsu Maeshi,* 38 (1-2) Kanazawa Law Review 211,222-223 (1996) (Japan)
Mina Wakabayashi, Hotekina Gainen toshite 「*Songai*」no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (1), 248 Ritsumeikan Law Review 108 (1996) (Japan)
Mina Wakabayashi, Hotekina Gainen toshite 「*Songai*」no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (2), 251 Ritsumeikan Law Review 105 (1997) (Japan)
Mina Wakabayashi, Hotekina Gainen toshite 「*Songai*」no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (3), 252 Ritsumeikan Law Review 63 (1997) (Japan)

[41] Osawa *supra* note 4 at 179

question as to whether negligence was included within the meaning of *koi.*[42] Tomii argued that if the inclusion of the term *koi* would generate such an issue with its interpretation, they must either clearly add negligence to the language of Section 709, or if the draft rejected the infringement of rights requirement, change the title to "unjust losses," or "*fusei no songai.*"[43]

Furthermore, Hozumi described the term *fuho* to mean failure to perform an act that should have been done, such as paying a reward. He reasoned that such actions contradicted morality and affected the balance of public interests.[44] Tomii supported the idea that when public order was established by law, it prevented any interference by moral considerations.[45] Ume maintained a more nuanced approach, promoting the separation of moral considerations and public order considerations. Morality, he argued, was within the internal sphere of the individual, while the law was positioned the external sphere. Hence, they could not prevent society from punishing certain immoral conducts, but they should prevent the law from doing so. He agreed with Tomii that once the law had regulated a conduct, it ceased to fall within the realm of morality and was absorbed into public order.[46]

However, this discussion was not about the correct title for the section. Rather, it reflected one of the main issues the drafters faced: the role of harm and loss within delictual liability in the new Japanese Civil Code. As Tomii[47][48] has noted, there were two opposing views during the drafting process regarding the role of loss in delictual liability. One view, which adhered to the British common law model, approached the issue of delictual liability through the concept of legal rights, and specifically their infringement. Under this view, the

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[42] Ibid.
[43] Ibid.
[44] Hoten Chosakai Minpo Giji Sokkiroku Dai 3 at 91 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367529 (at 95-96)
[45] Hoten Chosakai Minpo Chusa Kaigi Sokkiroku Dai 6 at 138 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367598 (at 141 *ff*)
[46] Hoten Chosakai Minpo Chusa Kaigi Sokkiroku Dai 6 at 144 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367598 (at 148 *ff*)
[47] Hoten Chosakai Minpo Soukai Giji Sokkiroku Dai 1 at 120 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367523 (at 124 *ff*)
[48] Akihito Kushihi, *Meiji Minpo [Fuhokoi] ni okeru Kisosha Ishi no Tankyu: Meiji Minpo 709 Jo no Shisoteki Haikei,* 66 Journal of Law and Political Studies 289,293 (2005) (Japan)
Osawa *supra* note 4 at 180

infringement of a legal right would suffice to grant a victim a claim for damages, regardless of any actual loss suffered by the victim. Therefore, this approach was labeled the right violation principle (*kenri shinpan shugi),* and was supported by Hozumi. In the other view, which followed the French model, Ume supported the actual loss principle (*jisson shugi*), under which the only requirement for delictual liability was that the victim had suffered a loss, regardless of any legal rights infringements.

The discussion regarding the requirements under Section 709 is the result of the influence of comparative law on the drafters, especially concerning the concepts of loss and rights. Hozumi[49] addressed the issue by identifying two approaches to the concept of *songai.* The first assumes that *songai* refers to *jishitsujo no songai,* or real losses, while the second concludes that a *songai* exists if a legally protected right has been infringed upon, regardless of any actual loss suffered by the victim. Hozumi supported the first approach, *i.e.*, *songai* refers to any actual loss suffered by the victim. However, from Hozumi's viewpoint, actual loss was limited only to economic losses.[50] In contrast, Ume argued for a broader view of *songai* as not limited to economic losses, but including material and non-economic losses as well.[51] Nevertheless, in explaining the last sentence of Section 709, Hozumi demonstrated that the draft had adopted the position that *songai* included both economic and non-economic losses.[52]

Ume and Hozumi's opinions on defamation illustrate the difference in their approaches. Hozumi argued that defamation by itself did not immediately amount to an actual loss and that victims' emotional discomfort did not amount to *songai.*[53] While he did not assert that these types of losses should not be recognized, he did believe that they were outside the purview of the concept of *songai.* Therefore, under the actual loss principle,

[49] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 72 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *75ff*)
[50] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 57 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *61ff*)
[51] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 66 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 70 *ff*)
[52] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 maki at 88 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at *91ff*)
[53] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 64 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 67 *ff*)

there would be cases in which defamation would not grant the victim a claim for damages, since no actual loss had occurred. In order to prevent this, defamation under the violation principle would be considered an infringement of a legal right in itself, therefore granting the victim a claim for compensation of any actual losses.[54] Conversely, Ume argued that in defamation cases, the victim does not always suffer a monetary loss. In those cases, he highlighted, the victim could still request an apology as a means of reparation, even if no economic remedy was available.[55] Therefore, from Ume's perspective, defamation was in itself a type of s*ongai,* which in turn meant that the victim had a claim against the wrongdoer. The reason, he argued, was that defamation would inevitably produce an actual loss.[56]

Kushihi argues that both views do not necessarily oppose each other, as Hozumi's view on *songai* was limited to monetary losses, while Ume's view included both material and non-economic losses. Therefore, at least in defamation cases, the result is the same, though the approach might differ.[57] On the other hand, in the case of infringement of property rights, the approach would indeed change the outcome. Hozumi argued that when property rights were infringed upon, the existence or absence of *songai*, *i.e.*, a monetary loss, would be irrelevant, as the infringement itself would be sufficient to grant the victim a claim for damages.[58] In contrast, Ume supported the view that not every case of infringement warranted compensation. He argued that victims should only be granted a legal remedy in cases where they suffered discomfort (*fukeikan)* as a type of non-economic loss.[59]

[54] Kushihi *supra* note 48 at 295
[55] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 60 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *63ff*)
[56] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 63 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *67ff*)
[57] Kushihi *supra* note 48 at 296
[58] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 60 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 64 *ff*)
[59] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 62 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 66 *ff*)

Hozumi opposed the actual loss principle, arguing that it contradicted principles contained within the draft.[60] He specifically argued that monetary losses might not result in cases of contractual liability. In those cases, under the right violation principle, the affected party could request performance because their rights were infringed upon. In contrast, under the actual loss principle, the affected party would have no remedy if no loss had occurred. Hozumi believed that this contradicted principles of the draft that permitted remedy for non-performance.[61] Ume defended his position by citing that parties enter a contract because it is mutually beneficial. Therefore, non-performance of the contract is a violation of a legally protected interest, which Ume reasoned amounted to loss.[6263]

The issue of which principle should rule the law of delictual liability also illustrates that the drafters did not share the same views regarding the nature and function of delictual liability. Hozumi opined that the value of a right derives from the fact that it has been granted protection under the law. Therefore, the adoption of loss as the basis for liability would obscure the standard of conduct for individuals.[64] Hence, for Hozumi, the rights violation principle was not only a matter of delictual liability, but also a means to protect the legal order.[65] In contrast, Ume upheld the view that the goal of delictual liability was not punishment, but rather compensation for the suffered loss. Therefore, liability should be the result of an actual loss, rather than the infringement of a legal right. Furthermore, under his approach, the infringement of a legal right was not included within the meaning of *songai*.[6667]

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[60]Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 64 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *67ff*)
[61] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 56 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 60 *ff*)
[62] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 66 ura http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 70 *ff*)
[63]Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 68 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 71 *ff*)
[64] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 64 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 67 *ff*)
[65] Kushihi *supra* note 48 at 301
[66] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 75 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 79)
[67] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 59 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 63*ff*)

Ultimately, the final version of Section 709 was a compromise between these two views. The infringement of a legal right is the basis of liability, but only so far as a loss results from it. The courts and scholars then had the task of determining what constitutes a legal right and in which cases the acts of an individual would amount to an infringement.

III. THE EVOLUTION OF THE CONCEPT OF SONGAI

As a result of Western influence brought by the Meiji Restoration, two schools of legal thought appeared in Japan.[68] The University of Tokyo taught English law, beginning in 1874. Meanwhile, Boissonade and other native professors taught the principle of French law at the school of law under the Ministry of Justice. However, in 1887, the law school attached to the Ministry of Justice was transferred to the university. In the same period, the German law section was founded, and by the 1890s, it had surpassed the other two in terms of influence. The reason for this was that the government had sent students abroad to study various teaching methods and had determined that the German model was superior. Nevertheless, Japanese universities diverged from the German model, which identified research as the primary goal, and instead focused on teaching existing knowledge and importing new ideas from the West. Thus, the issue was not how to develop new theories, but rather from where to import them.

Ume's commentary on the Civil Code after its enactment in 1898 triggered a short period of time when French law was highly influential for legal thought regarding civil law. For example, in 1902, Kazuo Hatoyama authored three papers for *Yale Law Journal* in which he compared the Japanese and French civil codes, only briefly mentioning German influences.[69] However, after the death of Ume in 1910, and coupled with the fact that the school under the Ministry of Justice had lost much of its influence, reliance on French law drastically diminished[70] and was replaced by the German school of legal thought.

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[68] Ono II *supra* note 21 at 47-48

[69] Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11-6 The Yale Law Journal 296 (1902) (Japan)
Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11-7 The Yale Law Journal 354 (1902) (Japan)
Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11-8 The Yale Law Journal 403 (1902) (Japan)

[70] Ono II *supra* note 21 at 47

This shift resulted in both courts and scholars applying German theories to the code in general, regardless of whether the specific rule was of French or English origin.[71] The law of delicts was also subject to this treatment. In the particular case of harm and loss, Japanese scholarship followed the German *differenztheorie* and renamed it amount difference theory. Consequently, discussions regarding loss were focused through a prism of monetary valuation, which is the basis for the *differenztheorie*, and a general approach to the concepts of harm and loss were excluded from the discussion, as is the case in countries that adhere to the French model.

A. THE SAGAKUSETSU OR AMOUNT DIFFERENCE THEORY

Scholars who wrote on harm and loss in the years following the promulgation of the Japanese Civil Code had perhaps more room to argue, in the sense that they were not limited by any previous ideas or case law regarding the code. As mentioned, Ume supported the adoption of French principles in the interpretation of the new Civil Code. Nevertheless, Ume limited his commentary on Section 709 to little more than one page. There, he explained that the two approaches – the infringement of a legal right and the existence of a loss – had their geneses in English and French law. He further specified that the Japanese Civil Code required both, without any references to German law.[72]

Early case law seems to reflect the ideas of Ume regarding the importance of loss. For example, the courts ruled that the mere infraction of a patent and production of counterfeit goods based on that patent was not solely enough to grant the right holder a remedy without proof of an actual loss.[73] Conversely, in defamation cases, the courts were more lenient on this requirement. For example, acts that affected credit and reputation were innately infringements on a victim's rights, without necessarily mentioning the existence of a loss.[74] Cases regarding comments were also examined under a similar standard.[75] However, there were cases in which the rights of victims were determined to be infringed

[71] Ono I *supra* note 21 at 31
[72] Kenshiro Ume, *Minpo Yogi Maki sono San Saiken Hen* 884 (reprint 1984) (Japan)
[73] Daishin'in [Great Ct. of Jud.] Aug. 16, 1904 Mei 37 (re) no.1525 Keiroku 10-1616 (Japan) The Japanese Supreme Court was known as the Supreme Court of Judicature (Daishin'in) before World War II.
[74] Daishin'in [Great Ct. of Jud.] Feb. 19, 1906 Mei 38 (o) no.296 Minroku 12-226 (Japan)
[75] Daishin'in [Great Ct. of Jud.] Nov. 2, 1910 Mei 42 (o) no. 172 Minroku 16-745 (Japan)

upon when their position in society was impacted. Thus, the concept of loss was abstract.[76] Furthermore, the Great Court of Judicature had pronounced that in defamation cases, monetary loss was not a requirement.[77]

Regardless of the lack of references to German law during the drafting process and the position adopted by the courts, after Ume's death in 1910 – and due to the decreased influence of the French school as a result of its assimilation – German theories began to expand to the realm of delictual liability. Two early examples of scholars who engaged with these theories are Otoshiro Ishizaka[78] and Tamakichi Nakajima.[79] Both Nakajima and Ishizaka discussed various German legal theories regarding harm and loss, emphasizing the *differenztheorie* and the *theorie der konkretenschaden*, which defined loss as the specific loss suffered by the victims to their person or property as a result of a delictual act. Nevertheless, as Takahashi noted, there were some differences between their approaches. First, Ishizaka considered the amount difference theory adequate for determining economic losses, but did not approve of its use for dealing when non-economic losses.[80] Nakajima approached the issue by presenting two different theories: the amount difference theory and the specific loss theory or *gutaiteki sonshitsu setsu.* Under the latter theory, Nakajima distinguished between harm and loss,[81] with loss referring to the actual effect on either the property or the body which is suffered by the victim as a result of the harmful event itself, *i.e.*, harm is the event itself, and not an abstract number.[82] However, while following the *theorie der konkretenschaden*, Nakajima favored the *differenztheorie* because of the monetary compensation system of Japanese law.

The most meaningful difference in the two scholars' approaches lies in their understandings of the *differenztheorie*. To Ishizaka, the state of the victim was to be taken

[76] Daishin'in [Great Ct. of Jud.] Dec. 8, 1905 Mei 38 (o) no.298 Minroku 11-1665 (Japan)
[77] Daishin'in [Great Ct. of Jud.] Apr. 13, 1911 Mei 44 (re) no. 463 Keiroku 17-557 (Japan) The Court did recognize that an individual's reputation and economic interest were deeply related to each other.
[78] Otoshiro Ishizaka, *Nihon Minpo Saiken Soron Jokan* 282*ff.* (1911) (Japan) available at http://kindai.ndl.go.jp/info:ndljp/p*Id.*/791647
[79] Tamakichi Nakajima, *Minpo Shakugi Maki Sono III Saiken Soron Jo* (1911) (Japan)
[80] Takahashi *supra* note 17 at 136
[81] Nakajima uses the word *songai* twice, as the term to be defined and, later within that definition, as the actual detriment suffered by the victim.
[82] Nakajima *supra* note 79 at 501

as a whole when comparing it to the situation that resulted from the harmful action. Nakajima, however, argued that each individual item in the victim's estate must be taken into account when determining harm. This focus on valuation eventually permeated the courts. For example, in a case where the plaintiff was unable to purchase goods due to the defendant's act, the court ruled that the standard in cases where the future price of the goods can be determined should be the standard under which damages are calculated.[83] In another case, the court recognized that the claim that the legal defense of a minor had against the minor's parents for the legal expenses incurred under their contractual obligation could be construed as a loss under the rules of delictual liability.[84] Under the traditional amount difference theory, losses arising from personal injury are classified into *danum emergens, lucrum cessans,* and emotional losses. Yoshimura[85] has posited that compensation was traditionally aimed at losses, such as medical and funerary expenses. However, this resulted in a system in which losses, such as pain, suffering, and emotional distress, were treated as equivalent to material and economic losses.[86]

In 1964, the Supreme Court addressed the meaning of *songai*. In that case, the court ruled that for the effects of civil delictual liability, loss can be defined as harm under the formula a – b = x, where "a" is situation the victim would have been in without the aggression, "b" is the actual situation of the victim that resulted from the aggression, and "x" is the monetary quantification that is ascribed to such a loss. Under this premise, loss is the monetary value of damages.[87] In addition, the Supreme Court ruled on the issue of earning potential in 1967. In that case, the court concluded that even if an individual's earning potential is affected by a traffic accident, the goal of civil liability is to compensate the victim for the *actual losses* suffered. Therefore, it was evident that victims who suffer a decrease in their earning potential have no claim for damages if no actual losses were incurred.[88]

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[83] Daishin'in [Great Ct. of Jud.] Jan. 22, 1916 Tai 4 (o) no. 950 Minroku 22-113 (Japan)
[84] Daishin'in [Great Ct. of Jud.] Sep. 30, 1941 Sho 16 (o) no. 625 Taiminshu 20-1261 (Japan)
[85] Ryoichi Yoshimura, *Jinshin Songai Baisho no Kenkyu* 71 (1990) (Japan)
[86] *Id.* at 73-74
[87] Saiko Saibansho [Sup. Ct.] Jan. 28, 1964, Sho 34 (o) no. 901 Minshu 18-1-136 (Japan)
[88] Saiko Saibansho [Sup. Ct.] Nov. 10, 1967 Sho 41 (o) no. 600 Minshu 21-9-2352 (Japan)

Although the concepts established under the amount difference theory and the definition adopted by the Supreme Court might imply that discussions surrounding the concept of loss under the amount difference theory are clear cut, the matter is actually more nuanced and complicated. Namba[89] has asserted that, in practice, the theory is applied as a compilation of various losses. Therefore, the modern amount difference theory is consistent with the views of Nakajima, especially in cases of personal injury.

The theory has also been the target of many critics, firstly because differences in legal backgrounds between Japan and Germany pose a challenge to the application of the *differenztheorie* under the Japanese Civil Code. Hirai has explained that the *differenztheorie* is based on the German concept of complete compensation, a principle to which Japan does not adhere. He has argued that since Section 416 of the Japanese Civil Code states that the goal of a claim for damages is the compensation of ordinary losses, Japanese law is distinctly different from German law, which demands a complete compensation of the victim.[90] Secondly, the amount difference theory does not address non-economic losses, as the monetary approach to defining harm precludes any possibility of including non-economic losses. This is another issue that suggests a somewhat forceful introduction of German concepts, as the Japanese code never had to address the issue of availability of claims for non-economic losses. The application of amount difference theory fostered a situation in which scholars who supported it were fixated on legal theories from a system that was not as developed as their own, at least in the area of non-economic losses.

Scholars have developed theories that aim to address the main critiques of the amount difference theory. One example is Nishihara's death and injury as a loss theory, or *shisho songaisetsu.*[91] In the 1960s, Nishihara argued that there are two approaches available for cases in which the victim has died. The first maintains that life itself cannot be ascribed monetary value, while the other conceptualizes life's value as infinite.[92] Nishihara opposed

[89] Namba *supra* note 12 at 106
[90] Hirai *supra* note 7 at 195
[91] Michio Nishihara, *Seimei Shingai Shogai ni okeru Songai Baishogaku,* 27 Journal of Private Law 107 (1965) (Japan)
[92] *Id.* at 109

the traditional role of the causal link theory[93] in cases of wrongful death. Specifically, he countered the complete compensation dogma, as it is known in Japan, which declares that a victim must be compensated for all losses, as it is impossible for the defendant to foresee the particular situation of the plaintiff. The main point of Nishihara's theory is the establishment of a set standard for damages.[94] Known as the fixed amount theory, or *teigakusetsu*, the theory states that non-economic losses resulting from death should not be divided into categories, such as emotional distress or pain and suffering, but rather considered as a whole. Moreover, it proposes that in cases of wrongful death, both economic and non-economic losses should also be considered holistically, including setting lower and upper limits and a mechanism for calculating the amount the victim should receive as damages. This would prevent any issues that would arise from an aggressor's lack of foreseeability of the personal situation of the victim.

The fixed amount theory did not receive much support. Kusumoto[95] has explained that Nishihara's criticism of the complete compensation dogma is unacceptable as long as the goal of civil liability is to restore a victim's situation to its original state as much as possible – a goal he has called the all compensation rule. Perhaps Kusumoto's most significant critique of Nishihara's theory is that it contradicts the very concept of individuality. By having a system in which all losses that arise from death are addressed through a standard approach, such as the one Nishimura proposed, the problem of harm and loss gets reduced and contained to a simple mathematical problem, ignoring other aspects of the law of compensation.

In the late 1970s the loss of work capacity theory, or *rodo noryoku soshitsu setsu*, was developed in response to Nishihara's theory.[96] It posited that individual intent and ability to work and earn an income (*i.e.*, the earning capacity) should be ascribed a

[93] Under the Japanese law of obligations, both for contractual and delictual liability, the concept of casual link is of the utmost importance. Discussions regarding it tend to overshadow other aspects of the law. Especially in the case of discussions regarding the concepts of harm and loss, it is not rare for the discussion to gravitate towards the standard under which the causal link is determined, sometimes in more depth that the concepts of harm or loss themselves.
[94] Nishihara *supra* note 91 at 114-115
[95] Yasuo Kusumoto, *Jinshin Songai Baishoron* 28 (1984) (Japan)
[96] Miki Chiho, *Inochi no Nedan: Seimei Shingai ni yoru Songai to Byodo Genri*, 6 Junior Research Journal 67, 71 (1999) (Japan)

monetary value, just as with any machine. Therefore, when this potential decreases as the result of a delictual act, that in and of itself should be considered a loss for which the victim can claim damages, regardless of any actual loss of income.[97] This approach is especially useful in cases where a victim is unemployed or has no income that could serve as a basis for calculating damages. Furthermore, in the case of minors who do not yet possess the necessary skills to earn a living, this theory allows for a standard under which the victim and next of kin can pursue damages, though the nature of these damages was subject to discussion. Scholarship regarding this point has been divided.[98] On one hand, there were those who believed that in cases of infant and minors, damages should not be granted for the amount that they could have earned in the future, but rather for being unable to participate in labor activities and support themselves, and that such loss should be considered non-economic for the effects of liquidation.[99] On the other hand, others argued that in cases of minors, the probability that they would have earned an income should be recognized and liquidation should be done under the rules of lost income by referencing adequate proof of such potential.[100]

In 1964, the Supreme Court[101] ruled on the issue and adopted the latter view. On that occasion, the court said that while it was true that calculating damages in cases in which a case a minor died as the result of a delict is a difficult endeavor, this in itself was not enough to deny the claim. If the claim were to be denied, the only remedy remaining for the victim and next of kin would be a claim for emotional distress, in which case the judge would determine the calculation after considering all the circumstances of the case. However, if the amount was too low, then it would fail to be considered a remedy, while if it were too high, it would be too harsh to the aggressor.

Therefore, the court concluded that in cases where a minor had died – regardless of the inaccuracy that it might entail – the judge should base the assessment of damages on the evidence presented, and in the event such evidence is not completely convincing, additional

[97] Kasuo Kato, *Koisho ni yoru Ishitsurieki no Santei, in* Gendai *Songai* Baishoho Koza 7 194 (1974) (Japan)
[98] Chiho *supra* note 96 at 71
[99] Shinji Somiya, *Fuhokoi* 395 (1935) (Japan)
[100] Bunjiro Ishida, *Saiken Kakuron Kougi 290ff.* (1937) (Japan)
[101] Saiko Saibansho [Sup. Ct.] Jun. 24, 1964 Sho 36 (o) no. 413 Minshu 18-5-874 (Japan)

remedies can be granted under the figure of non-economic damages.

B. THE LOSS-AS-FACT THEORY OR SONGAI JIJITSUSETSU

Regardless of the continuing influence of German scholarship on Japanese scholarship, the amount difference theory could not correctly address all the aspects of delictual liability under Section 709. Particularly, Hirai assumed an intensely critical stance against the amount difference theory. He was especially critical of the way in which the concepts of harm and loss were studied under traditional scholarship in Japanese law and questioned whether the method that defined these concepts under the amount difference theory and further concentrated their categories had any value as a legal tool under Japanese legal analysis.

He argued that the German *differenztheorie* is a result of the complete compensation principle, which Japan does not follow. Hence, there is no reason to try to apply that theory under Japanese law.[102] However, his most important argument and contribution was his distinction between harm and damages, which further divided harm into protectable harms that he called harms within the sphere of protection and non-protectable harms called harms outside the sphere of protection.[103] The causal link is the standard for judging whether certain harms should be considered protectable or not.[104] Under Hirai's interpretation, harm is based on reality – the event that is the cause and the loss itself – and he made no distinction between these two terms. However, Hirai seemed to return to a more traditional approach. He noted that since a claim is nothing more than a plaintiff's request for a certain amount of money, harm can be construed as a request for such an amount that is the result of the monetary compensation principle of the Japanese Civil Code,[105] effectively linking the concept of harm to the concept of damages, at least to a certain degree.

Nevertheless, because the loss-as-fact theory differentiates between harm and damages, it addresses the issue of non-economic losses, which was not possible under the

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[102] Hirai *supra* note 7 at 139
[103] Hirai *supra* note 7 at 140
[104] Ibid.
However, Hirai is a proponent of abandoning the adequate causality, or *soto inga kankei,* in favor of the real causality, or *jijitsuteki ingakankei,* as a causal link standard.
[105] Hirai *supra* note 7 at 141

amount difference theory. It also allows for an interpretation of the first half of Section 709 that is more in tune with the abstract requirements of civil liability. However, the most important contribution of this theory is that it permits remedies even in cases where the victim does not suffer a quantifiable economic loss, such as in the event of post-traumatic stress disorder (PTSD), bodily injuries, or the aftermath of such injuries.

Case law also appears to have adopted this stance, and in 1981, the Supreme Court[106] acknowledged the subject. The court had to decide whether the aftermath of an injury could be grounds for civil liability. It ultimately sided with the defendant under the argument that, barring special circumstances, and even if the aftermath itself could be grounds for damages, it could not justify granting damages for *lucrum cessans* if it did not affect the earning capacity of the plaintiff. Even though the court did not grant the plaintiff request for *lucrum cessans*, commentators have highlighted that this represents a transition in the court's stance from the amount difference theory to the loss-as-fact theory.[107]

Uchida has critiqued this theory under the argument that, strictly speaking, the harmful event (*i.e.*, death, injury, destruction of property, etc.), is already included under the infringement requirement of Section 709. Therefore, there is no reason to make a distinction between the infringement requirement and the existence of loss requirement.[108] However, he has also admitted that there are situations in which an infringement of rights does not result in a loss. Differentiating between the harmful event and the monetary compensation eliminates the necessity of rhetoric like the amount difference theory.[109]

Furthermore, the loss-as-fact theory led to the development of legal theories that part with the traditional understanding of the concept of harm, which treat the harmful event and its quantification as completely different and unrelated matters. At the practical level, a 1981 Supreme Court case served as the basis for lower courts to develop a theory under which a victim could recover a loss of earning potential.

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[106] Saiko Saibansho [Sup. Ct.] Dec. 22,1981 Sho 54 (o) no. 354 Minshu 35-9-1350 (Japan)
[107] Takashi Uchida, *Minpo II Saiken Kakuron* 384 (3rd ed., 2011) (Japan)
[108] *Id.* at 385
[109] Ibid.

IV. UNLAWFULNESS IN JAPANESE LAW

The role of unlawfulness under Japanese law is by no means clear when viewed under the general rule of delictual liability. As mentioned before, the concept of infringement of rights as a requirement for delictual liability resulted from the influence of common law during the drafting process. The main issue with unlawfulness under Japanese delictual liability stems from the language of Section 709. Originally, Section 709 required an infringement of a right in order for a victim to be able to claim damages. However, in contrast to the BGB, which requires an unlawful injury, or the Italian Civil Code, which explicitly refers to the unlawful loss suffered by the victim, the language of the statute in Japanese Civil Code does not require unlawfulness.

The original draft by Bossonaide did not utilize the term unlawful either. The inclusion of the legal right infringement requirement was due to the discussion between Ume and Hozumi.[110] Ume proposed a more realistic approach to the concept of delictual liability in which the deciding factor was the existence of a loss, regardless of whether or not an actual infringement on the rights of an individual had occurred. Hozumi, on the other hand, argued that the infringement of a legal right would be adequate to earn the victim a claim for damages, independent of the existence of any losses. In the end, Ume's approach prevailed. However, the concept of infringement referred to the event that caused the loss.[111] Furthermore, the drafters' concept of a right was not restricted to property rights, but also included the credit, life, body, honor, etc. of the victim.[112] To the drafters, this requirement served as an objective assessment of the defendant's conduct in contrast to negligence and intent, which were subjective assessments of said conduct.[113]

Regardless of the intent of the drafters, the courts originally construed legal rights as those which must be established via a law in order to be understood as such. The most famous example is the 1914 case of Kumoemon Tokuchen.[114] Kumoemon, a popular artist

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[110] Yoshimura *supra* note 85 at 570
See the discussion on the draft process above.
[111] Hirai *supra* note 18 at 20
[112] Hiroyuki Hirano, *Minpo Sogo 6 Fuhokoi* 29 (3rd., ed 2013) (Japan)
[113] Akihito Kushihi, *Meiji Minpo 709 Jo no [Kashitsu] to [Kenri Shingai] −Meiji Minpo Kisokatei kara no Shiten*, 71 Journal of Law and Political Studies 87, 107 (2006) (Japan)
[114] Daishin'in [Great Ct. of Jud.] Jul.4, 1914 Tai 3 (re) no. 233 Keirokiu 20-1360 (Japan)

of a traditional genre of music called *Rokyoku,*[115] produced a piece for which he obtained a copyright and which he proceeded to transfer to a third party. The melody was included on an LP, which was sold without the permission of the right holder.

The case addressed two main issues. The first was whether *Rokyoku* could be copyrighted under the provision of Japanese copyright law.[116] The second was whether, in the event that the court declared *Rokyoku* not subject to copyright, its reproduction would constitute copyright infringement. Both the trial and appeals courts determined that *Rokyoku* qualified for a copyright and that, as such, any reproduction without the permission of the right holder would constitute copyright infringement.

The Supreme Court, however, adopted a different view. While admitting that music was included within the term "fine arts," it expressly denied that the *Rokyoku* performed by Kumoemon was copyrightable, arguing that since it was improvised, it did not have a musical score, nor was it famous enough that a large number of people could remember it. Therefore, it could not be protected as music. As a result, any reproduction of the melody would not constitute copyright infringement. After this, the courts adopted an approach to the requirement for an infringement of a legal right that limited it to one that had to be explicitly established in the law, with the right holder needing to fully meet all the criteria of the law in order to receive legal protection.

This precedent was overturned 11 years later in the Daigaku Yu case.[117] The defendant was the owner of a famous public bath who had leased the facilities and sold the name "Daigaku Yu" to the plaintiff. The parties then decided to voluntarily rescind the lease contract. The defendant then proceeded to allow a new lessee to use the name Daigaku Yu in the operation of the public bath. The trial court ruled in favor of the defendant, arguing that the prestige and reputation[118] of the name Daigaku Yu was not a legal right protected under Section 709 of the Civil Code. The Supreme Court reversed this decision, and in doing so, it declared that the concept of a right was not limited to a formal, literal right

[115] A type of narrative singing.
[116] Section 1 of the Copyright law at the time, while including the term fine arts, did not expressly mention music as a type of copyrightable creation. It did, however, protect musical score.
[117] Daishin'in [Great Ct. of Jud.] Nov. 28, 1925 Tai 14 (o) no. 625 Minshu 4-670 (Japan)
[118] The term is "*shinise,*" which roughly translates as a long-established store.

established by law, but rather should be construed in a broad manner.

The Daigaku Yu case set a precedent that enabled the introduction of a concept of unlawfulness that was independent from the idea of infringement, at least under a narrow reading of Section 709. However, the Daigaku Yu case did not eliminate the requirement of infringement when it introduced that of unlawfulness. Rather, it expanded the concept of infringement to include not only rights, but "other interests" as well.[119] This in turn led to the issue of interpreting the language of Section 709 with the new ideas, or as it is known, the change from infringement to unlawfulness. Hiroshi Suekawa argued that the infringement requirement should be read as an expression of unlawfulness, especially regarding conduct, since the law could not approve an unlawful conduct and it was therefore against the legal order.[120] The language present in the BGB influenced Suekawa's approach.[121] By defining infringement as a sub-class of unlawfulness, he proposed a change in the interpretation of the first half of Section 709. Wagatsuma further advocated for this approach and suggested a standard method for measuring unlawfulness. Wagatsuma's theory, *sokan-kankei setsu,* posited that unlawfulness should be judged as a function of the relation between the type of legal interest protected and the nature of the infringing act.[122]

After World War II, Ichiro Kato expanded upon Wagatsuma's theory, arguing that replacing infringement with unlawfulness was a result of two factors. The first was the legal sentiment of Japanese scholars, and the second was that unlawfulness formally represented a general expression of infringement, which in turn was one of the situations in which the BGB admitted civil liability. It signified an expression of the German BGB.[123] Additionally, to Kato, a right was a rather rigid concept that could be definitively explained, whereas unlawfulness was more flexible and determined by the relation between the protected interest and the defendant's conduct.[124] Some interests, such as property, could be infringed upon by an otherwise innocuous act.

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[119] Hirano *supra* note 112 at 32
[120] Hiroshi Suekawa, *Kenri Shingairon: Fuhokoi ni kansuru Kenkyu no Ichibu toshite* 30 (1930) (Japan)
[121] Uchida *supra* note 107 at 359
[122] Sakae Wagatsuma, *Jimu Kanri ・Futo Ritoku ・Fuhokoi* 125-126 (1937) (Japan)
[123] Kato *supra* note 16 at 36
[124] *Id.* at 40

This theory was highly influential to the point that Section 1 of the State Redress Act of 1947 clearly establishes unlawfulness as a requirement for claims against the state. The courts also adopted this theory under the general provision of Section 709. In cases of nuisance in particular, the courts have ruled that the defendant's act must breach the "limit of tolerance," or *junin gendo*, which in turn is determined by taking into account the situation under which the defendant's act took place, such as while exercising a right, and the legal interest or right of the plaintiff from the standard of an ordinary individual.[125] The main critique of Wagatsuma's theory is that it does not address the relationship between intent, negligence, and unlawfulness. Under Wagatsuma's approach, the defendant's conduct was an important factor, but intent or negligence were irrelevant to determining unlawfulness. It was not addressed whether the defendant acted with intent, such as in cases of some criminal acts, or was simply negligent.

As mentioned, the infringement requirement was established in order to define objective criteria for determining liability. By introducing a concept of unlawfulness that incorporates both conduct and legal interest, the *sokan-kankei setsu* effectively eliminates the distinction between them. Instead, these concepts overlap, which in turn questions the necessity of the unlawfulness requirement. Furthermore, if the infringement requirement is broadly construed, as the drafters and Supreme Court intended, then the necessity of unlawfulness as a requirement ceases to exist, as such a concept is not present in the Japanese Civil Code.[126] In the 1970s, the discussion returned to the concept of infringement. If infringement could be construed in a manner that included not only legal rights, but also any interests worthy of legal recognition, then unlawfulness would no longer be required.[127]

Hirai also opposed requiring unlawfulness for civil liability, instead arguing that the discussion should be reduced to include only infringement and negligence/intent. Hirai has noted that in many cases, the courts invoked the term unlawfulness to refer to a defendant's negligence or intent, and in cases where they were used as individual terms, the standards

[125] Hirano *supra* note 112 at 148
[126] Uchida *supra* note 107 at 360
[127] Takehiko Sone, *Fuhokoi Ho ni okeru Ihosei Gainen*, 85 Waseda Law Review 21, 39 (2009) (Japan)

for judging them were identical.[128]He has further argued that the concept of unlawfulness under Japanese law varies from that of German law, primarily because the BGB establishes unlawfulness as an independent requirement for civil liability.[129] He then concluded that the main function of unlawfulness under Japanese law was to expand the infringement requirement, a function that is completely different from the unlawfulness requirement present in the BGB. Once the courts and scholarship accepted and therefore construed the infringement requirement in a broader manner, the goal of unlawfulness under Japanese law was achieved.[130]

V. SUMMARY

Japanese Civil Code was the product of a careful study of many legal systems. Particularly, in regards to delictual liability, both common law and continental law struck a balance. However, the notion that German law influenced the drafters – at least with regards to delictual liability – does not seem to have any support in reality. On one hand, the formal education of the three main drafters belies a deep influence of German legal theory. On the other hand, there were no policy elements that demanded the implementation of one school of thought over another. From a governmental perspective, the goal of the committee was to present a civil code, regardless of its source of inspiration. Generally, members of the committee supported German ideas, but only so far as they embodied an ideal that Japan should have striven to achieve, and not because of any inherent superiority over their common law or French counterparts.

Furthermore, while the drafters and committee did have access to a draft of the BGB, there is no evidence that it served as a model for Section 709. If anything, experience with the implementation of the German legal education system in Japan bolsters the idea that German ideals were applied in form, rather than in substance. Therefore, the issue becomes whether Section 709 of the Japanese Civil Code aligns with common law or the French model. While the discussion between Hozumi and Ume may suggest that it is a mix between the two, in reality, the loss element has more weight than the infringement of a

[128] Hirai *supra* note 7 at 378
[129] *Id.* at 379
[130] *Id.* at 383-384

legal right. Furthermore, since the infringement of a legal right is not a concept that is limited to specific claims, as common law was, Section 709 should be considered a variation of the general clause model introduced by the French *Code.*

However, scholarship seeking to address the importance of loss as an element of delictual liability from a German legal perspective has overshadowed the issue itself. The flaw of this approach, which exists to this day, is that the abstract concept of loss as it is present in the *Code* and other civil codes that have received its influence is a decisive factor of delictual liability. Loss is not a concept that is subject to delimitation, at least at the stage of assessing whether the defendant's liability.

Japan differs in this aspect from other countries that follow the French tradition. Countries that incorporate French tradition address the issue of loss by establishing criteria that the loss must meet in order to qualify for redress. Meanwhile, Japan approaches this issue through the unlawfulness of the act, the amount difference theory, the causal link, and other elements. Chapter 4 discusses the element of unlawfulness under comparative law, as the development of this concept warrants its own section. Nevertheless, it is notable that the unlawfulness of an act does not define the concept of loss. Japanese scholarship derides such abstract approaches to the issues of harm and loss, considering them to be empty and lacking legal merit, perhaps as a remnant of opposition to the school of natural law. This prompted the confusion over the concept of loss as a requirement of delictual liability, and loss as the specific amount for compensation.

To a certain extent, Section 709 of the Japanese Civil Code suffers from the same issues as Section 2043 of the Italian Civil Code.[131] Japan, like other civil law countries,

[131] Section 2043 of the Italian Civil Code reads "*Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno,*" the word *danno* being used twice within the same section. According to Franzoni, this is a result of the poverty of the Italian language. These two instances of *danno* have been construed as having different meanings. The first *danno* is the actual factual situation caused by the aggressor, i.e., an unlawful infringement of the victim's rights, while the second *danno* refers to the result of the first one, the actual loss that must be compensated for by the aggressor. See:
Massimo Franzoni, Danno Ingiusto e Danno Risarcible nella Responsabilitá Civile (2002) (It.) http://www.aci.it/fileadmin/documenti/studi_e_ricerche/monografie_ricerche/franzoni.pdf
Massimo Franzoni, *Trattato della Responsabilitá Civile - Il Danno Risarcibile 3* (2010) (It.)
Paolo Cendon, *Commentario al codice civile. Artt. 2043-2053* 187 (2008) (It.)
Francesco Caringella, *Responsabilità Civile e Assicurazioni. Normativa e Giurisprudenza Ragionata* 88 (2008) (It.)

insists upon the presence of harm and loss for civil liability to arise. However, Section 709 requires the infringement of a right or legally protected interest. This might initially seem like a mere difference in wording, but it does allow the argument that the amount difference theory addresses two distinct issues. First, if an interpretation of the amount difference theory only engages with the latter half of Section 709 concerning compensation of any resulting losses, then it is a matter regarding procedural law rather than substantive law. Thus, the amount difference theory does not seek to define loss as a requirement of delictual liability, but rather it is a method for quantifying the remedy. Oho[132] has noted that under the monetary compensation system of the Japanese Civil Code, the amount difference theory is the only method approved for economic losses.

Hirai[133] has argued that since Section 416 of the Japanese Civil Code states that the goal of a claim for damages is compensation of ordinary losses, Japanese law is distinctly different from German law, which commands complete compensation of the victim. This therefore prevents full assimilation of the German *differenztheorie*. As commentators have mentioned, this method of liquidation is inadequate for non-economic losses. Nevertheless, there is no obstacle for Japan to adopt two unique standards: one for economic losses and one for non-economic losses. Countries like Italy and Argentina have done so with minimal issues. Furthermore, under this interpretation, the argument that the legal development of Germany and Japan would present an insurmountable barrier to the application of amount difference theory is unconvincing.

The issue of legal transplants cannot be minimized to a simple difference in legal traditions, as it has been by laws such as the company law of Delaware, which has been used as model for civil law jurisdictions, or in Panama, where it was directly copied. The same is true for legal principles, such as estoppel and duties of care. However, an issue arises if the amount difference theory is not applied as a method of quantification, but rather as a method of qualification, *i.e.*, to define the concept of redressable losses. If the amount difference theory serves as a basis for interpreting the first part of Section 709,

[132] Fujio Oho, *Saiken Soron Shinban* 135-136 (1972) (Japan)
[133] Hirai *supra* note 7 at 195

which concerns the infringement of rights or legally protected interests, it cannot provide the quantifiable answer that many Japanese scholars seek. At most, it could only offer an abstract concept of being somehow disadvantaged, which has been considered empty and thus rejected.[134] As a qualifying method, the amount difference theory simply does not possess the tools necessary for scholars, judges, lawyers, or laymen to define harm or loss under statutory language.

The early influence the German *differenztheorie* permeates scholarship even today, as theories that attempt to separate both elements tend to lead irremediably to the issue of quantification of losses as an element of harm theory. However, this seems to derive from a sense of admiration for German scholarship in the early 20th century, rather than from a meticulous study of the statutory text or spirit of the law. As Shiomi has indicated, the traditional amount difference theory does not urge a discussion of the relationship between the concept of loss (*songai)* and the method of quantification of damages.[135] In addition, the fact that the Japanese Civil Code has explicitly allowed for the recovery of non-economic losses since its inception suggests a rejection of German legal influence in the matter, as this the BGB draft rejected these damages. Meanwhile, non-economic losses had been part of French legal tradition for decades, and the drafters would have known and been influenced by this.

However, perhaps the most convincing argument to discredit the amount difference theory as a qualifying method is that the drafters themselves did not consider it as such. Tomii defined harm as any loss suffered by the victim in regards to a legally protected interest,[136] and within those legally protected interests, he included both economic and non-economic losses. Tomii did not utilize the amount difference theory in his composing his definition of harm. Rather, his definition is arguably more aligned with the French model than with a German one. The rejection of the amount difference theory as a qualifying method is grounded in the fact that this was never its intended purpose, at least not in a

[134] Takahashi *supra* note 17 at 199
Hirai *supra* note 18 at 74
[135] Yoshio Shiomi, *Zaisanteki Songai Gainen ni tsuite no Ikousatsu －Sagakusetsuteki Songaikan no Saikento*, 687 Hanrei Times 4, 6 (1989) (Japan)
[136] Masaakira Tomii, *Minpo Genron Dai 3 Maki Saiken Soron Jo* 202 (1929) (Japan)

numerus apertus system. Simply noting that the historical legal development of Japanese law was different from that of Germany is like saying that the soils of these two countries are different. While that might be true, it is no obstacle for apple trees to grow from both.

Indeed, a close observation reveals that the amount difference theory, as traditionally interpreted, fulfills two roles in Japan: defining harm and quantifying loss. However, since Japan does not uphold a delictual liability system like the German one, the amount difference theory cannot fulfill the first role. The material and formal elements of harm under Japanese law do not converge into the actions of an aggressor, regardless of how much scholars argue about unlawfulness or infringement of rights. As previously stated, a judge or jury cannot enter the issue of quantification of damage into consideration if the existence of a harm or loss has not first been established. In systems like that of Germany or the common law of torts, where the act of the defendant is, in most cases, sufficient for establishing liability, this is not a problem. However, the abstract rules of the French system prevent this approach. To link the concept of loss to a monetary value is to deny the goal of the general clause system.

Nishihara's theory exemplifies how the economic valuation idea is deeply rooted within the mind of Japanese scholars and how the monetary compensation principle affects the concepts of harm and loss within the Japanese system. First, Nishihara had proposed this theory as a way to prevent what he considered the extreme form of complete compensation in cases where a victim has died. However, his argument is solely based on a monetary approach, which triggers a similar problem as that which arises from the amount difference theory.

The traditional approach of countries that require an element of unlawfulness within their delictual liability system is to use unlawfulness as a mean by which the law limits the number of legal interests that, if infringed upon, grant the victim a remedy. Nevertheless, the Japanese experience used the concept of unlawfulness in the opposite manner, as a way to add to the number of legal interests that grant a victim a claim. The process of modernizing the Civil Code that concluded in 2005 added the phrase "legally protected interests," which effectively ended the debate and brought the Japanese Civil Code's

general clause to the same level as the one present in the French *Code.* This established in a system in which the formal elements act as a limit to the material elements. Consequently, this boosts the importance of the relationship between these two elements. If this view is accepted, then the concept of loss can no longer be relegated to a secondary plane. Since this eliminates any formal limit beyond the legally protected interests of the victims, there must be a method to determine the scope of these interests.

CHAPTER 3 NON-ECONOMIC LOSSES UNDER JAPANESE LAW

I. OVERVIEW

The previous chapter examined the concepts of harm and loss under Japanese law, particularly through scholarship regarding Sections 709, 710, and 711 of the Civil Code. The influence of German ideas regarding these concepts caused scholarship and case law to stray from the drafters' intended model in favor of a more pecuniary approach to legal losses, at least with regards to Section 709. In contrast, this chapter concerns the notion and rules of non-economic losses. Interestingly, if the German influence on the concepts of harm and loss can be called into question, it is almost certain that such an influence did not extend to this area of the law, as the German scholarship of during the drafting of the BGB was strongly against granting remedy for non-economic losses.

As mentioned in the previous chapter, the concept of loss is strongly associated with monetary value, and courts, scholars, and lawyers tend to approach the issue of non-economic losses from the perspective of the monetary award, or *isharyo*. As a result, and in contrast with other countries that follow the French model, there is no abstract concept of *dommage moral* in Japanese law. There is, however, a strong tradition of grouping protected legal interests into *jinkakuken,* or personality rights, though these rights do not necessarily correspond with the concept of personality rights held in other jurisdictions.

In addition, the concepts that Section 709 establishes are not usually a basis for understanding non-economic losses. Rather, scholarly discussions regarding *isharyo* tend to focus on their nature and function. Indeed, these discussions arguably run parallel to discussions regarding delictual liability in general. However, that is not to say that there has been no attempt at engaging with the concept in an abstract manner. Rather, these types of approaches typically assume a secondary role and cede focus to the issue of quantification of monetary awards and the nature of such awards.

However, since the issue has been viewed from this monetary standpoint, one can argue that, for all intents and purposes, claims for non-economic losses are studied in a manner that is more similar to the law of torts of common law traditions than to the law of delicts of the continental law style. This contrasts with the general position of non-

economic losses under the view of *dommage moral*, wherein the existence and nature of the loss are viewed as independent of their monetary valuation. Furthermore, as Chapter 5 discusses, the tendency of comparative law is to abandon the idea of defining non-economic losses as those opposed to economic losses and instead locate some commonalities among all legal interests that fall within that category.

The Japanese Civil Code addresses the issue of non-economic losses under two Sections: 710 and 711. The first part of this chapter analyzes Section 710, which establishes general rules for recovery of non-economic losses. The second part focuses on Section 711, which concerns claims of the relatives of a victim. Consistent with the previous chapter, each section examines the drafting process of both Section 710 and Section 711 in order to outline the background of their legal foundations and illustrate how they have influenced and been influenced by courts and scholars. This is followed by an investigation of the development of legal scholarship and case law and a review of some of the legal interests within the scope of these provisions.

This chapter concludes with an assessment of how the general concept of loss under Japanese law has influenced the idea of non-economic losses under the figure of *isharyo*, and how such an influence might have actually contributed to the endless cycle in which courts, scholars, and lawyers seem to operate regarding non-economic losses, perhaps under the aforementioned German influence.

II. SECTION 710

The Japanese Civil Code is one of the few civil codes informed by the French tradition that contains a specific provision regarding non-economic damages. Section 710 reads:

> *Persons liable for damages under the provisions of the preceding article must also compensate for damages other than those to property, regardless of whether the body, liberty or reputation of others have been infringed, or property rights of other have been infringed.*[1]

[1] Translation from: http://www.moj.go.jp/content/000056024.pdf

This provision is the basis for all claims dealing with non-economic losses. The courts have expanded it to address many of the social issues that have arisen since the enactment of the code over 100 years ago, evidencing that the list of legal interests is not to be taken as *numerus clausus.* However, because of the manner in which Japanese scholarship and case law conceptualizes loss and harm, the relationship between Sections 709, 710, or 711 has not always been clear, particularly in regards to the legal interest being protected.

A. THE DRAFTING PROCESS

As the previous chapter mentioned, the draft presented by Bossoinade limited losses to those of economic nature. In the same manner, the drafters' views regarding the importance of loss and which elements the concept included were also subject to debate during the drafting process. Regardless of differences in opinion, the drafters ultimately adopted Ume's view that the concept of *songai* covered both economic and non-economic losses as the official position of the Japanese Civil Code.

Hozumi, whose stance on the matter was that *songai* should comprise economic losses, recognized that the language of Section 709[2] included both economic and non-economic losses.[3] He continued to explain that excluding non-economic losses (*mukei songai*) from the types of recoverable losses would result in the code not being sensitive to the demands of society. Furthermore, Hozumi explained that limiting an individual's legal interests to those of a material nature (*zaisanjo no rieki*) was too narrow of a view, as individuals have a number of legal interests in their daily lives.[4]

In regards to the relation between the infringement requirement and Section 710, Hozumi believed that any discussion of losses, both economic and non-economic, as well as of which cases warrant a claim, should be left to scholars.[5] Kuniomi Yokota, one of the

[2] Section 719 of the draft.
[3] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 148 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 152)
[4] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 148 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 152)
[5] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 149 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 153)

committee members, inquired if sadness and the loss of amenities were included within the scope of Section 710,[6] to which Hozumi replied that if they were proven during the trial, then he would not mind if the judge included them in the amount granted for damages. Furthermore, Rinsho Mitsukuri, one of the committee members for the civil code based on the Bossoinade draft, requested clarification on whether or not the drafters understood the concept of right, or *kenri,* to be limited to property rights. Hozumi specified that rights were not limited to those based on property, and that Section 710 was established to prevent any doubts regarding that matter in particular.[7][8]

The drafters did not discuss *isharyo*[9], at least not in the manner and to the extent of later scholarship. There were no comments regarding the goal or nature of *isharyo,* and there is no evidence that would indicate they granted them any particular function apart from the one already discussed for general delictual liability. Hozumi cited English law, particularly punitive damages, when explaining that the court system at the time had come to recognize non-economic losses. However, Hozumi explicitly communicated that such a meaning should not be construed from the language use.[10] The drafters did not provide any particular means for calculating the amount of damages for non-economic losses.

In his commentary on the Civil Code, Ume avoided the subject of the nature of *isharyo*. He was clear that civil delict and criminal wrongs were not equivalent, and that Section 710 was included to clarify that non-economic losses should be compensated under the system of delictual liability.[11] It is apparent that the drafters did not consider the matter

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[6] Section 732 of the draft.

[7] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 154 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 158)

[8] The original version of Section 710 used different language. For one, it made no reference to Section 709, and rather left granting the remedy completely in the hands of the court. Furthermore, it included one more paragraph, later becoming Section 723, which grants the victims in cases of defamation the ability to request for appropriate measures in order to restore their honor.

[9] The term used during the drafting process was either *itamikin* or *ishakin*

[10] Hoten Chosakai Minpo Giji Sokkiroku Dai 41 at 206 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367568 (at 210)

[11] Kenshiro Ume, *Minpo Yogi Maki sono San Saiken Hen* 885 (reprint 1984) If anything, Ume appears to have been more interested in presenting examples and expanding upon the concept of non-economic losses than discussing monetary compensation or damages. This goes in line with his legal training under the French system. Ume's influence restricted the discussion to the realm of losses, as scholarly dissertation regarding the nature of *isharyo* did not began to appear until after his death and the subsequent influx of German ideas.

of *isharyo* to be of significant importance, yet the discussion never deviated from topics of the infringed rights or losses. Hozumi's opinion would seem to support the view of non-economic losses as similar to parasitic damages, *i.e.*, they were to be taken into account when another right had already been infringed upon. As explained later, this had been the dominant view under the common law system for a long time at that point.

The drafters also had another important discussion concerning the transferability of a claim via *mortis causa.* In this particular regard, committee member Yasushi Hijigata asked the drafters whether the relatives of a victim could initiate a request in cases where that victim was merely injured or in cases where the victim died on their behalf.[12] Hozumi responded by noting that in cases where a victim died and a relative's rights were infringed upon as a result, *i.e.*, in cases where the victim had a duty to support that relative, then it was natural that the pain and suffering of that relative were taken into account when determining damages. However, this did not extend to the pupils of the victim, as the victim had no legal obligation to support them. Therefore, their legal rights would not have been infringed upon in that case.[13]

Nevertheless, the existence of Section 711 and its justifications indicate that the drafters did not consider relatives to have any claims to inherit. Indeed, as discussed in the next section, both the drafters and the committee members appear to have shared the idea that the deceased could not be the subject of any legal rights. Furthermore, in cases of death, the infringement of the legal right would also entail the inability for a victim to become the subject of any sort of rights or claims. Thus, it would be impossible for their next of kin to claim liability without Section 711, as there would be no claim to inherit under Sections 709 and 710.

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[12] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 163 hyo available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 166)

[13] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 163 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 167)
However, as Ozawa points out, Hozumi is not really answering the question presented. He is merely stating that the relatives' claims would extend to economic and non-economic losses that resulted from the infringement of their legal right, without actually addressing whether they could in the victim's stead under Section 709 and Section 710. Ippei Osawa, *Minpo 711 ni okeru Hoeki Hogo no Kozo I Fuhokoi Sekinin no Seisakuteki Kaju ni kansuru Ikkosatsu*, 128(1) Journal of the Jurisprudence Association the University of Tokyo 157, 192 (2011) (Japan)

B. CLASSIFICATION OF NON-ECONOMIC LOSSES UNDER JAPANESE LAW AND SCHOLARSHIP

Section 710 requires the infringement of a legal right as the basis for liability. It presents a list, *i.e.*, infringement of the *body, liberty, or reputation* of the victim, which has consistently been viewed a guide. However, an analysis of both Section 709 and Section 710 reveals a more nuanced issue. Since, as the drafters argued, the infringement of a right and the consequent loss are thought to be two different concepts, and the latter a result of the former, the infringement of a right must therefore be based upon an event, while the loss might refer to a purely legal and non-verifiable concept. This is particularly true in cases of non-economic losses, such as emotional distress. In this regard, the drafters did not seem to exhibit a limited view as to which type of losses were covered under Section 710. However, they did not consider that the right infringement and losses were not the same. At the very least, a thorough discussion regarding the content of these type of losses failed to take place during the drafting process.[14]

In addition, the language used during the drafting process for this type of loss, such as sadness, suffering, or harm to feelings, indicates that the drafters were not referring to the right infringement, but to the result of that infringement. Moreover, the initial case law alluded to these losses as "extra patrimonial losses" (*zaisangai no songai)* or "losses without form" (*mukei songai*) when treating them in a general manner, and "emotional suffering" (*seishinjo no kutsu, seishin kutsuu*), "loss of social standing" (*shakaijo no hyoka no gensho*), "loss of friendly relations" (*jujin to no kousai no gensho*)[15] when mentioning them in particular.

Since the mid-1950s, case law has further reduced the terms and settled on dividing *songai* into patrimonial losses (*zaisanteki songai)* and emotional distress (*seishinteki songai)*, with physical pain, emotional suffering, grief, frustration, shame, etc. as specific examples of the latter. Additionly, the courts defined *seishinteki songai* as "*the emotional and psychological result that arises from the loss of emotional interests,"* "*the disturbance*

[14] Noriko Suka, *Seishinteki Jinkakuken to Songai Baisho ni kansuru Kakusho,* 117 Senshu Hogakuron Shu 1, 16 (2013) (Japan)
[15] *Id.* At 17

of the emotional stability as a person," or "the *loss suffered by the victims in their emotional situation."*[16]

There is one more concept used to refer to non-economic interests that has gained momentum since the 1960s: personality rights, or *jinkakuken.*[17] Scholarly writing on this concept began in the early 20th century.[18] For example, as early as 1920, Hideo Hatoyama wrote that the term *jinkakuken* could refer either to the content of comprehensive rights for protecting personality (*recht der personlichkeit*) or to each individual right that aimed to protect personality interests (*personlichkristrechte*). [19] To Hatoyama, defending these interests was of utmost importance for an individual, and they would increase in tandem with contemporary cultural developments.[20] He explained that only three personality rights were granted protection under the Japanese Civil Code: *body, liberty, and reputation.* Nevertheless, he argued that the concept was not limited to only those three, but also included the right to a name (*shimeiken),* the right to self-image (*shouzoken*), credibility (*shiny ken),* and family rights (*kazokuken).*[21]

Since then, scholarship has tried to define and classify the concept in various manners. For example, according to Takehisa Awaji. *jinkakuken* are classified into two groups. The first group consists of rights related to the body or physical integrity

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[16] Ibid.

[17] However, personality rights under Japanese law are not necessarily the same as personality rights under common law or personality rights under a traditional civil law model. While they do share some similarities with the latter, it can be argued that they are closer to the concept of *patrimoine moral.*

[18] Tatsuo Chikusa, during his time as a district court judge in Matsumoto, Nagano, carried out comprehensive research on what he called *jinteki rieki* for the judiciary branch. Tatsuo Chikusa, *Jinteki Rieki Shingai ni yoru Songai Baisho* in Shiho Kenkyuu Hokoku Shoshu Kenkyu Hoshi 6 Shihosho Chosaka (1931) (Japan)
Even though Chikusa uses the term *jinteki* in the title of his work, it is clear from the content that he did not intend to make a distinction, as in various occasions he utilizes the term *jinkakuken*. Furthermore, to the list established under Section 710, Chikusa adds rights such as secrets (privacy using modern terminology), virtue (basically a prohibition on extramarital relations), name, interest inherent to marriage or engagements, and interests inherent to family relations. However, in contrast with Hatoyama, he did not consider the freedom of business (*eigyoken*) a type of non-economic interest.

[19] Hideo Hatoyama, *Nihon Saiken Ho Kakuron Shita* 864*ff.* (1920) (Japan) available at http://dl.ndl.go.jp/info:ndljp/pid/952513 at 186
However, Hatoyama refers to these rights when discussing the infringement requirement. Therefore, he is referring to the event, and not necessarily to the loss. Nevertheless, in the case of personality rights, the event and loss are so intimately related that it is possible to argue that, in some cases, they are one and the same.

[20] Ibid.

[21] Ibid.

(*shintaiteki jinkakuken*), while the second group includes rights related to emotional aspects of an individual (*seishinteki jinkakuken*). Awaji further asserted that the latter included the emotional wellbeing and freedom of an individual.

According to Kiyoshi Igarashi, personality rights comprise the life, health, and freedom of an individual, and that in order to protect the development of freedom, it is necessary to protect these rights from infringement. He further divided them into general personality rights and individual personality rights.[22] In the former, he included personal interests that are not limited and are granted legal protection as a whole, while the latter encompassed specific interests, such as a name, image, reputation, etc.

In 1965, Munehiko Mishima indicated that in Japan, defamation cases had traditionally focused on *jinkakuken,* and that after World War II, the number of cases increased as a result of advanced comprehension by the general public. Nevertheless, cases regarding image, name, privacy, and other *jinkakuken* were rare.[23] Masanobu Kato has argued that there are four types of rights or interests protected under delictual liability: absolute *jinkakuken*, or those listed under Section 710; absolute rights, such as property; relative *jinkakuken*, or those not listed in Section 710; and finally, relative rights. Kato has incorporated personal information, honor, privacy, name, image, and peaceful life under the concept of relative *jinkakuken.*[24] Suka has noted that in recent times, the term *jinkakuken* is used in two cases. The first refers to the content and the limit of protected legal interests, while the second serves as the legal basis for injunctions.[25] In regards to the second meaning, the issue lies on whether the infringed interest is considered a legal right under private law and thus serves as the basis for the injunction sought by the plaintiff.

As a result, research on the nature of legal interests that comprise the concept of *jinkakuken* has been rather limited compared to research regarding injunctions.[26] She has further argued that under delictual liability founded on the concept of unlawfulness, the first

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[22] Kiyoshi Igarashi, *Jinkaku Kenron* 7 (1989) (Japan)
[23] Munehiko Mishima, *Jinkakuken no Hogo* 250*ff.* (1965) (Japan)
[24] Masanobu Kato, *Shin Minpo Taikei V Jimu Kanri ・Futo Ritoku ・ Fuhokoi* 188 (2ed. 2005) (Japan)
[25] Noriko *Soka, Seishinteki Jinkakuken Shingai to sono Kyusai Hoho ni kansuru Mondai Ishiki*, 100 Senshu Hogakuron 157, 159-160 (2007) (Japan)
[26] *Id.* at 159

meaning refers to "rights," but that in reality, the content and nature of such legal interests has not the subject of much discussion.[27]

III. CASE LAW

As explained above, the delictual liability system in the Japanese Civil Code dictates that non-economic losses follow the general rules set forth by the general clause. Section 710 was established to clearly convey that such losses are legally protected. In theory, this meant is that only non-economic rights that had been granted a clear legal status would be protected, at least until the reform in the 2000s. Nevertheless, the number of legal interests that acquired protection under Section 710 began to rise, especially after World War II, and by the end of the century, they had expanded to include claims regarding public health hazards. In addition, claims regarding the list of legal interests presented under Section 710 had been streamlined to the extent that they arguably more closely resemble action under common law than their counterparts under the continental civil law system.

This section explores the characteristics of some of the legal interests protected under Section 710 – both those expressly listed and those added via case law. The matter of *isharyo* within Japanese legal thinking is addressed at the end of the section.

A. LIFE AND BODY

Claims arising from bodily harm under Section 710 are parasitical in nature,*i.e.*, non-economic losses, such as pain and suffering, are taken into account when calculating damages under the figure of *isharyo,* or apology money. Moreover, most claims for bodily injury are related to either traffic accidents or medical malpractices. In regards to the former, the Japan Federation of Bar Associations has compiled two handbooks that engage with the quantification of *isharyo*. These books, informally called the Red Book[28] and the Blue Book,[29] establish a standard for reparations in three cases: death, injuries, and PTSD or sequelae. While the courts usually adhere to these standards, they are not legally bound by them, and there are cases in which damages have been awarded without consulting the

[27] Ibid.
[28] *Minji Kotsu Jiko Sosho Songai Baisho Gaku Santei Kijun Jokan* (Nichibenren Kotsu Jiko Sodan Senta – Tokyo Shibun ed.) (Japan)
[29] *Kotsu Jiko Songai Baisho Santei Kijun 21* (Nichibenren Kotsu Jiko Sodan Senta ed.) (Japan)「

handbooks.[30]

In general, there is little to say regarding bodily injury in traffic accident cases, as Japanese case law and scholarship does not deviate from that which is normally encountered in other jurisdictions. However, in some cases, the victim's attitude can influence the amount received. For example, in an Osaka case, the court ruled that the victim's deliberate attempt to place the blame on the defendant was enough to reduce the damages for both the injury and the PTSD by 10%.[31] In addition, the rules do not only apply to traffic accidents caused by cars. Fujimura has argued that since infringed interests are the same regardless of which vehicles were involved in an accident (*e.g.*, car, bicycle, train, airplane, etc.) there is no need to make a distinction. However, Fujimura has admitted that an issue arises from the fact that circumstances vary in each case.[32]

B. MEDICAL MALPRACTICE

Medical malpractice cases present a unique set of issues, particularly regarding causality. Yutaka Tejima has noted that cases in which there is clear relation between the plaintiff's injury and the conduct of the doctor are rare.[33] There is also a difference in cases regarding informed consent. In cases where a patient was not provided with the necessary information to opt for a specific treatment, awards tend to be high. In contrast, cases where a patient received an explanation and subsequently underwent treatment tend to yield lower awards. [34] Furthermore, if a doctor or institution attempts to cover up the medical malpractice, that itself is grounds for a different claim, regardless of the bodily injury that was suffered as a result of the initial conduct by the defendants.

However, medical malpractice cases differ from other types of claims in the event of a patient's death. Since cases with an obvious causal link between the death of the victim and the medical conduct are rare, and taking into account that in those cases, the victim might already have had a preexisting condition that could result in death regardless, the courts are faced with the issue of how to grant remedy.

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[30] Hiroyuki Hirano, *Minpo Sogo 6 Fuhokoi* 320 (3rd., ed 2013) (Japan)
[31] Osaka Chiho Saibansho [Osaka District. Ct.] Sept. 26, 2008 Jiho Journal 1784-18
[32] Kazuo Fujimura, *Kotsu Jiko* in *Isharyo Santei no* Riron 33, 61 (Osamu Saito ed. 4th ed., 2013) (Japan)
[33] Yukata Tejima, *Iryo Jiko* in *Isharyo Santei no* Riron 71, 119 (Osamu Saito ed., 4th ed., 2013) (Japan)
[34] Ibid.

If a victim's health was already at a stage where the imminent result was death, arguing that the doctor's action infringed upon the wellbeing of the victim would not be possible. Therefore, the courts were forced to address the issue by approaching these cases from the perspective that the patient had a different right altogether, rather than from traditional ideas of bodily injury. These approaches differ from as the loss of chance doctrine present in other jurisdictions, but to a certain degree, they do follow the same legal principles, if only to the extent that they serve to establish liability.

The lower courts began ruling on cases where, while acknowledging the practitioner's negligence, there was no detriment to overall health, or even if there was, a causal link could not be established. Some courts treated these as an infringement of an "expectation right" (*kitaiken shingai*), *i.e.*, the expectation held by the patient that, if the medical treatment was performed in an adequate manner, there was a probability that the detrimental result (death) could have been avoided, and that as a result of the negligence of the medical practitioner, that expectation had been betrayed.[35] However, this trend was by no means uniform, and some courts rejected that such a right was a legally protected interest.[36] Moreover, since a right such as an expectation right is subjective in the sense that the *expectation* of the victim cannot be determined, the courts began granting claims under the assumption that the "possibility of prolonging the life" (*enmei no kanosei*) had been infringed upon, rather than that some subjective expectation had been betrayed.[37]

The above cases addressed issues where the result was the death of the victim. The courts soon began expanding liability to cases in which a patient's condition would have improved, but the practitioner was late in administrating treatment – regardless of whether or not the end result was death.[38] All the cases presented above granted damages as reparation for the emotional shock suffered by the victim, rather than for the infringement itself.

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[35] Fukuoka Chiho Saibansho [Fukuoka District. Ct.] Mar. 29, 1977 Sho 48 (wa) no. 1020 Hanji 867-90 (Japan)
[36] Tokyo Chiho Saibansho [Tokyo District. Ct.] Oct., 27, 1981 Sho 52 (wa) no. 11316 Hanji 1046-70 (Japan)
[37] Utsunomiya Chiho Saibansho [Utsunomiya District. Ct.] Feb. 25, 1982 Sho 54 (wa) no. 122 Hanta 468-124 (Japan)
[38] Urawa Chiho Saibansho [Urawa District. Ct.] Dec. 27, 1985 Sho 55 (wa) no. 32 Hanji 1186-93 (Japan)
Nagoya Chiho Saibansho [Nagoya District. Ct.] Dec. 21, 1986 Sho 56 (ne) no. 291 Hanta 629-254 (Japan)

In 2000, the Supreme Court handled the first ruling on the matter.[39] In that case, the Supreme Court decided that in the event a treatment did not comply with the medical standards of the time, regardless of an identifiable causal link between the negligence of the practitioner and the death of the victim, the victim (or in this case the estate) would be entitled to damages for the emotional suffering that occurred if there was a substantial possibility (*soto teido no kanosei*) that the victim would have survived. In 2002,[40] the Supreme Court revisited the issue and expanded liability beyond cases in which the victim died to include those in which there was a substantial probability that the victim would have not suffered grave sequelae if the proper treatment had been administered.

Furthermore, in 2003, [41] the Supreme Court approached the issue from the perspective of contractual liability. Following the precedent set in 2000, the court held that a medical practitioner was liable for a breach of contract in the event there was a substantial probability that the victim could have lived longer if the practitioner had performed further tests that would have detected cancer. The main difference between these two cases is that the court did not use the language "emotional distress"[42] to refer to the victim's loss in the 2003 case, but rather that the defendant was liable under the rules of a breach of contract.

Thus, under this interpretation, victims in cases of loss of chance for breach of contract could arguably claim both economic and non-economic losses. Therefore, the Japanese claims for loss of chance in delictual liability exhibit two main characteristics. First, they are mainly limited to medical malpractice cases. Second, unlike in other systems, they do not provide remedy for a percentage of the losses suffered, whether economic or non-economic, but rather are accepted as an independent, non-economic loss, specifically for the emotional distress of the victim.

C. TRANSFERENCE OF THE CLAIM

Another issue regarding claims from bodily injury is the transferability of a claim via *mortis causa.* As previously discussed, the drafters were opposed to the inheritance of

[39] Saiko Saibansho [Sup. Ct.] Sept. 22, 2000 Hei 9 (o) no. 42 Minshu 54-7-2574 (Japan)
[40] Saiko Saibansho [Sup. Ct.] Nov., 11, 2002 Hei 14 (uke) no. 1257 Minshu 57-10-1466 (Japan)
[41] Saiko Saibansho [Sup. Ct.] Jan. 15, 2004 Hei 14 (uke) no. 1937 Saihan Shumin 213-229 (Japan)
[42] However, the court did use the term "emotional distress" in the context of quoting the 2000 ruling.

claims under 710. Furthermore, since the close relatives of a victim have an independent claim via Section 711, it would appear that there was no need for a victim's claim to be incorporated into their estate. Nevertheless, this spurred one of the first great discussions that took place regarding Section 710. Discussions were of a procedural nature and centered on the issue of the nature of the claim, *i.e.*, whether the claim under Section 710 was a purely personal right.[43]

To further complicate the issue, the Supreme Court adopted a rather nuanced approach to the matter. Early cases construed Section 710 as granting a purely personal right. Therefore, the claim was inheritable only if victims had manifested their intentions to sue their aggressor before dying.[44] Consequently, a victim's relatives were obligated to prove that the victim intended to sue for damages under Section 710. Logically, this would present no problem if the victim had already brought a suit before passing. However, there was an issue with cases in which the victim died instantly, or without a chance to bring a suit. This led the courts to begin searching for meaning in the late victim's actions and words. For example, in a 1913 Supreme Court case,[45] a 31-year-old man died because of the negligence of a railway employee. The trial court granted damages for both economic and non-economic losses. Nevertheless, the Supreme Court reversed the decision, asserting that claims for non-economic losses differ from those for economic losses, as the former are a purely personal right that cannot be inherited unless the victim had expressed their intention to sue. In contrast, in a 1919 case, the court upheld a lower court decision that recognized a claim from the relatives of a victim who had died while in the hospital on the basis that he had left a note in which he manifested his intention to sue for non-economic losses.

[43] Sakae Wagatsuma, *Isharyo Seikyuken no Sozokusei*, 29 Hogaku Shirin 37, 45(1927) (Japan)
[44] The oldest example is a 1910 case in which the victim, a 56-year-old woman, suffered injuries when the employee of a company who was driving a vehicle crashed with the city train. She sued the company and died before a decision was reached, and her heirs continued the process in her stead. The Great Court of Judicature held that since she had already sued, the heirs could inherit her right to claim moral damage. Daishin'in [Great Ct. of Jud] Oct. 3, 1910 Mei 43 (o) no. 150 Minroku 16-621 (Japan)
[45] Daishin'in [Great Ct. of Jud] Oct. 20, 1913 Tai 2 (2) no. 172 Minroku 19-910 (Japan).

In two cases, one in 1927[46] and the other in 1933,[47] the victims died while screaming "too bad, too bad (*zannen zannen*[48])." In both cases, the lower court recognized the heirs' right to inherit the claims for non-economic losses. However, just as in the case mentioned above, the Supreme Court overturned the rulings, declaring that claims for non-economic losses that result from injuries perish with the victim, and heirs only inherit the claim if the victim had already clearly communicated that they were planning to file a suit.

However, the court did acknowledge that such a manifestation of intent did not need to have reached the defendant in order to be valid. In regards to the last words of the victim, the court stated that the expression "too bad" did not meet the criteria to be considered an intention to sue, as it could be construed as the victim expressing regret about their own negligence. In 1933,[49] the appeals court of Tokyo followed the test set by the Supreme Court in ruling that a drowning victim's calls for help could not be interpreted as an intention to sue. In another case in 1937,[50] the Supreme Court ruled that the expression "its [the other party's] fault, [they] had enough time to stop but did not do it" manifested an intent to sue for non-economic losses, and as such, the victim's heirs could inherit the claim.

These types of cases prompted discussions among scholars, which in turn yielded two opposing views. The first view, which Ichiro Kato usually represented,[51] denied the notion that claims for non-economic losses could be inheritable. Those who accepted this theory based their argument on Section 896 of the Civil Code, which expressly states that purely personal claims cannot be inherited.[52] Under this view, relatives of a victim could sue only for emotional distress under the rules set by Section 711. Seiko Yoshimi proposed

[46]Daishin'in [Great Ct. of Jud] May. 30, 1927 Shogan (o) no. 375 Shinbun 2702 -5 (Japan)
[47]Daishin'in [Great Ct. of Jud] May. 17, 1933 Sho 7 (o) no. 3149 Shinbun 3561 -13 (Japan)
[48] Because the word *zannen* means regret, there is no adequate way to translate his expression into English. It could also be translated as "what a shame," "I regret this," "how vexing," "how disappointing," or any similar expression.
[49] Tokyo Koto Saibansho [Tokyo High Ct.] May. 26, 1933 Sho 8 (ne) no. 1714 Shinbun 3568 -5 (Japan)
[50] Daishin'in [Great Ct. of Jud.] Aug. 6, 1937 Sho 12 (o) no. 530 Hanketsu Zenshuu 4-15-10 (Japan)
[51] Ichiro Kato, *Isharyo Seikyuken no Sozokusei -Daihoutei Hanketsu wo megutte*, 391 Jurist 34 (1968) (Japan)
[52] Section 896 states from the time of commencement of inheritance, an heir shall succeed blanket rights and duties attached to the property of the decedent, provided that this shall not apply to rights or duties of the decedent that are purely personal.
Translation from http://www.ishioroshi.com/english/japanese_civil_code_pt5.html#en_pt2

a modified version of this theory.[53] Yoshimi argued that, in cases of injuries that resulted in death, the victim had no claim – economic or otherwise – and heirs could only sue under Section 711 for their own losses. In contrast to this view, Sakae Wagatsuma postulated that claims under Section 710 were not only transferable via *mortis causa,* but that victims did not need to manifest their intention to sue either. In 1927, he wrote a highly influential paper in which he criticized case law up to that point as being unsound.[54] Supporters of Wagatsuma´s view argued that both economic and non-economic losses should be treated equally for the effects of inheritances. They also indicated that in cases in which a victim died without an opportunity to communicate with anyone, even if that victim had not died immediately, the defendant could not be held liable, regardless of how much the victim actually suffered.

The Supreme Court finally reversed its precedent in 1967.[55] In that particular case, a truck had run over an elderly person, who later died without suing or expressing an intention to sue for non-economic losses. The victim had neither a wife nor any children, so his sister sued the owner of the truck in his stead. The lower court and the appeals court denied the claim based on the precedent, but the Supreme Court overturned the ruling, arguing that the idea that claims for non-economic losses are only transferable if victims had sued or manifested an intention to sue was contrary to the notion of fairness and reason.

In regards to the nature of the claim, the court noted that while the legal interest protected was indeed a purely personal interest of the victim, the claim for damages was a pecuniary credit that could be inherited. However, the court did specify that relatives would forgo this right if the victim had expressed an intention not to sue.

D. NON-ECONOMIC LOSSES IN THE CASE OF FOREIGNERS

Perhaps the most striking stance of the Japanese system regarding the quantification of non-economic losses is found in cases in which the victim is a foreigner. The courts have adopted an approach that calculates the amount for non-economic damages based on two

[53]Seiko Yoshimi, Seimei Shingai no *Songai* Baisho Seikyuken to Sono Sozokusei ni Tsuite in Seiji Tanaka, Gendai Shouho Gaku no Shomondai 675 (Eisuke Yoshinaga ed., 1967)
[54] Wagatsuma *supra* note 43 at 1325
[55] Saiko Saibansho [Sup. Ct.] Nov. 1, 1967 Sho 38 (o) no. 1408 Minshuu 12-9-2249 (Japan)

elements. The first is the migratory status of the victim, *i.e.*, if the victim is a permanent resident of Japan or just a temporary visitor. The second is the economic situation of the victim's country of origin, *i.e.*, mostly if the country's price index is higher or lower than that of Japan.

In 1997, The Supreme Court[56] heard a case that engaged with the issue of loss of income of a foreign victim when a Pakistan national died while travelling in Japan as a tourist. The court determined that regarding lost income, the actual income of the victim's country should serve as the standard. However, regarding non-economic losses, the court limited its opinion to upholding the lower court amount under the justification that there was no reason to grant a higher amount than that which would have been awarded to a Japanese national.

Regarding economic losses, such as lost income, the argument that a victim's country should set the quantification method is sound. After all, the goal of such a remedy is to compensate the victim for the amount lost as a result of the harmful event. However, in cases of non-economic damages, where such standards are not applicable, it is difficult to refrain from criticizing such an approach. In cases in which the victim is a permanent resident of Japan, damages are calculated in the same manner as they would be for a Japanese national. However, in the event the victim is a temporary visitor, the economic situation of his or her home country is significant. The courts have adopted the view that when a victim's country of origin has a lower standard of living than Japan, non-economic damages should be adjusted to reflect that reality.[57] Not all cases apply this standard, and

[56] Saiko Saibansho [Sup. Ct.] Jan. 28, 1997 Hei 5 (o) no. 2132 Minshu 51-1-78 (Japan)

[57] Matsuyama Chiho Saibansho [Matsuyama District. Ct.] Sept. 21, 1990 Hei 2 (wa) no. 32 Kominshu 23-5-1191 (Japan) A Chinese tourist died in a traffic accident. The court held that in calculating damages for emotional distress, the amount should be decided in line with its value in the victim's home country. The plaintiff appealed and the appeals court overturned under the argument that Section 14 of the Constitution did not allow for such distinctions.
Tokushima Chiho Saibansho [Tokushima District. Ct.] Jan. 21, 2011 Hei 21 (wa) no. 69 Hanta 1346-192 (Japan) The plaintiff was a 26-year-old trainee who lost his right arm. Chinese prices should set the standard, regardless of the classification such injuries receive under Japanese law.
Tokyo Chiho Saibansho [Tokyo District. Ct.] Jan. 27, 2004 Hei 14 (wa) no. 28270 (Japan) A police officer grabbed the clothes of a Chinese individual who was trying to run away, which resulted in injuries for the plaintiff. The court held that the actions of the officer did not meet the criteria set by the police law defense. The court took into account the nationality of the plaintiff, and granted 500,000 yen in damages for the non-

some courts have even declared that this distinction contradicts Section 14 of the Constitution.[5859] However, one Tokyo High Court case did address this issue. The court upheld the difference in standard that the lower court had originally employed to determine damages. The court held that such a distinction should not be based upon the nationalities of victims or their next of kin, but rather upon the standard of living of their countries of origin, and that if a given standard of living varies from that of Japan, that difference should be taken into account.[60]

In other cases, the courts have not explained how they calculate damages, as judges have no obligation to do so. As a result, courts may decide that an amount is sufficient without mentioning nationality.[61] However, in some cases, the award can be even higher than it would have been for a Japanese national. In a recent case, a foreigner from Ghana was being deported after illegally residing in Japan for 20 years. The victim was fluent in Japanese, had a Japanese spouse and a stable source of income, and was an upstanding citizen in all aspects, apart from his lack of documents. However, authorities located him and initiated procedures for deportation. Before boarding the airplane, the victim resisted, and an officer restrained him. This tragically ended with death by suffocation. In finding for the next of kin, the victim's wife and mother, the court made no distinction based on nationality. Rather, it focused on the unlawfulness of the officers' conduct and granted 500 million JPY for the emotional distress of the victim and 100 million JPY each to the next of

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economic losses resulting of the injury.

[58] Section 14 All people are equal under the law, and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.
Peers and peerage shall not be recognized. No privilege shall accompany any award of honor, decoration, or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it. Translation from:
http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html

[59] Kofu Chiho Saibansho [Kofu District. Ct.].] Feb. 5, 2008 Hei 16 (wa) no. 405 Hanji 2023-134 (Japan) The victim was a Chinese national who was traveling as a tourist in Japan. After kidnapping and raping her, the defendant killed the victim. The court rejected the standard used by the lower court in establishing damages for emotional suffering using the standard of living criteria.

[60] Tokyo Koto Saibansho [Koto District. Ct.] Jan. 25, 2001 Hei 12 (ne) no. 5097 Hanta 1059-298 (Japan) The victim was a national from Sri Lanka.

[61] Tokyo Chiho Saibansho [Tokyo District. Ct.] Dec.24,1997 Hei 8 (wa) no. 12634 Komin 30-6-1838 (Japan) A 23-year-old Chinese exchange student studying Japanese died as a result of a traffic accident. The court granted 8 million JPY.
Tokyo Chiho Saibansho [Tokyo District. Ct.] Nov. 25, 1992 Hei 3 (wa) no. 1283 Hanji 1479-146 (Japan) An Iranian short-stay exchange student lost four fingers on the left hand in a work-related accident.

kin.[62] Nevertheless, in some cases, the courts apply the standard of living criteria to the claim that Section 711 guarantees to the next of kin.[63]

E. SOCIAL RELATIONS

Non-economic losses that result from infringement of social relation can be divided into two main groups: losses due to the infringement of family ties and losses due to the infringement of more general social relations, such as with friends or coworkers. Usually, only losses that fall within the first group qualify for legal protection. However, there are some issues as to the scope of whose legal interest deserves such protection. Furthermore, damages in cases of divorce are a staple of the Japanese legal system, which unlike many those of many Western countries, does not rely on a system of alimony. Additionally, while *isharyo,* or apology money, is the traditional name given to damages for non-economic losses, for a layman, it usually refers to the compensation that an innocent spouse receives in cases of divorce or from the lover of an unfaithful spouse.

While this section has discussed claims that arise from the death and injury of victims themselves, the next section engages with those involving claims of relatives. Therefore, only claims that arise from other infringements, such as extramarital relations, are covered here.

a. DIVORCE

Divorce is perhaps the most widely known type of non-economic losses in Japan. Among the general population, divorce is almost synonymous with *isharyo*, even if the underlying logic of the system is not completely understood. According to traditional scholarship, there are two types of non-economic losses that result from divorce: the emotional distress suffered by the spouses as a result of the divorce itself and the emotional

[62] Tokyo Chiho Saibansho [Tokyo District. Ct.] Mar. 19, 2014 Hei 23 (wa) no. 25874 Hanta 1420-246 (Japan)
[63]Chiba Chiho Saibansho [Chiba District. Ct.] Jun. 17, 2014 Hei 24 (wa) no. 2950 Hanji 2248-72 (Japan) A Chinese technical intern trainee died as a result of injuries from an assault by a co-worker. Regarding the applicable law, the court held that for the mater of inheritance, Chinese law would be applied. In regards to delictual liability, however, it ruled that the applicable law was Japanese civil law. The court recognized the emotional distress of the plaintiffs (the victim's father and mother). Particularly, the court added, the mother had been diagnosed with depression as a result, and the father had to quit his job to take care of her. Nevertheless, the court added, the difference in living standards (price index) between Japan and China must be taken into account. Therefore, the court granted each parent 500,000 JPY in damages.

suffering of the party who was the victim of the divorce. However, the courts usually do not distinguish between these two losses.[64]

Nevertheless, the court has held that the spouse who did not contribute to the divorce could sue for non-economic losses, even if their body, liberty, or reputation were not compromised.[65] In addition, if the conduct of the responsible spouse meets the criteria for delictual liability, the spouse who is the victim can sue for non-economic losses. In one case, the Supreme Court granted damages for the emotional suffering caused by the divorce itself, and another for all the abuse suffered during the marriage. Furthermore, the court noted that such a claim was independent and had no relation to the division of property following the divorce.[66]

b. EXTRAMARITAL AFFAIRS

Another type of protected interest is that of a party slighted by an extramarital affair against the lover of their spouse. The first Supreme Court case regarding the issue was in 1979.[67] The court concluded that the slighted spouse had a claim against the lover based on the general rules of delictual liability, regardless of the presence of any feelings of love. However, on the issue of emotional distress suffered by a couple's children, the court denied remedy under the argument that the relationship between the father and his lover did not affect his parental love for his child.[68] The court ruled that there were exceptions in which claims do not exist, such as with cases in which the marriage was already strained.[69]

However, in a recent case, the Tokyo District Court determined that it was public knowledge that sexual acts were among the activities that nightclub hostesses utilized to attract and retain clients. The court continued to state that this type of "pillow business" (*makura eigyo*) was not akin to solicitation, as in the former, parties had not engaged in

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[64] Michihiro Nakata, *Rikon・Futeikoi nado* in Isharyo Santei no Riron 195 (Osamu Saito ed., 4th ed., 2013) (Japan)
[65] Saiko Saibansho [Sup. Ct.] Feb., 21, 1956 Sho 26 (o) no. 469 Minshu 10-2-124 (Japan)
[66] Saiko Saibansho [Sup. Ct.] Jul. 23, 1971 Sho 43 (o) 142 Minshu 25-5-805 (Japan)
[67] Saiko Saibansho [Sup. Ct.] Mar. 30, 1979 Sho 51 (o) no. 328 Minshu 33-2-303 (Japan)
[68] Saiko Saibansho [Sup. Ct.] Mar. 30, 1979 Sho 53 (o) no. 1267 Saiban Shumin 126-423 (Japan)
Interestingly enough, the court ruled on the same day on the very same issue in a case where the unfaithful spouse was the mother.
[69] Saiko Saibansho [Sup. Ct.] Mar. 26, 1996 Hei 5 (o) no. 281 Minshu 50-4-993 (Japan)

sexual acts for the exchange of money. Rather, the women had chosen to be with their male clients in order to protect other business. The court concluded by ruling that like prostitution, pillow businesses do not endanger the peace of a household, as their purpose is to relieve the sexual needs of a spouse – in this case, the husband.[70]

There has been criticism of the courts' approach to these types of cases. Critics have argued that spouses do not hold an absolute right against their partners, and that since it is the offending spouse who is breaching the legal vows of marriage, it is unreasonable to hold a third party liable. Lastly, critics have asserted that courts should not rule on such personal matters.[71]

c. DE FACTO SPOUSES AND ENGAGEMENT

Engagement and *de facto* marriage, while not necessarily granted the same status as marriage, are nevertheless legally protected. In 1915, the Great Court of Judicature ruled that a promise to marry is a legally binding contract, albeit one in which parties cannot request courts for specific performance. Nevertheless, the court determined that in the case of a breach, the offended party could sue for non-economic losses.[72] It then elaborated upon this in a 1957 ruling, determining that although *de facto* relations lack the legal formalities of a marriage, cases in which a man and woman share the responsibilities and administration of a household entail a relation that is equivalent to a marriage. Therefore, it should be granted legal protection. In regards to the right infringement requirement, the court held that the term right should not be construed in a limited manner.[73]

In a different case, the court decided that even in the absence of a *de facto* relation, once a promise to marry had been made, the offended party could sue for emotional suffering as a result of a breach of contract.[74] Nevertheless, the courts do admit the cancelation of an engagement if there is a justifiable reason to do so.[75] However, there is

[70] Tokyo Chiho Saibansho [Tokyo District. Ct.] Apr. 14, 2014 Hei 25 (wa) no. 34252 Hanta 1411-312 (Japan)
[71] Nakata *supra* note 64 at 206
[72] Daishin'in [Great Ct. of Jud.] Jan. 26, 1915 Tai 2 (o) no. 621 Minroku 21-49 (Japan)
[73] Saiko Saibansho [Sup. Ct.] Apr. 11, 1958 Sho 31 (o) no. 21 Minshu 12-5-789 (Japan)
[74] Saiko Saibansho [Sup. Ct.] Dec. 20, 1963 Sho 38 (o) no. 334 Minshu 17-12-1708 (Japan)
[75] The courts have narrowly construed the criteria for justifiable annulment of engagement. For example, not even religious differences are enough of a justification. Osaka Chiho Saibansho [Osaka District. Ct.] Jul. 31, 1967 Sho 40 (wa) no. 2778 Hanji 510-57 (Japan), Kyoto Chiho Saibansho [Kyoto District. Ct.] Jan. 28, 1970

the issue of criteria for determining *de facto* marriages. For example, the Fukuoka District Court held that even if parties do not live together, their jobs and position, routine visits to each other's abodes, and sexual relations could be considered a form of cohabitation that embodies a *de facto* relation.[76]

There are also cases in which a *de facto* relation could amount to polygamy. In a 1940 case, a husband and wife were separated, preparing for divorce, and both seeing other people. The Great Court of Judicature ruled that the lover of the husband, who was aware of this state of affairs, had no recourse against him.[77] In 1969, the Supreme Court granted remedy in a similar case under the argument that the defendant used lies to seduce the plaintiff in order to initiate the extramarital affair. Therefore, his conduct was significantly more unlawful.[78]

F. OTHER LEGAL INTERESTS

a. PUBLIC NUISANCES

In the 1960s, the list of protected interests expanded to more effectively address the realities of public harms, such as pollution. However, it was scholarship, not the courts, that decided that these newly developed and protected rights should be included under personality rights. One of these rights is the right to a peaceful life (*heion seikatsuken*).[79] In 1975, the Supreme Court granted remedy to residents affected by noise pollution from the Osaka International Airport. The court ordered compensation for losses resulting from the

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Sho 40 (wa) no. 206 Hanji 615-56 (Japan) However, it does seem like the court favored cases with female plaintiffs. One of the few cases in which the annulment was considered justified was a district court case in which the plaintiff was the groom. In this case, the bride had a discussion with the mother of the groom and decided that the groom had not defended her enough during a discussion with her in-laws. Following the advice of her father, she decided not to inform the groom of her decision to cancel the wedding and started avoiding and ignoring him. When they finally spoke, the groom was able to convince her to go forth with the marriage. Nevertheless, the parents of the bride were opposed to the wedding this second time, and even threatened to not assist with the ceremony. The bride called the groom and told him that she would not marry him, as she did not want to lose her relation with her family. The court, citing the emotional stress the bride was under, not only denied the groom claims for emotional suffering, but decided that she was not liable for anything, including the expenses already incurred for the wedding preparations, as she had not incurred in any type of delictual liability. Tokyo Chiho Saibansho [Tokyo District. Ct.] Mar. 31, 1993 Hei 4 (wa) no. 16940 Hanta 857-248 (Japan)

[76] Fukuoka Chiho Saibansho [Fukuoka District. Ct.] Aug. 26, 1969 Sho 43 (wa) no. 334 Hanji 577-90 (Japan)

[77] Daishin'in [Great Ct. of Jud.] Jul. 6, 1940 Sho 14 (o) no. 1802 Taiminshu 19-1142 (Japan)

[78] Saiko Saibansho [Sup. Ct.] Sept. 26, 1969 Sho 42 (o) no. 790 Minshu 23-9-1727 (Japan)

[79] In this case, life refers to everyday activities, and not to the lifetime of the individual.

noise. However, it denied damages for any future losses, as it considered these too difficult to determine.[80]

Another famous case at the local level was the Nagoya Bullet Train (*shinkansen)* case.[81] In this case, the plaintiff claimed that the train interfered with daily conversations, telephone calls, studies, lectures, and thoughts, prevented them from watching television or listening to the radio, interrupted their sleep patterns, and produced both emotional distress and bodily harm. Although the Nagoya High Court did not expressly quote the Supreme Court case, the ruling was similar and granted damages for non-economic losses suffered by the plaintiff. However, the court rejected claims for future losses. Since then, the legal landscape of Japan has included cases regarding various types of pollution, and scholarship has followed suit in attempting to analyze them.[82].

b. LIABILITY FOR LOSS OF PROPERTY[83]

A glance at the language of Section 710 clearly reveals that non-economic losses are recoverable, regardless of whether or not the infringed interest is a property right. The traditional stance within scholarship and case law dictates that victims do not have a claim for non-economic losses when such losses arise from harm to property.[84] In the lower courts in particular, the stance is to consider that losses resulting from property damage should be addressed as economic losses, and that emotional suffering is not part of

[80] Saiko Saibansho [Sup. Ct.] Dec. 16, 1981 Sho 51 (o) no. 395 Minshu 35-10-1369 (Japan)
The plaintiff also requested for a permanent injunction for airport operations from 9 p.m. to 7 a.m. However, the court denied the petition under the argument that such request did not fall within the scope of a civil liability case, as the airport operation fell within the purview of administrative law.
[81] Nagoya Koto Saibansho [Nagoya High. Ct.] Apr. 12, 1985 Sho 57 (ne) no. 88 Gemin 34 1-4 - 461 (Japan)
[82] See: Shoetsu Matsumoto, *Shinkansen Kougai Sosho to Kankyoken ・ Jinkakuken, Kokyosei – Hanketsu wo Bochou site-,* 15(2) Chukyo Law Review 1 (1980) (Japan) available at: http://www.chukyo-u.ac.jp/educate/law/academic/hougaku/data/15/2/matumoto.pdf
Atsushi Miyazaki, *Jinkakuken toshite no Josui Kyojuken ni tsuite – Haikibutsu Shori Jisetsu wo meguru Sashitome Saiban wo Kenki tosite-*, 35 Soka Hogaku 75 (2005) (Japan)
Kimura Kazunari, *Kinji no Saibanrei ni miru 「Jinkakuken」 Gainen no Shoso*、 364-65 Ritsumeikan Hokgaku 136, 137-140 (2016) (Japan)
[83] For more see: Yuki Makino, *Zaisan Songai ni okeru Isharyo Seikyu no Kahi*、50(1) Jochi Hogakuronshu, 35 (2006) (Japan)
[84] Osamu Saito, *Sono Ta no Shomondai* in *Isharyo Santei no* Riron 307, 308 (Osamu Saito ed., 4th ed., 2013) (Japan)

recoverable losses.[85]

However, the courts have granted remedy in cases that meet one of the following criteria: there is a special relationship between the property and the victim, the conduct of the defendant is intentional and affects the victim in such a manner that the emotional suffering surpasses the general threshold, or the damage to property results in emotional suffering that surpasses the general threshold.[86] This stance is not new stance either. The Great Court of Judicature ruled as early as 1910 that when a defendant's conduct results in the destruction of property to which the victim has a special and sentimental connection, such as with a family heirloom, the defendant is liable for damages.[87]

The lower courts' rulings reveal that, in many cases, the relation between a piece of property and its owner is the deciding factor. For example, the new owner of an immobile property[88] is liable for the destruction of a pen and traditional family shrines.[89] In another case, a couple took their 10-year wedding anniversary rings for repair. The jeweler replaced the diamond with synthetic zirconia, and when the plaintiffs realized this, they requested their diamond back. However, the business did not comply, so the couple sued. In granting damages, the district court determined that the diamond had a special significance to the plaintiffs, as the wife even suffered from PTSD as a result of the ordeal.[90] In cases of damage to buildings, emotional suffering is not usually taken into account when calculating damages, with the exception of traffic accidents in which a car collides with a building. In these cases, the courts consider the fear and anxiety that plaintiffs suffer as a result of these collisions.[91]

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[85] Makino *supra* note 83 at 37
[86] Saito *supra* note 84 at 308
[87] Daishin'in [Great Ct. of Jud.] Jun. 7, 1910 Mei 43 (re) no. 954 Keiroku 16-1121 (Japan) The court reaffirmed this position in 1960. Saiko Saibansho [Sup. Ct.] Mar. 10, 1960 Sho 33 (o) no. 659 Minshu 14-3-389 (Japan)
[88] The ruling uses the word *tatemono* which can refer to any type of structures.
[89] Tokyo Chiho Saibansho [Tokyo District. Ct.] Apr. 22, 2002 Hei 13 (wa) no. 1743 Hanji 1801-97 (Japan)
[90] Tokyo Chiho Saibansho [Tokyo District. Ct.] Feb. 15, 2007 Hei 16 (wa) no. 10480 Hanji 1986-66 (Japan)
[91] Osaka Chiho Saibansho [Osaka District. Ct.] Mar. 30, 1973 Sho 47 (wa) 752 Hanta 306-241 (Japan) Okayama Chiho Saibansho [Okayama District. Ct.] Sept.19, 1996 Hei 6 (wa) no. 1182 Komin 29-5-1405 (Japan)

Cases related to the injury or deaths of pets are also common. However, Makino has noted that early case law approached these instances under the view of property damage,[92] while recent case law tends to classify them as pure emotional distress.[93] Furthermore, Saito has explained that awards tend to be higher if a death is the result of veterinary malpractice, as this is also considered a breach of contract.[94] Finally, the animal must be a pet. If the animal is killed while still being treated as an object, the courts will not grant damages for emotional distress.[95]

IV. THE CONCEPT OF APOLOGY MONEY, OR *ISHARYO*

As mentioned, non-economic losses were recognized under Japanese law as early as the drafting of the actual civil code. Section 710 grants remedy for damages, besides property-related cases, and 711 endows next of kin with an independent action in cases of wrongful death. As a matter of legal scholarship, most issues tend to revolve around the nature of this claim, *e.g.*, transferability via *mortis causa,* or the nature of the remedy.

Japanese law does not have a concept analogous to *dommage moral*. The claims under Section 710 are described as non-pecuniary claims. Both scholarship and case law use the term *isharyo*, or apology money, to refer to the damages granted in such cases. Moreover, the term *isharyo* is not found in any statute. During the drafting process, remedy for non-economic losses was referred to as "pain-money" (*itami kin*),[96] and the courts utilized various terms during the Meiji period.[97]

The study of non-economic losses starts with the concept of *isharyo*. Most books and papers on the topic of non-economic losses either engage with the doctrinal issues of

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[92] Tokyo Chiho Saibansho [Tokyo District. Ct.] Sept. 11, 1961 Sho 35 (ne) 1801 Hanji 283-21 (Japan)
[93] Makino *supra* note 83 at 43
[94] Tokyo Chiho Saibansho [Tokyo District. Ct.] May, 10, 2004 Hei 15 (wa) no. 16710 Hanji 1889-65 (Japan) Utsunomiya Chiho Saibansho [Utsunomiya District. Ct.] Mar. 28, 2002 Hei 9 (wa) no. 529 (Japan)
[95]Osaka Chiho Saibansho [Osaka District. Ct.] Jan. 13, 1997 Hei 8 (wa) no. 2167 Hanji 1606-65 (Japan) The veterinarian was held liable for using a labor-inducing drug that resulted in the death of the cat. Hiroshima Koto Saibansho [Hiroshima High. Ct.] Nov. 6, 1972 Hanta 286-230 Defendant held liable for stealing a colored carp from the plaintiff.
[96] Nobuhige Segawa, *Minpo 709 Jo (Fuhokoi no Ippanteki Seiritsu Yoken)* in III Minpoten no Hyakunen Kobetsuteki Kanstatsu (2) Saiken Hen 559, 641 (Toshio Hironaka, Eichi Hoshino eds., 1998)
[97] Daishin'in [Great Ct. of Jud.] Nov. 10, 1903 Mei 36 (re) no.2053 Keiroku 9-1699 (Japan) Ianryo Daishin'in [Great Ct. of Jud.] Oct. 16,1906 Mei 39 (o) no.277 Minroku 12-1282 (Japan) Ishakin Daishin'in [Great Ct. of Jud.] Mar. 26, 1908 Mei 40 (o) no.491 Minroku 14-340 (Japan) *Isharyo*

isharyo or a specific type of claim, such as defamation or medical malpractice. Nevertheless, discussions regarding non-economic losses as a general concept are situated in the context of personality rights. The traditional view is that *isharyo* are remedies granted in cases of emotional suffering or spiritual losses (*seishinteki songai).*[98] However, since the courts recognized non-economic losses in the case of defamation of legal entities, the discussion has since shifted from treating *isharyo* as remedies for spiritual losses to treating them as remedies for intangible losses.[99] Claims for *isharyo* have been traditionally understood as a form of private sanction. However, this view undermines the division between criminal and civil liability in mainstream theory.[100]

A. THE NATURE OF ISHARYO

Regarding *isharyo*, discussions have typically focused on their nature and function. Ume did not refer to the function or nature of *isharyo* directly and instead referenced Section 710 as granting protection to non-economic losses.[101] Afterwards, there was no discussion of the nature of *isharyo*. Rather, discussions centered on the distinction between criminal and civil liabilities.[102]

The first view regarding the nature of *isharyo* is that they fulfill a compensatory role, decreasing the estate of an aggressor in the same manner as a fine while increasing that of the victim. However, it is important to note that unlike fines, *isharyo* are not the payments themselves, but their effect for victims. Hiroshi Uebayashi advanced the view that since *isharyo* are damages for losses, the courts' approach of considering the specific circumstances of an aggressor was inadequate. He argued that *isharyo* offer victims the possibility to obtain essential items for everyday life, save money, and experience the joy of receiving money, which could help alleviate suffering. These three points, he posited, should be the basis for calculating *isharyo*. He was critical of the private sanction theory,

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[98] *Isharyo* Santei no Jitsumu 1 (Chiba ken Bengoshi Kai ed., 2013) (Japan)
Osamu Saito, *Soron* in *Isharyo Santei no* Riron 1 (Osamu Saito ed., 2013) (Japan)
Hirofumi Ito, *Isharyo* no Seishitsu wo Meguru Giron ni Tsuite,7 Bulleting of Toyohashi Sozo College 141,142 (2003) (Japan)
[99] *Isharyo* Santei no Jitsumu 1 (Chiba ken Bengoshi Kai ed., 2013) (Japan)
[100] Saito *supra* note 98 at 5
[101] Kenjiro Ume, *Minpo Yogi* 883-885 (1912) (Japan)
[102] Ito *supra* note 98 at 146

finding it unconvincing because it would oppose the public order. Since punishment and compensation are concepts that were at odds with each other, the end result would be the victim receiving more than their actual loss.[103]

In contrast with the compensation theory, the private sanction theory positions the punitive nature of *isharyo* in a central role. Santaro Okamatsu[104] opined that the function of damages was not to repair the losses suffered by victims of a delictual act, but rather to add to the punishment of the aggressor. Following this approach, Michikata Kaino has argued about the punitive function of delictual liability, stating that it was a type of punishment for the unlawfulness of the conduct.[105] In regards to non-economic losses, he has reported that the difference between civil and criminal liability is a reflection of the ideology of the period, which conceptualized civil liability as a sort of criminal liability, but covered in a different tint.[106]

Beginning in the 1950s, Munehiko Mishima reintroduced the idea that non-economic damages are of a punitive nature. He argued that Section 710 established two types of *isharyo*: those which function to compensate for emotional losses and those with the sole function of punishing the aggressor. He based this on the reasoning that if delictual liability could not be considered a private punishment, it would lose its function as a deterrent.[107] He continued by arguing that although the purpose of *isharyo* was to measure the satisfaction of a victim, they also served as a condemnation of the aggressor and a social deterrence. Therefore, when calculating *isharyo,* the focus should not lie solely on repairing the loss suffered by the victim, but also on the motives, negligence or intent, wealth, and other factors of the wrongdoer.[108]

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[103] Hiroshi Uebayashi, *Isharyo Santei Ron* 131-132 (1962) (Japan)
[104] Santaro Okamatsu, *Minpo Riyu Gemakiji* 467 (1897) (Japan)
[105] Michitaka Kaino, *Saiken Kakuron* 420 (1945) (Japan)
[106] Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 1*, 50(2) Hogaku Kyoukai Zasshi, 18 (1932) (Japan), Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 2 Kan*, 50 (3) Hogaku Kyoukai Zasshi,116 (1932) (Japan)
[107] Munehiko Mishima, *Isharyo no Honshitsu*, 5 (1) Kanazawa Law Review 1 （1959） (Japan)
[108] Munehiko Mishima, *Songai Baisho to Yokuseiteki Kino 1*, 105-106 Ritsumeikan Law Review 666 *ff.* (1972) (Japan), Munehiko Mishima, *Songai Baisho to Yokuseiteki Kino (Tsuzuki)*, 108-109 Ritsumeikan Law Review 112*ff.* (1973) (Japan)

B. THE FUNCTION OF *ISHARYO*

Another discussion of *isharyo* is that regarding its function. In contrast with debates regarding the nature of *isharyo*, which are based on such concepts as goals and social objectives of damages, discussions on the function of *isharyo* are typically supported by – or rather, sourced from – case law. In other words, scholars analyze certain cases and seek to infer the "role" that damages fulfilled in those particular cases.

Traditionally, damages for non-economic losses have assumed a number of different functions:[109] compensatory, punitive, satisfactory, as a symbolic valuation of a victim's emotions, as a way to overcome the loss, and – in the case of Japan – a complementary function.[110] Complementary *isharyo* are used in cases in which the existence of an economic loss has been established, but proving such a loss is especially difficult. Therefore, with *isharyo,* a judge can fill the gap in damages a victim should receive.[111] The Supreme Court employed this approach in 1973 when recognizing a single claim for both patrimonial and emotional losses that result from a physical injury.[112]

Since then, an example of the use of *isharyo* has been to bridge the income gap between sexes, especially in cases of small children.[113] Also, in cases where the delictual act caused a deformity of the victim's appearance, this disfigurement can be taken into account when liquidating *isharyo,* regardless of any loss of earning capacity for the victim.[114] They have also been used for cases in which the victim contended with the aftermath of an injury, regardless on any actual effect on income.[115] The courts have also recognized *isharyo* in cases where a victim could have earned a work promotion, but failed to receive it because of an injury,[116] and to adjust for inflation in cases where such an

[109] Saito *supra* note 98 14*ff.*
[110] Ibid.
[111] Saito *supra* note 98 at 17
[112] Saiko Saibansho [Sup. Ct.] Apr. 5, 1973 Sho 43 (o) no. 943 Minshu 27-3-419 (Japan)
[113]Tokyo Koto Saibansho [Tokyo High. Ct.] Nov. 25, 1980 Sho 53 (ne) no. 2758 Ge-minshu 31-9-12-953 (Japan), Saiko Saibansho [Sup. Ct.] Oct.,8, 1981 Sho 56 (o) no. 498 Saihan Minshu 134-39 (Japan)
[114] Saito *supra* note 98 at 17
[115] Tokyo Chiho Saibansho [Tokyo District. Ct.] Aug. 23, 1976 Sho 49 (wa) no. 8606 Hanji 855-84 (Japan)
[116] Osaka Chiho Saibansho [Osaka District. Ct.] Mar. 23, 1972 Sho 46 (wa) 152 Kotsu Minshu 5-2-451 (Japan)

adjustment could not be done in regards to lost wages.[117]

C. CALCULATING *ISHARYO*

In Japan, the Civil Code[118] and the Code of Civil Procedure[119] contain no provision that exclusively concerns the calculation of non-economic losses. Thus, the courts have established a standard for judges to use. Just as with instances of economic losses, plaintiffs must prove the existence of a non-economic loss, although they do not need to prove that the amount claimed is adequate.[120]

The Supreme Court stated early in its rulings that judges may exercise complete discretion when calculating damages and are not required to explain how they decided on a specific amount.[121] However, the amount must not be arbitrary, and if it varies drastically from an amount that would commonly be deemed adequate, it can be considered illegal.[122] Because of this discretion, a judge is not bound by the amount requested by a plaintiff-victim and is able to grant more, provided the total amount does not exceed the total requested amount.[123] Nevertheless, there are certain factors the court must consider when deliberating the amount. These factors can be divided into two categories: circumstances of the victim and circumstances of the defendant.[124] Within the first group is the extent of the physical and emotional disturbance suffered by the victim. This immediately exposes the

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[117] Tokyo Koto Saibansho [Tokyo High. Ct.] May, 11, 1982 Sho 56 (ne) no. 2374 Hanji 1041-40 (Japan)

[118] The Civil Code does have a general provision for calculating damages, but it makes no mention of non-economic damages. The general provision for calculating damages in the Japanese Civil Code is Section 416, which refers to damages in case of failure to perform an obligation, but which has also been applied to torts.
Section 416 (1) The purpose of the demand for damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure.
(2) The obligee may also demand compensation for damages arising from any special circumstances if the party did foresee, or should have foreseen, such circumstances.
Translation from http://www.moj.go.jp/content/000056024.pdf

[119] The Code of Civil Procedure does have a section that addresses damages that are quantifiable. Section 248 states that "where it is found that any damage has occurred, if it is extremely difficult, from the nature of the damage, to prove the amount thereof, the court, based on the entire import of the oral argument and the result of the examination of evidence, may determine a reasonable amount of damage."
Translation from
http://www.japaneselawtranslation.go.jp/law/detail/?id=2092&vm=04&re=02

[120] Daishin'in [Great Ct. of Jud.] Dec. 20, 1901 Mei 34 (re) no.1688 Keiroku 7-11-105 (Japan)

[121] Saiko Saibansho [Sup. Ct.] Apr. 5, 1973 Sho 43 (o) no. 943 Minshu 27-3-419 (Japan)

[122] Isamu Goto, *Saikin ni Okeru Isharyo no Shomondai*, 145 Hou no Shihai 31, 39 (2007) (Japan)

[123] *Supra* note 121

[124] Hiroshi Uebayashi, *Seishinteki Songai ni taisuru* Isharyo in Chushaku Minpo (19) Saiken (20) Fuhokoi 193, 203-211 (Ichiro Kato ed., 1965) (Japan)Ito *supra* note 98 at 164

problem of victims who cannot actually experience loss, such as infants.

The Supreme Court held in a 1936 case[125] that a baby aged 1 year and 4 months could sue for future emotional suffering caused by the death of his father. In another case,[126] Yokohama District Court granted a claim for non-economic losses to a 60-year-old man who entered a vegetative state due to medical malpractice. The harm suffered by the victim must be measured from the standpoint of an average person and should not exceed a tolerable limit of society. The age, sex, marital status, health condition, social standing, occupation, material wealth, tendencies, lifestyle,[127] and negligence (if any) of the victim, as well as any kind of aftereffects or profit the victim might have had from the act, are also taken into account when calculating damages.[128]

Japanese courts also consider the circumstances of a defendant, beginning with his or her state of mind, especially if the act was the result of intent or mere negligence.[129] The defendant's wealth is also a significant factor.[130] However, the Supreme Court has declined to consider the wealth of victims.[131] Any kind of sympathy, apology, or nursing from a defendant towards the victim and the motives and reasons behind the tortious act are elements that might affect the amount a defendant must pay.[132] This has been employed as an argument against the compensatory nature of *isharyo.*[133]

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[125] Daishin'in [Great Ct. of Jud.] May, 13, 1936 Sho 10 (o) no. 2183 Taiminshu 15-861 (Japan)
[126] Yokohama Chiho Saibansho [Yokohama District. Ct.] Jun., 20, 2003 Hei 11 (wa) no. 3642 Hanji 1829-97 (Japan)
[127] The main reason for granting damages in cases regarding non-economic losses, at least in current Japanese theory, is to compensate the victim. Therefore, the lifestyle the victim had before the injury is of great importance. Nevertheless, if the average lifestyle of the population is declining, some scholars believe that such a situation should also be taken into account. Kato *supra* note 124 at 206.
[128] Section 722 of the Japanese Civil code establishes a system of comparative negligence in tort cases. Under this provision, the negligence of the victim has to be taken into account when calculating the amount. In a 1915 case, the Supreme Court ruled that in the case of victims with some kind of disability, the negligence of the guardian should not be taken into account when determining damages. Daishin'in [Great Ct. of Jud.] Jun.,15, 1915 Tai 3 (o) no. 688 Minroku 21-939 (Japan)
[129] Ito *supra* note 98 at 164
[130] Ibid.
[131] Daishin'in [Great Ct. of Jud.] Jul., 7, 1933 Sho 7 (o) no. 2838 Minshu 12-1805 (Japan) The defendant hit the plaintiff with a brassier in the head during a party, causing laceration and affecting his eyesight. However, the defendant passed away before the appeal proceedings were completed, and his heirs continued in his place. The Supreme Court overturned the ruling of the lower court that took into account the wealth of the heirs when determining the amount.
[132] Ito *supra* note 98 at 164
[133] Ibid.

Traditionally, Japanese courts have granted low amounts of damages, usually around 1 million JPY in defamation cases. The Justice System Reform Council [134] recommended the following:

> *With regard to determining the amount of damages, in light of the criticism that, viewed overall, the amount of damages is too low, it is desirable that necessary institutional studies be made and that damage determinations continue to be made in line with the circumstances of each individual case without being bound by the so-called "market rate" of past cases.*

Later the same year, the Tokyo District Court held a symposium where it proposed that the standard for damages in cases of mass media defamation be raised to 4 or 5 million JPY.[135]

Japanese awards for non-economic losses tend to be rather low, possibly because judges enjoy full discretion in determining damages. As Saito[136] has stated:

> *[B]ecause judges can freely determine the amount lawyers do not know if their request is going to be granted even if they advocate for it, and even if their request is granted the amount is usually low and the burden on the lawyer is very heavy, therefore, they do not press for the emotional pains of the victim too strongly, and because of that their understanding of this type of pain diminishes, as a result the amount in non-economic losses cases has stayed low. Furthermore, because the amount is low it has become a vicious circle*.

This judiciary discretion and the lack of understanding by the lawyers is

[134] The Justice System Reform Council was established by the the Law concerning Establishment of Justice System Reform Council (Law No.68, promulgated on June 9, 1999) and its goal was to "*fundamental measures necessary for justice reform and justice infrastructure arrangement by defining the role of the Japanese administration of justice in the 21st century*". Its agenda was geared towards on how to achieve "*a more accessible and user-friendly justice system, public participation in the justice system, redefinition of the legal profession and reinforcement of its function*." For a more information in English see: http://japan.kantei.go.jp/policy/sihou/singikai/index_e.html

[135] Tokyo Chiho Saibansho Songai Baisho Sosho 「*Mass Media ni Yoru Meiyo Kison Sosho no Kenkyu to Teigen*」, 1209 Jurist 63 (2001) (Japan)

[136] Osamu Saito, *Isharyo no Santei no Riron*, 164 Hou no Shihai 5, 11 (2012) (Japan)

perhaps one of the reasons for the standard used in cases of foreign plaintiffs.

V. SECTION 711

In contrast to Section 710, Section 711 of the Japanese Civil Code grants remedy to close relatives in cases of a victim's death. The specific language of Section 711 reads:
A person who has taken the life of another must compensate for damages the father, mother, spouse and children of the victim, even in cases where the property rights of the same have not been infringed.[137]

This section is a direct result of the drafters' resistance to the school of natural law. There is no doubt that a victim has a right to life and that such a right is compatible with the perception of "right" upheld by the drafters. However, the right to life is peculiar in the sense that its infringement inherently results in the inexistence of the right holder. Therefore, under solely positivist thinking, there must be a legal basis for a claim to exist under such circumstances. The solution was to grant an independent claim to the victim's close relatives.

Furthermore, the language use clearly expresses that this provision applies to both economic and non-economic losses. However, since a victim's relatives could claim damages for economic losses via Section 709, interpretations of Section 711 have always linked it solely to non-economic losses.[138] Furthermore, in contrast to Section 710, which requires that liability fulfill the conditions set forth under Section 709, Section 711 grants remedy without citing the infringement of rights requirement. In its place, the drafters navigated the issue of liability by setting a limit for the number of people who could bring the claim.

This presents an issue for the necessity of the infringement of rights requirement and a concept of loss that is based on monetary compensation. Although the language of Section 710 sets forth a number of rights that grant a victim remedy when infringed upon, the courts and scholars have not construed it as being *numerus clausus.* However, the positivist approach of the drafters meant that the death of a victim would go unpunished, as

[137] http://www.moj.go.jp/content/000056024.pdf
[138] Ippei Osawa, *Minpo 711 ni okeru Hoeki Hogo no Kozo I Fuhokoi Sekinin no Seisakuteki Kaju ni kansuru Ikkosatsu*, 128(1) Journal of the Jurisprudence Association the University of Tokyo 157,158(2011) (Japan)

a deceased victim's rights could not be infringed upon.

Moreover, this resulted in many of the discussions regarding Section 711 – both during and after the drafting process – assuming a more academic and procedural nature than those regarding Sections 709 and 710. However, the development of the unlawfulness concept set forth in the previous chapter means the foundational background during the drafting process is no longer supported.[139] As a result, the study of Section 711 provides an opportunity to explore how Japanese legal thinking differs from other codes of similar background and influence.

A. THE DRAFTING PROCESS

During discussions regarding Section 711, Hozumi assumed responsibility for explaining the necessity of Section 711 and answering any questions brought forth by other committee members. Furthermore, in contrast with Sections 709 and 710, Section 711 inspired discussions that mostly concerned the legal and logical basis for the existence of Section 711 under the delictual liability model chosen by the drafters. There were almost no discussions regarding the scholarship, doctrine, or implication of selecting one school of thought over the other, as was the case with Section 709.

The original provision, as presented in the draft under Section 732, did not include the final sentence regarding the infringement of property rights. Although the drafters' conceptualization of *songai* included both economic and non-economic losses, the concluding sentence was added to ensure complete clarity that non-economic losses were covered.[140] The exchange premised that emotions such as sadness were included in non-economic losses that could be claimed under Section 710. One of the committee members, Kuniomi Yokota, inquired what would happen if the parents of a plaintiff were killed. Hozumi responded that unless the deceased was the provider or supporter of the plaintiff, there was no infringement of a right to justify liability under the rules of Section 709, as the children of the deceased did not have a right to the life of their parents. Nevertheless, if they did have a right, then the judge should take into account emotional losses in deciding

[139] *Id.* at 159
[140] *Id.* at 189

the amount for damages.[141] Therefore, sadness and similar negative emotions can be considered as loss, *songai,* at least from the perspective of the drafters. However, if they do not result from the infringement of a legal right, they would not entitle the victim to remedy.[142]

Yokota continued by highlighting a contradiction. If, as the drafters explained, the infringement of a legal right requirement under Section 709 was a means to broaden liability, then compensation for emotional distresses like sadness and hardship could not be completely explained, as they could not be considered rights in the traditional sense of the word. If that was the case, the requirement of infringement of a legal right would have the opposite effect, acting as a limitation to liability.[143] Yokota further proposed the elimination of the infringement requirement, in effect changing the language to more closely resemble delictual liability under the French *Code.*[144] By doing so, Yokota argued, there would be no issue in compensating the relatives of a deceased victim, even in the absence of a legal right.[145]

According to Hozumi, the infringement requirement covered sadness and suffering. He further argued that life in a society entails that some individuals will suffer harm and loss. Therefore, the infringement of rights requirement would establish the limits of delictual liability.[146] Hozumi explained that the relation between family members is such that a provision, such as Section 711, should be established as an exception to the rule of infringement, and that such provisions were present in civil codes of various countries.[147]

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[141] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 153 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 156)
[142] Osawa *supra* note 138 at 182
[143] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 173 hyo to 174 hyo available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 176-177)
[144] Section 709, under Yokota's proposal, would have read: "Whoever intently or negligently causes harm to another must compensate such harm."
[145] To be exact, Yokota argues that not compensating the children of the victim because they have no right to the life of their parent is not interesting (*omoshirokunai*).
[146] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 at 174 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at 178)
[147] However, Yoshimi argues that many of the codes presented by Hozumi as evidence dealt with economic losses without referring to non-economic losses. Seiko Yoshimi, *Seimei Shingai no Songai Baisho Seikyu to sono Sozokusei ni tsuite – tokuni Isharyo Seikyuken wo Chushin toshite-,* in Gendai Shohogaku no Shomondai: Tanaka Seiji Sensei Koki Kinen 675, 681(Eisuke Yoshinaga ed., 1967)

Furthermore, neither Tomii nor Ume offered any criticism of Hozumi´s stance that Section 711 was an exception to the general rules of delictual liability.

On the contrary, Ume explained that Section 711 was written in order to prevent an aggressor from evading punishment for infringing on another individual's right to life under the pretense that a victim's relatives possessed no rights in regards to the victim's life. Tomii also argued that in the case of death, the closest relatives of a victim were also victims, and that while monetary compensation may be inadequate to repair their losses, it was at least some consolation. Nevertheless, Hozumi also specified that only relatives listed under Section 711 could request remedy, and the claim did not extend to grandparents or grandchildren.[148]

B. THE EXTENT OF THE REMEDY

After the enactment of the Civil Code, the courts began construing Section 711 without taking into account the intent of the drafters. This occurred in two periods: pre-World War II and post-World War II.[149] During the former, the courts approached the issue mainly from the victim's standpoint, with coexistence of both the victim's and relatives' claims.[150] Scholarship regarding Section 711 has also followed the same course, with discussions centering on the transferability of a victim's claim in the case of death. Scholars who followed the German school argued that Section 709 did not allow for indirect losses. Therefore, the extent of the claims under Section 711 should fall within the scope of Section 709, allowing for both to coexist for the effect of their transferability.[151]

The Great Court of Judicature ruled that since the plaintiff and legal basis for the remedy granted under Section 711 and the economic losses suffered by victims were different, both claims could be brought forth without contradicting the spirit of the law.[152]

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[148] Hoten Chosakai Minpo Giji Sokkiroku Dai 41 at 148 ura available at http://dl.ndl.go.jp/info:ndljp/pid/1367568 (at 233)
[149] Osawa *supra* note 138 at 199 *ff.*
[150] Discussions regarding Section 711 have to be framed within the two opposing views regarding the transferability, *mortis causa,* of the victim's claim for non-economic losses that was mentioned in the corresponding section. Therefore, the issue was not whether the victims and their relatives had a claim, but rather the relation between those claims. See: Osawa *supra* note 138 at 200 *ff.*
[151] Osawa *supra* note 138 at 203
[152] Daishin'in [Great Ct. of Jud.] Jul. 31, 1942 Sho 17 (o) no. 428 Shinbun 4795-10 (Japan)

Subsequently, two issues regarding the language of Section 711 soon became apparent. The first issue was whether or not Section 711 was limited to cases in which the victim died. This would appear to be a non-issue; after all, the drafters clear about their intent and discussions regarding the basis of Section 711 were founded on the lack of the right of relatives to the life of the deceased. To reflect this, the provision is direct its language and limited the claim so that only those who have *taken the life of another* are liable to the victim's relative.

However, the Supreme Court ruled in 1958 that in cases in which a victim suffered a bodily injury resulting in grievous physical disability, a relative (in this case, the mother) could sue for remedy, as the emotional distress could be equated to that suffered in cases of actual death of a victim.[153] However, the court did not grant remedy under Section 711. Instead, it stated that in these cases, in which the facts were similar to the situation protected under Section 711, the relative's rights were infringed upon and, as such, it fell within the scope of Sections 709 and 710.[154]

Furthermore, the court was explicit that the defendant would be liable for emotional distress only in cases in which the victim's injury was of such a magnitude that the suffering of the victim's family could be equated to that they would have experienced with the death of the victim.[155] This was apparent in the court's ruling of a case in which an 8-year-old child was unconscious for two weeks as the result of the defendant's action, but the child's parents could not sue for emotional distress. The court recognized that the parents, who had not slept for four days, had suffered an extremely intense form of emotional distress. However, according to the court, their suffering could not be equated with that which would have resulted from the death of their son.[156]

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[153] Saiko Saibansho [Sup. Ct.] Aug. 5, 1958 Sho 31 (o) no. 215 Minshu 12-12-1901 (Japan)
[154] It can be argued that this stance goes against the express intent of the drafters, as it recognizes that third parties' rights can be infringed upon as a result of injury suffered by the victim. If this approach is taken in cases of physical injury, it is rather difficult to negate that the same infringement can result from the death of the victim. Therefore, the whole basis for the establishment of Section 711, granting remedy regardless of the existence of a right to the life of the victim, can be called into question.
[155] Saiko Saibansho [Sup. Ct.] Jun. 13, 1967 Sho 40 (o) no. 1308 Minshu 21-6-1447 (Japan)
[156] Saiko Saibansho [Sup. Ct.] Sept. 19, 1968 Sho 43 (o) no. 63 Minshu 22-9-1923 (Japan)

The second issue that the courts encountered was whether or not Section 711 limited remedy to the relatives listed. Hozumi was unambiguous in his opinion that the list provided by the provision was *numerus clausus*. The statutory language supports to this view, as it states that the responsible party is liable to the *father, mother, spouse, and children* of the victim. Indeed, there is no aspect that could be construed as allowing for expansion of the claim beyond the individuals established therein.

Initially, the courts strictly adhered to the law. However, some issues soon appeared, such as the status of illegitimate children. In a 1937 case, the Great Court of Judicature ruled that an unborn child who was conceived with a common law wife could sue for both economic and non-economic losses arising from the death of the father.[157] However, in the same ruling, the court denied the claim from the *de facto* spouse, reasoning that it could not be considered legally protected.[158][159]

At the lower court level, remedy was granted to the parent of an illegitimate child, provided the relationship between the child and parent was the same as if it were between a parent and a legitimate child.[160] Furthermore, in the event that no other relatives were alive, the courts construed Section 711 to include the grandparents of the victim. For example, in a 1967 case, the Tokyo District Court assumed the position that the language of the provision should be construed in a limited manner, yet recognized that the grandparents were the primary caretakers of the victim and should thus be granted a claim under Section 711.[161]

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[157] Daishin'in [Great Ct. of Jud.] Oct. 6, 1932 Sho 6 (o) no. 2771 Daiminshu 11-2023 (Japan)

[158] However, the court later adopted a more lenient view towards *de facto* spouses regarding various aspects of the conjugal life, such as financial support. Saiko Saibansho [Sup. Ct.] Apr. 11, 1958 Sho 32 (o) no.21 Minshu 12-5-789 (Japan)

[159] Some lower courts have violated the precedent and granted remedy to *de facto* spouses. Tokyo Chiho Saibansho [Tokyo District. Ct.] Dec. 10, 1968 Sho 42 (wa) no. 11524 Komin 1-4-1429 (Japan)

[160] Tokyo Koto Saibansho [Tokyo High. Ct.] Jul., 5, 1961 Sho 36 (ne) no. 617 Saiji 334-6 (Japan)

[161] Tokyo Chiho Saibansho [Tokyo District. Ct.] Nov. 20, 1967 Sho 38 (wa) no. 7690 Hanta No. 215 - 115 (Japan)
More reccently: Sendai Chiho Saibansho [Sendai District. Ct.] Feb. 27, 2008 Hei 19 (wa) no. 169 (Japan) However, in this case, the father of the victim also sued for damages.
Saitama Chiho Saibansho [Saitama District. Ct.] Feb. 27, 2008 Hei 19 (wa) no. 537 (Japan) both parents and the grandmother. However, being a blood relative is not enough. The court denied the claim of a brother under the argument that his relation with the deceased did not meet the criteria set under Section 711. Osaka Chiho Saibansho [Osaka District. Ct.] Apr. 28, 2008 Hei 18 (wa) no. 2506 Komin 41-2-534 (Japan)

In 1974, the Supreme Court ruled that Section 711 should not be interpreted as restricting claims to the father, mother, spouse, and children of the victim. Rather, it should extend to individuals who are in similar positions as those listed in the statute, and who would suffer emotional distress to an equal degree in the case of the victim's death.[162]

In this particular case, the court granted damages to the victim's sister-in-law, who had sued for damages under Section 711. In analyzing the relationship between the victim and the plaintiff, the court took into account that the plaintiff had a disability as the result of contracting myelitis during childhood, and she had cohabitated for many years with the victim, from whom she also received care and support. The court determined that the plaintiff's emotional distress in this situation should be granted legal protection without the need to utilize a legal right as a basis.

At the scholarship level, discussions regarding unlawfulness have also extended to Section 711. Hiroshi Suekawa was opposed to the idea that delictual liability arose from the infringement of a legal right. In particular, he argued that judgment of delictual liability should be based on the unlawfulness of the defendant's act, and that the infringement of a legal right was not a necessary requirement.[163] In regards to Section 711, Suekawa assumed the stance that, in general, the act of killing another person was unlawful *per se,* and that the consequences of such an event would affect a large number of people.

Therefore, as a matter of legal policy, it would be necessary to restrict the number of persons allowed to claim non-economic losses, even in the event they suffered no economic losses as a result of the victim's death.[164] He further argued that the claim granted to relatives could not be explained under the premise that a legal right must be infringed upon. Nevertheless, Suekawa continued, setting the standard of liability upon the conduct of the defendant, *i.e.*, the act of killing the victim, would preclude the need to resort to legal rights in order to explain the relatives' claims.[165]

In-laws have also been denied damages. Tokyo Chiho Saibansho [Tokyo District. Ct.] Aug. 27, 2013. Hei 24 (wa) 13073 (Japan)

[162] Saiko Saibansho [Sup. Ct.] Dec. 17, 1974 Sho 49 (o) no. 212 Minshu 28-10-2040 (Japan)

[163] Hiroshi Suekawa, *Kenri Shingai Ron* 481 (1930) (Japan)

[164] Suewaka *supra* note 163 at 501

[165] Suekawa *supra* note 163 at 502

Wagatsuma, in accordance with Suekawa's ideas, expanded the concept of unlawfulness. However, Wagatsuma approached Section 711 from a different perspective. First, Wagatsuma agreed with Suekawa that the infringement requirement was equivalent to an expression of unlawfulness within the Japanese Civil Code.[166] However, as mentioned in the previous chapter, Wagatsuma proposed that the standard for determining unlawfulness should be based on both the importance of the legal interest of the victim and the conduct of the aggressor.[167]

The main difference between the views of Suekawa and Wagatsuma is that Suekawa believed that liability under Section 711 arose from the fact that killing someone was unlawful *per se*, while for Wagatsuma, the unlawfulness of the act was insufficient for determining liability. Rather, Wagatsuma believed that liability arose from the severance of a victim's family ties and relationships with relatives that resulted from the aggressor's act.[168] This difference is not merely semantic. From Suewaka's perspective, the act of the defendant is unlawful *per se*, and thus the law must act in order to prevent an endless chain of liabilities to third parties. In the particular case of the Japanese Civil Code, it does so through the list of claimants set forth under Section 711. Since this list cannot be viewed as only setting a procedural means to a claim, but is rather a tool of legal and public policy, the courts would therefore struggle to grant remedy to individuals who are not covered by the language of the provision.

However, this is not an issue under Wagatsuma's approach. Since "family ties" are a key factor in determining liability, the issue is no longer linked to the concept of public policy, which permits an examination of each particular case in order to determine relations between victims and their relatives for the purposes of granting those relations legal protection under delictual liability. Furthermore, from Wagatsuma's viewpoint, killing another person would be considered unlawful in most cases, so the issue rests solely within the sphere of the legal interest protected –*i.e.*, the family ties – effectively classifying it as an issue regarding the unlawfulness of the loss.

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[166] Sakae Wagatsuma, *Jimu Kanri Futo Ritoku Fuhokoi* 125 (1988) (Japan)
[167] *Id.* at 126
[168] *Id.* at 138

In the end, judging from the case law, the courts seem to have favored a variation on Wagatsuma's approach. In both types of cases, the courts had based their decisions on an analysis of either the loss suffered by the claimants, *i.e.*, emotional distress resulting from the injury of the victim, or the type of relation between the victim and the claimant, *i.e.*, whether such a relation could be equated with the relations protected under Section 711.

VI. SUMMARY

The inclusion of two provisions regarding non-economic losses in the Japanese Civil Code evidences that the drafters were aware of trends in comparative law during the time they were writing the code. After all, each of the three drafters was trained in a country that had undergone the process of developing the legal foundation necessary to expand liability for non-economic losses. France in particular had recognized such a remedy for over 50 years by the time Ume and Hozumi obtained their doctorates. Tomii, who was educated in common law, also had the opportunity to track these developments, as non-economic losses under the common law were experiencing development during the same time frame.

In regards to the code itself, the simplicity of the language in Section 710 allows for an interpretation that permits the addition of new interests without much of an issue. However, given some of the relevant discussions in scholarship and case law, it is surprising that there was disagreement over whether or not the interests listed in Section 710 were *numerus clausus*. Moreover, there is the question of for what exactly the system set up by Section 710 compensates. The obvious answer would seem to follow the rules of Section 709 and identify "losses" as the object of the suit. However, the content of non-economic losses is not easily established, since non-economic losses are non-verifiable by their very nature. The consensus is that emotional suffering is the main loss requiring recovery, with emotional suffering ranging from pain and suffering to shame. Additionally, in defamation cases, social standing and loss of trust are also deemed recoverable.

However, the courts and scholarship have not always adopted the same stance regarding this matter. Scholarship has addressed the development of non-economic losses under the theory of personality rights, adding new rights as the courts address new issues,

such as pollution. The courts in those cases have tended to approach the issue from the losses suffered by the victim, *i.e.*, interface with the daily conversations, telephone calls, studies, sleep patterns, lectures or thoughts of the plaintiffs, emotional distress, and bodily harm. This recalls the right infringement requirement of Section 709. However, as the previous chapter mentions, the drafters' idea of a legal right was closely related to the concept of formal law as a means to distinguish between moral and legal considerations. Nevertheless, in most cases, non-economic losses are grounded in moral considerations rather than purely legal ones.

This also invokes the issue of differentiating between the infringement of a right and the loss that results from it in the case of non-economic losses, and whether this is even possible. This is usually addressed under the doctrine of subjective and objective non-economic losses. The drafting committee's discussion regarding the rights of relatives highlights this issue. Each member of the committee understood that the death of a close relative, such as a parent, triggers sadness and emotional trauma. The issue was never whether the loss existed, but rather how to justify the claim under the design of the system, as each member firmly believed that individuals do not hold rights over the lives of third parties.

However, since their idea of right was purely steeped in a positivist approach to the concept, whether or not relatives had their rights infringed upon by the death of a victim would appear to be a moot point. Thus, since the drafters believed that rights must be established via a formal law, and the promulgation of the Civil Code through the legal procedures of Japan granted the status of a formal law, relatives do maintain a right to the life of a victim by virtue of the existence of Section 711. In other words, the drafters themselves created the very right they were trying so hard to deny.

Another example of the same issue is how the courts decide when to grant damages for injuries of third parties. This chapter has presented one case[169] in which the court did not conduct an analysis of the action of the defendant or the injuries suffered by the plaintiffs' son. Furthermore, the court did not deny that the plaintiffs suffered emotional

[169] Saiko Saibansho [Sup. Ct.] Sept. 19, 1968 Sho 43 (o) no. 63 Minshu 22-9-1923 (Japan)

distress. Rather, the deciding factor was the degree of suffering. Yet another example is claims for non-economic losses in the event of damage to property, as the court decides whether to grant remedy based solely on the sentimental relation of owners with their property. However, as this category of cases concerns infringement of property right, the distinction might be more difficult.

In cases of loss of chance (*soto teido no kanosei*), this argument finds firmer ground. The emotional distress of a victim whose life is ending is by far more ambiguous than one whose life was abruptly cut short. Indeed, in cases in which a patient is aware that a procedure may not help at all – a sort of "Hail Mary" – it might be impossible to claim that their suffering was augmented by the actions of medical staff. Nevertheless, the courts have usually addressed these cases by granting damages for emotional distress that resulted from the infringement of a substantial probability. In these cases, it might be more accurate to say that the courts are compensating for the infringement of the right, rather than for any loss resulting from it.

From there, the courts arguably adopted a system similar to those of other countries with French legal influence, which dictates that the unlawfulness of a loss determines whether or not a plaintiff qualifies for remedy. Accepting this line of thought yields two possibilities. The first possibility is that the courts decide whether the rights of the plaintiffs are infringed upon based on the suffered loss. However, this would mean the courts do not follow the cause-effect relationship between rights infringement and loss as established under Section 709. The second possibility is that the courts simply reject the idea of right infringements in these types of cases, as the rulings are based on the existence and nature of the loss itself and forgo a need for any sort of infringement.

However, a critic may assert that the loss is simply the evidence necessary to prove the occurrence of an infringement. Indeed, this is not a new position, as the doctrine of objective and subjective *dommage moral* that is discussed in the following chapters addresses precisely this issue. Nevertheless, it would mean that the infringement of a right must be considered the loss *per se*. It would also mean that any reparation for non-economic losses would need to include two aspects: reparation for infringement of the right

and any actual losses suffered by the victim, as evident in cases of divorce.

Finally, there is the issue of the relation between *isharyo* and protected legal interests. As cases concerning emotional distress involving foreigner-victims have illustrated, the standard adopted by the courts blurs the distinction between economic and non-economic losses and raises the issue of discrimination. More than anything, it demonstrates the detriment to the nature of the legal interest when the matter of quantifying losses assumes center stage. Regarding economic losses, such as lost income, the argument that the victim's country should set the quantification method is a sound one. After all, the goal of such a remedy is to grant the victim the amount lost as a result of the harmful event. However, in the case of non-economic damages, to which such standards are not applicable, it is tempting to criticize such an approach.

Under Section 17 of the Act on General Rules for Application of Laws, the governing law is Japanese law.[170] However, since judges have absolute liberty to determine the amount of non-economic damages, the issue becomes whether or not they are obliged to determine it under the Japanese standard. Furthermore, since the issue at hand does not relate to the existence or nonexistence of liability under Sections 709 or 710 of the Civil Code, but rather on the quantification method, the question arises whether such a quantification method is law for the purposes of Section 17 – in other words, whether the liquidation method is an issue of substantive law or procedural law.

Furthermore, the argument of the High Court of Tokyo[171] cannot be considered logical. If calculations are made on the basis of one of two choices, Japan or another country, and that selection depends upon the country of origin of the victim or next of kin, then the decision is made on the basis of nationality. The application of this standard in cases of people with multiple nationalities or who can freely live in multiple countries, such as citizens of the United Kingdom or the European Union, is ambiguous.

The relation between this approach and Section 14 of the Constitution, which grants

[170] Article 17: The formation and effect of a claim arising from a tort shall be governed by the law of the place where the result of the wrongful act occurred – provided, however, that if the occurrence of the result at said place was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern. Available at http://www.japaneselawtranslation.go.jp/law/detail/?id=1970&vm=&re=

[171] Tokyo Koto Saibansho [Koto District. Ct.] Jan. 25, 2001 Hei 12 (ne) no. 5097 Hanta 1059-298 (Japan)

equal protection under the law, is not clear either – nor is the question of whether the courts would be willing to apply this approach in the reverse situation, *i.e.*, in the case of a foreigner whose home country's economic situation situates him or her well above the standard of living of Japan. Case law regarding punitive damages seems to indicate that the courts would reject claims for higher amounts under the justification that they contradict Japanese public policy.[172]

Finally, inquiries into the nature and function of *isharyo* extend beyond the realistic scope of legal scholars. In the first place, there appears to be no reason to separate these discussions from those about delictual liability in general in order to concentrate solely in non-economic losses. Moreover, whether the victim has been compensated or the aggressor has been punished is better left to sociology and psychology, as the circumstances of the actors in each particular case cannot be fully understood from the mere amount granted in damages.

[172] Saiko Saibansho [Sup. Ct.] Jul. 11, 1997 Hei 5 (o) no. 1762 Minshu 51-6-2573 (Japan) However, this case dealt with the *exequatur* of a California ruling granting punitive damages to the plaintiff.

CHAPTER 4 HARM AND LOSS FROM THE PERSPECTIVE OF COMPARATIVE LAW

I. THE CONCEPTS OF HARM AND LOSS

This chapter engages with the concepts of harm and loss, their various meanings under comparative law, and the ways in which their differences have shaped discussions and understandings of the law of non-economic losses. The existence of a loss, whether economic or non-economic, is more than a simple argument of semantics. In fact, it is one of the key differences between civil and criminal liability, and is a central element of the law of delicts – and to a certain extent, the law of torts.

The first challenge is to determine what is considered harm and loss, as both concepts are approachable from various perspectives and their importance deviates depending on legal tradition. As Wards has explained:

> *Tort liability under the common-law system has from the very beginning been determined on the basis of a posteriori arguments in contradistinction to a priori logic of the civil law. Yet, the inductive process of the common-law was undoubtedly less the result of design than of necessity. In the early development of fear-damage, a hatchet blow in the middle of the night before the startled eyes of Madam Tavern-Keeper was reason enough for Judge Thorpe to sustain a verdict of half a mark without needless concern for the principles which were being established that would make the brandishing of a dunning letter worth $500.*[1]

The *a priori* approach of civil law is responsible for the importance of harm and loss as elements of civil liability. Since the abstract concept of loss is the dominant element for establishing liability under the law of delicts, civil law scholars and judges must first grapple with abstract ideas in order to effectively apply them to specific cases. In doing so, the elements that define *redressable harm* or *redressable losses* naturally become the main point of inquiry. However, the law of torts emphasizes *a posteriori* arguments over abstract

[1] Peter Ward, *Tort Cause of Action*, 42 Cornell L. Rev. 28, 30 (1956)

concepts, which arguably precludes the possibility of concepts such as loss and harm to develop as they would under the logical rules of civil law.

As Zimmermann[2] has explained, "*[t]he continental law of delict presents the picture of a coherent body of rules based on general principles and abstract concepts."* Furthermore, he has noted that "*the crisp provisions of the modern codes, still essentially shaping our ideas about delictual liability, are the result of a long and characteristic process of generalization, systematization and abstraction."* Regarding the theory of harm and loss, this process of abstraction composes a series of criteria that seek to remove these concepts from any specific context and establish them as general principles that are applicable to individual cases for the purpose of resolving conflicts. This is especially true in countries that adhere to the French general clause system of delictual liability.

Furthermore, this prioritization of the facts of the case over the principles allowed common law to develop claims for non-economic losses much earlier than other civil law countries, albeit they were limited in most cases to a parasitic nature. Most civil law countries do not have a statutory definition of harm or loss in their civil codes, with the exceptions of Argentina and Paraguay. Section 1835 of the Paraguayan Civil Code defines harm as any loss regarding the person, rights, faculties, or property of an individual,[3] while Section 1737 of the Argentinian Civil Code defines harm as the infringement of an individual's legal right or interest, property, or collective rights.[4] These two definitions align with traditional definitions of harm in civil law scholarship. Section 1382 of the French Civil Code does not define *dommage*, but general consensus has determined *dommage* to be a loss regarding the person, property, or rights of an individual. This consequently raises the issue of whether or not harm and loss refer to the same concept.

De Cupis,[5] whose two-volume treatise on harm is highly regarded as the seminal work on the subject, began by recognizing that, broadly speaking, a loss is nothing more

[2] Reinhard Zimmermann, *The Law of Obligation –Roman Foundations of Civilian Tradition* 907 (1996)
[3] Section 1835: There will be harm when an individual suffers a loss to his person, rights, or faculties, or to the items under his ownership or possesion. Translation by the author-.
[4] Section 1737: There exists harm when a right or interest not reproached by the law and concerns the person, patrimony, or a collective right. Translation by the author.
[5] Adriano de Cupis, *El Daño* 81 (Angel Martínez Sarrión trans. Bosch 1975)

than a *"decrease or alteration of a favorable situation."* However, only loss as a legal phenomenon qualifies to be the subject of legal studies. Furthermore, harm can be a legal effect so far as defying the conditions set forth by a legal rule precludes an individual from enjoying the benefits of that rule. This observation is not as objective as it may initially seem, as identifying "*a favorable situation"* entails a subjective evaluation by the individual. Therefore, two distinct standards are needed: the first to delineate a favorable situation and the second to determine when this favorable situation has decreased.

De Cupis continued by stating that harm as the cause of legal effects, *i.e.*, a legal event, is composed of two elements. The first is a material element, *i.e.*, a physical phenomenon which is the nucleus of the concept. The second is a formal element in the form of a legal rule.[6] The legal effect of harm is thus the law's reaction, the goal of which is to redress the harm. Harm, therefore, entails an event or fact, a phenomenon that exists in the physical world that in turn produces certain results. This is again problematic, as a physical phenomenon might not be sufficient on its own to justify a redress in favor of the victim. Therefore, the legal rule forms the basis for the second standard and allows for an objective measurement of favorability. It does so by establishing rights or interests, which in turn afford the ability to claim redress in the case of infringement.

However, through his work, De Cupis has occasionally confused the terms harm as a physical phenomenon and harm as the loss that results for the victim. De Cupis[7] has recognized that it might be possible to question whether a harmful event or act should be considered a legal fact, yet any legal harm must by its own nature derive from a human act. He has argued that the harmful event and harm (loss) are parts of a complex process, but the main element necessary to produce a legal effect is the harm, which must nevertheless derive from a human act.[8].

When De Cupis argued that only harm deriving from a human act should be considered a valid cause for a legal effect, *i.e.*, civil liability for damages, he was referring to the distinction between the concepts of harm and loss. A car accident alone does not

[6] *Id.* at 82
[7] *Id.* at 83
[8] Ibid.

provide the owner of a vehicle with a claim for damages. In order to claim *dannum emergens,* the owner first must establish that the car had value, then quantify that value. The same is true for *lucrum cessans,* for which the victim must first prove the occurrence of a loss, such as an inability to work for a certain amount of time. Not having a vehicle could cause a victim to lose income in some cases, but not all. Therefore, the accident and the loss are treated differently.

Furthermore, under this approach, it is inadequate to qualify harm as either economic or non-economic because harm refers to a change in the physical world, regardless of the existence of legal rules. Thus, any harm yields the possibility of an individual suffering both economic and non-economic losses. De Cupis himself has recognized this, writing that "*it is easy to realize that a single fact can derive in both material and intangible harm (losses).*"[9]

In contrast with civil law, common law presents the concepts of harm and loss as deeply connected to each individual tort. Discussions of whether there can be any general principle in the common law of torts have been ongoing for well over a century. Pollock has said:

> *It is not only certain favoured kinds of agreement that are protected, but all agreements that satisfy certain general conditions are valid and binding, subject to exceptions which are themselves assignable to general principles of justice and policy. So we can be no longer satisfied in the region of tort with a mere enumeration of actionable injuries.*[10]

However, Pollock's ideas do not seem to have withstood the passage of time. Prosser has referred to "tort" as:

> *Tort is a term applied to a miscellaneous and relatively unconnected group of civil wrongs, apart from than breach of contract, for which a court of law can afford a remedy in the form of an action for*

[9] *Id.* at 125

[10] Frederick Pollock, *The Law of Torts* 24 (4th ed., 1886) available at http://files.libertyfund.org/files/2123/Pollock_1428_EBk_v6.0.pdf

> *damages. The law of torts concerns the compensation of losses suffered by private individuals in their legally protected interests due to conduct of others that is regarded as socially unreasonable.* [11]

Zimmermann has commented on torts as a whole, saying, "*[t]ort does not constitute a coherent body of law, definable in general and abstract terms, but is no more than the sum total of variety of individual torts that have developed, under the writ system, in characteristically casuistic and haphazard fashion."*[12] If this is indeed the case, and there are no general principles applicable to all torts, then the concept of loss derived from the remedy is logical. Legal loss is understood as the amount the victim receives. However, that is not to say that monetary compensation is the absolute remedy to a legal loss. Rather, a legal loss can have no remedy surpassing that granted in the form of damages. It also means that this approach is not compatible with a more general view of loss, such as that of the French system. On the other hand, since this approach replaces the lack of general principles of harm or loss with an itemization-like list of damages, it is arguable to a certain extent that it is also applicable to systems that limit liability to the infringement of a set of rights, *i.e.*, that of Germany.

The concept of loss is not absent from the law of torts; indeed, any book about tort is likely to utilize terms like "the loss of the victim." However, these instances convey a specific meaning within each tort. Roberts has argued that there are two models available to explain tort law. Under the first model, or loss model, the overall objective of tort law is to define cases in which the law may justly hold one party liable. Furthermore, at least under the tort of negligence, damage (loss) is the key element, and the duty of care is essentially a "control device" that is concerned with the reasons a defendant might be exempt from liability, regardless of the existence of loss.[13]

The second model, or rights model, posits that a tort is a species of wrong, with a wrong being the breach of a duty owed to someone else. Such a breach, in turn, is the infringement of a right that the plaintiff has against the tortfeasor. Therefore, the law of

[11] William L. Prosser, *Handbook of the Law of Torts* 1 (1941)
[12] Zimmermann *supra* note 2 at 907
[13] Robert Stevens, *Torts and Rights* 2 (2007)

torts relates to the secondary obligations that result from the infringement of primary rights. The main focus of tort law is the infringement of such rights, not the infliction of a loss.[14]

Nevertheless, Roberts has not defined loss, a posture mimicked by many commentators. Furthermore, by arguing that the rights model is adequate both for torts that are actionable *per se* and those that require another element, he has placed the emphasis on a defendant's duty of care, rather than on a victim's loss. This approach may render a general conceptualization of harm or loss impossible, as every tort has a unique set of rules and standards.

However, some commentators have argued that the issue of liability can change depending on the standard and the importance of the loss. A prime example is the tort of negligence. The traditional understanding is that liability in negligence is based on the fact that the tortfeasor breached a duty of care. However, McBride has theorized that the tort of negligence can be approached from two angles. The first proposes that parties do not have a duty of care, but rather a duty to pay damages if they fail to perform that care. McBride has called this the "cynical view" of duties of care in negligence.[15] In contrast, the second angle argues that parties who obligate themselves to conduct or refrain from conducting an act actually have the duty to fulfill that obligation, and failure to do so yields a secondary to pay damages emerges.[16] McBride has deemed this the "idealist view" of duties of care.

In the specific case of the tort of negligence, McBride has argued that to those who adopt the idealist view, liability is based on a wrong, *i.e.*, an individual is liable because the victim suffered a loss that resulted from a breach of the duty of care.[17] In contrast, those who maintain the cynical view believe it is possible to explain the law of negligence without relying on the concept of duty of care. According to McBride, a cynic would indicate that an individual should be held liable for negligence if, by acting unreasonably, their actions caused another person to suffer some kind of loss, and the law does not

[14] Robert Stevens, *Torts and Rights* 2 (2007)
[15] Nicholas J. McBride, *Duties of Care – Do they Really Exist?,* 24(3) Oxford Journal of Legal Studies 417, 420 (2004) (U.K)
[16] *Id.* at 421
[17] *Id.* at 422

provide any kind of defense.[18] Furthermore, he has asserted that the cynical view dictates that the court's inquiry into whether a duty of care has been breached is really a question of whether there is any reason the defendant should not be held liable.[19]

Jansen has advanced this idea further by incorporating an analysis of civil law and presenting two ways to approach the issue of liability under negligence: either an individual is liable because of a breach of legal duty, or liability is based on the wrongdoer's responsibility for a certain outcome.[20] He has highlighted how English common law approaches the discussion through various losses, while Germany requires the infringement of a protected right and Italy demands that the loss be unjust. In contrast, the French model rejects these approaches and employs the ideas of damage, fault, and causation to assess liability.[21]

Recently, discussions have engaged with the idea of a more abstract concept. Nolan has defined damage as the following:

> *[A] certain kind of interference with a person's protected interests – typically and paradigmatically either bodily or mental injury, or an impairment of the value or utility of property – such as would ground a claim in negligence*" and loss as a "*an abstract concept of being worse off', such that the suffering of a loss amounts to a 'detrimental difference' to the person who suffers it*.[22]

He has also presented a reason for a damages concept under a right-based analysis of the law of negligence:

> *[T]he existence of the duty to act with reasonable care that (on this view) underpins negligence law depends on showing that it was reasonably foreseeable that the defendant's actions would result in the claimant suffering (as appropriate) physical injury or*

[18] *Id.* at 423
[19] *Id.* at 424
[20] Nils Jansen, Duties and Rights in Negligence: *A Comparative and Historical Perspective on the European Law of Extracontractual Liability,* 24(3) Oxford Journal of Legal Studies 443, 443(2004) (U.K.)
[21] *Id.* at 444
[22] Donal Nolan, *Rights, Damages and Loss*, 36 (3) Oxford Journal of Legal Studies 1, 2 (2016)

> *psychiatric illness, or damage to property in which the claimant had a sufficient interest at the time it was damaged*.[23]

To Nolan, this confusion of terms is also cause for disorientation regarding the law of negligence. He has specified that damage refers to the wrong in some cases, stating that "*this kind of usage is to be deprecated, as when 'damage' is collapsed into 'wrong', the utility of the damage concept as a distinct element of the cause of action for negligence is lost.*"[24] Furthermore, damage under the law of negligence implies that there is a victim. Cases of personal injury do not present much of a problem, as the damage is a result of the defendant's conduct.

However, he has clarified in cases of damage to property:

> *[T]he need to establish this connection between claimant and damage requires us to show not only that a particular item of property has suffered 'damage', in the sense of an impairment of its utility or value, but also that the claimant has a certain kind of right in the property in question.*

Nolan has ultimately concluded that "*[i]n everyday parlance, we can certainly say that the claimant's body or car has been 'damaged', but the damage that grounds a negligence claim is the more intangible notion of a certain kind of interference with a person's protected interests*."

This thesis does not analyze the intricacies of the right-based analysis of negligence law, as that is another legal area of its own. Nevertheless, Nolan's argument is certainly not one that can be found in the common law of torts at large. Furthermore, the fact that it is an argument made in the law of negligence potentially indicates that these types of non-limited liability clauses are more hospitable to a general theory of harm than those based on specific conducts or the infringement of absolute rights. For a more traditional approach, the figure of "damages" is perhaps an adequate reference. Each type of damages, from compensatory to punitive, is used to remedy the victim's losses. Therefore, a legal loss can

[23] *Id.* at 4
[24] *Id.* at 6

be defined by its remedy rather than by a set of abstract and general principles that enshrine logical rules.

Under De Cupis' analysis of harm in these types of systems, both material and formal elements of harm converge within a single event. The law of torts or an exhaustive list of rights suggests that an aggressor's conduct in and of itself is the standard to guide the measurement of the loss. Especially when taking into account intentional torts, such as battery, assault, and intentional infliction of emotional distress, the discovery of a general concept of harm or loss seems impossible. After all, these torts mainly focus on the conduct of the tortfeasor rather than the loss suffered by the victim as grounds for establishing liability.

II. REDRESSABLE LOSSES IN CIVIL LAW

The most basic characteristic of a protected interest is that it is a human interest.[25] As such, the interest of an animal in its life is superseded by the wellbeing of a human individual. However, for an interest to be legally relevant, the law must provide for a remedy in the event it is infringed upon.

De Cupis has argued that one must understand the concept of "asset" in order to understand the concept of interest. According to De Cupis, an asset is anything that can satisfy a necessity, with the necessity being a requirement or need that arises from the lack of certain asset.[26] He has cited two main theories that aim to explain the concept of interest under that background. The first theory considers interests a valuation of an asset in regards to a need. The second theory posits that an interest is the objective measure of the relation between the subject of the need and the object capable of satisfying that need.[27]

Carneluti has rejected the first theory, as legal rules do not protect the subjective valuation that an individual grants to an asset[28] because the victim retains the valuation that the asset provided, even in cases where harm has occurred. In other words, since the interest in this case is an intellectual endeavor, the value of a certain asset derives from the

[25] De Cupis *supra* note 5 at 109
[26] Ibid. However, De Cupis uses the term *bene* or *bien* which denotes not only material assets but also inmaterial interests.
[27] De Cupis *supra* note 5 at 110
[28] Francesco Carnelutti, *Il Danno e il Reato* 12 (1926) (It.)

consciousness of the individual. The harm cannot affect this consciousness, so it cannot be legally protected.

Nevertheless, continental civil law has adopted two approaches to the matter of redressable losses, and although the term civil law is used to refer to both French and German legal traditions, these traditions employ starkly different approaches to the concepts of harm and loss. This section briefly discusses the background of codification processes and how they have influenced the law of delicts in each system. It also provides a simple introduction to how these two legal traditions approach the concepts of harm and loss. As such, it is not a review of the elements of delictual liability, although it briefly addresses them to provide clarification.

A. THE FRENCH METHOD

The French *Code* is the product of the ideology of the French Revolution. Merryman and Pérez-Perdomo have explained:

> *The rampant rationalism of the time also had an important effect on French codification… The assumption that, by reasoning from basic premises established by the thinker of the secular natural law school, one could derive a legal system that would meet the needs of the new society and government.*[29]

Therefore, the *Code* was never intended as a legal tool for lawyers and judges. Instead, it was written with the French people in mind.

Merryman and Pérez-Perdomo have further stated:

> *There was a desire for a legal system that was simple, non-technical and straightforward- one in which the technicality and complication commonly blamed on lawyers could be avoided. One way to do this was to state the law clearly in a straightforward fashion, so that ordinary citizen could read the law and understand what their rights*

[29] John H. Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition – An Introduction to the Legal Systems of Europe and Latin America*- 29 (3rd ed., 2007)

and obligations were…"[30]

This desire for simplicity is apparent in the text of Section 1382 of the *Code,*[31] which is the primary provision governing delictual liability. There are no legal qualifications and no technical terms, except maybe fault, that could confuse a reader of the code about the general principle the statute enshrines.

However, this also means that the concept of *dommage* can be construed in a broad manner, as there is no statutory limit as to what can be claimed. This creates a situation in which *dommage* is any decrease of a favorable situation. Yet, this means that a legally relevant criteria must be set for a loss to be considered certain. The simplicity of the general clause requires that lawyers and judges compose a standard for approving or denying the compensation of a loss. In fact, these rules were developed in accordance with traditional legal thinking. Thus, they are general principles that can be applied to any number of factual situations.

Furthermore, the issue of intent does not influence the existence of liability as much as it is an issue of causation or remoteness under English law.[32] Except in certain cases, such as abuse of rights, negligence is sufficient to support most claims.[33] In this regard, it seems dubious that laymen could comprehend some of the intricacies surrounding these concepts. Ironically, the simplicity of the *Code* invited the technicality that the French drafters endeavored so strongly to avoid. In this case, as De Cupis has explained, the formal elements of loss are not limited to the legal norm expressed by a law and instead also include legal doctrines that support and expand the formal law.

The rules that guide the examination of losses to determine if reparations are justifiable are known as "characteristics of redressable loss" (*les caractères du préjudice*

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[30] Ibid.
[31] Art 1382: 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrive, à le réparer'
"Any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it"
Translation from: http://www.biicl.org/files/730_introduction_to_french_tort_law.pdf
[32] David Howarth, *The General Conditions of Unlawfulness, in* Towards a European Civil Code 845, 862 (Hartkamp, Hesselink, Hondius, Mak, Perron eds. 4ed. 2011)
[33] Cees Van Dam, *European Tort Law* 226 (2ed., 2013)

réparable). Cadiet[34] has explained that, traditionally, a loss must have subjective elements to be considered legally significant – *i.e.*, it must be personal and legitimate. A legal loss must also have objective elements, *i.e.* it must be direct and certain. There are some variations in wording, but these criteria are generally accepted.[35]

The certainty of loss in this regard entails that the loss must be real, not hypothetical.[3637] A future or eventual loss, *i.e.*, a loss that has yet to materialize but is expected to do so, is also considered certain. Accordingly, losses that might not occur are not compensated for, even if they are possible.[38] A loss is considered direct when it results from a harmful act or event. This criterion engages with causality and addresses problems that arise when establishing a causal link between the act of the plaintiff and the loss of the victim. Finally, the subjective elements of loss refer to its legal value, *i.e.*, the importance a society places on protecting such interests. This has to do not only with substantive law, but also with customs and sources of law in general. It is deeply rooted in the concept of unlawfulness of any particular system.

Those abstract rules do not involve the quantification of the loss. Their main objective is to create a method for determining when a certain loss warrants liability. The existence and quantification of loss are therefore two separate elements, which in turn are treated in different manners, as illustrated by the use of the terms *dommage* for the harm or loss and *dommages-intérêts* for the actual monetary awards. This is aligned with the basis of the system, as focusing on quantification before determining if a loss deserves compensation would require an exhaustive list of losses to ensure the coherency of the system. It would also contradict the influence under which the *Code* was drafted. The

[34] Loic Cadiet, *Les Métamorphosis Du Préjudice*, in Les métamorphoses de la responsabilité: sixièmes Journées René Savatier, Poitiers, 15 et 16 mai 1997 / [colloque commum aux Facultés de droit de l'Université de Montréal, de l'Université catholique de Nimègue et de l'Université de Poitiers] 39 (1997) (Fr.)

[35] Philippe Le Tourneau & Loic Cadiet, *Droit de la Responsabilité et des Contrats* (2000) (Fr.)
Henri Mazeud, Leon Mazeud & André Tunc, *Lecons de Droit Civil - Obligations Théorie Générale* (Francois Chabas ed. 8ed., 1991) (Fr.)

[36] Alain Benavent, *Droit Civil - Les Obligations* - 467 (10 ed., 2005) (Fr.)

[37] However, this requirement is not as strict as it might seem ar first, as Le Torneau mentions “car la certitude n’est pas de ce monde”.

[38] Manuella Bourassin, *Droit des Obligations - La Responsabilité Civile Extracontractuelle-* (2nd ed., 2014) (Fr.)

French method is then a set of rules that aim to provide a means to discover which of the many daily losses that individuals suffer should be legally protected without explicitly limiting the claims of a victim.

B. THE GERMAN METHOD

German legal tradition has arguably dictated clear and specific rules since before the advent of the modern German nation.[39] Modern German legal culture is fond of legal order, and commentaries by German legal scholars have been likened to descending a pyramid composed of a great number of sub-sections.[40] Perhaps the primary difference between the French *Code* and the BGB, at least from a historical point of view, is evident in the intended public of the BGB. The German code was not written with the German people in mind. Rather, it was a product of the historical school of jurisprudence. It is historically oriented, scientific, and rational,[41], and was written for an audience of law professionals.

Merrymann and Pérez-Perdomo have explained that *"the idea that the law should be clear and simple so that it could be correctly understood and applied by the popular reader was expressly rejected."*[42] The BGB is not the result of abstraction or examining the natural and secular world for general concepts. It was designed to be systematic and scientific to a degree that the French drafter rejected, and the effects are apparent in the law of delict.

In contrast with the French general clause, itself a result of the development of fault-based liability during the 19th century, the Pandectists advocated for a return to the limited scope of aquilian liability that existed in Roman law.[43] Consequently, Section 823 of the BGB only lists a certain set of protected rights that, if infringed upon, can render an individual liable for damages. Zimmermann[44] has highlighted that *"the German law of delicts does not protect a person's property at large,"* which in turn means that some losses, such as pure economic loss, can only be protected under contract law, as they are not

[39] Frederick the Great's Landrecth of 1794 had more than seventeen thousand provisions.
[40] Van Dam *supra* note 33 at 149
[41] Merryman & Perdomo *supra* note 29 at 31
[42] *Id*. at 32
[43] Zimmermann *supra* note 2 at 1036
[44] Zimmermann *supra* note 2 at 905

among Section 823's protected absolute rights.[45]

In order to file an action under Section 823 of the BGB, four requirements must be satisfied: first, the violation of one of the enumerated rights; second, such interference must be unlawful; third, it must be culpable; and fourth, there must be a causal link between the defendant's conduct and the victim's harm.[46] Among the elements of civil liability, the infringement of one of the enumerated legal rights has replaced the emergence of a loss.

Under that premise, the idea of general theory of harm that dictates a set of abstract rules to apply to different situations becomes purposeless and immediately disappears. The drafters of the BGB had a specific type of loss in mind when redacting those rules. Yet, regardless of the fact that the design of the BGB was influenced by the legal science of the 19th century, the drafters were opposed to the idea of defining harm or loss.[47] This yielded a system in which legal remedies for a victim are restricted to the specific cases listed in the BGB, *i.e.*, rights to life, bodily integrity, health, freedom, property, and the last clause of other rights, which are related to the concept of *rechtswidrigkeit* and serve to limit liability. Therefore, it was unnecessary to devote energy or time to the creation of an abstract concept of harm or identify its differences with the concept of loss. Furthermore, during the late 19th century in Germany, the only type of loss that was of legal importance was that which could be subject to economic valuation.

These factors led to the implementation of the *differenztheorie* developed by Mommsen, under which damages are purely compensatory.[48] This theory identifies recoverable loss as the difference between a plaintiff's position after an unlawful act and

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[45] Francesco Paresi *et al.*, *The Comparative Law and Economics of Pure Economic Loss*, 27 International Review of Law and Economics 29, 32 (2007)

[46] B. S. Markesinis & Hannes Unberath, *The German Law of Torts: A Comparative Treatise* 43 (2002)

[47] Mina Wakabayashi, *Hotekina Gainen toshite 「Songai」 no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (1)*, 248 Ritsumeikan Law Review 108, 119 (1996) (Japan)

[48] Nils Jansen, *Developing legal doctrine – Fault in the German law of Delict-, in The Development and Making of Legal Doctrine* 96 (Nils Jansen ed., 2014)

For a more in depth look at the historic development of the concept of harm in Germany

Mina Wakabayashi, *Hotekina Gainen toshite 「Songai」 no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (1)*, 248 Ritsumeikan Law Review 108 (1996) (Japan)

Mina Wakabayashi, *Hotekina Gainen toshite 「Songai」 no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (2)*, 251 Ritsumeikan Law Review 105 (1997) (Japan)

Mina Wakabayashi, *Hotekina Gainen toshite 「Songai」 no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (3)*, 252 Ritsumeikan Law Review 63 (1997) (Japan)

what it would have been without the occurrence of that act. Zimmermann has asserted that "*[s]ince, as a rule, only material damages are recoverable, this involves a comparison of the actual value of the plaintiff's assets after the damaging event with their hypothetical value established on the assumption that this event had not occurred.*"[49]

However, since the primary purpose of the *differenztheorie* is to quantify the loss rather than define it, German legal tradition arguably allows for the concepts of legal harm and legal loss to be construed as synonymous. Furthermore, by providing a list of legal interests that must be infringed upon in order for liability to arise, harm and loss have already been granted statutory relevance. Therefore, the application of *differenztheorie* is rational in the context that such a valuation of legal interests in a monetary fashion takes precedence over their definition. The loss suffered by the victim refers to a specific type of infringement and is unlawful by the very nature of that infringement. It is further arguable that De Cupis' model presents the material element and formal element of harm as equivalent under German law. Thus, qualifications like unlawfulness or inexistence under the French tradition occupy a more significant role.

So far, the discussion has centered on the possibility of distinguishing harm and loss as two discrete concepts. However, at least from a legal perspective, this is arguably only possible or necessary in civil law countries that follow a general clause system. The case is much weaker for the German system, where legally protected rights are clearly listed and the courts are not concerned with identifying new losses to redress. These interests have been assigned a clear position and value within the legal system.

III. UNLAWFULNESS

Having established the ways in which the philosophies behind codification processes have influenced the ideas of harm and loss in France and Germany, the next step is to analyze the concept of unlawfulness. Although the importance of unlawfulness is the same in both systems, the different approaches yield somewhat varied results. Unlawfulness is an essential element under the civil law delictual liability system. However, most codes do not explicitly state that an unlawful action or loss must occur to

[49] Zimmermann *supra* note 2 at 824

entitle the victim to a claim.[50] In modern times, the unlawfulness requirement is the result of studies of the German Pandectist movement during the late 19th century as a means to express that not every harmful conduct leads to liability.[51] However, even before the promulgation of the BGB, civil codes such as the Austrian Code of 1811 or the Swedish Code of 1881 had already employed language that required unlawfulness in the area of delictual liability.[52] In Roman law, the concept of *injuria* referenced an act that was against the law. Therefore, it was more similar to the modern concept of illegality than to unlawfulness. However, this changed with the advent of the *ius commune*, the traditional approach being that the concepts of negligence (*culpa*) or intent (*dolus*) were of far more importance than the illegality or unlawfulness of the act.[53]

However, since the function and role of delictual and tort liability have changed from purely punitive to identifying compensation for victims as the main goal, the standard of unlawfulness under the concepts of negligence and intent has also transformed to more accurately reflect this change. This transformation consisted of a shift that can be observed in the three-way division of the concept of negligence that is present in some Latin American codes and the standard proposed by Judged Learned Hand in the common law. The French *Code* spearheaded this approach, which replaced the concept of *injuria* with the idea of *culpa,*[54] a stance that most of the countries influenced by the *Code* have followed.

With the enactment of the BGB, the discussion turned to the necessity of the concept of unlawfulness. Montijano[55] has argued that there is a schism in civil scholarship regarding unlawfulness, with most scholars asserting that unlawfulness refers to the result,

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[50] There are some exceptions to this trend, the better known being Section 823 of the German BGB. However, Section 2043 of the Italian Civil Code, Section 438.1 of the Portuguese Civil Code as well as Section 6:162 of the Dutch Civil Code all clearly state that unlawfulness is a necessary element.

[51] Van Dam *supra* note 33 at 138

[52] Martín García-Ripoll Montijano, *La Antijuridicidad como Requisito de la Responsabilidad Civil*, 66 Anuario de Derecho Civil 1503, 1505 (2013) (Spain)

[53] *Id.* at 1508

[54] *Id.* at 1509

[55] *Id.* at 1520 According to Montijano, the language of Section 823 does not allow for unlawfulness to refer to the conduct. He does present the arguments of von Caemmerer, who proposes that the unlawfulness of the result only applies to those cases described in Section 823.1, while in any other case, the unlawfulness will refer to the act. Furthermore, Montijano argues that this issue is not exclusive to the German BGB. Austria and the Netherlands consider that the unlawfulness refers to the act, as only human acts can go against legal norms. In Sweden and Portugal, the requirement refers to the result.

not the conduct. Von Hippel, quoted by Petrocelli, has distinguished between these two views by recognizing that unlawfulness was a disapproval of a certain event, while *culpa* was a disapproval of the individual who caused it.[56]

In contrast, although civil law countries under the French model still approach unlawfulness from the standpoint of the aggressor's act, they tend to put more emphasis on the loss suffered by the victim.[57] This raises the question of defining an unlawful act, and whether such an act is sufficient on its own to invoke civil liability. Nevertheless, it is clear that unlawfulness is an element of delictual liability that serves as a judging standard under which to determine if a certain individual is required to repair the loss of a victim. The discussion is not only theoretical or philosophical. Countries such as Spain have limitations on liability for breach of contract that depend on whether the breach was the result of negligence or intent. Under common law, some actions, such as battery, assault, or intentional infliction of emotional distress, are entirely dependent on whether the defendant acted in a particular manner, rather than the actual loss suffered by the victim.

Language is important element in the discussion. The distinction between an illegal act and an unlawful act goes beyond a simple problem of semantics and can affect the logic of the system as a whole. An illegal act, *i.e.,* one that defies a clear legal prohibition, is usually met with punishment regardless of the existence of a victim. The mere contravention of the law suffices to warrant a response. Hence, a civil liability system that demands illegality as a requirement would have to either depend on a *renvoi* to another law or specifically list the types of acts, injuries, or losses that, when produced, could be considered illegal. Unlawfulness, on the other hand, is a much broader concept, as it does not necessarily require a prohibition, but is nevertheless contingent on a set of rules and standards that are much more basic than law as a formal instrument of government.

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[56] Biagio Petrocelli, *La Antijuricidad (Segunda Parte)*, 46 Revista de la Facultad de Derecho de Mexico 288, 289 (José Luis Pérez Hernández trans., 1962) (Mex.)

[57] Diez-Picazo when referring to Spanish law, has noted that the study of delictual liability is not the study of the act of the defendant, but of the loss suffered by the victim. Luis Díez-Picazo, *Derecho de Daños* 290-291 (1999) (Spain)

A. THE CONCEPT OF UNLAWFULNESS

A certain degree of clarification is needed before undertaking a discussion on the concept of unlawfulness. As mentioned above, unlawfulness has been used to qualify the act committed by a defendant. However, understanding the concept under comparative law requires more than a simple knowledge of legal terms. As Fletcher and Sheppard have explained:

> *The term* Rechtswidrigkeit *in German (*antijuridicidad *in Spanish,* antiguirdicita *in Italian) is construed of the following three parts: (*Recht *or Law) + (anti) + (ness). The temptation is to translate this term as anti-law-ness, or 'unlawfulness'; the problem, of course, is the difficulty of translating* Recht *as law.*[58]

They correctly assert that *recht* includes not only the law as a formal legal rule, but also a higher sense of morally binding principle. Therefore, they argue, the term wrongfulness is better suited to express the idea of *rechtswidrigkeit,* as wrong is the opposite of right.[59] Furthermore, the issue with the term unlawfulness – at least to a common law lawyer – lies in the fact that under common law, the law is narrowly construed as the legal formal rules established by the legislature.[60]

In contrast, De Cupis has observed that under civil law, concepts of harm and loss are broad in the sense that they include a multitude of physical phenomena, but only those that are the result of an "unlawful" action should be granted a legal remedy.[61] This commands an understanding of what "unlawfulness" entails. Unlawfulness, according to De Cupis, refers to something that is against the law.[62] In order to determine whether something is unlawful, an exact knowledge of the law is required.

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[58] George P. Fletcher & Steve Sheppard, *American Law in a Global Context: The Basics* 56 (2005)
[59] Ibid.
[60] Ibid.
[61] De Cupis *supra* note 5 at 84
[62] Language plays a very important role in De Cupis argument. The word he uses is *diritto*, which has many different connotations depending on context. However, when translated into other languages, such as English or Japanese, this concept becomes law or *horitsu*, which by their very nature are more restrictive.

For De Cupis, *diritto* is understood to have three meanings.[63] The first refers to the legal rules that form a certain system as a whole, not limited to the law as promulgated by a legislature, but also includes other legally binding rules, regardless of their origin (*diritto oggetivo*). The second meaning regards the specific right of an individual to request remedy through the law, *i.e.*, to require third parties to comply with a certain standard of conduct (*diritto soggetivo*). Finally, the third meaning concerns with the law and legal subject of study.

Furthermore, the main goal of the *diritto oggetivo* is to allow for the coordination of opposing interests within a society, providing a solution for potential conflicts by establishing supra existential criteria for human acts. From this, De Cupis has concluded that unlawfulness is the recognition, under the dominant social conscience, granted by legal rules to a certain interest when compared to another.[64] Therefore, the distinction between illegal, unlawful, just, and unjust depends on the valuation method determined by the legal rules themselves.

This is a broad approach to unlawfulness in the sense that unlike an illegal act, which is by definition one that disobeys a clear legal prohibition, an act might be unlawful even if there is no clear statute that declares it so. Furthermore, under the concept of *diritto oggetivo*, the question arises of whether legal rules can truly regulate every aspect of human life, at least from a social perspective.

De Cupis has argued that for any harm or loss that arises from an act to be unlawful, [65] the act in question must be legally relevant and violate a legal rule. Only then can that harm or loss be considered legally relevant. Finally, De Cupis has stated that unlawfulness can also refer to the infringement of a subjective right. However, in these cases, since rights are a type of protected legal rule, the infringement of a subjective right is inherently an infringement of the *diritto oggetivo.*[66]

[63] De Cupis *supra* note 5 at 84
[64] De Cupis *supra* note 5 at 85
[65] De Cupis *supra* note 5 at 86
[66] De Cupis *supra* note 5 at 86, 88

De Cupis' argument is instrumental for understanding the concept of unlawfulness under codes that do not explicitly establish it as a requirement. As mentioned, De Cupis has advocated for harm and loss to be considered from both material and formal perspectives, the latter being the legal norms. Therefore, unlawfulness is a formal element of harm and loss that does not need to be clearly established but is nevertheless a *sine qua non* reality of these two concepts. Even if the French *Code* does not utilize the term, it is implicit either in the fact that whoever causes a loss must repair it or even the broader legal principle of *alterum non laedere.*

However, even if the term can be understood under the French system using the above abstract methodology, common law presents a more difficult challenge. In discussing the feasibility of a European Civil Code, David Howarth has addressed the concept of unlawfulness:

> [T]he *most prominent example is the German (BGB), with its requirement that the defendant's act be* widerrechtlich*, or if intentional and not otherwise prohibited,* gegen die guten sitten*. In England the position is similar, at least according to the conventional view that defendants must be found to have been subject to a 'duty of care', that is, they can only be liable if they are subject to a legal duty which they have breached. In such systems, the question of lawfulness is often connected with the question of the kinds of interest the law protects against interference, but it is also connected with the questions of liability for omissions, immunities from suit and the liability of public authorities*.[67]

He has further stated:

[67] Howarth *supra* note 32 at 845
However, Howarth's mainly proposes a standard under which liability could be limited or controlled. In this sense, his opposition to the unlawfulness requirement is based on the argument that if unlawful means in violation to protected interests, it does not capture the full range of arguments for excluding the possibility of liability. If the term is used to mean "not justified by some other rule of law that allows the conduct no matter how faulty," the issue is the nature of such rule. If the rule is decided by the courts, the meaning of unlawful would be empty. If it is established in the code, it would be too inflexible. Finally, he critiques the Italian systems of "unjust" as leading to a protected interest approach. Id. at 877

> *In German law the main method for limiting liability is that conduct is not said to be unlawful unless it violates one of a set of specified protected interest listed in the code. In English law the courts have developed a much broader method of saying that there should be no duty of care unless it is 'just, fair and reasonable' that there should be such a duty. The German method leads to pressure to extend liability by widening the meaning of the listed interests or by adding examples to the final clause that recognizes 'other interests'. The English method, in contrast, has allowed the courts to develop an extraordinary creative negativity, for it means that there is no logical end to the reasons –economic, constitutional or pragmatic- that can be giving for denying liability.* [68]

The issue with Howarth's view is that it limits the meaning of unlawfulness to either statutory language or an established duty. His argument that the French *Code* does not include an unlawful requirement and addresses everything within the concepts of fault, causation, and damages limits the issue to the existence of a word, rather than viewing under the broader meaning of unlawfulness.

Specifically regarding the idea of "wrongfulness" under English common law, Rogers has attested that the relationship between torts and wrongfulness is not simple. As the law of civil wrongs, tort law is thoroughly linked to the concept of wrongfulness. Nevertheless, a definition such as "torts are wrongful acts" does not convey which elements constitute wrongfulness.[69] Rogers has admitted that the idea of wrongfulness is compatible with common law, at least at an abstract level, as every system includes certain losses that do not grant a claim for damages to a victim.[70] In this regard, he has followed the same approach as Howarth in defining wrongfulness (unlawfulness) as an instrument to limit liability. Roger has presented the example of wrongfulness in the case of negligence,

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[68] *Id.* at 846
[69] W.V. Horton Rogers, *Wrongfulness Under English Tort Law, in* Unification of Tort Law: Wrongfulness 39 (H. Koziol ed., 1998)
[70] *Íd.* at 40

admitting that the statement "it is wrongful to cause harm by negligence" is useful for providing a citizen with a general idea of tort law. However, it would not be adequate to provide a cause of action.[71]

Roger has argued that under common law, this is the only accurate statement:

> *Negligence causing harm is wrongful where there has been a breach of a duty of care recognized by the law in situations of that type (this duty being a complex [sic] based upon fairness, reasonableness and 'justice', and the nature of the interest in respect of which the protection is claimed).*[72]

Regardless of whether it refers to the act or result, civil law scholarship has acknowledged the existence of the concept of unlawfulness. However, some commentators have argued that unlawfulness is a concept that cannot possibly exist. Sessarego's[73] stance is particularly unique. He has opined[74] that there is nothing that can be considered truly unlawful, as every human act - from a simple greeting to causing injury to another – can be classified as just and allowed, or unjust and prohibited. Therefore, all human conduct must conform to a legal rule, *i.e.*, "lawful."[75]

Sessarego has noted that every human conduct is regulated by a legal norm in one way or another, so the idea of unlawfulness, *i.e.*, something that opposes such norms, is not possible. An unlawful act, he has argued, would entail a human conduct that is not the subject of any legal norm[76], *i.e.*, that is neither allowed nor prohibited. Whether Sessarego´s approach is a simple semantic argument or a fundamental question of the philosophical elements of what is considered unlawful is far beyond the scope of this work. However, as De Cupis has explained, since civil liability can be considered a loss to the aggressor, his or her actions would not be unlawful *per se* in the sense that they infringe upon a legal rule.

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[71] *Id.* at 41
[72] *Id.* at 41
[73] Carlos Fernández Sessarego, *La "Antijuridicidad" como Problema* available at http://dike.pucp.edu.pe/bibliotecadeautor_carlos_fernandez_cesareo/articulos/ba_fs_10.PDF
[74] *Id.* at 4
[75] The term is "*jurídico.*" However, in this context, it is used to mean "conforming to a legal rule." The English term "lawful," while not completely adequate, is used instead.
[76] Sessarego *supra* note 73 at 6

This is because the legal prohibition only establishes a sanction for whoever contravenes it, so the actor can choose to ignore it and suffer any retribution that arises from such an act. According to Sessarego's point of view, this would be a "lawful" conduct, provided it falls within the sphere of a specific or generic legal rule.

Nevertheless, the main critique of Sessarego's argument is that it utilizes the term unlawful in an untraditional manner. Especially under von Hippel's view, where unlawfulness refers to the reproachability of the event, the argument seems moot, as unlawfulness is then is a qualification that denotes a result or conduct that, to a certain degree, requires reparation.

B. UNLAWFUL ACT VS UNLAWFUL RESULT

Having briefly addressed the concept of unlawfulness, the next step is to determine how its interpretation might affect delictual liability. Therefore, this section addresses the main issue of whether the element of unlawfulness should fall on the conduct or the result of that conduct. The argument is not semantic either. Even though it might seem that the end result is the same whether the unlawfulness refers to the conduct, the result, or both, the discussion can form a basis for the standard of liability.

The original issue can be traced back to a discussion that took place in the second half of the 19th century between Jhering and Adolf Merkel, who were influenced by the ideas of Hegel.[77][78] Merkel, opposing Hegel's concept of unlawfulness, argued:

> *When we set up private unlawfulness against the criminal one, we should not think of a grading of unlawful behaviors—since a lot of legal infringements, as, for instance, the majority of patrimonial damages appear both as criminal and private unlawfulness-but in a*

[77] Montijano *supra* note 52 at 1517-1518

[78] In regards to unlawfulness (*Unrecht*), Hegel made a distinction between unintentional wrongs (*unbefangen*), deception (*betrug*), and crime (*verbrechen*). When acting under the concept of *unbenfangen*, the actor was not opposing a legal rule, but rather was under the impression of acting according to it, *e.g.*, two plaintiffs arguing for the ownership of particular object. *Betrug*, on the other hand, implies that the actor understands that the action goes against the universal will by making the other party believe that such an act is lawful. Finally, in the case of *verbrechen*, it supposes the clear intent of the actor of violently infringing both the general universal will and particular will of an individual. Therefore, being a true unlawful act, it falls under the rules of criminal law. G.W.F. Hegel, *Elements of the Philosophy of Right* 115-121(Allen W. Wood ed., H.B. Nisbet trans., 1991)

> *distinction of the legal consequences of the unlawfulness, that is to say, in different aspects of legal liability that can be founded in unlawful behavior.*[79]

Furthermore, he argued that unlawfulness contains two elements: firstly, a breach of universal will, which in turn is defined objectively by the law, and secondly, the accountability of the actor, which he deemed of utmost importance. He then defined law as the following:

> *[A] set of legal commands and prohibitions; unlawfulness, thus, as the breach of such orders and prohibitions. But these commands are directed at the will of an imputable human being… Hence, the infringement of law is due to an offender's infringement of his duty. But there are only duties for imputable human beings and they are measured according to their capacities. There is no duty to fulfill what is impossible for the human being, or to prevent and avoid what is unavoidable. Consequently, there can be no legal infringement in not preventing and not avoiding.* [80]

Meanwhile, Jhering argued that the concept of unlawfulness should not apply to a certain conduct. He cited the example of a thief and a possessor in good faith of a third party's property. In the latter case, there is no need to discuss the reproachability of the possessor's conduct; it is simply a discussion of who has is the true owner. On the other hand, any claim against the thief depends solely on the reproachability of his or her conduct – the crime – as there is no theft without intent.[81]

The distinction engages with the terms illegal and unlawful and the fact that they are not used as synonyms. However, an illegal conduct is by definition an unlawful one, whereas the opposite is not necessarily true. An illegal act, such as those prohibited by criminal law, is subject to a vastly different set of rules and standards than those in civil

[79] Martín García-Ripoll, *Unlawfulness in Western European Tort Law,* Open Access Library Journal, 2: e1605. http://dx.doi.org/10.4236/oalib.1101605 2 (2015)
[80] Ibid.
[81] Idem However, it is important to note that both Merkel and Jhering mainly refer to intentional acts, or rather, the intent to infringe on a legal rule.

cases. First and foremost, through the limit it imposes on individual liberties by declaring an act illegal, the law effectively imposes restrictions to conduct in a clear manner. Therefore, by limiting protected rights, the BGB is arguably establishing a concept of illegality, rather than unlawfulness. However, as previously mentioned, the concept of *rechtswidrigkeit* is broader than a simple contravention of formal law.

The same can be argued for unlawfulness. By focusing on the nature of the act, proclaiming it unlawful *per se* in the case of civil liability, the courts are effectively limiting both the actions of an individual of society as a whole, regardless of whether any real loss arises from such act. This, in effect, contradicts the reparatory nature of civil liability. However, it does provide for a certain degree of legal stability, as the widespread adoption of a certain interpretation permits the argument that the conduct changes from unlawful to illegal. Nevertheless, in contrast with criminal liability, the issue remains that including the requirement of unlawful conduct in cases of civil liability confronts individuals with the fact that performing a certain act will lead to a legal punishment without offering any real means of determining the extent of that punishment beforehand. Furthermore, since whoever performs an unlawful conduct should repair it, it would arguably be much harder to limit liability through rules of civil procedure without other clear rules that establish limitations.

However, perhaps the most convincing support for the unlawfulness of the result is the fact that civil liability requires the existence of a victim. Regardless of the nature of an act, it does exist in the eyes of civil law unless an individual has suffered a loss that warrants reparation. As the Spanish Supreme Tribunal[82] has noted, "*the unlawfulness of the loss disappears when there exists a justifying cause or when a cause excludes it, generating the legal obligation of withstanding the loss."* When a loss ceases to be unlawful, it also causes the act itself to forgo that qualification, at least under the sphere of delictual liability. This is especially true under De Cupis' view that civil liability can be understood as a balance between two types of losses: the victim's and the aggressor's. Even if a defendant's act caused a loss for the victim, the defendant will not be liable unless such a loss surpasses

[82] S.T.S Oct. 18, 1999 RCyS, 2000-1206 (Spain)

a certain threshold. Key examples of this are cases that deal with an abuse of rights. The conduct of the defendant in these types of cases is clearly neither illegal nor unlawful. Therefore, the decisive element is not the conduct, but rather the loss suffered by the victim.

C. UNLAWFULNESS AND JUSTIFICATION CAUSES.

The Italian Civil Code does not require unlawfulness. Rather, it requires that the loss suffered by the victim must be "unjust" (*danno ingiusto*). Hence, liability requires the existence of another element besides fault,[83] in contrast with the second use of the word *danno* in Section 2043, which refers to economic losses suffered by a victim.[84] This concept mainly expresses that loss must be viewed in relation to the type of liability and its consequences, and that there are no methods that can define loss in all relevant situations.[85] However, an issue arises from the term, as the concept of just is inherently subjective. Furthermore, the concept of an unjust loss could refer to one that is the result of an unjust act, or rather that the loss itself is considered unjust.[86] Discussions regarding the meaning of unjust have occupied the forefront of scholarship for years. Nevertheless, as it explained shortly, the courts have simplified the term into two elements.[87] Originally, Italian commentators followed the theories of the time by supporting the idea that the unjust requirement referred to the conduct of the defendant and arguing that the expression *danno ingiusto* was the result of imprecise language in the provision, with the correct reading of Section 2043 conveying that any unjust act produces a loss.[88]

Critics of the main theory relied on a literal reading of Section 2043, which suggested that the term unjust referred unequivocally to the harm, not the act. Furthermore,

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[83] Aurelina Pera, *I Danno Inguisto, in Il Danno Ingiusto, Responsabilità Precontrattuale E Responsabilità Speciali* 19 (Luigi Viola, ed., 2007) (It.)
[84] 1 Massimo Franzoni, Trattato della Responsabilitá Civile L'illecito 61 (2ed., 2010) (It.)
[85] Christian Von Bar, *Non-contractual liability arising out of damage caused to another* 299 (2009)
[86] Marco Rodolfi, *La Responsabilità Civile Sinistri Stradali, Codice Delle Assicurazioni, Immissioni Ed Altri Fatti Illeciti* (2007) (It.)
Marcello Adriano Mazzola, *Responsabilità Civile Da Atti Leciti Dannosi* 83 (2007) (It.)
[87] Guido Alpa, *La Responsabilità Civile. Parte Generale* 358 (2010) (It.) Alpa calls into question the role of such a requirement under a general clause system, as these systems are characterized by flexibility. He argues that, theoretically, this requirement´s only role is the classification of delictual liability.
[88] Paolo Franceschetti, *La Responsabilità Civile* 65 (2009) (It.)

if the unjust requirement concerned the act of the defendant, it would call into question the role of the fault requirement.[89] Therefore, scholars began attempting to define this new requirement, and the consensus dictated that unjust harm referred to the infringement of a legally protected interest.[90] By placing the unjust requirement in the loss itself, the Italian Civil Code is referring to the legally protected interest, in which case justification causes become much more important.

The courts have ruled that the expression "unjust" is composed of two elements. First, the loss must be *non iure*, *i.e.*, it must be the result of an act that does not conform to law (*diritto*) or to which the law grants no justification cause.[91] These justification causes illustrate a comparison of opposing interests.[92]. Under the Italian code, self-defense and emergencies are granted the status of justification causes.

However, cases concerning abuse of rights still remain an issue, as the Civil Code does not explicitly regulate the matter. Nevertheless, the traditional view is that the exercise of a right cannot be grounds for liability under the Roman maxim *qui iure suno utitur neminem laedit.*[93] The solution lays in the manner in which the right is exercised, with losses only considered unjust – and therefore redressable – in cases where the right was exercised in an arbitrary or negligent manner.[94] De Cupis has argued that in cases of abuse of rights, it cannot be said that the right is exercised in a reproachable manner, as exercising a right is a legal act.[95] Rather, the loss that results from that act must be considered unlawful, therefore allowing for a claim for remedy.

The second requirement is that the loss must be *contra ius, i.e.*, it must affect a legally protected interest. Traditionally, scholars and courts have held that legally protected rights under delictual liability were limited to absolute subjective rights,[96] such as property, bodily integrity, etc. This view was founded on the argument that delictual liability under

[89] *Id.* at 66
[90] *Id.* at 66
[91] Rodolfi *supra* note 86 at 6
Gaetano Annunziata, *La Responsabilità Civile e Le Fattispecie Di Responsabilità Presunta* 15 (2008)
[92] Pera *supra* note 83 at 23
[93] *Id.* at 21
[94] Rodolfi *supra* note 86 at 6
[95] De Cupis *supra* note 5 at 104
[96] Pera *supra* note 83 at 22

the code was typified. Therefore, only those rights that could be opposed *erga omnes* were worthy of legal protection.[97]

This view was maintained until 1971, when the Court of Cassation ruled on the matter in the famous Meroni Case.[98] Luigi Meroni was a soccer player for the Torino Football Club who died in a traffic accident. The club sought damages from the insurance company of the driver who struck Meroni. Under the traditional view, the protection granted by Section 2043 excluded rights *in personam*, such as contractual obligations. However, the court reversed its position, reasoning that the term unjust under Section 2043 referred to a harm that was both *contra ius* and *non iure*. The court held that this principle did not distinguish between absolute and relative rights, and that the relative rights of the club, in the form of the contractual relations with Meroni or, as the court expressed a credit right, should be granted protection. However, the discussion then shifts from the nature of the rights *in personam* to issue of causation.

This dual approach by the Italian courts can be applied to any system, regardless of clear language that requires unlawfulness. An unlawful loss therefore indicates a loss which the victim has no legal obligation to withstand.[99] Justification causes, such as self-defense, force majeure, the exercise of a legal right, etc., can therefore be construed as establishing the victim's legal obligation to shoulder the loss.

IV. SUMMARY

Loss as an element of delictual liability occupies center stage in most civil law countries, especially those influenced by the French *Code*. However, as De Cupis' theories have demonstrated, harm and loss are concepts that are not limited to statutory rules, but rather more deeply rooted in basic societal rules that form the background of any system of civil liability. These are visible in how common law and the civil law approach the issue. Particularly in the case of the latter, the difference in approach taken during the codification process to follow the social ideas that marked each era produced two codes that, while

[97] *Id.* at 23

[9898] Cass., sez. un., 26 gennaio 1971 no. 174 (It.)

[99] Deissy Motta Castaño & Diego Baracaldo Amaya, *Responsabilidad Civil Extracontractual del Estado Colombiano por la Violación a los Derechos Humanos* 6 (2010) (Colom.). Referring to the liability of the Colombian State under the text of Section 90 of the Colombian Constitution.

similar in their roots, nevertheless adopted different views on the matter of loss. Regardless, both the C*ode* and the BGB adhere to De Cupis' model, as both codes require material elements, a legal act, and a formal element, which entails the obligation to repair the loss in the *Code* and the list of legal interests in the BGB.

However, as not every loss is legally protected, only those that meet certain criteria will grant a victim remedy. The most basic criteria are that established by the common law system of actions, as in many cases, they focus on the conduct of the tortfeasor over the loss suffered by the victim. The BGB exhibits a similar pattern, limiting the number of legal losses that warrant a claim. The French model is broadest, as any loss can, in theory, be the basis for a suit. Thus, the main issue is whether or not the loss is considered redressable.

It is in these cases that the element of unlawfulness emerges. The main goal of unlawfulness is to limit the circumstances in which an individual is liable to another for any loss. However, if unlawfulness is confused with illegality, the result is consistent with a criminal system in which the sanction is a monetary fine paid to the victim. An insightful example of this is the figure of punitive damages in common law and the amount of controversy it has attracted. The concept of unlawfulness is ambiguous by its very nature, an as it cannot be reduced to formal laws.

Furthermore, as objective liability demonstrates, delictual liability can be approached without requiring fault, but only if the victim suffered a loss. The defendants are not liable because they broke a law – a formal element – but because such an action resulted in a decrease of a favorable situation of the victim. In addition, a guilty defendant's obligation to pay reparation to the victim is a loss for the defendant, as it meets all the criteria set by the De Cupis model. As such, reparation must be considered a legal loss to the responsible party, albeit one which the party must endure. The reason for this is explained by the unlawfulness of the conduct of an individual. However, the same arguments introduced above can challenge this view. Alternately, another approach is to consider it a competition between two legal losses.

Therefore, the issue of unlawfulness can be approached from the perspective of loss without relying on the unlawfulness or illegality of the conduct, as the elements of every

case determine whether the defendant or plaintiff should bear the burden. Most cases in which the defendant is found liable can be explained under this view as a balance between the actual loss suffered by the plaintiff and the future loss that the defendants will suffer when they pay the monetary award.

This becomes increasingly evident in cases of abuse of rights, where the issue of liability is not resolved by examining the conduct of defendants, as they were acting within their rights. Rather, it regards the degree to which such a right affects the situation of the plaintiff. Whether the court will rule in favor of an individual who built a fence within his own land is a question that, without considering any administrative ordinances, can only be answered by investigating how the fence affects third parties, *i.e.*, if it blocks sunlight by an appreciable degree or disrupts the flow of water. In this example, timing is also a crucial factor, as not many courts would grant remedy to a plaintiff if the fence was constructed before they moved onto the land.

Justification causes also serve to support this point. Arguably, the reason a defendant is not liable when there is a justification cause is because their act is no longer unlawful. With that, the question arises why the act is no longer considered unlawful. An answer that relies on the justification cause, *i.e.*, the act is lawful because the law so establishes, is nothing more than a tautology. In fact, the act becomes lawful because, after balancing the actual losses suffered by the plaintiff with the possible losses suffered by the defendant, the court concludes that the defendant´s potential loss in legal interests should be granted a higher degree of protection than the actual loss suffered by the plaintiff. The act of a defendant becomes permissible only in those few cases in which the possibility of a loss outweighs an actual loss; it has little to do with the formal law.

CHAPTER 5 NON-ECONOMIC LOSSES IN COMPARATIVE LAW

I. HISTORICAL DEVELOPMENT[1]

The previous chapter has described how the idea of loss as an element of delictual liability has been addressed in comparative law. This chapter contends with the evolution of the modern concept of non-economic losses and how it has been understood in modern legal thought. The law of defamation in particular has been the entry point through which many systems have developed the concept of non-economic losses. For example, under the Sumerian laws of Ur-Nammu in ancient Mesopotamia, the punishment for slander was the payment of three shekels of silver, the punishment for accusing a woman of adultery was one-third mina of silver, and the punishment for a slave woman who swore at her mistress was to be scoured with salt.[2]

The Code of Hammurabi also established punishments for similar offenses. For example, the punishment for accusing someone of a capital crime and failing to prove the accusation was death. Meanwhile, individuals accused of sorcery could use the river-ordeal to prove their innocence, and if successful, could seize the house of their accuser. However, it was with the development that took place under the rule of Roman law that individuals had access to an increased number of claims for conduct that could be considered defamatory. Therefore, this chapter begins with a quick overview of some of the *actio* that granted a victim a claim for defamation under Roman law, followed by an examination of how these claims developed in common law, and finally concluding with the civil law context.

II. ROMAN LAW

The Romans employed the concept of *injuria* to refer to the notions of wrongfulness and fault, two elements of aquilian liability.[3] The historical roots and evolution of the

[1] This section is based on the author's master's thesis: Ruben Rodriguez Samudio, *The Development and Current State of the Law of Non-Economic Harm – A Comparison Between the U.S., Panama and Japan*- (2014) (unpublished master's thesis, University of Hokkaido)(Japan)

[2] Ur-Nammu 10 as translated in J.J. Finkelstein, *The Laws of Ur-Nammu*, 22 Journal of Cuneiform Studies 66, 68 (1968/1969). The numbering of the laws of Ur-Nammu is not uniform. Some laws might be in a different order depending on the translation. This thesis uses the translation provided by Finkelstein.

[3] Reinhard Zimmerman, *The Law of Obligations Roman Foundations of the Civilian Tradition* 1050-

concept are beyond the scope of this work. Nevertheless, *injuria* marks the starting point of the modern concepts of harm and loss.

In D.47,10,1.pr. Ulpian has defined *injuria* as an act done contrary to law and recognized that *injuria* might refer to a loss caused by negligence, particularly in reference to insults. This becomes evident in his statement in D.47,10,1,139 that *injuria* could be caused by things and words, with things in this context referring to the damage done using hands. The digest then establishes a set of actions for the various forms of *injuria* that are exemplified by the following:

Convicium was an *actio* in which a group of people assembled to insult someone.[4] Whether or not the victim was present when the group shouted the insults was irrelevant. Also, the instigator was liable regardless of the other people who shouted provided he or she rallied them to the point of inciting action. However, if there were no shouts, the instigator was not liable.

De ad temptata pudicitia punished offenses against women and young people who still wore *toga praexata*. This offense could assume two forms. The first was following someone in a constant and silent pursuit or making indecent remarks. The second was "removing" or "abducting" a lady's companion to cause an injury to her honor,[5] as she could be mistaken for a whore.

Ne quid infamandi causa fiat was the most general provision regarding moral offenses against honor. The punished conduct was rendering someone infamous. There are many cases under this *actio* that involve not only words, but also actions that bring

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1053(1996)
Maria Jose Bravo Bosch*, A Proposito de la Protección del Honor de la Persona*, 16 Revista Jurídica de la Universidad Autónoma de Madrid 29, 35 (2007) (Spain)

[4] See: Maria Jose Bravo Bosch, *La Conducta Punible en una Injuria Verbal Proferida en Público*, 29 Revistas de Estudios Historicos-Jurídicos 209 (2007) (Spanish) quoting RABER who argues the point that the phrase *sive unus* could be construed in a way to allow a *convicium* done by a single individual, he also points out that under D.47,10,34, slaves could be individually liable for insulting someone, even if the insult was done by a group. *Si plures servi simul aliquem ceciderint aut convicium alicui fecerint, singulorum proprium est maleficium et tanto maior iniuria, quanto a pluribus admissa est. immo etiam tot iniuriae sunt, quot et personae iniuriam facientium.*

[5] In Rome, virtuous women were not seen alone on the street, and were always accompanied by a family member or a slave. Therefore, removing that companion had a deleterious effect on the reputation of the woman. Raquel Escutia Romero*, La Difamación Pública en el Derecho Romano*, 22 Revista Jurídica de la Universidad Autónoma de Madrid 65, 77 (2011)

disrepute to another, which was enough to invoke liability.[6] For example, the misuse of mourning dresses by individuals who were not members of the family was considered an insult.[7]

The *pater familiae* could sue for offenses against those under his protection. Under *servum alienum verberare,* the master had a claim against a person who beat or tortured his slaves.[8] He could also bring two suits under different proceedings: one for himself and one for his son.[9] Insulting a married woman was grounds for her husband to sue,[10] but the wife could not sue in the stead of her husband.[11] This arrangement was not rare under the patriarchal structure of Roman society and its concept of honor,[12] and insults to the members of a house were considered a loss for the *pater familias.*

However, the above actions are not adequate to successfully argue that the Romans distinguished between the act and its consequences, or that they had developed these *actios* for any purpose beyond practicality or to establish any sort of general liability. These actions all shared a commonality that they were contrary to the good morals of the community. *Contumelia.* in the sense of disregarding an individual personality, was a common element of *injuria*.[13] The wrongdoer's *animus injuriandi* was another element that has motivated many discussions.[14]

Zimmerman has explained that a purely mental element was not indispensable for the purpose of liability, as proving lack of intention did not excuse the wrongdoer.[15] Even though it was a private action with a pecuniary remedy, the *actio injuriarum* was penal in nature and could not be brought by the heirs of a victim, nor against the heirs of a

[6] For a more detailed exposition see Zimmermann *supra* note 3 at 1057
[7] Ibid.
[8] *Id.* at 1058
[9] D.47,10,41
[10] D.47,10,5,1
[11] D.47,10,2
[12] One prime example of this is Julius Caesar, who divorced his wife, Pompeia, under pressure caused by the amount of rumors surrounding her. He is supposed to have said "*Meos tam suspicione quam crimine iudico carere oportere*": "Caesar's wife should be without reproach." Arthur Hugh Clough, *Plutarch's Lives* 253 (2003-2013), http://www2.hn.psu.edu/faculty/jmanis/Plutarch/Plutarchs-Lives-2.pdf
[13] Zimmerman *supra* note 3 at 1059
[14] *Id*. at 1060
[15] *Id.* at 1060-1061

perpetrator.[16] Truth was a defense against an *actio* for *injuria*, as it was considered necessary to identify guilty persons and their crimes.[17]

Many types of *injuria* engaged with honor-related offenses, but they were not necessarily limited to defamation cases. For example, D.47,10,15,2 states:

> *Where a man has not been beaten, but hands have been threateningly raised against him, and he has been repeatedly alarmed at the prospect of receiving blows, without having actually been struck, the offender will be liable to an equitable action for injury sustained.*[18]

This provision is a nearly verbatim description of the common law tort of assault.

III. THE COMMON LAW

A. PRE-19TH CENTURY

The study of non-economic losses in common law has followed two drastically different paths: the law of defamation and the tort of battery. The other key contribution of common law to the law of emotional harm is the tort of assault under the writ of trespass to the person. It was first recognized in the 1348 case of I de S et Ux v. W de S.[19] In this case, a husband sued for the apprehension his wife suffered because of a missed attack with an axe. Despite the woman suffering no physical injury, the husband was able to recover.

Defamation in common law first emerged in the realm of the church courts. It was considered a sin, and as such, offered no pecuniary remedy to a victim. The offender was obliged only to perform penance, and any attempt to claim a monetary award was met with a writ of prohibition.[20]

Beginning with the *scandalum magnatum* of 1275, a series of statues began to regulate and punish defamation, excising it from the jurisdiction of the church and

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[16] *Id.* at 1061

[17] D.47,10,18

[18] Translation from Samuel P. Scott, *The Civil Law* (1932). Available at: http://www.constitution.org/sps/sps.htm. The original text reads as follows: Si quis pulsatus quidem non est, verum manus adversus eum levatae et saepe territus quasi vapulaturus, non tamen percussit: utili iniuriarum actione tenetur.

[19] John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 790 (2007)

[20] The Ecclesiastical Courts used to limit the power of the Common Law Courts with the writ of prohibition. For more see II Thomas Starkie, *A Treatise on the Law of Slander and Libel* (2ed.1830)

introducing it into the king's courts. These statues were mostly political in origin and criminal in nature, and it seems they were not frequently used until the reign of Queen Elizabeth.[21] A successful claim for slander had to be accompanied by assault, or at least the threat of assault.[22]

By 1585, however, judges had grouped words that could support defamation actions into three classes.[23] The first category involved criminal charges, in which the plaintiff had to prove that the defendant had accused him or her of a certain crime. The defendant was only liable if the statement was a clear accusation against the plaintiff. Thus, the defendant's words were of major importance when determining liability. Consider the example of Holt v. Astrigg.[24] In this case, the plaintiff claimed that the defendant had said, "*Sir Thomas Holt struck his cook on the head with a cleaver and cleaved his head: the one part lay on the one shoulder and another part on the othe*r." This would suffice to grant the victim of such an attack a claim for slander or libel to any modern lawyer, regardless of legal tradition. However, the court rejected the plaintiff's claim under the rationale that *"...For slander ought to be direct, against which there may not be any intendment. But here, notwithstanding such wounding, the party may yet be living, and it is then but trespass.*"[25]

The lack of the simple phrase "Sir John killed his cook" was enough to condemn the claim, regardless of the fact that a man whose head had been split in half could barely survive a few seconds, let alone until the trial. This resistance to awarding damages for defamation, or at least to holding the defendant responsible in all but the clearest of cases, was the result of a sense of necessity, rather than a lack of understanding or plain indifference from the judges. In Crofts v. Brown,[26] the judges explained this resistance in the following terms: "*We will not give more favour unto action upon the case for words than of necessity we ought to do, where the words are not apparently scandalous, these*

[21] Theodore F.T. Plucknett, *A Concise History of the Common Law* 430 (2 ed. 1936)
[22] C.H.S. Fifoot*, History and Sources of the Common Law Tort and Contract* 129 (1949)
[23] Plucknett *supra* note 21 at 494,
[24] *Holt v. Astrigg* (1607) Croke, Jac.184
[25] John Baker, *Baker and Milsom Sources of English Legal History Private Law to 1750* 704(2010)
[26] *Crofts v. Brown* (1609) 3 Bulstrode, 167

actions being now too frequent." It is challenging to comprehend how the accusation in *Holt* could not be considered scandalous, but the judges were convinced that people would abuse the court system. Therefore, measures were imperative to suppress such abuses.

The second class of actionable words included those regarding unfitness to perform a particular trade, profession, or office. The third class was the imputation of certain diseases – those words which the plaintiff could prove had caused him or her some sort of economic loss. The first three classes are what Plucknett has called slanders *per se*, *i.e.*, words that a plaintiff could cite to bring an action of slander without proving economic loss. Although a plaintiff could bring a claim under any of the cases defined as *slander per se*, in other cases, the victim had to actually prove the existence of an economic loss, *i.e.*, that the defendant's actions had actually caused the victim to suffer a measurable loss. Even the claim of unfitness can be construed as founded on the premise that the plaintiff suffers or might suffer a certain degree of economic loss from the actions of the wrongdoer.

Common law distinguishes slander, or oral defamation, from libel, or written defamation, and this differentiation was based on the development of printing techniques. As Veeder has noted, "*[i]n early times libel must have been comparatively rare and harmless; rare because few could write, harmless because few could read.*"[27] Nevertheless, this distinction was not immediately clear either. Records from The Star Chamber reveal that in the proceedings, the defendant would plead that the plaintiff's bill was seditious and slanderous,[28] but that does not seem to have given rise to an action of libel *per se*.

The first recorded case that made use of the new law of libel was *De Libellis Famosis* case in 1609.[29] During the reign of Mary and Elizabeth, the political climate was such that the law of libel was changed to accommodate traitors. Therefore, private libel, public libel, and sedition were closely related.[30].

Plucknett, quoting Hudson, has stated that "*spoken words can be justified in showing their truth, but written words are punishable in respect the very fact that they were*

[27] Van Vechten Veeder, *The History and Theory of the Law of Defamation,* 3 Col. L. Rev. 546, 561 (1903)
[28] *Plucknet supra* note 21 at 432
[29] Veeder *supra* note 27 at 563
[30] *Plucknet supra* note 21 at 433

written."[31] In this context, he was asserting that, at least at the time Hudson had written this (before 1635), truth was a defense against an accusation of slander, but not against libel.

Thus, libel cases do not adhere to the slander *per se* distinction. However, this appears to be a based on political reasons rather than legal rationale. Absolutist governments do not tend to receive any type of critique amicably. Therefore, the actual loss suffered by a plaintiff, especially if they were part of the government, is of little importance when the ultimate goal is to enact punishment.

B. THE DEVELOPMENT OF NEW TORTS

The 19th century witnessed a surge of new actions that sought to expand liability to include non-economic losses. Both the US and England only granted remedy for non-economic losses when they were accompanied by another claim of a particular tort or breach of duty, *i.e.*, as long as they were parasitic damages.[32] The development of the law of non-economic loss under common law can be divided into two distinct, but not unrelated, categories: non-economic damages as parasitic damages and non-economic damages as an independent claim – neither of which is absolute.

It is not entirely correct to use the expression "loss" in the context of the development of claims for non-economic damages, as common law does not contain a concept of loss as it traditionally understood in the French tradition. Damages is the remedy given to the victim for his or her loss, and to that extent, there is no difference. However, the idea of an abstract concept of loss is not necessarily an element for tort liability, as the conduct of the tortfeasor and its relation to the victim are more pertinent elements.

Therefore, the concept of damages as the remedy to a loss suffered by a victim is better suited for understanding the common law approach. Pain and suffering, emotional distress, fear, anxiety, and any other similar emotion suffered by a plaintiff as a result of a

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[31] *Plucknet supra* note 21 at 433

[32] The earliest use of the term identified was in 1 Thomas Atkins Street, The Foundations of Legal Liability Theory and Principles of Torts 461 (1906). *"The authorities which have just been considered bring us into contact with a factor which we may, for the sake of convenience, refer to as parasitic element of damages. The idea which is meant to be brought out by the use of this expression is that in certain situations the law permits elements of harm to be considered in assessing the recoverable damages, which cannot be taken into account in determining the primary question of liability."*

previously recognized legal wrong are classified as parasitic.[33] In early cases, this usually implied the existence of physical injury. There are number of cases in which the jury was instructed to take into account the suffering of a victim as part of the injury when calculating damages.[34] In some cases, like illegal seizure, physical injury was not necessary.[35]

Regarding the second category of non-economic damages, *i.e.*, independent claims that could be brought without physical injury, the courts of the late 19th century were opposed to granting remedy to claims brought for emotional distress alone. The courts cited five primary reasons:[36] lack of precedent[37] the potential flood of litigations it could provoke,[38] public policy,[39] remoteness of the damage[40] (*i.e.*, the damage was not a natural consequence of the defendant's action), and the difficulty in proving emotional harm when not accompanied by a physical injury.[41]

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[33] Ibid.
[34] *Canning v. Inhabitants of Williamstown*, 55 Mass. 451 (1848)
Seger v. Town of Barkhamsted, 22 Conn. 290 (1853).
[35] *Tyler v. Pomeroy et al, 90* Mass. 480 (1864)
[36] Many of these reasons came under attack early on. See: Archibald H. Throckmorton, *Damages for Fright*, 34 Harv. L. Rev. 260 (1921)
[37] *Gulf, C. & S.F. Ry. Co. v. Levy*, 59 Tex. 563 (1883). Plaintiff's daughter in law and grandchild died in childbirth. Plaintiff's son hired the defendant to deliver a telegram informing of this fact and that he needed help. The defendant delivered the telegram late, for which the plaintiff could not go to help his son in time. The court rejected the claim, stating, "*In cases where a bodily injury has been inflicted even by negligence, the mental suffering resulting therefrom and necessarily incident thereto has been considered an element of damages; but we know of no case, unless it be one hereafter to be referred to, in which it has ever been held sufficient in itself to maintain an action for damages, in absence of some statute affecting the question*."
[38] *Summerfield v. W.U. Tel. Co.*, 87 Wis. 1 (1894). Defendant was late in delivering a telegram to the plaintiff informing him that his mother was on her deathbed. The court analyzed the situation of the liability for telegraph companies and found that Indiana, Kentucky, Tennessee, North Carolina, and Alabama supported the claim, while Georgia, Florida, Mississippi, Missouri, Kansas, Dakota, and the federal courts rejected it. In rejecting the plaintiff's claim, the court held: "*Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such rule of damages."*
[39] *Barnes v. Western Union Telegraph Co*., 27 Nev. 438 (1904)
[40] In *Phillip v. Dickerson*. 85 Ill. 11, 1877 WL 9466 Ill. 1877., Defendant attacked plaintiff's husband, threatening him with a knife, and because of the shock of seeing, this the plaintiff gave birth to a dead child. The court held: "*The injury in question not being one which the defendant could reasonably be expected to anticipate as likely to ensue from his conduct, we cannot regard it as the natural consequence thereof, for which defendant is legally responsible."*
[41] *Mitchell v. Rochester Ry. Co*., 5 E.H. Smith 107(1896)

Courts in the 19th century and early 20th century rejected claims based on a trio of English cases. In Lynch v. Knight,[42] a couple jointly sued for the words uttered by the defendant, who imputed an immoral conduct to the wife. Because of this, her husband sent her away to live with her father for a time. Lord Wensleydale said:

> *...[M]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.*[43]

In Allsop v. Allsop[44], the defendant started a rumor accusing the plaintiff of immoral conduct. Although the accusations were not made in front of the plaintiff, she eventually found out and suffered physical illness. The court refused to grant a remedy because the plaintiff could not prove special damages. Finally, in Victorian Railway Commissioners v Coultas,[45] the plaintiff could not recover damages for the mental shock suffered when a train almost collided with her as the result of the negligence of a railroad company because the act caused no physical harm.

Under the common law of the mid-to-late 19th century, these three cases served as precedents when denying claims for non-economic damages that were not parasitic in nature. However, the Lynch decision was preceded by the 1823 case of Chamberlain v. Chandler[46] in which the court granted remedy to the plaintiff for non-economic damages that were not parasitic. The defendant, the captain of a ship transporting the plaintiff, was sued for his rude and vulgar behavior. Judge Story ruled in favor of the plaintiff, providing the following rationale:

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[42] *Lynch v. Knight*, (1861) 9 H.L.C. 577, 11 Eng. Rep. 854
[43] *Lynch v. Knight,* (1861) 9 H.L.C. 577, 598, 11 Eng. Rep. 854 To be precise, the discussion between the justices was not only whether the words themselves gave a cause of action to the wife, but also in the case such action would lie, what would be the special damages claimed against the defendant, and even in the case such damages existed, seeing as they were cause by the conduct of the husband, *i.e.,* sending the wife away, if the Lynchs could bring the claim.
[44] *Allsop v Allsop* (1866) 5 H & N 534
[45] *Victorian Railway Commissioners v. Coultas,* (1888) L.R. 13 App. Cas. 222
[46] *Chamberlain v. Chandler*, 3 Mason 242, 5 F.Cas. 413 (1823)

> *It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet if he withholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct, or of consequential, injuries. In each case the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law, if it could not award some recompense*.[47]

It took almost 70 years for this to change under English common law. In the 1897 case of Wilkinson v. Downton,[48] the defendant jokingly told the plaintiff that her husband had been in an accident and broken both his legs. Upon hearing this, the plaintiff suffered from a nervous shock, which in turn made her physically ill. In granting remedy to the plaintiff, Wright J wrote:

> *The defendant has, as I assume for the moment, willfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby*

[47] *Chamberlain v. Chandler*,3 Mason 242, 5 F.Cas. 413. 415 (1823)
[48] *Wilkinson v Downton,* (1897)2 Q.B. 57

caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This willful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.[49]

Judge Wright did consider *Allsop* and *Coultas*. Rejecting the first, he argued:

*[*Allsop*] however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend.*[50]

Regarding Coultas, Judge Wright said:

... [N]or is it altogether in point, for there was not in that case any element of willful wrong; nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case.[51]

The court granted remedy to the plaintiff in *Wilkinson* not because the plaintiff's loss was of such importance as to warrant special legal protection, but rather because the conduct of the defendant was abhorrent to the court. Although damages were more punitive than compensatory, this is one of the most significant cases in common law regarding non-economic damages. Furthermore, even before *Wilkinson,* U.S. courts were granting remedy in cases in which the conduct of the tortfeasor triggered miscarriage, even if the victim suffered no direct physical injury.[52]

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[49] *Wilkinson v Downton,* (1897)2 Q.B. 57, 59
[50] *Wilkinson v Downton,* (1897)2 Q.B. 57, 59
[51] *Wilkinson v Downton,* (1897)2 Q.B. 57, 59
[52] *Hill v. Kimball*, 76 Tex. 210 (1890), *Renner v. Canfield*, 36 Minn. 90 (1886), *Brownback v. Frailey*, 78 Ill.App. 262 (1898), *Nelson v. Crawford,* 122 Mich. 466, (1899)
However, in an earlier case, the court of Illinois rejected a similar claim, stating that wife was too far from the

Courts began protecting people from emotional harm without requiring another independent claim by managing to accommodate the wrongs that, in their eyes, needed correcting. However, not every conduct unable to squarely fit into a particular tort qualified for reparation.[53] For example, wrapping a dead rat in a sandwich that frightened a plaintiff gave rise to liability,[54] but a proposal of illicit sexual relations would not give an offended woman a claim for damages.[55] In these later claims, the "loss" of the victim is arguably of far greater importance than the act of the tortfeasor. However, this does not mean the courts had begun to develop a concept of non-economic losses. Rather, the courts were forced to accept the development of new types of claims and attempt to incorporate them into the system as effectively as possible. Scholars mainly contributed by recognizing the existence of these cases and that they were numerous enough to merit discussion within the context of common law at the time.[56]

Magruder[57] has noted:

> *We would expect, then, the gradual emergence of a broad principle somewhat to this effect: that one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue. Such a formula would not decide concrete cases; but it is as practicable to apply as the standard of reasonable care in ordinary negligence cases, and it would permit the courts to exercise a judgment upon the merits of the particular*

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fight between the husband and the defendant for it to be the cause of the miscarriage. *Phillips v. Dickerson*, 85 Ill. 11 (1877).

[53] Jeremiah Smith*, Torts without Particular Names*, 69 Univ. Penn. Law Rev.91 (1921)

[54] *Great Atlantic & Pacific Tea Co. v. Roch,* 160 Md. 189 *(1931)*

[55] Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 48 Hav. L. Rev. 1033, 1055 (1936)

[56] *E.g.* William Prosser, *Intentional Infliction of Mental Suffering a New Tort,* 37 Mich. L. Rev. 874*,* 874 –892 (1939)

[57] Magruder *supra* note 55 at 1058

case, unembarrassed by the notion that the interest involved is beyond the pale of legal protection.[58]

The issue of how to address these new torts became even more apparent with the first Restatement. Published in 1934, the first Restatement did not recognize liability for emotional distress or physical injury that resulted from emotional distress, except in cases of common carriers,[59] innkeepers, and telegraph companies,[60] and the mishandling of dead bodies.[61]

Nevertheless, by 1948, the Restatement amended its view on the matter, stating that *"[o]ne who intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."* [62] In the second Restatement,[63] the rule was expanded:

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[58] Smith *supra* note 53 at 100. When discussing whether the defendant's act would give rise to liability in cases where it was negligent rather than willful, "*It would be foreign to the purpose of this paper to enter now into a discussion of the above disputed point. We are here attempting to deal only with the cases where the facts (apart from the absence of a particular name) are admittedly sufficient to sustain an action of tort. We are not considering cases where the existence of an actionable tort is a matter in dispute."*

[59] During the late 19th century, however, the courts started developing new doctrines regarding the liability of carriers that were independent of any physical injury on the plaintiff and was based instead on the treatment received by the employees of the carrier.

Having a ticket was not seen as a requisite for the claim. Plaintiff who had not yet bought a ticket, but was on the process of doing so, could sue for damages. *Texas & P. Ry. Co. v. Jones,* 39 S.W. 124 (Tex.Civ.App. 1897), as well as plaintiff who had boarded the train with the intention of buying a ticket during the travel. *Randolph v. The Hannibal and St. Joseph Railway Company*, 18 Mo. App. 609 (1885)

Even plaintiff who had not bought a ticket could claim liability for emotional distress. *Smith v. Pittsburg, Ft. W. & C. Ry. Co.*, 23 Ohio St. 10 (1872)

[60] Liability in the case of telegraph companies was based more on what could be called gross negligence when performing a contract than an outrageous conduct. Not being able to be by the side of the spouse in their last moments, or suffering many trials because of the failure to deliver a message, regardless of the fact destination was mere meters away from the company offices, was a common theme. Young v. Western Union Telegraph Co., 11 S.E. 1044 (1890), *Barnes v. Western Union Telegraph Co.,* 76 P. 931 (Nev. 1904).

However, in these claims, the victim had to actually suffer some sort of distress. A mere delay in normal circumstances was not enough to grant the plaintiff damages. *Bowers v. Western Union Telegraph Co*., 135 N.C. 504 (1904)

[61] However, liability in these cases was granted under the idea that the corpse was the property of the surviving members of the family. *Larson v. Chase*, 47 Minn. 307 (1891), *Burney v. Children's Hospital in Boston*, 169 Mass. 57 (1897), *Koerber v. Patek*, 123 Wis. 453 (1905).

These claims were reserved to the person who had the legal power to decide about the body. There were no individual claims to every surviving close relative. *Gostkowski v Roman Catholic Church*, 262 N.Y. 320, (1933)

[62] Restatment of Torts 46 (Supp. 1948)

[63] Restatment of Torts 46 (Supp. 1948)

(1)One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.[64]

The courts were then more inclined to recognize a claim for emotional damages when the conduct of the defendant was "outrageous," though the meaning was not completely clear. The Restatement advises that an outrageous conduct is not limited to intentional one or one filled with malice. Instead, it must be intolerable when regarded from the standpoint of a civilized community.[65] A conduct can also be deemed outrageous because of the actor, or because of any special condition of a plaintiff, if the defendant is aware of it.[66]

The other side of the issue is the tort of negligent infliction of emotional distress. The second Restatement recognized this claim under Section § 313 (1) in the following manner:

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for the resulting illness or bodily harm if the actor

(a) Should have realized that his conduct involved an unreasonable risk of causing distress, otherwise than by knowledge of the harm or peril of a third person, and

(b) From facts known to him should have realized that the distress, if

[64] Restatment (Second) of Torts § 46
[65] Dan B. Dobbs, *The Law of Torts* 827 (2000)
[66] Kircher *supra* note 19 at 802-805

it were causes, might result in illness or bodily harm.[67]

In another Section § 436 (A), the Restatement says:

> *If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.*[68]

Regardless of how the Restatement views these kinds of claims, the states have adopted three different approaches that set unique requirements for a plaintiff's success.[69] The first approach is the "impact rule," under which there is no claim for emotional damages if there is no physical impact.[70] Impact does not mean injury; if that were the case, the emotional harm would be for pain and suffering, not an independent tort. Instead, impact refers to contact. The contact itself indicates that the emotional harm alleged by the plaintiff might have occurred by proving the cause of the harm. The main issue with this approach is that it bars recovery in cases where the plaintiff suffered no impact. For example, in situations of a speeding car crashing next to the plaintiff, a falling piano, a huge dog that is restrained before reaching the plaintiff, and a plane crashing into the plaintiff's house, recovery would be denied.

Some states[71] follow the "physical manifestation" rule, under which the emotional harm must produce a physical sign of its existence.[72] In other words, the plaintiff must prove the existence of emotional harm through a visual manifestation through means of objective and verifiable physical symptoms.[73] Symptoms like nightmares, headaches, and weight loss are not considered physical manifestations of emotional distress. This rule is restrictive in the sense that it denies remedy to plaintiffs who do not present a physical

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[67] Restatment (Second) of Torts § 313 (1)
[68] Restatment (Second) of Torts § 436 (A)
[69] Kircher *supra* note 19 at 810
[70] Kircher *supra* note 19 at 810
[71] Alaska, Arizona, Delaware, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, and Utah. Kircher *supra* note 19 at 812
[72] Kircher *supra* note 19 at 812
[73] Dobbs *supra* note 65 at 838

manifestation of their distress, even if the existence of said distress is a matter that can be presumed under the circumstances.

Finally, some states[74] do not follow the above rules regarding emotional harm, but rather apply the usual rules of the tort of negligence and require a plaintiff to prove the loss.[75] As of 2016, only two states, Arkansas and New Mexico, do not have a claim for negligent infliction of emotional distress.[76] In New Mexico, however, courts have recognized a cause of action in the case of bystanders, so a person can sue when he or she is a bystander to whom the act was not directed, but not in the case he or she is the direct victim of the act.[77] Both the impact rule and the physical manifestation rule can be considered descendants of the parasitic nature of the first claims for non-economic damages in U.S. law. After all, in many of those early claims, remedy was granted when the plaintiff suffered no injury whatsoever, and in others, the defendant did not touch the plaintiff, but caused him or her to suffer a grievance that was perceived through a bodily reaction.

In the US, the nature and existence of non-economic losses and their remedy is not a matter of much dispute. However, one main issue is the amount a victim receives as damages. Since the 1970s, the tort reform movement has been advocating for limiting the amount that can be granted in cases of punitive damages and non-economic damages, which has resulted in the enactment of statutes to that effect in some states.[78] Those who support this movement do so on the basis that these non-economic damages are difficult to determine, and thus produce high awards for injuries.[79] In medical malpractice cases, there is the argument that high non-economic damages tend to increase premiums that insurance companies charge to clients.[80] At the time of writing, 29 states[81] have placed caps on non-

[74] Hawaii, New Jersey, North Carolina, Ohio, Oklahoma, Tennessee, Washington, Winsconsin. Kentucky
[75] e.*g.*, *Osborne v. Keeney, 2012 WL 6634129 (Ky. Dec. 20, 2012)*
[76] Kircher *supra* note 19 at 809
[77] For a more detailed exposition, see Karen Molzen, *TORTS-New Mexico Establishes a Cause of Action for Negligent Infliction of Emotional Distress to a Bystander: Ramirez v. Armstrong,* 15 N.M. L. Rev. 525 (1985)
[78] Dobbs *supra* note 65 at 1071-1072
[79] Dobbs *supra* note 65 at 1093
[80] Carol K. Kane & David W. Emmons, *The Impact of Liability Pressure and Caps on Damages on the Healthcare Market: An Update of Recent Literature,* American Medical Association available at: http://www.aaos.org/sectionlink/?id=27476
[81] Alabama, Alaska, California, Colorado, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma,

economic damages However, caps have been struck down in some cases, such as by the courts of Alabama, Georgia, Missouri, North Dakota, Washington, and Oregon, under the argument that they infringe upon the right to trial by jury.[82] In Alabama and Oregon, the caps were struck down in cases of personal injury, but upheld in cases of wrongful death.[83]

In Illinois, the caps were repealed because they were considered a legislative remittitur that violated the separation of power clause in the state constitution.[84] In New Hampshire, the caps were overturned because they violated the equal protection clause.[85] Missouri overturned the caps as the result of a special law.[86]

Only Alaska, California, Colorado, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Nebraska, New Mexico, Ohio, Oklahoma, Texas, Utah Virginia, West Virginia, and Wisconsin have laws in their books that limit non-economic damages. In the cases of Oklahoma, Wisconsin, Texas, and Ohio, their courts had struck down previous laws that established caps on non-economic damages, but new laws were enacted afterwards and have not been repealed or struck down.[87]

IV. PRE-19TH CENTURY CIVIL LAW

The study of the evolution of emotional harm in civil law has been greatly informed by Roman law, while also developing a great deal of customary law and incorporating the influence of canon law.[88] The ecclesiastic courts adopted and interpreted Roman law to compose basic principles of justice under the Christian fate.[89] This influence cannot be overstated, as civil law was the result of a centralized governmental power.[90] Consequently, any development of the concept of personality rights has been heavily guided by Christian thinking. As Tobeñas has stated, "*Christianity laid the indestructible moral foundations on*

Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin

[82] American Medical Association Advocacy Resource Center, *Caps on Damages* (2011) http://www.medmalfacts.com/wp-content/uploads/2012/02/DamageCapsbyState.pdf

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Louis Perret & Graciela Fuentes, *El Sistema Juridico del Derecho Civil en el Siglo XX* in La Ciencia del Derecho durante el Siglo XX, Universidad Autonoma de Mexico 639 (1998) (Mex.)

[89] *Id.* at 640

[90] Ibid.

which the acknowledgement of the individual personality rights would rise."[91]

Under the *ius naturalism* proposed by Thomas Aquinas, the idea of human dignity was instrumental in the development of these types of interests. This school of thought argued for the concept and importance of natural law, and this was formative for the political ideas of the time. A clear example is the Declaration of the Rights of Man and of the Citizen.[92] In the early 19th century, both the Austrian Civil Code of 1811 and the Portuguese Civil Code of 1867 mentioned the unalienable rights of an individual.[93] Personality rights, as understood today, are of Germanic origin, and were introduced to France via the writings of Roguin,[94] La régle du droit.

There are three theories regarding personality rights.[95] The first theory argues that an individual personality is an interest that cannot be divided. Therefore, its protection should be under a general concept of personality instead of a number of rights. An early draft of the BGB followed this theory, but it was ultimately rejected.[96] Most scholars and courts favor the second theory, which posits that an individual's personality is protected under a number of substantives rights, each related to the various manifestations that an individual's personality might possess.[97] The main disadvantage of this theory is that it limits the protection of these interests to those recognized by a legal rule, which became a problem during the Second World War in totalitarian regimes.[98]

Finally, the third theory admits the existence of multiple rights that are nevertheless derived from a unitary concept of personality. It addresses the issue of protection of interests that are not explicitly recognized by a legal rule. However, it also entails that

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[91] I Jose Castan Tobeñas, *Derecho Civil Español Común y Foral* 337 (1971) (Spain)
[92] Eduardo de la Parra Trujillo, *Los Derechos de la Personalidad: Teoría General y su Distinción con los Derechos Humanos y las Garantías Individuales,* 31 JURÍDICA, Anuario del Departamento de derecho de la Universidad Iberoamericana 139, 144 (2001) (Mex.)
[93] José Javier López Jacoiste, *Una Aproximación Tópica a los Derechos de la Personalidad,* 39 Anuario de Derecho Civil 1059, 1066 (1986) (Spain)
[94] Carlos Rogel Vide, *Origen y Actualidad de los Derechos de la Personalidad,* 20 Revista del Instituto de Ciencias Jurídicas de Puebla 260, 271 (2007) (Mex.)
[95] Alejandra de Lama Aymá, La Protección de los Derechos de la Personalidad del Menor de Edad 20 (unpublished Ph.D. dissertation, Universidad Autónoma de Barcelona) available at http://www.tdx.cat/bitstream/handle/10803/5207/ala1de1.pdf?sequence=1
[96] Trujillo *supra* note 92 at 144
[97] *Id.* at 21
[98] Ibid.

personality rights only warrant protection if they are considered substantive rights. Therefore, it must first be determined if personality rights can be considered substantive rights, and in the event they can, if their protection falls solely within their sphere or if other legal rules are needed to ensure their safeguard.[99][100]

Traditionally, the protection of personality rights has operated within the sphere of non-economic losses as a loss covered under the concept of *dommage moral*. However, some commentators have divided personality rights into essential interests, such as life, and bodily integrity, and civil liberties. Civil liberties are further divided into physical liberties, such as freedom of movement; moral liberties, such as freedom to choose one's lifestyle; and professional liberties, such as freedom to choose one's profession. These liberties are not the same as public liberties, such as freedom of expression and association, which are granted by and exercised against the state.[101] Within civil liberties there are also social and individual rights, such as reputation and privacy. Moreover, in some cases, both mental and physical health have been classified as types of interests.[102]

A useful example of the law of non-economic losses is *las siete partidas of alfonso el sabio*, which addresses defamation in the seventh *partida*, title nine. Defamation could occur either through words or acts, and truth was a defense except when defamation was incited by a child, grandchild, or great-grandchild against his or her parent, grandparent, or great-grandparent, or by a servant against his or her master, in which case the accused was not allowed to prove his or her comments in order to escape liability.

However, not every civil law country has followed this approach. Germany and those countries influenced by its legal tradition have expressly rejected the idea of the *ius naturalism,* instead opting for a more scientific approach to creating and interpreting the law. These countries have adopted the concept and function of Roman law, while ignoring

[99] Trujillo *supra* note 92 at 22
[100] Trujillo argues that the personality rights are both subjective and moral rights. He bases his argument in the fact that personality rights fulfill all the criteria of subjective rights. First of all, they are a type of permission. They also impose an obligation for third parties not to infringe on such a right, and are based upon a substantive rule of law. Finally, it grants the right holder remedy against those who infringe upon that right. Trujillo *supra* note 92 at 146-147
[101] Vide *supra* note at 94 at 262
[102] Ibid.

that sources of the law were not necessarily Roman.[103] In contrast with the common law *curia regis,* the development of the law under canon law and *ius commune* was the result of interpretations by the Juris Utriusque Doctor in the form of the *communis opinion doctorum.*[104]

The codification process that took place during the 19th century was also highly influential for the origins of the concept of *dommage moral.* These processes were an outcome of significant social changes, especially in Latin American countries. This directly contrasts with the development of common law claims for non-economic losses. The U.S. common law did not reject its origins, but rather embraced English common law and case law, from which it developed new causes of action.

Countries that followed the French system did so under the premise of rejecting previous law, instead searching for legal principles that could be applicable under the new nationalist conception of the state. Therefore, development of the concept of *dommage moral* was guided by the moral ideas of Christianity, which are still the foundation of many civil law countries, as well as the concept of *ius naturalism*. However, a certain presence of nationalist elements in civil law countries cannot be ignored. The concept of *dommage moral* emerges from the courts' interpretation of the concepts of harm and loss. This tradition informed codification processes in Latin America during the 19th century. Accordingly, both drafters had multiple sources at their disposal to assist with their task, such as Roman law, both in its classic form and with the developments added throughout the centuries, non-Roman laws, such as Germanic or feudalistic customs, *lex mercatoria*, etc., compilations of laws previously adopted within a specific state, and original solutions composed by the drafters.[105]

V. DEVELOPMENT OF THE CONCEPT OF "DOMMAGE MORAL"

This section is limited to the acceptance of the concept of *dommage moral* under delictual liability in some jurisdictions. Dominguez has explained that the development of the concept of *dommage moral* is a fruit of the endeavor of the courts, either by filling the

[103] Perret *supra* note 88 at 640
[104] *Id.* at 642
[105] Perret *supra* note 88 at 646

void in a statute when there is no express rule on the subject or extending the interpretation of a restrictive text to cases that, at first glance, are excluded.[106] Furthermore, Dominguez[107] has argued that the evolution of *dommage moral* progresses in three stages. In the first stage, these types of losses are accepted under the delictual liability system, which she has called an improper *dommage moral*. During the second stage, harms do not directly or indirectly affect a victim's economic interests, which is termed proper *dommage moral*. The third stage is the total recognition of a victim's non-economic interests.

In civil law countries, such as Spain, France, and Latin American countries, these losses are usually grouped under the term "moral losses" (*daño moral, dommage moral, etc*.). Others, such as Italy and Germany, prefer the term "non-pecuniary" or "immaterial losses" (*danno non-patrimoniale*). These terms can be traced to a canon law interpretation of the ancient Germanic law "*wergeld,*" from which the modern German concept of "*schmerzensgeld*" derives. Drafters of the *Code Napoleon*, which was formed in the tradition of canon law, introduced the concept of morality to delictual liability under the figure of *culpa*. This dictated that any legal moral rules used to determine liability must be approached not only under the idea of *culpa,* but also through an analysis of the personal circumstances and necessities of a victim. Thus, *dommage moral* does not express a specific legal phenomenon. Rather, it signifies a category of different losses that are constantly updated and changing.

In this regard, both common law and civil law have treated non-economic losses in the same manner. Nevertheless, since civil law does not value case law as a source of law, at least in theory, the legal basis must be found in statute. However, many civil codes do not expressly allow for the recognition of non-economic losses. Originally, France had permitted non-economic losses to be taken into account when calculating damages, but only in cases that had their genesis in criminal liability.[108]

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[106] Carmen Domínguez Hidalgo, *La Indemnización por Daño Moral. Modernas Tendencias en el Derecho Civil y Comparado*, 25 Revista Chileno de Derecho 27, 31 (1998) (Chile)
[107] Ibid.
[108] Dominguez *supra* note 106 at 33

In the 1833 Dupin affair,[109] [110] a group of pharmacists intervened in criminal proceedings against unlicensed individuals who were selling remedies. *procurer général*. Dupin, in reference to the plaintiffs' loss, coined the term "*un préjudice tout moral.*" The court understood these types of prejudices to be due to the act of the defendants. Even though the plaintiffs could not prove that they had suffered any economic loss, they had nevertheless suffered an attack to their honor as pharmacists. Dominguez has argued that, strictly speaking, this type of loss is not a *dommage moral*, as the loss was not suffered by only the plaintiffs, but rather by all pharmacists.[111] Thus, the first instance of *dommage moral* in France was resolved under the rules of defamation. This was in line with the development of the law up to that point, as the law of non-economic losses had revolved around defamation in one way or another for thousands of years.

In Spain, 1912 case [112] is considered the first that recognized non-economic losses.[113] A newspaper published an article in which it falsely accused a young girl of eloping with a friar. Without defining the concept of *daño moral* harm, the court ruled in favor of the young girl:

> *[T]he honor, virtue and reputation of a woman constitute her most important social interests,[114] and harming them results in the loss of the most important esteem that she might suffer in a civilized society, as it deprives her of having the character of holder and custodian of*

[109] Cass. Ch. Réunies 15 Juin 1833 S.P. 1833. I. 458
[110] Vernon V. Palmer, The Recovery of Non-Pecuniary Loss in European Contract Law 64 (2015)
[111] Dominguez *supra* note 106 at 33
[112] S.T.S. Dec. 6, 1912 (Spain)
[113] However, Crespo argues that this is not the first case in which *Daño Moral* was recognized. He cites a 1894 case, (S.T.S. Dec. 15, 1894 (Spain), in which the court granted damages for the loss of affection and monetary losses to the wife and daughter of the victim. Furthermore, in a 1909 case (S.T.S. Oct. 19, 1909 (Spain)), the court granted remedy to the father of the victim, who died impaled by a bull. Crespo highlights that while it is true that the 1912 case was the first to consider moral harm as an infringement of the spiritual interests of an individual, there were many other cases that had granted remedy in cases of physical injury. The first case that actually used the term moral harm, "*daño moral,*" was in 1917. Mariano Medina Crespo, *Acerca de las bases doctrinales del sistema legal valorativo (Ley 30/1995) Los Efectos de su Marginación*, 36 Revista de la Asociación Española de Abogados Especializados en Responsabilidad Civil y Seguro 9, 16 (2010) (Spain)
[114] The court utilizes the term "*bienes sociales*" As discussed in the next chapter, the term "*bien*" can be translated as "property," and it usually refers to a material good. However, the courts and scholarship in Latin America have expanded the term to include social and non-economic values.

the sacred purpose of the household, foundation and cornerstone of the public society, therefore these type of losses are to be considered amongst the most severe.[115]

The legal basis for this decision was Section 1902 of the Spanish Civil Code. However, the court also utilized the seventh *partida* in conjunction with Section 1902 to rule in favor of the plaintiff.[116] Casado has noted that this ruling does not recognize pure *daño moral*, as it only granted remedy because the acts of the newspaper had the potential to indirectly affect the future state of the plaintiff. The first case that actually employed the term *daño moral* occurred in 1917.[117]

In Chile, even though Andres Bello was influenced by the French *Code*, he never intended for Section 2314 of the Chilean Civil Code to protect non-economic losses.[118] The Chilean Supreme Court acknowledged this in a 2001 ruling, saying "*[a]t the time that the De Bello code came into effect, almost a century and a half ago, the redressable harm only included material or patrimonial losses… because the concept of moral harm did not exist."*[119] The first instances of moral loss in Chile were not under the figure of defamation, but rather emotional suffering due to the death of a relative[120] or from injury. Traditionally, the first case that clearly recognized *daño moral* in Chile was in 1922.[121][122] In this case, a father was granted remedy for emotional distress caused by the death of his child, who was run over by a tram and suffered for eight days before dying. The court arrived at this conclusion by making a distinction between Section 2315 and Section 2329. It held that

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[115] Blanca Casado Andrés, *El Concepto del Daño Moral Bajo el Prisma de la Jurisprudencia,* 9 Revista Internacional de Doctrina y Jurisprudencia 1 5 (2015) (Spain)
[116] *Id.* at note 14
[117] S.T.S. Dec.14, 1914 (Spain)
[118] Carmen Dominguez H, *La Reparación del Daño Moral Derivado del Contrato en el Derecho Civil Chileno: Realidad y Límites*, in III Cuadernos de Análisis Jurídico 227, 233 (Iñigo de La Maza ed., 2006) (Spain)
[119] Corte Suprema de Justicia (C.S.J) (Supreme Court) 5 de noviembre de 2001, R.D.J. T. 98, secc. 1', p. 234 (Chile)
[120] Corte de Apelaciones de Santiago (C. Apel) (Santiago court of appeals) 27 de julio de 1907, R.D.J. T. 4, sec. 2ª p. 139 (Chile)
[121] Corte Suprema de Justicia (C.S.J) (Supreme Court) 16 de diciembre de 1922, R.D.J. T. 21, sec. 1ª, p. 1053 (Chile)
[122] The same year the Court had already rejected a claim. Corte Suprema de Justicia (C.S.J) (Supreme Court) 13 de enero de 1922, R.D.J. T. 21, sec. 1ª, p. 529 (Chile)

Section 2315 only applied to harm to objects, while Section 2329 applied to harm to persons. Section 2320 does not offer a definition of harm. Therefore, the court stated that harm does not refer only to bodily injury, but also to emotional distress, and moral harm was the *pretium doloris*.[123]

In Colombia daño moral was first recognized in the Villaveces case of 1922.[124] Section 2341 of the Colombian Civil Code is almost identical to Section 2314 of the Chilean Civil Code. The plaintiff owned a mausoleum that entombed the remains of his late wife. Municipal workers erroneously removed the remains from the mausoleum. The plaintiff sued for both economic and moral losses, but the trial and appeals court only granted pecuniary damages. The Supreme Court partially reversed this decision, saying that in refusing to grant remedy for non-economic losses, both the trial and appeals courts had failed to address all issues of the case, as the evidence clearly indicated that the plaintiff had suffered emotional distress. The court asserted that Sections 2341 and 2356 of the Colombian Civil Code could not be construed as limiting remedies to only economic losses. Honor, reputation, personal dignity, pain, and suffering are all considered harm when they are the result of an intentional or negligent act.

Thus, while non-economic losses were first addressed under the law of defamation in French systems, not all countries that adhere to the general clause rules developed the law in the same fashion. As case law demonstrates, family relations also played a part in the development of the law in Latin American countries.

Exceptionally, in some countries, claims for non-economic losses were the result of a statutory provision. An early example is Section 1196 of the 1922 Venezuelan Civil Code,[125] which granted damages for slander for both a victim and his or her family, as well

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[123] For more on the distinction between Sections 2315 and 2329, see: Grandon, Javier Barrientos, *De la presunción general de culpa por el hecho propio. A propósito de los artículos 2314 y 2329 y de nuestro "Código Civil Imaginario" (II)*, 13 Revista Chilena de Derecho Privado Diciembre 9, 9 (2009) (Chile)
Carolina Schiele, Josefina Tocornal, Artículo 2329 del Código Civil. la interpretación de presunción por hechos propios existe en la jurisprudencia, 37 Revista Chilena de Derecho, 123 (2010) (Chile)

[124] Corte Suprema de Justicia (C.S.J) (Supreme Court) 21 de julio de 1922 Gaceta Judicial. T. 29 N°1515 (Colom.)
The court ruled on the same case again in 1924. Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 22 de agosto de 1924 Gaceta judicial T 21 p. 82 (Colom.)

[125] Section 1196: The obligation to compensate covers all types of material or moral losses that result from the

as for unlawful entry and revealing secrets. Section 1916[126] of the Mexican Federal Civil Code of 1928 granted a claim to victims, or their families in cases of the victim's death, as a type of *moral reparation*. However, the amount could not exceed one third of the amount granted as economic damages, and it did not apply to cases in which the state was the defendant. The code was amended in 1982, completely changing the language of Section 1916[127] and adding Section 1916bis to produce perhaps one of the most comprehensive

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unlawfull act. The judge can specially award compensation for the victim in the cases of bodily injury, an afront to their honor or reputation or that of their family, to their personal freedom as well as in those cases their domicile or privacy of the victim are infringed. Translation by the author.

[126] Section 1916: Regardless of any losses, the judge can award the victim of an unlawful act or their family in the case the former has died a fair amount as a mean of moral compensation, paid by the responsable of the act. This compensation cannot exceed a third of the amoun granted as damages for civil liability. This shall not apply to the cases governed by Section 1928. Translation by the author.

[127] Section 1916: Moral harm is the harm which a person suffers in his (or hers) feelings, affection, believes, decorum, honor, reputation, private life, physical attributes and configuration, as well as the regards others have for him (or her). Moral harm is presumed when the freedom, body or mental health of a person is unlawfully infringed or violated.

When the unlawful act or omission produces moral harm, the person responsible for it has the obligation to compensate it via a monetary sum, independent of any economic harm, in both contractual and extra-contractual (delictual) liability. The person who is liable in the cases of strict liability established in Section1913, as well as the State and public official, under Sections 1927 and 1928 of this code must also compensate the damage.

The action to claim reparation is non-transferable via an inter vivos act, and the heirs of the victim will only inherit it when the latter has brought the suit during his lifetime.

The amount will be calculated by the judge taking into account the infringed rights, the degree of responsibility, the economic situation of the responsible party and the victim, as well as any other circumstances of the case.

When the moral harm affects the victim's decorum, honor, reputation, or consideration, the judge, when the victim so requests and under the responsibility of the responsible party, will order a part of the judgment that reflects its nature and reach to be published on the media formats he considers convenient. In cases where the damages result from an act that has been diffused on the media, the judge will order they (the media outlets) diffuse part of the judgment, with the same relevance given to the original (section, broadcast, etc)"

The following conducts are considered unlawful and give rise to the obligation to compensate for moral harm as described in this section:

I. The party that communicates to another (one person or many) the accusation being made against a natural or moral person of a true or false fact, determinate or indeterminate, that could cause dishonor, discredit, damage, or expose him (or her) to the disdain of a third person.

II. The person that accused another of a conduct describe as a crime by the law, if the accusation is false or if the person is innocent.

III. The person that makes slanderous or libelous reports, understood as those in which he accused a determinate person of a crime, while knowing that said person is innocent or no crime has been committed, and

IV. The person who offends the honor, or attacks the private life or image of another person.

The reparation of the moral harm relating to the above paragraphs must contain the obligation of the rectification or answer of the information disseminated in the same media outlet where it was published and

statutes on non-economic losses. The new language of Section 1916 also influenced section 1644a of the Panamanian Civil Code, amended in 1992.[128]

In 1968, an amendment to Section 1078[129] of the previous Civil Code of Argentina introduced claims for non-economic losses. Section 1322[130] of the 1984 Peruvian Civil Code also provided remedy in cases of *daño moral*, although it neither defines nor lists what should be considered as such. However, Section 1984[131] established some rules for quantification.

VI. THE MODERN CONCEPT OF NON-ECONOMIC LOSSES

Since its origin, the category of non-economic losses has evolved from a punitive measure for certain types of slander to a broad concept signifying an individual's intangible interests. Nevertheless, few countries actually define non-economic losses within their statues, and it is usually through the works of courts and scholars that these losses are granted protection.

At a doctrinal level, non-economic losses have traditionally been defined according to their relation to economic losses, which Dominguez[132] has called a negative approach. Under this view, the first step is to define economic losses, after which any losses that do

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with the same size, circulation and audience as the original information, without prejudice of the fifth paragraph of the present Section.

The accurate reproduction of information does not give rise to moral harm. Even in the case that the reproduced information is not correct and could affect the honor of a person, it does not constitute a liability of who disseminates the information, as long as the source where it was obtained is quoted.

Originally translated by the author in: Rodriguez Samudio *supra* note 1 at 26-27

[128] Section 1916 Bis. Whoever exercises his or her rights of opinion, criticism, expression, and information is not obligated to compensate for moral harm, under the terms and limitations set forth by Sections 6 and 7 of the General Constitution of the Republic.

In any event, the plaintiff who files for the reparation of moral harm for contractual or delictual liability must fully prove the unlawful act of the defendant and the damage directly caused to the Plaintiff by said act.

Under no circumstances will unfavorable opinions regarding literary, artistic, historic, scientific, or professional criticisms be considered an offense against the honor. Neither are unfavorable opinions expressed during the fulfillment of an obligation or the exercise of a right when the manner (in which the opinion was expressed) and the absence of any reservation have no offensive objective to be considered offensive. Translation by the autor.

[129] Section 1078: The obligation to compensate for the losses that result from unlawful acts includes not only the losses and interest, but also the any moral loss suffered by the victim. Translation by the author.

[130] Section 1322: Moral losses must be compensated in the event they arise. Translation by the author.

[131] Section 1984: Moral losses must be compensated by taking into account their magnitude and the detriment suffered by the victims or their families. Translation by the author.

[132] I Carmen Domínguez Hidalgo, *El Daño Moral* 33 (2000) (Chile)

not fit that category are considered non-economic.[133] However, non-economic losses have also been defined in a positive manner, *i.e.,* regardless of their relation to economic losses. Under this approach, non-economic losses are ascribed a specific meaning, such a *pretium doloris,* or as an infringement of the personality rights of an individual. The latter approach has inspired the term *patrimonio moral* or *patrimoine moral* within civil law countries to refer to all the cultural, social, and spiritual interests of an individual. This in turn produced a new interpretation of the term *patrimoine*, which abandons its Latin origins.

The difficulty of defining non-economic losses arises from a terminological issue: the relation between the concepts of harm and loss. However, for the effects of this chapter, the term *dommage* (harm) is usually used in two contexts: the first refers to the harmful event itself, and the second to the consequences of that event. In the former case, a *dommage moral* can certainly be the result of a harmful event to an interest that can be assigned economic value, such as in cases of body injuries. Vice versa, economic losses can arise from an infringement of non-economic interests, such as reputation.[134]

Dominguez[135] has asserted that any efforts to establish an absolute definition for non-economic losses have been in vain. Indeed, such endeavors might be useless, as modern delictual liability is founded on the idea of repairing all types of losses. She has further concluded that the very idea of a or moral loss is directly linked to the level of legal protection granted to an individual. Therefore, higher social consciousness towards this protection will yield a higher number of interests that are protected as moral losses. Furthermore, as a concept that evolves with society and is in constant renovation to better reflect contemporary views, these types of interests should not be approached under a *numerus clausus* system.[136] Duarte y Noroña, quoting Jimenez Gomez, has noted that the protection of the moral interest of the individual is not only the protection of a class of legal

[133] De Cupis famously proposed this approach when he said that non-economic losses can only be defined in contrast to economic losses, as any loss that cannot be considered pecuniary. Adriano de Cupis, *El Daño* 124 (Angel Martínez Sarrión trans. Bosch 1975) (Spain)
[134] Dominguez cites this as one of the criticisms against the negative approach. Dominguez *supra* note 118 at 40
[135] Dominguez *supra* note 118 at 43
[136] Casado Andres supre *supra* note 115 at 7

interest, but also an efficient method to prevent the collapse of society.[137]

Medina[138] has posited that, depending on its content, definitions of non-economic loss can be classified into four categories: (1) restrictive, in cases where the losses are related to the spiritual interest of an individual, (2) strict, when it includes losses resulting from bodily injury, (3) broad, if it includes both spiritual and bodily harm, as well as any loss resulting from them, or (4) superlative, when it expands to include not only all of the above, but also any other non-economic loss that results from harm. This last definition, Medina has argued, is a strictly positive concept of non-economic losses, as it does not require any reference to economic losses. He has further criticized the negative approach as one that only establishes what non-economic losses are not – which does not contribute to understanding what they are.

A. LEGAL BASIS

In contrast with property and other rights, the spiritual, cultural, and social interests of an individual do not necessarily depend on the existence of a statutory provision that recognizes them. As previously mentioned, at least in civil law countries, the idea of moral losses is deeply rooted in canon law. By extension, Christian ideas of morality, good and bad, had an influence over scholars and societies throughout Europe. The protection was not based on some utilitarian ideals, but rather came as an expression of the natural law movement. As such, even now the level of protection granted to these kinds of interests not only varies depending on country, it can also be taken as an indicator of the relation between the concepts of positive law and natural law within each system.

However, as unlawfulness is a requirement of most modern delictual liability systems, the protection of these interests must be either directly or indirectly established by a legal norm, though this does not necessarily entail a statute. Regardless, because of the very nature of these interests, it is almost impossible to find a rule that will cover all possible circumstances. Therefore, the relation between these types of interests and the

[137] Alicia Elena Pérez Duarte y Noroña, *El Daño Moral,* 53 Boletín Mexicano de Derecho Comparado 625, 629 (1985) (Mex.)
[138] Mariano Medina Crespo, *Acerca de las Bases Doctrinales del Sistema Legal Valorativo (Ley 30/1995). Los Efectos de su Marginación,* 36 Revista de Responsabilidad Civil y Seguro 9, 16 (2010) (Spain)

various legal and cultural rules is of great importance, as it is not rare for the courts to protect or deny protection of these interests by invoking social or cultural rules.

Since civil law countries tend to develop their case law on the basis of abstract rules applied to specific cases, the protection granted to non-economic losses under civil law can be divided into three approaches dependent on the rules of each code. However, societal and religious values are also deeply present in the interpretation the courts give to their statute. Christian morality in particular occasionally dictates how a case is resolved. For example, countries like France, Italy, and Spain will not consider the negligence of a medical professional during an abortion procedure that results in a healthy infant to be grounds for liability. In contrast, in countries like Germany, England, and some states in the US, such an event would be viewed as producing a legally relevant loss.[139]

a. CIVIL LAW

i. GENERAL RULES REGARDING CLAIMS FOR NON-ECONOMIC LOSSES

In most jurisdictions, claims for non-economic losses are private matters between individuals and fall under the rules of delictual or tort liability. Therefore, losses that result from physical injuries, such as defamation or infringement of certain rights, will grant the victim a claim for parasitic non-economic losses in the same manner as in common law, regardless of their origin. With regards to the manner in which non-economic or moral losses are treated under civil liability rules, countries can be divided in three groups. The first is those countries, such as France, that do not explicitly protect non-economic losses but place them within the general clause under the terms harm or loss. Therefore, they adhere to the general rules that govern redressable losses. Civil law countries that redacted their civil codes during the 19th century tend to follow this approach.[140] Under the French model, non-economic losses have been mentioned under certain terms, such as *souffrances morales ou physiques, préjudice esthétique, préjudice d´agrement*, and in some cases, separate amounts are granted for each of these losses.[141] Furthermore, the French courts

[139]Mauro Bussani & Marta Infanto, *The Many Cultures of Tort Liability, in* Comparative Tort Law: Global Perspectives 11, 24 (Mauro Bussani, Anthony J. Sebok eds. 2015)
[140] Dominguez *supra* note 106 at 33
[141] Cees Van Dam, *European Tort Law* 363 (2ed., 2013)

have developed their concept of *dommage moral* based on human dignity and respect towards the individual,[142] a stance that has influenced other systems.

Under general clause systems, recognizing moral losses will usually depend on if they meet the criteria of redressable losses. Therefore, it is simpler for the courts to recognize claims that would otherwise not exist under the more limited language of other codes. Non-economic losses are also recognized in claims for the death of a pet[143] and damage to property;[144] under contract liability[145]; for psychological trauma, nuisances,[146] or judicial errors[147]; and others. The list of losses has no limit. Rather, the situation of each case is taken into account when determining the level of protection granted.

The next group consists of countries that explicitly and without limitation grant remedy for non-economic losses within their civil codes, as is the case for Mexico and Panama. In Mexico, Section 1915 of the Federal Civil Code grants a special claim for physical injuries that result in death or any type of disability.

The final group is comprised of countries that limit these types of claims to cases specifically established under statute, which in most cases tends to be their civil code, such as in Germany and Italy.[148] Although in Germany the limitation established by Section 847

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[142] Dominguez *supra* note 106 at 34

[143] S.A.P.de Oviedo Nov. 16 1999 (Spain)

[144] However, in cases where emotional distress results from the infringement of property, the position of the victim is not so clear. Some countries grant damages only in the case that the property had a special meaning to the victim. For example, in the case of Panama, the Supreme Court ruled on the issue in a pair of 2008 cases. In both cases, the court held that the appellants had not proved any moral loss resulted from the destruction of their property. However, it did recognize that a person can suffer emotional distress from the loss of property to which a special attachment exists.

[145] S.A.P. de Las Palmas Sep. 16, 2005 (AC 2005\1682) (Spain) Due to an eight-hour delay for a flight, the defendant had to spend all night in airport without any support from the airline company.

[146] S.A.P. de Álava Oct. 22, 1999 (Spain)No elevator Access for elderly people.

[147] S.A.P. de Málaga Oct. 15, 1998 (Spain)

[148] Bolivia based Section 994-2 of the Civil Code on Section 2459 of the Italian Civil Code. However, Section 23 of the Civil Code grants protection to the personality rights of the individual, but these has been limited to those established under Section 16 and 32 of the Constitution. However, under Section 920 and 925 of the Bolivian Civil Code of 1920, the aggressor had the obligation to repair non-economic losses. José Luis Diez Schwerter, *La Resarcibilidad del Daño no Patrimonial en América Latina: Una Visión Historico Comparativa,* in Derecho Civil y Romano Culturas y Sistemas Jurídicos Comparados (Adame Goddard cord.) 337, 347 (2006)

Guatemala only admits claims for non-economic losses in two cases. Section 1656 of the Civil Code grants damages for slander, and Section 225 in the cases of pregnancy that result from rape. However, Section 226-3 and 4 limits the liability of the father in the cases the mother had sexual relations with another person, or in

was removed after the 2002 reform via Section 253,[149] claims for non-economic losses are limited to cases established by law. However, Section 253-2 does provide a claim in cases in which a victim's body, health, freedom, or sexual self-determination have been affected, as a part of the constitutional protection of personality rights.[150]

Furthermore, emotional distress as a type of non-economic loss is only recognized in cases where the victim's condition surpasses normal levels of grief, and such a result is foreseeable.[151] Relatives do not have a claim for emotional distress in the case of the death of the victim, as Section 844 only grants damages for funeral costs and for the infringement of the right of maintenance. However, if their condition surpasses normal levels of grief, they might be able to claim damages under Section 253.

In contrast, the development of both claims for non-economic losses and the concept itself has been a lengthy process in Italy. Italian courts and scholars have developed a profound legal theory regarding the nature of and remedies for non-economic losses, despite the 1945 Civil Code establishing limitations regarding claims for these types of losses.[152] However, even though the admissibility of non-economic losses was a subject of discussion in the realm of civil liability, Section 38 of the criminal code of 1889 explicitly stated that the judge could grant damages in the case of a felony that affected the honor of the victim or the family, even if no "loss" was caused. Furthermore, Section 7 of the criminal procedure law of 1913 allowed for a civil claim in cases of crimes against

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cases where, during the time of conception, it would have been impossible for the alleged father to have had sexual relations with the mother.

[149] Non-economic losses that result from damage to property are not granted remedy. Christian Von Bar, *Non-Contractual Liability Arising out of Damage Caused to Another* 506 (2009)

[150] Gerald Spindler, Oliver Rieckers, *Tort Law in Germany* 42 (2011)

[151] Van Dam *supra* note 141 at 177

[152] For more on the evolution of the claim see: Francesca Cristina Salvadori, *Il Danno Non Patrimoniale: Evoluzione Storica e Prospettive Future* 7 *ff.* (2011) (unpublished Ph.D. dissertation, Universitá Ca´Foscari Venezia) (It.)

Section 1151 of the 1865 Italian Civil Code was a textual copy of Section 1382 of the French *Code*, as just as in the Code, there was no definition of *"danno."* This led to a discussion of whether *"danno"* could be construed to include both economic and non-economic losses. Case law was also divided in this matter. Some courts accepted the theory that non-economic losses should be protected even when the property of the victim was not affected. On the other hand, there were courts that held that non-economic losses could only be claimed if the harm also affected the state of the victim. This issue was settled by the Cassation Court in two cases in 1912 (Cass. sez. un., 27 luglio 1912, in Giur. it., 1912, I, 1, pg. 837 (It.))
) and 1927 (Cass. sez. un., 30 novembre 1927, in Riv. dir. comm., 1928, pg. 621 (It.))

individual liberties, honor, unlawful entry, and breach of correspondence even if no "loss" had occurred.[153] In 1930, a new criminal code was enacted. Section 185 of the new code explicitly extended the claims for damages that resulted from crimes to include economic and non-economic losses, without limitation to any kind of specific crime. However, the influence of Section 185 would be truly felt once the Civil Code of 1942 was implemented.[154]

In 1942, Italy enacted a new Civil Code that was influenced by the BGB in which the concept of unlawfulness was introduced in the area of delictual liability. In regards to non-economic losses, Section 2059 of the new code limited claims to cases explicitly determined by law. This effectively meant that the notion of redressable loss under Section 2043 of the Italian Civil Code is limited to economic losses. This created a situation in which non-economic losses and the theories regarding them in the context of civil liability had to be approach under a sort of *renvoi*. The obvious approach was Section 185 of the criminal code. Therefore, liability for non-economic losses under the Italian system became *numerus clausus,* and in order to claim damages, a victim would have to satisfy a much higher standard.

In 1974, the Court of Genova recognized the existence of *danno biologico.* This became the first of a number of classifications of non-economic losses in the Italian system. The Genova Court ruled that physical harm did not only affect the earning potential of an individual; its consequences extended to all everyday activities. The Constitutional Court had the opportunity to hear two cases in 1979 that concerned the concept of non-economic losses. The first one engaged with the constitutionality of Section 2059, which the court upheld. The second had a more profound impact on the interpretation of the law. The plaintiff argued that Section 2043 of the civil code was incompatible with Sections 3,[155]

[153] Salvadori *supra* note 152 at 10-11

[154] Interestingly enough, Section 85 of the Italian-French Code of Obligation established that the obligation to repair included both economic and non-economic losses that resulted from the unlawful act.

[155] All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, and personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature, which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic, and social organization of the country.

24,[156] and 32[157] of the Italian Constitution, as it only granted remedy for economic losses and did not grant an independent claim for injuries that affected health (*danno a la salute*).

The court held that the right to health as enshrined in Section 32 of the Constitution was not only a social interest, but an absolute primary right of the individual as well. Thus, the Constitution had granted the individual a right which, if infringed upon, granted the ability to seek remedy for non-economic damages (*danno non-patrimoniale*). The court continued by establishing that the Section 32 of the Constitution could be used in conjunction with Section 2059 of the Civil Code, the latter governing cases in which the loss could not be quantified directly, *e.g.*, cases regarding the health of an individual. However, the court did reject the idea of granting damages for non-economic losses in cases not covered by a specific law. The supporting argument was that any moral loss caused by a physical injury was subject to rules regarding non-economic losses under Section 2059, and that Section 32 of the Italian Constitution did not grant the plaintiff an independent claim for damages. Therefore, the plaintiff could only succeed if the moral loss occurred as a result of a physical injury that could be considered a crime, and by invoking Section 185 of the criminal code.

In 1981, the Court of Cassation made a ruling regarding the concept of *danno biologico*. Following the precedent set by the Constitutional Court, the court held that the right to health is an absolute and autonomous right, which affects the life of an individual. Therefore, any infringement on such right can be subject to reparation, regardless of whether or not the victim suffered a monetary loss. Furthermore, it defined *danno biologico* as any infringement on the mental and physical integrity of an individual,[158] not limited to

[156] Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall define the conditions and forms of reparation in case of judicial errors.

[157] Section 32 of the Italian Constitution reads:
The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent.
No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person.
Translation from: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

[158] This was later redacted into Section 5.3 of the Legge. N. 57 del 2001

earning potential, which also affects every aspect of daily life in its economic, biologic, social, cultural, and aesthetic spheres.

However, the biggest development occurred in 1986 when the Constitutional Court reviewed the issue of the constitutionality of Section 2059. On that occasion, the court had the opportunity to unify various interpretations of Section 2043 and Section 2059. The court began by saying that the *danno non-patrimoniale*, as established in Section 2059, referred to a subjective moral loss (*danno morale subiettivo*), *i.e.,* the mental and physical suffering that arises from injuries. The court then completely changed the interpretation of Section 2043. By interpreting the *danno biologico* as the harmful event (*danno evento*) and the *danno a la salute* as the result of such an event (*danno conseguenza*), the court effectively held that for the effects of Section 2043, *danno biologico* should be considered a type of redressable harm.

This meant Italian law housed three types of claims for delictual liability. Harms that caused economic losses and cases of *danno biologico* fell under Section 2043 and could be brought forth without need of a special law. Furthermore, under this new reading of Section 2043, claims for *danno biologico* included both economic and non-economic losses.[159][160] Section 2059, on the other hand, dealt with cases regarding pure non-economic losses, *i.e.*, those regarding emotional distress, and similar losses were only admitted under the rules set forth by Section 185 of the criminal code.

As early as 1991, Italian scholarship began discussing the concept of existential losses (*danno esistenziale*) as a generic term to define alterations to life-relations that result from an infant born with a disease. In 2000, the Court of Cassation[161] ruled that a *danno esistenziale* was present in a case where a father did not fulfill his obligations towards his

[159] However, this led to another issue, specifically in cases where the victim died. If *danno biologico* could be used to claim damages in the case of injury, then it should logically extend to the cases of wrongful death. However, the Court of Cassation has said that in cases in which the victim died, the claim did not pass to the heirs, as it was a personal right of the victim.

[160] The court had the opportunity to expand this definition in 1990. *Danno biologico* was then defined as the modification of the preexisting mental and physical condition of the individual, which is independent of the ability to produce earning. Cass., sez. un., 27 giugno 1990 no. 6536 (It.)
In 2001, the court extended the sphere of *danno biologico* to include the "loss of generic earning capacity"- Cass., sez. un., 22 giugno 2001, no. 8599, in GCM, 2001, 1248 (It.)

[161] Cass., sez. un., 7 giugno 2000 no. 7713, in Foro Italiano, 2001, pg. 187 (It.)

son. It reasoned that Section 2043, when construed in accordance with the language of Section 2 of the Constitution, could not be limited to strictly economic losses, but to any harm that could, at least potentially, prevent the realization of an individual.

The leading cases for *danno esistenziale* happened in 2003. In what is often called the twin rulings, the Court of Cassation revisited the issue of *danno non-patrimoniale* under Section 2059 of the Civil Code. The court overturned the traditional case law regarding Section 2059 in the context of Section 185 of the criminal code, holding that *danno non-patrimoniale* was not limited to the idea of a *danno morale soggetivo*, but rather that the term *danno non-patrimoniale* protected all types of losses related to a value inherent to the individual, concluding that when the infringed interest is granted constitutional protection, that in itself is enough for it to be redressable as *danno non-patrimoniale* under Section 2059.

However, Section 185 of the criminal code still established a claim for non-economic losses only in cases of criminal liability. To address this issue, the court held that although Section 2059 does limit claims for *danno non-patrimoniale* to those established by law, *i.e.*, Section 185, those interests that have been granted protection via the Constitution could serve as the basis for a claim without need for a specific rule under the law. The end result was that the court abandoned the three-way classification of losses in favor of a more traditional division: economic and non-economic losses, the latter including both *danno biologico* and *danno morale soggetivo*. Later the same year, the Constitutional Court[162] had to yet again respond to a challenge to the constitutionality of the application of Section 2059. The court, following the precedent set by the Court of Cassation, upheld the notion that Section 2059 did not only grant claim for *danno morale soggetivo*, but also for *danno biologico* as the infringement of the rights granted by Section 32 of the Constitution, and *danno esistenziale*, considered the loss that resulted from the infringement of other constitutional rights inherent to the individual as a human being.

[162] Corte Costituzionale (Corte Cost.) (Constitutional Court) 11 luglio 2003 no. 233, Giur. it. 2004, 1129 (It.)

In 2005, the Court of Cassation,[163] following the precedents, elaborated by ruling that Section 2059 protected non-economic interests, either in an explicit manner, *i.e.*, Section 185, or an implicit manner. When referring to a constitutional rule, the adjectives *morale, esistenziale,* and *biologico* are used only as a guide for the quantification of the loss, as they all refer to *danno non-patrimoniale.*[164] More recently, in 2008, the Court of Cassation addressed the issue of non-economic losses in four rulings on the same day.[165] The court held that Section 2059 did not grant a new type of claim for non-economic losses, but rather had to be read in tandem with Section 2043. In other words, Section 2043 presents the general rules for delictual liability, such as fault and causal link, while Section 2059 establishes the unlawfulness of the loss (*danno antiguiridico*) required by Section 2043 in the case of non-economic losses.

Furthermore, Paraguay has also adopted a third category of loss under Section 1985 of the civil code, harm to the individual (*daño a la persona)*, which was influenced by Italian scholarship and case law.[166] Sessarego has asserted that it is the result of the humanist influence of a legal philosophy under which the fundamental rights of the individual are protected. Particularly, he has argued that *daño a la persona* produces a series of detrimental changes in individual's psyche that are the result of an infringement of any personality right and do not affect the patrimony of the victim.[167] Moreover, in describing the harm to the individual, he posited that moral loss (*pretium doloris*) is a sub-genre of harm to the individual[168] that is comprised of any psychosomatic harm,[169] as well as any harm to the life project of the victim.

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[163] Cass., sez. un., 15 luglio 2005 no. 15022 (It.)
[164] Quantification in Basil Markesinis ET AL., *Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline* 84 (2005)
[165] Cass., sez. un., 11 novembre 2008 no. 6972 (It.)
Cass., sez. un., 11 novembre 2008 no. 6973 (It.)
Cass., sez. un., 11 novembre 2008 no. 6974 (It.)
Cass., sez. un., 11 novembre 2008 no. 6975 (It.)
[166] Schwerter *supra* note 148 at 345
[167] Juan Morales Godo, *El Daño a la Persona en la Jurisprudencia Nacional e Internacional,* 9 Revista Jurídica "Docentia et Investigatio" 57, 68 (2007) (Peru)
[168] Carlos Fernández Sessarego, *Daño al Proyecto de vida* 9 available at http://dike.pucp.edu.pe/bibliotecadeautor_carlos_fernandez_cesareo/articulos/ba_fs_7.PDF
[169] Carlos Fernández Sessarego, *Daño a la persona y Daño Moral en la Doctrina y en la Jurisprudencia Latinoamericana Actual,* 38 Themis: Revista de Derecho 179, 194 (1998) (Peru)

The life project of the individual, according to Sessariego, emerges from the freedom and temporary nature of the human being, and while it might develop throughout the years, its planning takes place in the present.[170] By nature, this type of harm affects the manner in which an individual has decided to live his or her life to such an extent that it loses its meaning. It is a type of harm that affects the *reason d' etre* of the individual.[171]

However, scholarship regarding the harm to the individual is not clear. Even though it was inspired by the Italian scholarship and case law of the 1980s, the language used suggests that harm to the individual is a type of *danno evento*, of which emotional distress and some other losses are a result. If this were the case, classification then refers to a type of harmful event, rather than to any actual legal interest protected by law.

For this reason, the term harm to the individual has not been accepted by most scholarship outside of Paraguay. Nevertheless, infringement of an individual's life project has been better received. In the Loayza Tamayo vs. Peru case, the Inter-American Court of Human Rights adopted this type of loss by distinguishing it from *danum emergens* and *lucrum cessans.*[172] The court associated the concept of a life project with the personal fulfillment of the individual, which is based on the options available to the individual to develop his or her life and achieve his or her goals. Therefore, any infringement or detriment results in an objective reduction of the freedom of the individual.[173]

In Niños de la Calle vs. Guatemala, the court held that the right to life cannot be construed in a restrictive manner. The victims' lives already lacked any meaning, as they had no chance to create and develop a life project that would have instilled meaning in their existence. Furthermore, the life project is inherent to the right to exist and requires decent living conditions.[174]

In the Cantoral Benavides vs Peru case,[175] the plaintiff was a young individual accused of treason, arrested without a warrant, and denied access to a lawyer. Moreover, he

[170] Sessarego *supra* note 168 at *24*
[171] *Id.* at 28
[172] Loayza Tamayo vs. Peru Sep. 17, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33 para. 147
[173] *Id*. para 148
[174] Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala Nov. 19, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63
[175] Cantoral Benavides Vs. Perú Aug. 18, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69

was subjected to public defamation by being presented in the media as a terrorist. During his arrest, he was forced to sign a document confessing to the crime, and was tortured by the officers in charge of the prison. He was acquitted in August 1993; however, the prison officers made a mistake and released his twin brother, who had been found guilty and received a 30-year sentence. The plaintiff's lawyer presented two *habeas corpus*, both of which were rejected. Afterwards, the plaintiff continued to be subjected to torture and judicial abuses. The court held that a life project was closely related to professional education, and in order to repair the harm done to the plaintiff, it ordered the Peruvian state to grant him a scholarship to study a career of his choosing.

The notion of a life project as a type of protectable legal interest has also been adopted by other national courts. In 2007, the Colombian Council of State granted damages for a loss of domestic life (*perjuicio a la vida de relación*), which was inferred from changes in the behavior of the victim, such as quitting sports activities or interactions with other people. The court defined these losses as intangible and different from moral loss, which extends beyond the internal sphere of the individual and into their relations in such a manner that it affects the possibility of establishing relations with other individuals, the maintenance of a routine or activities, their role in society, and any future prospects.

The court declared that loss of domestic life is related to harm to the life project as understood by the Inter-American Court of Human Rights. However, the court did make a mistake in saying that the Inter-American Court of Human Rights classifies harm to the life project as a type of economic loss, whereas the loss of domestic life is non-economic loss. As mentioned above, the Inter-American Court of Human Rights has, since the very beginning, classified life projects as non-economic interests.

ii. OBJECTIVE AND SUBJECTIVE LOSSES

One important issue regarding non-economic losses is their nature. Mazeud and Tunc, in discussing non-economic interests, have already divided them into two groups: the social *dommage moral* and the emotional *dommage moral.*[176] Reputation, honor, trust, and

[176] Henri Mazeud, Leon Mazeud, André Tunc, 1 *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 387 (6 ed., 1965)

other social interests are found under the former, while feelings such as personal love are included in the latter. In other words, any ethical and emotional interest of an individual can be divided into external and internal interests.

This distinction has become a source of discussion in some Latin American countries under the name of objective and subjective *dommage moral*. However, there are two different approaches regarding these terms. Under the first approach, the difference between objective and subjective moral loss rests on whether or not patrimonial interests have been affected. Any moral harm that affects an economic interest is considered objective. In contrast, subjective moral harm affects non-economic interests of a victim.[177] The Supreme Court of Colombia and the Costa Rican Supreme Court[178] employed this approach, dividing *daño moral* into those that arise in a concrete manner, *i.e.*, they are certain or can be determined, and those which are abstract losses.[179]

According to the Colombian Supreme Court, objective moral harm is simple to determine and quantify. Therefore, it follows the same process used for patrimonial losses.[180] Conversely, subjective moral harm is not quantifiable in an exact manner. The dominant criticism of this approach assumes a semantic perspective. There is no doubt that pecuniary losses might arise from an event that is non-pecuniary. The most illustrative example is defamation, as insults or lies do not physically change the material world around a victim. Nevertheless, pecuniary losses can and do arise from defamatory statements. The misconception is a result of synonymously using harm, *i.e.*, the event itself, and loss, *i.e.*, the actual detriment suffered by the victim. Once these meanings are understood, objective moral harm becomes nothing more than loss of income, and therefore cannot be considered non-economic.[181]

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[177] Jorge Cubides Camacho, *Obligaciones* 298 (2005) (Colom.)
[178] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 112 de las 14 horas 15 minutos del 15 de julio de 1992 (Costa Rica)
[179] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 20 de junio de 1941 G.J.T. 51 No. 1971-1972 (Colom.)
[180] Ibid.
[181] F. Hinestrosa. "*Apreciación del Daño Moral (Aclaración de voto en la Sentencia de 25 de febrero de 1982 de la Sección 3.ª del Consejo de Estado)*", en ÍD. Escritos varios, Bogotá, 1983, 722 in José Luis Diez Schwerter, *La Resarcibilidad del Daño No Patrimonial en Chile, Colombia, Ecuador y El Salvador,* 30 Revista de Derecho Privado 177, 191 n.57 (2005) (Colom.)

The second approach, in accordance with the distinction made by Mazeud and Tunc,[182] addresses the issue through the nature of objective and subjective moral losses and the plaintiff and defendant's burdens of proof. Subjective moral losses are those that result from an infringement to the internal circumstances of the victim, *e.g.*, physical pain, emotional distress, etc., therefore making their consequences known only by the victim. In contrast, objective moral losses affect the external sphere of the victim, and therefore are easily observable, *i.e.*, through the loss of social standing resulting from defamation.[183] The Colombian Supreme Court also adopted this approach when it held that moral losses affect both the social and emotional spheres of the moral patrimony.[184]

The Supreme Court of Panama illustrated this point in a 2001 ruling in which it defined the distinction in the following manner:

> *...[A]ny loss, be it material or moral, in order to be recognized and to give rise to the obligation to repair, must be proved during the process, there must not be any doubts about it being real, unless it is one of those moral loss called abstract, intangible, indeterminate, subjective by the doctrine, that is, those (loss) that by their own nature, cannot be proved, but they are established by proving the event that causes them and the condition of the victim, in contrast to the objective or tangible moral losses.*[185]

The Costa Rican Supreme Court also admitted this approach. In 1979,[186] it determined that in cases of moral losses, *"their existence and gravity must be proven, a burden that lies on the victim… when the psyche, health, physical integrity, honor, intimacy, etc., the loss can be inferred, therefore the proof of moral loss is in re ipsa."* [187][188]

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[182] Ivan Hunter Ampuero, La Prueba del *Daño Moral* 11 (April 2005) (unpublished B.A. thesis, Universidad Austral de Chile) (Chile)
[183] Nainane dos Santos Mohr, *Dano Existencial e sua Repercussão no Direito Brasileiro : do Reconhecimento à Cumulação* 23 (2011)(unpublished thesis, Universidade Federal do Estado do Rio Grande do Sul)(Br.)
[184] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 23 de abril de 1941, GJ T. 41 (Colom.)
[185] Corte Suprema de Justicia (C.S.J) (Supreme Court) 26 de diciembre de 2001 (Pan.)
[186] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 114 de las 16 horas del 2 de noviembre de 1979 (Costa Rica)
[187] The court has upheld this view over the years. See: Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 14 de las 16 horas 25 minutos del 5 de enero de 2000 (Costa Rica) [The subjective moral

In Chile, case law has not explicitly recognized this distinction, instead requiring a certain degree of proof in cases of objective moral losses.[189] However, the Supreme Court also follows this approach for physical injury and death of a victim.[190] The Argentine courts also employ a similar approach.[191] The courts typically make use of this distinction in cases where a family member has perished as a result of the defendant's act. Some civil law countries do not have a provision that explicitly grants claims to the next of kin of the deceased victim. However, such claims have been developed via case law.[192] For example, the Colombian courts have established that the *in re ipsa* presumption only applies to the close relatives of a victim.[193] The presumption extends to infants who have been raised by a person without being legally adopted by them, provided the existence of such a relation has been proven.[194] Nevertheless, in cases in which the defendant can prove a strained relation

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loss] takes places in the sphere of personal intimacy, in the psyche, the soul, or emotion. Therefore, in line with the harmful event, the loss can be presumed, as it exists in re ipsa.
Also Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 676 de las 11 horas 40 minutos del 15 de octubre de 2003 (Costa Rica)

[188] However, the approach followed by the Costa Rican Court in this regard is not clear. See: Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 7 de las 15 horas 30 minutos del 15 de enero de 1970 (Costa Rica). The court recognizes that in some cases, defamation results in losses that might affect the patrimony of the victim. However, in Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 112 de las 14 horas 15 minutos del 15 de julio de 1992 (Costa Rica), it defines objective moral harm as the infringement of an extra-patrimonial interest that affects the patrimony of the victim… (In this case the Court quotes the 1970 ruling). The main issue is the choice of words, as the 1970 case clearly states that defamation ***might*** result in an indirect affectation of the victim's assets, which is in line with the concept of objective moral loss, as any detriment to the social standing of the victim can eventually lead to economic losses. In contrast, the 1992 ruling explicitly states that objective moral losses affect the patrimony of the victim, a view that follows the first approach regarding the distinction between objective and subjective moral losses.
Furthermore, in the 1992 ruling, the court called the distinction useful because it allows for the delineation of the social and individual spheres, *i.e.* the loss suffered by the individual regarding any social considerations, and the loss suffered by the individual in the emotional sphere.

[189] Ampuero *supra* note 182 at 11

[190] Corte Suprema de Justicia (C.S.J) (Supreme Court) 14 de Junio de 2001, Rol de la causa: 2036-2001 (Chile)

[191] Cciv. y Com. La Plata, Sala 3ª.6/3/93 "Fernández de Bruno c/Florio s/ds. y ps. (Arg.)
Cciv. y Com. San Martín, 18/5/95, "Novais, R. c/Zanella Hnos. y Cía. S.A.C.I.F.I. y/o s/ds. y ps." (Arg.)
Cciv. sala 1ª., San Nicolás, 25/6/98, "Calisprener de Deganas c/Garibaldi, J. S/ds. y ps. (Arg.)

[192] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 112 de las 14 horas 15 minutos del 15 de julio de 1992 (Costa Rica)
In Chile, the first case that granted remedy for moral loss dealt with the death of child. Corte Suprema de Justicia (C.S.J) (Supreme Court) 16 de diciembre de 1922, R.D.J. T. 21, sec. 1ª, p. 1053 (Chile)

[193] Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 17 de julio de 1992 Radicado 6750 (Colom.)

[194] Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 26 de marzo del 2008,

between the victim and next of kin, the *in re ipsa* presumption ceases. For example, in cases of parental abandonment of a child, the Supreme Court has rejected the claim for moral losses in the event of the death of the child.[195]

Traditionally, the US followed the English common law rule under which tort claims were personal actions, *i.e.* they perished with the victim.[196] However, this rule was considered inadequate, which led to the creation of two causes of action: wrongful death and survival claims.[197] A survival claim is a claim by the estate of the deceased against the defendant for any cause of action the former had before perishing.[198] A wrongful death claim, on the other hand, is an independent claim that relatives, spouses, children, parents, etc., have against the defendant,[199] regardless of the existence of a survival claim.

b. CRIMINAL LAW

The role of criminal law in regards to civil law claims has always been secondary. Especially in the case of non-economic losses, criminal law acts as nothing more than a *renvoi* to the civil jurisdiction. However, two countries – Italy and Colombia – have adopted an interesting approach to the role of criminal law. Section 2059 of the Italian Civil Code limits claims for non-economic losses to those cases established by statutory law. For a long time, the courts construed this to mean Section 185 of the Italian criminal code. In this case, criminal law had the role of a substantive provision, granting a victim the right to claim damages in the case of a crime.

In Colombia, however, criminal law fulfills a procedural purpose. Section 95 of the 1937 criminal code limited the amount of damages to 2000 Pesos in cases where the quantification of moral loss was either difficult or impossible, a rule which the civil courts maintained for many years. In 1974,[200] the Supreme Court of Colombia adjusted its

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Expediente 18846 (Colom.)

[195] Obdulio Cesar Velasquez Posada, *Itinerario Jurisprudencial Del Daño Moral en Colombia* in Colombia Responsabilidad Civil Y Del Estado 63, 112 (2009) (Colom.)

[196] Dobbs *supra* note 65 at 803

[197] Dobbs *supra* note 65 at 804

[198] Dobbs *supra* note 65 at 805

[199] Dobbs *supra* note 65 at 805

[200] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 27 de septiembre de 1974 Gaceta judicial T. 148. p. 248 (Colom.)

approach. The court ruled that under the language of Section 95, the limitation on damages was clearly intended for those cases where the non-economic losses were granted as a result of a criminal offense, and was explicitly directed at criminal justices in the event they had to grant damages. In the same ruling, the court fixed the new limit at 30,000 Pesos for cases in which the deceased victim is the child of the plaintiff. The limit was set with regards to the devaluation of Colombian currency, and according to the court, its function was not to compensate, but rather mitigate the emotional pain of the plaintiff.[201]

In 2000, the criminal code was amended, and the old standard of 2000 Pesos was abandoned. Section 97 established a new standard using the legal minimum wage, setting the new limit at 1000 monthly minimum wages. In 2002,[202] the Constitutional Court upheld the legality of this provision for cases in which liability arises from criminal conduct.

c. CONSTITUTIONAL LAW

i. NON-ECONOMIC LOSSES FROM A CONSTITUTIONAL PERSPECTIVE

Constitutions grant basic rights to their nationals, and in most cases, to foreigners as well. The most common approach is to grant this right protection via other laws, such as civil or criminal codes. In this regard, there are few constitutions that grant a claim for moral losses. The issue is then whether or not the infringement of these rights can be invoked as the basis for a claim in cases where a statute does not grant them explicit protection.[203]

The countries that provide protection to non-economic interests via constitutional provisions comprise three groups. The first is countries that, while having a provision that clearly safeguards such interests, do not expand upon their meaning or content and instead depend on civil, criminal, or administrative provisions to develop constitutional rights.

[201] Since then, the court has not changed this approach of setting maximum limits for the amounts of damages. Nevertheless, the court has revisited the issue on many occasions in order to update the limit to better reflect the economic realities of the country. As such, the court raised the limit to 100.000 Oesos in 1981, then to 500,000 Pesos in 1987, 1 million Pesos in 1992, 4 million Pesos in 1994, 10 million Pesos in 1999, and finally to 40 million Pesos in 2009. Velasquez Posada *supra* note 195 at 84
Furthermore, the limits are not binding to lower courts. As the Supreme Court itself has recognized, they are nothing more than a guide. Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 6 de mayo de 1998, expediente 4972 (Colom.)

[202] Corte Constitucional (C.C) (Constitutional Court) 29 de octubre de 2002 C-916 (Colom.)

[203] The issue of the direct application of constitutional provision will not be touched upon.

Costa Rica is one example of such a system. Section 41[204] of the Costa Rican Constitution protects the victim's body, property, and moral interest. In turn, Section 1045[205] of the civil code covers the general delictual liability and Section 197[206] protects the administrative code, under which non-economic losses are repaired.[207]

In the Brazilian Civil Code, Section 186 enshrines the general clause for delictual liability, which grants protection to constitutional rights in the context of the private law. The Brazilian Constitution, in Section 5,[208] protects life, freedom, equality before the law, and property. Furthermore, sub-Section 5[209] explicitly grants remedy for economic and non-economic losses, as well as any infringement of reputation. Sub-Section 10[210] provides protection to the privacy and reputation of an individual and establishes the right to sue for damages in cases of infringement, while sub-Section 49[211] ensures the physical and moral integrity of inmates. Section 114-6[212] establishes remedy for pecuniary and non-pecuniary losses that arise from a work contract.

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[204] Ocurriendo a las leyes, todos han de encontrar reparación para las injurias o daños que hayan recibido en su persona, propiedad o intereses morales. Debe hacérseles justicia pronta, cumplida, sin denegación y en estricta conformidad con las leyes.

[205] Todo aquel que por dolo, falta, negligencia o imprudencia, causa a otro un daño está obligado a repararlo junto con los perjuicios.

[206] Cabrá responsabilidad por el daño de bienes puramente morales, lo mismo que por el padecimiento moral y el dolor físico causados por la muerte o por la lesión inferida, respectivamente.

[207] Álvaro Fonseca Vargas, *Indemnización al Trabajador por concepto de Daño Moral ante Despidos Injustificados del Patrono Reclamable en un Proceso Laboral,* (2013) (unpublished B.A. thesis, Universidad de Costa Rica) (2012) (Costa Rica)

[208] Section 5: All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
Translations of the Brazilian Constitution in English available at: http://english.tse.jus.br/arquivos/federal-constitution

[209] V – the right of reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or for damages to the image;

[210] X – the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured;

[211] XLIX – prisoners are ensured of respect to their physical and moral integrity;

[212] Section 114. Labour Justice has the power to hear and try:
VI – judicial actions arising from labour relations which seek compensation for moral or property damages;

Chile also follows this approach. Section 19-1[213] of the Chilean Constitution grants protection to the life and physical and mental integrity of the individual, and Section 19-4[214] establishes the protection of private life and reputation.[215][216] Section 19-7 sets forth a number of instances in which the liberty and security of an individual are protected. In the case the Supreme Court rules that trial or imprisonment was unlawful, erroneous, or arbitrary, sub-Section i[217] grants any individual absolved of a crime a compensation for any pecuniary or moral losses that resulted.

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[213] The right to life and to the physical and psychological integrity of the person. An English translation of the Chilean Constitution is available at: https://www.constituteproject.org/constitution/Chile_2012.pdf

[214] The respect and protection of private life and the honor of the person and his family

[215] However, previous to the 2005 amendment, Section19-4 set forth a series of rules that applied only to cases in which the infringement of reputation was done via media coverage. First, it established defamation as a crime, and second, it made the owners, editor, director, and administrators of the media institution jointly liable for any damages that resulted from the publication. The second part of Section 19-4 was removed for two main reasons. First, both slander and libel had ceased to be felonies under Chilean law. Therefore, in order to prevent the possibility that the constitutional rule could be interpreted as a way to once again punish such behaviors, it was necessary to remove it. The second reason was to protect freedom of speech and freedom of the press, and that any protections to the honor should be granted under civil law and not as part of the criminal law. 2 José Luis Cea, *Derecho Constitucional Chileno* 196-197 (2012) (Chile)

[216] Prior to 2008, Section 2331 of the Civil Code limited claims for defamation only to those cases where the victim suffered an economic loss. In 2008, the Supreme Court ruled that the statute is inapplicable, as it is unconstitutional under Section 19-26 of the Constitution. Tribunal Constitucional de Chile, Sentencia de 10 de Junio de 2008, Rol 943-07. Section 19-26 reads: The security that the legal precepts which, by mandate of the Constitution, regulate or complement the guarantees that it establishes or which limit them in the cases it authorizes, cannot affect the rights in their essence, or impose conditions, taxes or requirements which may impede their free exercise.

However, it has not been declared unconstitutional and therefore struck down from the Civil Code, under the rules of Section 93-7 of the Constitution. When the court finally got the opportunity to rule on the issue, media associations opposed the possibility of Section 2331 being declared unconstitutional, as it would limit the freedoms of speech and of the press. *La Libertad de Expression y Protección a la Honra*, equilibrio en Peligro, 40 Revista de la Asociación Nacional de Prensa 5, 5-7 (2011) (Chile) Available at: http://anp.cl/wp-content/uploads/2015/08/53695310-Revista-ANP-40.pdf

The Court ruled on May 24th, but it did not achieve the quorum needed to declare Section 2331.

Section 93-6 and 93-7 establish the rules under which a statute can be struck down as unconstitutional.

6. To resolve, by the majority of its members in office, [on] the inapplicability of a legal precept having application in any measure that is taken before an ordinary or special tribunal, [having a] result contrary to the Constitution;

7. To resolve, by the majority of four-fifths of its members in office, [on] the unconstitutionality of a legal precept declared inapplicable in conformity with that provided in the previous Numeral;

Tribunal Constitucional (T.C.) (Constitutional Court) 24 de mayo 2011, Rol de la causa: 1723-10 (Chile)

[217] Once definitive dismissal, or absolutory sentence has been declared, the [person] subjected to trial or sentenced in any instance by resolution which the Supreme Court declares unjustifiably erroneous or arbitrary, will have the right to be indemnified by the State for patrimonial and moral losses that have been suffered. The indemnification will be judicially determined in a brief, and summary proceeding and in which the evidence shall be conscientiously assessed

The second group of countries that provide protection to non-economic interests via constitutional provisions are those in which the constitution assumes a more detailed approach to non-economic losses – not under an abstract protection, but by actually granting a victim the right to pursue a claim. In the Constitution of El Salvador, Section 2[218] protects an individual's life, physical and mental integrity, freedom, reputation, rights over self-image, and privacy – both individual and of the family. Furthermore, it grants the victim a claim for non-economic losses that, nevertheless, must be regulated by law. Furthermore, Section 245[219] establishes the liability of public officers and the state for any infringement of constitutional rights for both economic and non-economic losses. For a long time, there was no law that regulated claims for non-economic losses, as mandated by Section 2 of the Constitution.[220] Section 115-3 of the criminal code granted both the victim and his or her family remedy for non-economic losses that arise from a criminal act, however, these claims are limited to only cases of felonies. This is a similar case to that of Italy, which had the same limitation for a long time, but as a result of a provision in the civil code.

However, there is no specific statute that granted a broad protection of non-economic losses. In 2015,[221] the Supreme Court ruled that these types of provisions, in which the Constitution establishes that a certain right or action must be regulated by law, are not some simple declarations of intent. Rather, they are true constitutional orders that must be fulfilled. Furthermore, the court recognized that non-economic losses were covered under a number of statutes. Nevertheless, said statutes only governed their specific cases, and did not actually rule upon moral losses as a whole, *i.e.*, the content and minimum

[218] Section 2: Every person has the right to life, physical and moral integrity, liberty, security, work, property and possession, and to be protected in the conservation and defense of the same. The right to honor, personal and family intimacy, and one's own image is guaranteed. Indemnification, in conformity with the law, is established for damages of a moral character. An English Translation of the Consitution of El Salvador is available at: http://confinder.richmond.edu/admin/docs/ElSalvador1983English.pdf

[219] Section 245: The public functionaries and employees will answer personally and the State [in] subsidiary, for material or moral damages which they should cause in consequence of a violation of the consecrated rights of this Constitution.

[220] In principle, Section 2080 of the Civil Code grants remedy for any loss that is a result of malice or negligence. On the other hand, Section 2081 is a textual copy of Section 2331 of the Chilean Civil Code, and the same restrictions apply.

[221] Corte Suprema de Justicia (C.S.J) (Supreme Court) 23 de enero de 2015 no.53-2012 (El Sal.)

requirements for the judge to grant remedy.

The court therefore ruled that the National Assembly was guilty of violating the constitutional mandate by omission and ordered a law to regulate non-economic losses to be passed no later than December 31st, 2015. On December 12th 2015, the National Assembly complied with the court order. Under Order 216, the law defines moral loss as any infringement that affects a non-economic interest of an individual that results from unlawful acts or omissions, regardless of whether or not it is based on contractual or delictual liability. It establishes limitations for media coverage, except in cases evidencing intent to defame. It also regulates the liability of the state for this type of loss.

Any infringement on the personality rights of an individual, regardless of the legal provisions involved, are grounds for remedy. In the same manner, any loss resulting from an abuse of rights, defamation, or a substantial infringement on an individual's life project is protected. However, claims can only be brought forth by the victim and do not pass to relatives in cases of death. It can be brought as an independent claim or with others.

Finally, the third group of countries adopt the aforementioned approach that Italy used in expanding claims for non-economic losses. This approach demands a direct application and protection of constitutional rights without the need for a specific statute, besides a general delictual liability. The Family Code also contains many sections that establish claims for non-economic losses. Under Section 97,[222] the spouse that is guilty in a divorce must pay reparations that include both economic and moral losses, and Section 122[223] grants the surviving spouse a claim for both economic and non-economic damages against the party responsible. Section 150 establishes that both a mother and child can claim economic and non-economic losses against the father once paternity has been confirmed.[224]

[222] Section 97: The spouse responsable for the dissolution of the marriage is responsible of any material or moral losses that the other spouse suffers. Translation by the author.
[223] Section 122: In the case of death, the surviving spouse has the right to seek compensation against the responsible party for the material and moral losses suffered. Translation by the author.
[224] The child or descendants have a claim for the judicial declaration of parenthood against the father or his heirs, or the curator of the inheritance. This claim shall not be subject to any statute of limitations. If parenthood is declared, the mother and the child have the right to claim compensation from the father for any material or moral losses in accordance with the law. Translation by the author.

ii. BASIC RIGHTS VS PERSONALITY RIGHTS

The nature of constitutional rights – and by extension, how to protect them – is an issue that exceeds the discussions of criminal or civil law. Constitutional rights are inherently abstract basic rights, in that their existence does not depend upon a specific statute. They form the pillars of modern societies, and their protection must be of the utmost priority. However, even as basic rights, their importance is not necessarily equivalent, especially in the case of personality rights versus human rights. The most basic distinction between the two is the infringing party, as in cases of human rights, the defendant is usually the state.

In this type of case, the claim is directed at an action performed by the State while acting as such, in contrast with cases where the State has acted as a private party, and can either be brought at a national level or, in cases in which an international treaty so allows, to a supranational court. Furthermore, in human rights cases, the infringement alone is usually a basis for claims, regardless of any specific losses. The number of victims is usually higher in cases of human rights, as their infringement can be the result of public policy of the state, which in turn means that public officers might not be liable under criminal or civil liability. In these cases, *i.e.*, where the population as a whole is affected as a result of policy, the issue of whether this constitutes a human rights infringement can become an important one, and is usually at the forefront.

Some jurisdictions, such as the US, have established a direct claim for depravation of rights[225] without restricting it to constitutional rights. However, since the infringement itself does not necessarily cause a victim any loss, remedy can be granted in the form of nominal damages. Human rights violations are therefore a barometer that measures the

[225] 42 U.S. Code § 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

relationship between a state and its nationals.

In contrast, personality rights, while established under constitutional rules, are usually protected under a specific law, *i.e.*, a civil code, and their infringement is the result of a private individual act, *i.e.*, delictual liability, breach of contract, etc. In these cases, the role of the state becomes that of an arbiter. Already under Roman law, the individual was granted a certain degree of *potestae in se ipsum,* which was in turn protected by the *action injuriarum*. However, personality rights as they are understood under modern law are a product of the second half of the 19th century.[226] The issue, at least as far as the concepts of *dommage moral* and personality rights are concerned, is whether the latter includes all of the rights. If so, *dommage moral* is nothing more than the infringement of such rights, regardless of any individual content they might possess. Otherwise, personality rights are but one of many types of non-economic losses covered that fall under the sphere of *dommage moral*.

In contrast with civil law countries, personality rights under U.S. common law are often composed of the individual's name, image, likeness, or other similar rights,[227] as well as the right of publicity, which was first written about in an 1890 paper by Samuel Warren and Louis Brandeis.[228] However, the term right of publicity was first used by the courts in the case of Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.,[229] in which the Court of Appeals of the Second Circuit acknowledged the existence of a right of publicity that could be waivered as a property right.[230]

However, the main difference between personality rights as understood by the civil law, under the influence of Roman law, and U.S.-style personality rights lies in their nature. As detailed above, personality rights under civil law are undoubtedly considered a type of non-economic interest. In contrast, the U.S. approach regards them as a type of proprietary

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[226] Caridad del Carmen Valdés Díaz, *Del Derecho a La Vida y Los Derechos Sexuales y Reproductivos, ¿Configuración Armónica o Lucha De Contrarios?,* 29 Revista del Instituto de Ciencias Jurídicas de Puebla, 216, 217 (2012) (Mex.)

[227] Dobbs *supra* note 65 at 1310

[228] Samuel D. Warren, Louis D. Brandeis, *The Right to Privacy,* 4 Harvard Law Review (1890)

[229] Haelan Laboratories, Inc v Topps Chewing Gum, Inc, 202 F 2d 866 (2nd Cir, 1953)

[230] For a more in-depth review see
J. Gordon Hylton, *Baseball Cards and The Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum,* 12 Marq. Sports L. Rev. 273 (2001)

right.[231]

In contrast, the right of privacy is not recognized under English common law. In Kaye v. Robertson,[232] Lord Justice Glidewell proclaimed:

> *It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals*.

Lord Justice Bingham further agreed, writing, "*[t]he case highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens.*"

The idea of a U.S.-style right of privacy was rejected once more in 2003 in the case of Wainwright v Home Office.[233] In that case, the House of Lords ruled in an opinion written by Lord Hoffman:

> *The need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle.*

Therefore, personality rights and their content under the civil law does not directly correlates to the concept as it is understood under the common law. This makes finding commonalities difficult and further presents a challenge when the losses produced by the infringement of these rights are viewed as non-economic losses. The Wainwright ruling is an example of the *a posteriori* approach prevents the adoption of general abstract concepts

[231] Rosina Zaparroni, Propertising Identity: Understanding The United States Right Of Publicity And Its Implications — Some Lessons For Australia, 28 Melbourne University Law Review, 690, 700 (2004)
[232] Kaye v Robertson [1991] FSR 62
[233] Wainwright v Home Office [2003] UKHL 53

under the common law.

VII. SUMMARY

The historical review carried out in this chapter has revealed that the law of non-economic losses is likely as old as civilized societies. However, as with civil liability in general, its origins were of a punitive nature, and the change in value given to individuals resulted in a greater degree of protection. Furthermore, advances in technology, particularly the development of printing techniques, resulted in an broadening of the scope of liability for political motives.

Nevertheless, the most significant development of the law came in the 19th century, when individual liberties and rights transformed a religious matter into a central issue in the development of societies. In addition, as the common law example has illustrated, societal and moral rules have exerted a great deal of influence in determining in which cases an individual should repair emotional losses. Although France first approached the issue via the law of defamation, countries such as Spain and Colombia deviated from this and introduced the idea through the concepts of social interests or family ties. Even when drafters of a particular code, such as the De Bello code, were opposed to the idea of granting remedy to non-economic losses, social pressure led to courts to defy the express wishes of the legislator.

In general, non-economic losses are part of the domains of civil liability. However, in some cases, the courts and scholars approach the issue via *renvoi* to other laws in order to expand the number of legal interests under protection. Criminal law and constitutional rights are two key examples. In the case of the former, liability assumes a secondary place to the criminal proceedings, though in some cases, only criminal liability grants the victim a claim for non-economic losses.

Constitutional rights are a somewhat different matter, as they require that the courts in a particular country recognize their direct protection. It is an issue that extends beyond the simple reparation of non-economic losses. For example, Italian courts had to make use of these rights in order to expand the number of cases in which a victim is granted remedy. Thus, the idea of non-economic losses act as a punitive mechanism, and later as a negative

concept, *i.e.*, one which content can only be defined via its comparison to economic losses, has been replaced by the idea of having a set of rights that are to be protected in the same manner as any other type of economic rights. This is especially evident in the fact that countries that have gone through a period of strife, such as Latin American countries or Spain, have developed the idea of a *patrimoine moral* to a higher degree than countries that have not suffered similar setbacks.

The role of religion has also been decreasing in recent years, and nowadays, its importance is tied to specific issues, such as abortion or same-sex marriages. The infringement of rights, on the other hand, has come to occupy a more prominent role. Especially when viewed under the prism of the subjective non-economic loss doctrine, in cases such as restriction of civil liberties or political rights, the infringement itself is the loss. In other cases, such as the death of a relative, the loss is presumed.

The main difference between these two cases is that, in the latter, some countries allow the presumption of the existence of loss to be overturned if the defendant can present evidence to the contrary. However, in the case of civil liberties, etc., since not being able to exercise the right is the loss, there is no way to produce such evidence. Be that as it may, awards for these types of losses tend to be of a more symbolical value.

CHAPTER 6 GENERAL ANALYSIS AND FINAL CONSIDERATIONS

I. JAPANESE LAW FROM A COMPARATIVE PERSPECTIVE

This chapter analyzes the Japanese legal doctrines and ideas that were introduced in Chapters 2 and 3 from the comparative law perspective described in Chapters 4 and 5, beginning with the societal background that led to the development of the Japanese Civil Code. The end of the chapter presents the final conclusions and considerations of this thesis.

While the French *Code* was heavily influenced by the experience gained from the French Revolution, and thus designed as a document the general population could read and understand, the BGB was a product of the historical review of legal ideas, a tool for legal scholars to fulfill their profession without any special consideration for laymen. The Japanese Civil Code, on the other hand, does not squarely fit into either of these two models. Certainly, it was the answer to an immensely disadvantageous situation that affected the country during the 19th century. As such, it was a tool designed with a highly specific goal in mind: to demonstrate to the Western powers that Japan was a civilized nation under the Western ideals of the time. From this fact, the idea that the Japanese Civil Code was written with the ordinary Japanese individual in mind seems unfounded.

However, it cannot be said to have been thought of as a tool for legal professionals, as the differences in background between Japan and Germany is far too drastic for that to be the case. The scholarly discussions that took place in Germany during the 19th century were influenced by the study of Roman law. In contrast, the Japanese drafters were tasked with distilling the doctrines, case law, and ongoing discussions in Europe in order to introduce them to a Japanese public. Therefore, it is possible that at the time, the average Japanese lawyer or judge would be reading some of these ideas for the first time.

Furthermore, the *ius naturalism* that marked the French legal thought of the time contrasts with the positivistic approach of German scholarship. While the top members of the committee wanted the codes to follow the Germanic model, the drafter themselves were not necessarily bound by such ideas. Indeed, the inclusion of Section 710 dealing with non-economic losses can be better explained under the French and English influences of the

drafters, which further lends support to the argument that delictual liability and its elements under the Japanese Civil Code were not influenced by German ideas.

In both France and Germany, the spirit of the law also influenced subsequent legal developments. For example, French scholars and courts were more receptive to developing the concept and ideas of non-economic losses in areas the German scholars and courts kept with a limited interpretation of the law. In contrast, Japan was faced with the fact that through the years, the courts and scholars have opposed the intent of the drafters on numerous occasions. Tomii was very critical of French law and exalted the virtues of the BGB. This in turn has been used as a way to support analysis of the BGB in order to import legal doctrines into Japanese legal thinking. However, the fact of the matter is that Tomii wrote about this many years after the enactment of the Japanese code and the BGB, when the influence of the French school of legal thought had already waned. After the death of Ume, the counterbalance to the German school of thought wavered, and the influx of German ideas increased, sometimes without an understanding of their background. This caused scholars to seek to explain institutions that had their origins in social conventions of an era using modern theories that had long been separated from their roots.

Another example of the way in which time has affected the influence of the Japanese Civil Code is found within concepts of rights: transference of the claim for non-economic losses, and non-economic losses of the victim's relatives. Particularly in the first case, the courts went from a strictly limited view of the concept of rights to expanding liability to cover the infringement of legal interests. As Chapter 2 mentions, this runs contrary to the drafters' ideas regarding the role of law and the meaning of the right infringement requirement. Hozumi, for example, was clear that the infringement requirement served as a way to clarify the conduct that was expected from the parties.

However, by expanding liability to include legal interests, the courts are recognizing that such legal interests might have a basis that is not a legal right as specifically codified in a positivistic way. This is arguably more in line with a French view. Furthermore, even if the original code was written for use by bureaucrats, the reforms that took place from 2004 to 2005 were made under the assumption that civil code exerted a great deal of influence on

daily life and economic activities, and therefore it was important to actualize the language for it to better reflect the everyday parlance of the population.[1]

Additionally, various legal theories introduced via precedent, such as the protection of legal interests that were not covered under a specific statute in the particular case of delictual liability, clearly suggest a different legal consciousness, one that is farther from the positivistic doctrines of the late 19th century. Therefore, in terms of delictual liability, the Japanese Civil Code has long abandoned the ideas of its drafters and has become a more accessible text than originally intended. Though it is still mainly used by law professionals, the changes in the last reform have made it more accessible to most individuals that approach it.

II. THE ELEMENTS OF LOSS UNDER JAPANESE LAW

While Section 709 of the Japanese Civil Code follows a model closer to the French *Code,* traditionally there has no discussion of the nuances of the word *songai.* Hiroki Morita, when referring to the distinction between *dommage* and *préjudice,* has noted that the meaning given to the word *songai* under traditional Japanese scholarship corresponds with *préjudice, i.e.,* the abstract loss suffered by the victim as a result of the *dommage.*[2] However, Morita does not explain how this abstract concept fares when confronted with the amount difference theory or any other theories regarding loss in civil scholarship.

Following De Cupis's argument about formal and material elements of harm, the language in the first part of Section 709 is challenging to interpret, as it can be construed as representing both elements. In contrast, Section 1325 of the French *Code* innately represents the formal element of harm, *i.e.*, the legal obligation of the aggressor to repair any loss suffered by the victim. By establishing no special requirements regarding harm and loss besides their emergence, the *Code* allows for a clear division of the material and formal elements and limits the confusion. Furthermore, the monetary compensation element and emergence of harm and loss requirement are both structurally and linguistically unique elements under the French *Code*, which in turn permits an analysis that treats them

[1] *Minpo Gendaikaan Hosoku Setsumei* available at: http://www.moj.go.jp/content/000071232.pdf
[2] Hiroki Morita, *Joron -Songai Gainen ni tsuite-,* 86 Horitsu Jiho 55, 56 (2014) (Japan)

different. Conversely, under the requirement of unlawfulness, the German BGB does provide more formal elements to legal harms and losses, but does so while offering a list of losses that serve as limits to the material element, *i.e.*, not all losses or harmful events yield civil liability.

Furthermore, to analyze Section 709 under the model presented by De Cupis, it is necessary to make a small distinction with regards to the Civil Code as it was before and after the last reforms. It can be argued that prior to the reforms, the formal and material elements of loss, *i.e.*, a legal rule that enshrines the loss and a legal event that causes it, are found within the concepts of *songai* and the infringement of rights. Indeed, if this view is adopted, then the arguments and discussions the drafters had regarding the necessity of the infringement of rights requirement are rather moot. As both the legal event and the legal result – or under Italian terminology, *danno evento* and *danno conseguenza* – are necessary in order for a loss to be recognized.

However, regardless of any arguments among the drafters with respect to the importance of these two elements, the stance taken by the code supports the view that the drafters understood that the fundamental difference between having a system in which both material and formal elements were confused into one figure and having one that made a distinction between the two.

In addition, discussions on the difference between *dommage* and *préjudice* were not part of the legal scholarship in Japan, as there was no single concept that could be used to replace *songai*. This is perhaps due to pervasive positivist ideas at the beginning of the century. Nevertheless, it is clear from the case law and the drafter's opinions that the concept of *songai* is not as simple as some scholarship has made it out to be. In particular, the formal element of loss is clearly established, *i.e.*, only losses that result from the infringement of a legal right can be considered legally relevant.

The Japanese delictual liability system also grants a unique role to the concept of unlawfulness. The traditional view in comparative law is that unlawfulness is used as a way to limit the extent of delictual liability. Only acts that are unlawful, either through illegality or transgressing a social norm, are considered reproachable. The infringement requirement

was included as a means to prevent liability from expanding too much and to create a clear standard for the conduct of society's members. However, Japanese courts and scholars have opposed such a limited view of rights and legal interests, and in order to escape the limitations set by the drafters, have used the concept of unlawfulness as a means for increasing the number of legal interests that would give rise to delictual liability upon infringement. This meant that scholars and courts had to undertake an analysis of the different requirement of unlawfulness in order to justify the expansion of the scope of liability beyond formal legal rights. Nevertheless, since the word used for unlawfulness, *iho*, can also be translated as illegal, there is confusion between these two terms.

Furthermore, the state of scholarship regarding loss has also influenced the concept of unlawfulness, as many scholars have approached the issue by examining the conduct of the wrongdoer without analyzing where or not a particular loss should be considered recoverable, and if so, which elements permit a loss to be considered legally relevant beyond the requirement of causality.

III. THE CONCEPT OF NON-ECONOMIC LOSSES

Though non-economic losses are usually studied under the figure of *isharyo*, there have been some scholars that have approached the issue of the protected legal interest. The most common type of loss recognized is emotional distress, followed by physical pain. However, since Section 710 has been construed as a guide rather than a list, new interests can be protected by the courts without much issue.

Regardless, the point made by Ito that Japanese lawyers tend not to concentrate too much on the concept of non-economic losses becomes more evident when trying to classify or define the system followed by the courts and scholars. Following the division presented by Dominguez, non-economic losses under Japanese scholarship are arguably closer to a positive concept than a negative one. For once, scholars have debated the existence of personality rights, or *jinkakuken*, since the early 20th century. However, since these are legal interests rather than losses, the concern arises of how to understand them under the prism of Section 709 and its relation with Section 710. Furthermore, while it is true that legal interests, such as an individual's name, honor, and body, are traditionally included within

personality rights, family rights are usually not provided such a denomination. Thus, in Japan, the law of non-economic losses is not limited to personality rights.

Even after the 2004-2005 reforms, delictual liability is based on the concept of infringement, at least at the statutory level. Therefore, at least in theory, the plaintiff must present evidence that convinces the court of the occurrence of a loss. However, case law is clear in indicating that it is the judge who ultimately decides the matter, and that they need not explain how they reached their conclusions. Therefore, not all non-economic losses are viewed under the same prism. It can be argued that the Japanese courts have evolved a system similar to that of objective and subjective non-economic losses, even if the courts and scholars do not discuss it in such manner.

The infringement of *jinkakuken* can be considered a type of subjective non-economic losses, *i.e.,* the loss is considered to exist *in res ipsa,* in which case infringement and loss requirements merge into one, further raising the question of whether it is necessary to meet both in order for the wrongdoer to be liable. The issue then shifts from any losses suffered by the victim to how to determine when a legal right has been infringed upon, which would result in the circumstances surrounding the conduct of the defendant being granted even more importance.

An example of this is a 1988 case in which the Japanese Supreme Court[3] ruled on an infringement of the right to a person's name, or *jinmeiken*. This suit was brought by a Korean individual whose name was mispronounced during a news broadcast. The Supreme Court began by explaining that a person's name is not only a means for society to identify its members, but also one of the basic aspects of an individual's personality. Therefore, the court continued, individuals have a right to be called by their name correctly. However, the court denied the plaintiff's request for damages, arguing that although such a legal interest warranted protection, it was different from cases of fraudulent use of a name, as it did not immediately meet the criteria to be considered one of the legal interests protected under delictual liability. Rather, this should be determined based on the motivations and extent of the infringement, as well as the personal and societal relations between the defendant and

[3] Saiko Saibansho [Sup. Ct.] Feb. 16, 1988 Sho 58 (o) no. 1311 Minshu 42-2-27 (Japan)

plaintiff. Nevertheless, in the end, the court denied liability on the grounds that the pronunciation of Chinese characters in Japanese varied from that in Korean. Thus, the defendants act could not be considered unlawful, as it had to be analyzed from the point of view of Japanese society and customs.

The court's argument is sound, as it would be unreasonable to expect individuals to pronounce a name using sounds that are foreign to their mother tongue. However, in this particular case, the issue was with two different readings of Chinese characters, both of which exist in the Japanese language. The defendant did not mispronounce the name, but rather used a completely different reading. Furthermore, the fact that the defendant was a news show would support the idea that it had an obligation to at least check the basic facts.

However, the biggest issue is perhaps the fact that the court did not follow the standard they set for themselves. In other words, while the court talked about motivation, extent, and personal and social relations, it ultimately approached the issue from the cultural difference between the Japanese and Korean languages.

In addition, the court made no mention of which types of losses would arise if the infringement of the right was confirmed, *e.g.*, emotional distress, loss of status, etc. Therefore, it is arguably that the plaintiffs who would have to prove that their rights have been infringed upon, and that would suffice to grant remedy. However, it is unlikely that these issues will be revisited in the near future, since these types of cases are rare, likely as a result of the Supreme Court decision. However, as subjective non-economic losses, the presumptions the courts have towards the existence of the loss could be classified as *iuris et de iure*, which would mean that defendants are liable the moment they infringe on a right or interest, without the possibility of presenting a legal defense.

Once the discussion leaves the realm of *jinkakuken,* the issue of the loss suffered by the victim becomes more subjective. For example, as public nuisance cases illustrate, the courts in Japan might approach the issue of non-economic losses by focusing on the changes to a victim's life in order to establish liability. Therefore, the courts are approaching the issue in either one of two manners. The first approach would have them recognize the loss as proof that an infringement has occurred. The second approach would

have the courts navigating the issue without recurring the idea of rights infringement, and concentrate only on the negative situation of the victim.

Early case law would seem support the first approach. However, the efforts of scholars led to the creation of the right of *heion no seikatsu,* and with it, a return to a more traditional interpretation of the law. Since many of these cases are managed by balancing the effects the defendants conduct had on the plaintiff's lifestyle, the mere infringement of a right is not adequate to grant a monetary award.

Claims that arise from damage to property also lend support to the idea that in some cases dealing with non-economic losses, the loss of the victim must be taken into account, regardless of the infringed right. The fact that the courts require plaintiffs to prove an emotional connection to the damaged property is an example of how subjective non-economic losses are approached in Japan.[4] However, these types of cases are outliers. Cases in which remedy is granted for emotional distress suffered by the victim as the result of sudden car crash, even when no personal injury has occurred, reveal that fear itself is a non-economic loss that must be accompanied by an actual danger, similarly to the zone of danger approach taken by some U.S. courts.

Furthermore, there is the issue of the legal defenses available to defendants. Traditionally, the courts of countries that recognize this distinction have established that the defendant can present evidence to prove that the plaintiff did not suffer the alleged emotional shock. It is possible to argue that Japanese courts are also willing to recognize that, in some instances, the presumption of the existence of non-economic losses can be overturned based on the facts of the case. However, the question remains regarding the possibility of expanding theory to other instances. Cases dealing with extramarital affairs would support this idea, as the courts are willing to surpass the mere infringement of a right and assess the relation between the parties.

[4] However, Japan is not alone in granting remedy for this type of loss by requiring an emotional connection between the property and the plaintiff.
See: Corte Suprema de Justicia (C.S.J) (Supreme Court) 26 de junio de 2008 (Pan.)
Corte Suprema de Justicia (C.S.J) (Supreme Court) 1 de septiembre de 2008 (Pan.)

IV. LOSS OF CHANCE IN MEDICAL MALPRACTICE CASES

In some countries, the doctrine of loss of chance is an independent legal wrong that can be redressed. Its main purpose is to strengthen the position of the victim in situations in which obtaining proof of a causal link might be considered difficult.[5] In France, the doctrine was recognized in 1889 and first applied to medical malpractice cases in 1961. Some countries consider the doctrine an independent head of loss, which makes reference to the final loss the victim suffered.

Ferreira has noted that there are four positions regarding the loss suffered by the victim in these types of cases.[6] One position argues that the doctrine should be applied in cases where it is impossible to identify an autonomous loss, *i.e.*, the loss is independent of the injury suffered by the victim. Another position argues that there are no substantial differences between loss of chance in medical cases and other types of cases, but compensation should be decreased based on the risk. A third view argues that the doctrine should be applied to most types of cases. Finally, the fourth view argues that the doctrine does not constitute an autonomous loss, but rather expresses of the idea of partial causality.

In the US, the loss of chance doctrine has been employed in medical malpractice cases as a way to overcome the difficulty of proving causation, where most plaintiffs lack the required technical knowledge or training to be able to ascertain a more-likely-than-not scenario.[7] There, the issue can be approached either as a matter of causation or a valuation aspect of damages.[8] However, because the matter is approachable under both views some

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[5] *Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe*, CLES Research Paper Series 2/2015 Centre for Law, Economics and Society CLES Faculty of Laws, UCL 20 (Ioannis Lianos dir., 2015)

[6] Rui Cardona Ferreira, *The Loss of Chance in Civil Law Countries: A Comparative and Critical Analysis,)* 20 Maastricht Journal 56, 61 (2013) (Port.)

[7] Steven R. Koch, *Whose Loss Is It Anyway? Effects of the "Lost-Chance" Doctrine on Civil Litigation and Medical Malpractice Insurance*,88 North Carolina Law Review 596, 603 (2010)
Robert J. Rhee, *Loss of Chance, Probabilistic Cause, and Damage Calculations: The Error in Matsuyama v. Birnbaum and the Majority Rule of Damages in Many Jurisdictions More Generally*, 1 Suffolk U. L. Rev. Online 39, 40 (2013), available at http://scholarship.law.ufl.edu/facultypub/470

[8] For example, Fischer argued that: "*Loss of a chance becomes a theory of 'probabilistic causation' if we use it to hold the physician liable for the patient's harm but reduce any award by the chance that the harm would have occurred even with proper diagnosis and treatment. If, for example, the chance of a cure was 40 percent, under a 'probabilistic causation' rule, the physician would be liable for 40 percent of the patient's harm because the physician deprived the patient of a 40 percent 'chance' of avoiding the harm."* David A. Fischer, *Tort Recovery for Loss of A Chance*, 36 Wake Forest L. Rev. 605 (2001)

courts have struggled to define loss in cases regarding loss of chance.[9] Nevertheless, the issue of the loss is traditionally approached in one of two ways[10]. The first allows the victim to recover 100% of losses if the victim's chances were initially over 50%, or the practitioner's negligence is considered a substantial factor in hastening the loss.

The second approach grants the victim recovery only for a percentage of the loss *i.e.*, the courts will determine the percentage of survival or recovery before and after the procedure and apply said percentage to the normal award in other cases. The loss, therefore, is not the infringement of chance, but rather actual loss suffered by the victim, albeit limited in some fashion. In contrast, there is no doubt that the doctrine is used as a means to relax the requirement of causation, though the matter of the actual loss suffered by the victim is still the subject of discussion.

Tomoko Terasawa has explained that, at the very least, the reduction of the time left for the patient can be considered recoverable.[11] She has further stated that there are various views on the matter.[12] One view argues that the matter should be approached based on a percentage of causation. Another view supports the idea that the matter of causation should be avoided completely, and the issue should be approached under the idea that the infringement of the expectation right causes the non-economic loss on which the award is based. A third view considers that the loss of chance itself should be taken as the loss, with the matter of monetary awards being addressed in percentage values. Thus, while the majority of the scholarship supports the idea that the infringement of the expectation right is grounds for *isharyo,* there is a group of scholars that have argued that it should also include economic losses.

In addition, Terasawa mentions that since substantial probability is an abstract concept, the loss that results from the infringement of said abstract legal interest should also

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[9] George J. Zilich, *Cutting through the Confusion of the Loss-of-Chance Doctrine under Ohio Law: A New Cause of Action or a New Standard of Causation*, 51 Clev. St. L. Rev. 673, 678 (2002-2003)
[10] Edward Kionka, *Torts in a Nutshell* 43 (2015)
[11] Tomoko Terasawa, *Soto Teido no Kanosei Singai ni okeru Songai ni kansuru Ikkousatsu: Koi Gimu kara no Apurochi,* 43(2) Sangyo Hogaku 207, 207 (2009) (Japan)
[12] Tomoko Terasawa, *Soto Teido no Kanosei Singai ni okeru Songai ni kansuru Ikkousatsu: Koi Gimu kara no Apurochi,* 43(2) Sangyo Hogaku 207, 208 (2009) (Japan)

be considered abstract. Therefore, the issue of the nature of the loss still persists.[13] This is particularly true if the issue is addressed under the traditional amount difference theory, as victims would not really have suffered a loss in the sense that their situation would have been the same regardless of the acts of the defendant. For this reason, cases dealing with substantial probability, or *soto teido no kanosei,* usually exemplify the courts taking the approach of the real loss theory.[14]

Of particular interest is a paper authored by Hirotoshi Ishikawa and Megumi Ohba in which they index and analyze 59 cases spanning from 2000 to 2012. Their results reveal that the lower courts do not approach substantial probability issues as a matter of loss, but rather as a matter of causal link between the conduct (fault) and the result (death) of the victim.[15] Furthermore, Ishikawa and Ohba classify the infringed interest into five classes: *kitaiken* (expectation right), *kyumei kanosei* (possibility of saving the life of the victim), *enmei kanosei* (possibility of extending the life of the victim), possibility, *iryo kikai* (opportunity to receive medical treatment), and finally, those cases with no quoted legal interest. This last heading was the most numerous, appearing 30 in total, followed by *iryo kikai* with 11 cases, *enmei kanosei* with 5 cases, possibility with 4 cases, *kitaiken* with 3 cases, and *kyumei kanosei* with 2 cases. In some cases, the courts made reference to two legal interests.

In regards to the loss of the victim, a perusal of their date indicates that of the 53 lower court cases, the *isharyo* are used to compensate emotional distress in 28 of them, while there is no mention of emotional suffering in the other 25. The distribution of cases in which emotional distress was recognized was as follows: expectation rights, two cases; possibility of saving the life of the victim, two cases; possibility of extending the life of the victim, three cases; possibility, four cases; opportunity to receive medical treatment, five

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[13] Tomoko Terasawa, *Soto Teido no Kanosei Singai ni okeru Songai ni kansuru Ikkousatsu: Koi Gimu kara no Apurochi,* 43(2) Sangyo Hogaku 207, 210 (2009) (Japan)

[14] See: Kaoru Kamata, *Ishi no Shindan Gimu no Taiman to Kanja no Shibo tono Ingakankei in* Horitsu Jiho Bessatsu「Shiho Hannrei Rima-kusu 2000 (jo)」*20,* 73 (2000) (Japan), Tadashi Otsuka, 「*Fusakui Iryo Kago ni yoru Kanja no Shibo to Songai・Ingakankeiron ― Futatsu no Saiko Saikosai Hanketsu wo Kiroku toshite*」, 1199 Jurist 11, 13 (2001) (Japan)

[15] Hirotoshi Ishikawa and Megumi Ohba, *Iryo Sosho ni okeru* 「*Soto Teido no Kanosei*」 *no Hyouryu,* 61(3) The Journal of law & politics 81, 104 (2010) (Japan)

cases, with the remainder quoting no legal interest.

This sample supports the argument that under the Japanese doctrine of substantial probability, the loss of the victim falls in one of two camps. Under the first, the courts follow the general rules of delictual liability under Section 709, *i.e.*, the loss is a result of the infringement of legal interests of the victim. In these cases, losses are limited to the emotional distress suffered by victims and their relatives. Furthermore, since the courts do not address the matter in terms of percentage, this emotional distress seems to be independent from that which results from the death of the victim in other types of cases. Perhaps as a result of discussions regarding the transferability of a claim via *mortis causa,* scholarship does not seem interested in exploring the matter of whether or not the victim could actually have suffered any sort of emotional distress.

Under the second camp, the approach taken by the courts is to consider that the infringement itself is enough to warrant a remedy. Analyses of cases based on this model can assume one of two perspectives. First, these cases could be thought of as examples of subjective non-economic losses, *i.e.*, the courts are compensating for a type of non-economic loss, such as emotional distress, that is so closely linked to the infringed right that the infringement itself becomes indistinguishable from the loss. The second perspective would be to consider these infringements in the same manner as the infringement to civil liberties, *i.e.*, the infringement itself suffices to grant the victim liability, regardless of the existence of any actual loss. Therefore, the loss under this doctrine falls is addressed from either the first or second perspective mentioned by Ferreira, with little to no relation to the doctrine of loss of chance as it is understood under common law.

V. EXTRAMARITAL AFFAIRS

Since marriage is a highly emotional legal relation that requires particularly specific steps to both begin and end, granting damages for emotional distress resulting from the extramarital affairs of one of the spouses is logical to a certain extent. However, Japanese courts grant remedy under the argument of protecting family ties. Therefore, the actual feelings of the spouses are not taken into account when determining liability. This entails that even rights such as those under marriage, which have a clear beginning and end, are

not absolute. Rather, liability for non-economic losses in this situation can adhere to the general rules of delictual liability set forth under Section 709.

This is one of the clearest cases of subjective non-economic losses in Japanese law, and it is also a type of legal recovery that is particular to Japan. For example, Spanish courts have traditionally rejected claims for non-economic losses resulting from extramarital affairs,[16] although some lower courts have granted damages when there is a child born from the affair.[17] In Argentina, the courts had traditionally granted damages for these types of affairs in certain cases, but the Civil and Commercial Code enacted in 2014 abolished the claims in the cases of infidelity, considering that fidelity is a mere moral obligation.[18] The courts in Chile have also rejected these types of claims based on the traditional separation of family law and civil law, the former maintaining its own special rules.[19] More recently, the Colombian Supreme Court[20] ruled that a spouse could sue for non-economic losses, specifically pain and suffering and emotional distress, only when the conduct of the other spouse infringed upon the physical and mental health of the plaintiff. However, the court was referring to cases of domestic violence and explicitly ruled that this claim could not apply to cases of infidelity.

Comparing the Japanese and Spanish approaches, it would seem that under Japanese law, non-economic losses from extramarital affairs are considered subjective losses. The courts presume that the affair itself is enough to prove the loss, except in cases in which the

[16] See: Pamela Mendoza Alonzo, *Daños Morales por Infidelidad Matrimonial. Un Acercamiento al Derecho Español,* 2 (2) Revista Chilena de Derecho Y Ciencia Política 41 (2011) (Chile)
Laura López de la Cruz, *El Resarcimiento del Daño Moral ocasionado por el incumplimiento de los Deberes Conyugales* 4 (2010) (Spain) available at http://www.indret.com/pdf/783_es.pdf

[17] S.A.P.de Barcelona Jan. 16, 2007 nº 27/2007 (Spain)Wife had an affair that resulted in pregnancy.
S.A.P. de Valencia Nov. 2, 2004 nº 597/2004 (Spain) The plaintiff found out that three of the four children born during marriage were not his. Court granted damages.
S.A.P. de Valencia Sep. 5, 2007 nº 466/2007 (Spain) Plaintiff discovered the child was not his.
S.A.P. de Cádiz Apr. 3, 2008 nº 125/2008 (Spain) In addition to granting damages for the emotional distress, the court also ordered the wife to return child support under the doctrine of unjust enrichment and to pay for half of the costs of the paternity test and the transportation costs the father had paid to be with the child.

[18] Leonardo Marcelino, *¿Son resarcibles las consecuencias no patrimoniales derivadas de la infidelidad de uno de los cónyuges en el C.C.C.N.?* available at: http://thomsonreuterslatam.com/2016/01/14/son-resarcibles-las-consecuencias-no-patrimoniales-derivadas-de-la-infidelidad-de-uno-de-los-conyuges-en-el-c-c-c-n-autor-leonardo-marcellino/#FN11

[19] Corte Suprema de Justicia (C.S.J) (Supreme Court) 13 de junio de 2012 Nº 263-2010 (Chile)

[20] Corte Suprema de Justicia (C.S.J) (Supreme Court) 30 de diciembre de 2014 rol de la causa: 10622/2014 (Chile)

defendant can provide evidence to the contrary. On the other hand, Spanish courts consider it an objective loss. Thus, the conduct of the defendant is not sufficient to establish liability. Instead, there must be another element that helps determine the emotional suffering endured by the victim. However, one aspect in which Japanese law is unique is that these claims can be brought against the lover of a spouse, while most other countries tend to approach the matter as an issue between the spouses or former spouses. Even within Spanish cases, the defendant was always the former spouse, and never the lover.

VI. CLAIMS FOR WRONGFUL DEATH

Section 711 of the Japanese Civil Code is rather unique among countries that follow the French model in that it explicitly regulates the rights of a victim's relatives. The drafters of the Japanese Civil Code did not consider relatives to have any rights in relation to the life of the deceased victim. Nevertheless, they established Section 711 to prevent wrongdoers from completely evading liability in cases where the victim died without suing, as they held that the deceased victim could no longer be considered to have any legal rights.

However, while the Japanese Civil Code certainly recognizes these types of claims, it is by no means the only one. Indeed, early 20th century case law regarding this issue exists in both Spain[21] and Chile.[22] French courts have also recognized non-economic losses for deaths of parents and children. The language of Section 1644-a of the Panamanian Civil Code specifically allows for any individual to sue for direct losses, but denies the possibility of transferring the claim via *mortis causa,* and the courts have allowed parents to sue for injuries and deaths of their children.[23] Meanwhile, Section 1078 of the old Argentinian Civil Code granted a claim to only the legal heirs of a victim, which Sections 3565 to 3570 dictate are the children, parents, or spouse of that victim. Section 1741 of the new Civil Code establishes that in cases where the victim died or suffered a great disability,

[21] S.T.S. Oct. 19, 1909 (Spain)
[22] Corte de Apelaciones de Santiago (C. Apel) (Santiago court of appeals) 27 de julio de 1907, R.D.J. T. 4, sec. 2ª p. 139 (Chile)
[23] Corte Suprema de Justicia (C.S.J) (Supreme Court) 15 de junio de 1998 (Pan.)
Corte Suprema de Justicia (C.S.J) (Supreme Court) 14 de septiembre de 2012 (Pan.)
Corte Suprema de Justicia (C.S.J) (Supreme Court) 31 de Julio de 2000 (Pan.)
Corte Suprema de Justicia (C.S.J) (Supreme Court) 24 de octubre de 2006 (Pan.)
Corte Suprema de Justicia (C.S.J) (Supreme Court) 14 de Junio de 1999 (Pan.) (injury)

the parents, children, or spouse of that victim who hold a family bond are entitled to claim non-economic losses, depending on the circumstances.[24]

Claims for the non-economic losses suffered by the relatives of a victim as a result of the death of the latter are not rare in comparative law. The U.S. courts followed the common law rule under which tort claims perish with the victim,[25] but this rule was considered inadequate, as the tortfeasor would ultimately pay less in cases where the victim had died. Two causes of action emerged to address this issue: wrongful death and survival claims, both of which have been previously discussed.[26]

However, the most striking difference between Japan and other civil law countries is not the willingness to recognize these types of claims, but rather how the courts have addressed the issue of who can bring the suit. Japanese courts have extended this right to siblings, common law partners, and illegitimate children of the victim, dependent on the relation between the victim and the plaintiff-claimant. In Colombia, courts have construed that since the relation between parents and children is a type of subjective non-economic interest,[27] a plaintiff does not need to prove a loss has occurred, as its existence is presumed from the death of the victim. However, this presumption is not absolute, as the defendant can present evidence in order to prove that the relation between the victim and claimant lacks the necessary elements to be considered legally protected.[28]

Colombian courts have also recognized the claims of children born after the death of their father under the argument that the lack of support, guidance, and love of a father can influence the child in a negative manner.[29] Furthermore, the courts have also granted

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[24] Section 1741: Compensation for non-economic losses. The victim has a claim for non-economic losses. If the act results in the death or great disability of the victim, the ascendants, descendants, spouse, and those who live together (with the victim) are evidently treated as family and also have a personal claim (for non-economic losse). Translation by the author.

[25] Dan B. Dobbs, *The Law of Torts* 803(2000)

[26] See Chapter 5 *supra* notes 196 to 199

[27] Case law in Panamá also follows this approach. Corte Suprema de Justicia (C.S.J) (Supreme Court) 26 de enero de 1998 (Pan.)

[28] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 28 de febrero de 1990. Gaceta judicial T. 200. p. 79 (Colom.)
Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 17 de julio de 1992 Radicado 6750 (Colom.)

[29] Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 21 de febrero de 2002 Expediente No.

remedy to "*hijos de crianza,*"[30] a social phenomenon in Colombia in which an individual raises a child as their own, despite no legal relation between them.[31] In contrast, the courts have denied remedy to siblings born after the death of the victim under the rationale that the suffering is not the same as in cases where the father has died, as fathers support and are present in all stages of development for an individual. Meanwhile, the death of a sibling who the plaintiff has never met cannot be said to have the same influence.[32]

However, Japanese courts have not examined whether the claim under Section 711 can be opposed based on the relation between the victim and his or her relatives, which raises the question of the nature of the claim under Japanese law. In other words, the question becomes whether the claim under Section 711 and absolute right for the relatives of the victim can be exercised regardless of the particular circumstances of each case, or if the courts can hear evidence to prove that there was no sentimental relation between the victim and relative.

For example, in 2016 a child was abandoned by his parents abandoned in the mountains after he failed to behave properly.[33] The child survived for six days and was found inside a base belonging to the Japanese Self Defense Force. Public opinion on the matter was divided between those who believed that the father was well within his rights to discipline his son and those who believed that the father's conduct constituted child endangerment. For the sake of the argument, consider the scenario were the child was run over by another vehicle. Should the parents have a right to claim non-economic losses under Section 711? Other countries that have developed the issue further would likely deny the claim, as their conduct could be used as evidence against the legal presumption that there is a familial relation that should be protected. However, the issue would not be as clear cut in present day Japan. Perhaps in another 20 years, once societal views have

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6063 (Colom.).

[30] Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 26 de marzo del 2008, Expediente 18846 (Colom.)

[31] The child is not adopted, nor are they related by blood. It is an act performed out of the good will of the individual

[32] Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 6 de 1994 Expediente 7834 (Colom.)

[33] http://www.telegraph.co.uk/news/2016/06/03/japanese-boy-found-alive-in-mountains-having-been-left-in-forest/

changed further, this discussion will assume center stage within scholarship on non-economic losses.

So far, Japanese courts have been expanding the number of claimants without addressing this issue, therefore leaving many questions unanswered: Are individuals entitled to receive damages in cases where relations with their parents were strained? What about spouses who are living separately and have yet to divorce? In the latter case, would the precedent regarding extramarital affairs apply, *i.e.*, could a defendant present evidence of the existence of an extramarital affair to claim that the marriage was already strained, and deny recovery under Section 711? If these questions ever emerge, the courts might find a solution by following the Argentinean model and utilizing the rules of inheritance. In particular, Section 891 of the Japanese Civil Code could provide some guidance, as it regulates cases in which an individual loses the right to inherit and establishes in which cases an heir can be disqualified.[34]

Each conduct above affects the body and freedom of the descendant. An application via analogy would result in relatives who cause bodily injury to the victim in any way that has infringed the liberty of the victim being excluded from the application of Section 711. However, if bodily injury is used as a criterion, logic dictates that it would be limited to cases of grievous injury or injury resulting in disability, *e.g.*, domestic violence, etc.

VII. NON-ECONOMIC LOSSES IN CROSS-BORDERS CASES

From the cases presented in this thesis, it is apparent that some courts demonstrate a clear inclination towards conduct that is arguably discriminatory against certain

[34] Section 891 reads:
"891 The following persons may not become an heir:
(i) a person who has received punishment for intentionally causing, or attempting to cause, the death of a decedent or a person of equal or prior rank in relation to inheritance;
(ii) a person who is aware that the decedent was killed by someone but made no accusation or complaint about this; provided that this shall not apply if that person cannot discern right from wrong, or if the killer was that person's spouse or lineal relative;
(iii) a person who prevented a decedent from making, revoking, rescinding, or changing a will relating to inheritance through fraud or duress;
(iv) a person who forced a decedent to make, revoke, rescind, or change a will relating to inheritance through fraud or duress; or
(v) a person who has forged, altered, destroyed, or concealed a decedent's will relating to inheritance."
Translation from: http://www.japaneselawtranslation.go.jp/law/detail/?id=2252&vm=04&re=02

nationalities, in particular those of Asia. No cases were found in which the defendant was found liable and the victim was a national of a wealthy nation. While some courts recognize that this is an untenable stance, the development of theories that allow the courts to grant less in damages reveals a deeper issue, which is not related to the law. This is particularly evident when the fact that Japanese judges are usually highly trained in the application of law is taken into account.

However, the phenomenon of courts granting different amounts depending on the nationality of victims or their heirs is one that requires deeper research. In particular, quantitative research would help determine whether the arguments made by the courts that apply this double standard are only for the purpose of making a distinction, or if they also have an observable effect on the amount. Since these types of cases are rare, and since most of the victims are usually individuals without the means to pursue the issue to the Supreme Court level, a unified standard seems improbable. Furthermore, even within the legal community of Japan, these types of cases are often the subject of study.

In a purely legal sense, the issue might seem to be one of applicable law. Nevertheless, in cases where one of the parties is foreign, the courts must first determine whether it has jurisdiction, and then decide on the issue of the applicable law. In the case of personal injuries resulting in the death of a victim, Japanese courts do not deviate from this custom. Since the acts are committed in Japan by defendants that are either Japanese nationals or companies, the issue of personal jurisdiction does not factor in. Therefore, this is not an issue of the jurisdiction of the court, as both parties have agreed to bring the proceedings to the Japanese court and there is no reason for that court to remove itself from the controversy. Thus, the only issue remaining is that of the applicable law.

In some cases, the issue of applicable law is sometimes encountered in the matter of inheritance, with the courts deciding on using Japanese law when the applicable law is either unknown or runs contrary to the Japanese *ordre public*. However, courts have recognized that based on Section 17 of the Act on General Rules for Application of Laws, the applicable law in delictual liability is Japanese law.[35]

[35] Section 17 The formation and effect of a claim arising from a tort shall be governed by the law of the

With regards to private international law, the doctrine of *lex locus delicti* has served as the governing principle for the question of conflict of laws in many countries since the beginning of the 20th century.[36] However, since the 1960s, it has lost ground to the principle of *favor laesi*, *i.e.*, the law most favorable to the victim.[37]

At the European level, Article 4 of the Rome II statute states:[38]

General rule

> *1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*
>
> *2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.*
>
> *3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.*

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place where the result of the wrongful act occurred; provided, however, that if the occurrence of the result at said place was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern. Available at http://www.japaneselawtranslation.go.jp/law/detail/?id=1970&vm=&re=

[36] Symeon C. Symeonides, *Tort and Conflicts of Law* in Comparative Tort Law: Global Perspectives 39,39 (Mauro Bussani, Anthony J. Sebok eds., 2015)

[37] *Id.* at 48

[38] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1459818518522&uri=CELEX:32007R0864

Furthermore, in regards to the assessment of damages, Article 15 states:

Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:…

(c) the existence, the nature and the assessment of damage or the remedy claimed;

A key concern in these matters is whether the assessment of damages is an issue of substantive or procedural law, as the applicable law is usually reserved to matters that engage with substantive law. In the English case of Harding v. Wealands,[39] Lord Hoffmann addressed the issue by explaining:

> *As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy.*[40]

The matter is even clearer in the US, as the assessment of damages is executed by a jury, and as matter of fact, the amount that a victim receives in compensation has nothing to do with his or her nationality.[41]

[39] Harding v Wealands [2006] UKHL 32.
[40] Harding v Wealands [2006] UKHL 32. para 24
[41] This is one of the reasons U.S. courts are sought after in cross-border litigations. See: Patrick J. Borchers, Punitive Damages, Forum Shopping, and the Conflict of Laws, 70 La. L. Rev. 529 (2010)

Thus, the distinction on basis of the plaintiff's nationality in cases where the victim was not a permanent resident of Japan cannot be supported on the application of a foreign law. The issue of calculating damages is and has always been an issue of procedural law dealing with the facts of the case. Furthermore, the courts have recognized that the emotional suffering of a plaintiff or their relatives remains consistent regardless of the nationality of the individual.

Interestingly enough, only plaintiffs who are nationals of countries with lower economic levels than Japan have been involved in these cases. Therefore, there is no data to support the idea that Japanese courts would apply the same principle in cases in which the plaintiffs or their families are nationals of a country with a higher living standard than Japan. If anything, based on experiences with cases concerning punitive damages, the courts might apply the notion of *ordre public* as a means to reduce the awards the plaintiff might have otherwise received.

In contrast with Japanese courts, the issue of comparative law has always been how to prevent the plaintiff from using forum shopping in a frivolous manner, as once the court has determined that it has jurisdiction and that the applicable law is the *lex fori,* then damages are awarded according to the rules and customs established in each particular system. This is the reason the US is such an attractive jurisdiction for foreigners, and why many lawyers attempt to try their cases in the US using the doctrine of personal jurisdiction.

The argument that plaintiffs might receive more in damages in one court than they would have in another has never been held as a valid defense. If the matter of the amount is considered central to the issue of loss, and not part of procedural law, then the question the Japanese courts should ask is not whether the plaintiff's home country is in a better or worse economic situation than Japan, but rather which awards are given under such jurisdiction. However, if this were the case, courts would benefit from applying the law of the plaintiff's home country, as they could make use of precedents of that jurisdiction in order to find an amount that would be in line with the standard of living. As the issue stands today, Japanese courts usually just refer to the matter by acknowledging that the standard of

living or price index is different, but failing to present any evidence of the parameters of this difference, a result of the discretion they have under the law when deciding the amount for non-economic losses.

On the other hand, if the issue is a matter of procedural law, then the arguments of the Japanese courts have no legal basis, as both parties and the court have recognized the jurisdiction and followed the procedures of the court. It would defy logic and reason to argue that the trial should be conducted according to Japanese law only to change that rule for the assessment of damages. Regardless, perhaps the sharpest criticism of this approach is that Japanese courts do not apply it in the case of their own nationals. In other words, if a national tourist suffers an accident or dies in a different prefecture, the courts will not take into account the price index or standard of living of the prefecture in which the victim lived.

Arguably, since Japan does not follow a federal model of government, it would be impossible to have different laws governing the issue for each prefecture. However, this argument is founded on the assumption that this is a matter of applicable law, which the Japanese courts have already said it is not the case. Another issue is that although Japan is a small country, its economic situation is not uniform. Areas like Tokyo tend to have higher prices, while more rural areas tend towards the lower end. In those cases, the question arises whether the Japanese courts should take into account the place of residence of the victim when determining the amount for non-economic damages.[42] For example, if a tourist from Hokkaido died as the result of a traffic accident in Tokyo, should the standard be set with regards to Tokyo or Hokkaido?

VIII. FINAL CONSIDERATIONS

Hereafter are summaries of the findings and arguments of this thesis.

1. The Japanese approach to the concept of loss is the result of a German influence on scholars that began during the early 20th century. Influxes of foreign ideas have been dependent on the historical periods in which they took place. During the period of

[42] According to the Shohisha Bukka Chiiki Sashisu no Gaijo published by the Bureau Statistics in 2013, the price index can differ up to almost 10% between prefectures. Available at: http://www.stat.go.jp/data/cpi/sokuhou/chiiki/pdf/chiiki.pdf

the drafting of both the Bossonaide code and the Japanese Civil Code, new ideas were limited to those introduced by the scholarly and political elite, who had access to both the economic and linguistic means to obtain knowledge directly from its source. As a result, studies were limited to only those the government wished to advance, which in turn restricted the pool of knowledge to those countries that were admired by the leading politicians of the time. This changed after the Second World War, when the Allied troops landed in Japan, and the subsequent opening of the country to a new flow of ideas that were not limited to those selected by elites, but rather by the scholars who introduced them. However, old customs are persistent, and even today, scholarship regarding German law overshadows other comparative law studies, even if this contradicts the express wishes of Ume and Hozumi.

2. The confusion of terminology, which began even during the Bossonaide draft, has been in the background of discussions and led to difficulties conceptualizing the terms harm and loss. However, there is no evidence that the drafters were or could have been influenced to the degree they would have adopted a restrictive approach to the concept of harm and loss. Rather, records from the drafting committee clearly indicate that Section 709 of the Civil Code was influenced by French and English legal thought, at least to the extent loss is concerned. The confusion has been further augmented by the fact that the Japanese term *songai* is used in a manner that conveys both the event that causes the liability and the abstract or concrete loss of the victim. The issue then becomes whether traditional theories can overcome these semantic and practical setbacks. However, Japanese scholars have addressed some of the issues that usually regard the concept of loss under the figure of right infringement, or *kenri shingai.* Nevertheless, initial discussions were limited to the nature and meaning of the concept of right, rather than the loss suffered by the victim.

   At a more basic level, the point of inquiry is whether the Japanese courts and scholars can or should use the legal thinking of a casuistic system, such as that of Germany, or rather apply abstract concepts to a larger degree in accordance with

other French tradition countries. At a comparative law level, the use of the word *songai* mirrors the challenges that Italian scholars faced in the past. Therefore, if their example is any guide, a rethinking of the various meanings ascribed to the term *songai* will help clarify the current situation.

3. Overreliance on concrete concepts for harm, such as that presented by German legal scholars, belittles the fact that unlike Section 823 of the BGB, the Japanese Civil Code follows a different legal tradition. However, this is not to say that German theories are completely incompatible with the Japanese Civil Code. On the contrary, many countries have adopted the *diffenztheorie* as a manner to calculate economic damages without affecting discussions about non-economic damages. However, in casuistic countries, such as Germany and England, abstract concepts are generally unwelcome. Therefore, these countries find themselves without any need to develop general legal theories that address the issue of harm or loss, as they are either already defined within the rights established by statute, or are incorporated into the claims for damages themselves.
4. The first part of Section 709 has been traditionally approached as an issue of infringement or unlawfulness. However, if the language is perceived as referring only to a harmful event, and without regards to any of its consequences, it would help direct the discussion towards a more general concept of harm and loss, which do not require a concrete monetary valuation for the purpose of establishing liability. Under this premise, theories such as the amount difference theory cannot be utilized to abstractly define harm, as they were never intended to be capable of doing so. On the other hand, at least as far as the distinction between the harmful event and its consequences is concerned, the real loss theory does provide a more fertile ground for discussion. Nevertheless, this discussion has centered on the nature of the causal link, again shying away from a more abstract construction of the concept of *songai.*
5. The infringement of right requirement is not absolute, particularly after the 2004-2005 reforms. Furthermore, while the courts have tended to approach the issue of

delictual liability under the process set by the drafters – *i.e.*, grant damages when there is a loss that results from the infringement of a legal right – there are cases with respect to non-economic losses where this process has not been followed. For example, in cases involving substantial probability, the courts sometimes grant damages for an infringement of the right of the victim, while in other cases, they focus on the emotional distress of the victim. In cases of public nuisance, the courts decide on the issue of the right infringement after analyzing the actual effect of the nuisance on the lifestyle of the plaintiff.

6. The concept of unlawfulness also plays a key role in discussions regarding loss and harm. Since the concept has been used to refer to both a requirement for liability and a way to expand the range of protected interests, it is not surprising that, even today, Japanese courts base their arguments on whether or not a conduct is unlawful. However, as the Italian example has demonstrated, even with a clear requirement for unlawfulness the matter remains of whether it should apply to the conduct or the loss suffered by the victim. The latter case is better suited to explain the contraposition of legal interests that characterizes delictual liability. Especially in cases such as constitutional and civil rights infringements, wherein the rights themselves are granted such a status that liability results from their infringement regardless of any loss, economic or otherwise, the unlawfulness cannot refer to the conduct, but rather should be applied either to the infringed interest or any hypothetical losses that arise from it.
7. The approach of equating harm and loss to some form of monetary quantification, supposedly based on the principle of monetary compensation or *kinsen baisho gensoku*, has influenced legal thinking to the point that returning to such abstract concepts might not be possible or desirable. The system fulfills it role from a pragmatic standpoint, but the natural confusion and difficulty that accompanies the concept of non-economic losses is augmented by the combination of French and German schools of thought. Strictly speaking, the reason German influences permeate civil law scholarship can be traced to a sense of admiration for the

country's legal method during the early 20th century. However, the German legal method is also based on the study of the roots of law, such as Roman law, which differs from the situation in Japan. This has led to scholars' blind decrees that the *kinsen baisho gensoku* is a mandate to treat losses from a monetary perspective without fully understanding the background and historical evolution of the figure.

8. Furthermore, the fact that Japan was never greatly influenced by the *ius naturalist* ideas resulting from Christian moralism supports the idea that development of a concept such as *dommage moral* in Japan has been a much more challenging endeavor than in other civil law countries. While Section 710 of the Japanese Civil Code does provide for a list of rights, it is not *numerus clausus.* Therefore, the courts and scholars do not encounter the same limitations that both German and common law lawyers must navigate in order to recognize these types of claims. After all, Section 710 was included as a clear means to recognize non-economic losses, which had been rejected by the Bossonaide code and were still a subject of debate in comparative law during the 19th century.

   However, the development of a concept such as moral interests (*patrimonies moral*) does not seem likely under current circumstances – particularly if the development of the law is taken into account. The concept of *jinkakuken* advanced by the courts and scholars since the beginning of the 20th century is still not part of the main discourse surrounding delictual liability. Thus, the possibility that an idea even more global and abstract than moral interest can be developed in the near future seems highly unlikely.

   Claims such as the breakdown of marital relations are grounded more in a sense of legal obligation than a moral one. However, the court provides exceptions that do appear to indicate a certain level of moral or societal considerations.

9. Regardless of the fact that Japan has had neither doctrinal nor historical issues with recognizing non-economic losses under the Civil Code, the discussion has been impacted by the monetary concept that permeates the general approach to the concepts of harm and loss. To a certain degree, the scholarly approach to non-

economic losses has more closely resembled that of a common law country, in the sense that research and discussions regarding the remedy have overshadowed that of the concept of loss itself. With emphases on the nature, function, and role of the remedies, even empirical discussions tend not to address doctrinal issues, such as the characteristics of non-economic losses. Clear examples of this are cases of non-economic losses for foreigners. Discussion in the courts centers on whether or not the Japanese standard of living should be applied to liquidating the damages of the victim, suggesting a clear economic consideration of a much deeper issue. Furthermore, on a more practical level, the issue remains that since the traditional Japanese views on harm and loss do not address non-economic losses, the development of concepts such as objective and subjective non-economic losses have passively recognized, but not explored.

10. With regards to discussion surrounding the nature, function, and role of damages for non-economic losses (*isharyo),* there is no apparent reason why these discussions should be separated from the general theory of the function and role of delictual liability. Whether the amount granted to the victim is compensatory, punitive, or otherwise an issue that cannot be resolved through legal discourse, any theory that attempts to provide an answer will provide unsatisfactory for the simple reason that compensation, reparation, and punishment are subjective feelings of both the wrongdoer and the victim.

    This focus on the nature and function of *isharyo* can be envisioned as a means to criticize the Japanese delictual liability system in an indirect manner. Since the system in general is well received and widely used by lawyers and courts, a direct criticism might be much harder to support. By highlighting these issues in the realm of non-economic losses, scholars can make them known without much risk of opposing the system as a whole.

11. In this regard, the Supreme Court precedent that allows for non-close relatives that held a special relation to the victim to claim emotional distress under Section 711 would seem to enable possibilities for a deeper understanding of the concept of

objective and subjective non-economic losses. However, the issue is then whether the viability of these claims are viable, which derives from the statute or from a deeper sense of social relations. In the case of the former, any limitations towards these claims, such as the cases of violence, could be resolved under the code's rules for inheritance. Support for this exists in the fact that traditional ideas of familial relations and their associated obligations have been evolving in recent years. For example, the awareness and protection given to victims of domestic violence or child abuse have increased to the extent that old ideas regarding the relation between parents and children are being called into question

12. In some other claims, such as the loss of chance, the lack of the concepts of harm and loss makes it difficult to fully comprehend the ramifications of precedents. If the non-economic loss, *e.g.*, emotional distress, is the result of the infringement of a type of expectation right, then the courts are actually addressing a case of subjective losses, and the infringement of the right itself would evidence the existence of subjective suffering sensations that have arisen from it. If, on the other hand, the harmful event is medical malpractice that produces a physical injury and the emotional distress and pain of the victim is the loss, the need for such an instrument is unclear.

    Furthermore, in the latter case, the issue of the actual suffering of the victim would emerge, as in most cases, victims are already aware that their illness is untreatable. Since the courts are not granted a percentage of damages based on a lost chance, as is the case in other jurisdictions, it can be argued that the courts consider the emotional distress from death and the emotional distress from being unable to survive longer to embody two distinct types of losses.

13. The system has been working for over 100 years and has adapted accordingly to changing times. However, the limited scope of the research also suggests a deeper issue of understanding. This arises from over a century of scholarship that rejected the establishment of concepts that reflected a comprehension of the principles behind the code, in favor of legal transplants of theories and institutions in a manner

that differs from their intended purpose. As a result, any rethinking of the system should not occur at a statutory level, but rather engage with the doctrinal approach to the concept of non-economic losses. There is no reason or necessity to reduce the existence of these losses to a discussion of their quantification, which is by no means simple or without merit. However, a more holistic perspective and a new approach can translate into new developments of the law that in turn could allow for the introduction of new losses, perhaps at a faster and more comprehensive rate.

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