論　説

Non-Economic Losses under Japanese Law from a Comparative Law Perspective (3)

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I. CHAPTER 4: HARM AND LOSS FROM THE PERSPECTIVE OF COMPARATIVE LAW

Having examined the general rules of delictual liability and specific non-economic losses under Japanese law, we turn to comparative law, particularly how civil law and common law systems view the concepts of harm and loss. Although, at a general level, the law of delicts and the law of torts follow similar paths under common and continental law, in practice, their approach to harm and loss has shaped discussions and understanding of non-economic losses. The first challenge is determining what constitutes harm and loss, as they can be defined from various perspectives, and their importance varies 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 loss is one of the essential elements for establishing liability under the law of delicts, civil law scholars and judges must first grapple with abstract ideas to effectively apply them to specific cases. In doing so, the requirements of *redressable harm* or *redressable losses* naturally become the main point of inquiry. By contrast, the law of torts emphasizes *a posteriori* arguments over abstract concepts, which arguably precludes the possibility of concepts such as loss and harm from developing to the extent they have under civil law. This difference is evident in the "tests" that common law courts establish as part of their rulings.

As Zimmermann[2] explains, "*[t]he continental law of delict presents the picture of a coherent body of rules based on general principles and abstract concepts.*" He continues by pointing out 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.*" In the case of the theory of harm and loss, the process of abstraction composes a series of criteria that seek to remove these concepts from any specific context and establish them as general principles applicable to individual cases. This process is especially true in countries that adhere to the French general clause system of delictual liability.

In comparison, the common law approach of prioritizing the facts

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

2 Reinhard Zimmermann, The Law of Obligation –Roman Foundations of Civilian Tradition 907 (1996).

of a case over the principles allowed for the development of claims for non-economic loss much earlier than in civil law countries, albeit limited in most cases to a parasitic nature. The original general clause model, Article 1382 of the French Civil Code, does not define *dommage,* but the consensus defines it as a loss regarding an individual's person, property, or rights. While most civil law countries that follow the French model do not have a statutory definition of harm or loss in their civil codes, there are some exemptions. For example, Article 1835 of the Paraguayan Civil Code defines harm as any loss regarding an individual's person, rights, faculties, or property.[3] Likewise, Article 1737 of the Argentinian Civil and Commercial 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.

In his seminal two-volume treatise on the subject, De Cupis[5] posits that, at a general level, a loss is nothing more than a *"decrease or alteration of a favorable situation."* However, only loss as a legal phenomenon qualifies to be the subject of legal studies. Moreover, this observation is not as objective as it may initially seem, as identifying *"a favorable situation"* entails a subjective evaluation. Therefore, two standards are needed: the first to delineate a favorable situation and the second to determine when this 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 that is the concept's

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3 Article 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 possession. Translation by the author.

4 Article 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).

nucleus. 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. Therefore, harm entails an event or fact, a phenomenon in the physical world that produces specific results. This argument, while simple to understand, is again problematic, as a physical phenomenon might not be sufficient to justify redress in favor of the victim. Therefore, the legal rule forms the basis for a 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 occasionally confused the terms harm as a physical phenomenon and harm as the loss that results for the victim. De Cupis[7] 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 derive from a human act by its nature. He argued that the harmful event and harm (loss) are parts of a complex process, but the main element required 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 action 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 provide the vehicle owner with a claim for damages; 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

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6 *Id*. at 82.

7 *Id*. at 83.

8 Ibid.

the loss are different elements of civil liability.

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 legal rules. Thus, any harm yields the possibility of an individual suffering economic and non-economic losses. De Cupis admits this, writing that "*it is easy to realize that a single fact can derive in both material and intangible harm (losses).*" [9]

Under common law, harm and loss are profoundly connected to each individual tort. Discussions of whether there can be any general principle in the common law of torts have been ongoing for over a century. As Pollock pointed out:

> *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 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 comments on torts as a whole, saying, "*[t]ort does not constitute a coherent body of law, definable in general and abstract*

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[9] *Id*. at 125.

[10] FREDERICK POLLOCK, The Law of Torts 24 (4th ed., 1886).

[11] WILLIAM L. PROSSER, Handbook of the Law of Torts 1 (1941).

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 in such cases 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. Instead, 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.

Regardless, loss as a concept 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 argues that there are two models available to explain tort law. Under the first, known as the 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 critical 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 torts relates

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[12] ZIMMERMANN, *supra* note 2, at 907.

[13] ROBERT STEVENS, Torts and Rights 2 (2007).

to the secondary obligations resulting from violating 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 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] By contrast, the second angle argues that parties who obligate themselves to conduct or refrain from performing an act have 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

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14 Ibid.

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.

resulted from a breach of the duty of care.[17] By 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 loss, and the law does not provide any 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 advances 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 particular outcome.[20] In addition, he highlights 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. By 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*

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17 *Id*. at 422.

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.

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 concept of damages 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 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 also causes disorientation regarding the law of negligence. He specifies 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 results from the defendant's conduct.

However, he has clarified in cases of property damage:

[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 ultimately concluded that "*[i]n everyday parlance, we can*

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22 Donal Nolan, *Rights, Damages and Loss,* 36 (3) Oxford Journal of Legal Studies 1, 2 (2016).

23 *Id.* at 4.

24 *Id.* at 6.

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 paper 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 not found in the common law of torts at large. Furthermore, the fact that it is an argument regarding 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, seeks to remedy the victim's losses. Therefore, a legal loss can be defined by its remedy rather than by a set of abstract and general principles that enshrine logical rules.

Under De Cupis's 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. Particularly when considering intentional torts, such as battery, assault, or 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

In Civil Law jurisdictions, the most basic characteristic of a protected interest is that it is a human interest.[25] As such, the well-

[25] De Cupis, *supra* note 5, at 109.

being of a human individual supersedes an animal's interest in its own life. However, for an interest to be legally relevant, the law must provide a remedy in the event of an infringement.

De Cupis argued that one must understand the concept of "asset" to understand the concept of interest. Accordingly, an asset is anything that can satisfy a necessity, with said necessity being a requirement or need that arises from the lack of a particular asset.[26] He cited two main theories that aim to explain the concept of interest under that background. The first theory considers interests as a valuation of an asset concerning a need. The second theory posits that 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, a particular asset's value derives from the individual's consciousness. 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. 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 briefly introduces how these two legal traditions approach the concepts of harm and loss. As such, this section is not a

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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.).

review of the elements of delictual liability; however, 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 explain that:

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 further state:

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 and obligations were…"[30]

This desire for simplicity is apparent in the text of Article 1382 of the *Code,*[31] which is the primary provision governing delictual liability.

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[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).

[30] Ibid.

[31] Article 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: https://www.biicl.org/files/730_introduction_to_french_tort_law.pdf.

No legal qualifications or technical terms, except maybe fault, could confuse a reader about the general principle the statute enshrines.

However, this also means that the concept of *dommage* can be construed broadly, as there is no statutory limit; hence, creating a situation in which *dommage* is any decrease of a favorable position. Therefore, 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. These rules, developed per traditional legal thinking, are general principles 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 some instances, such as abuse of rights, negligence is sufficient to support most claims.[33] In this regard, it seems dubious that non-specialists could comprehend some of these concepts' intricacies. Ironically, the simplicity of the *Code* invited the technicality that the French drafters endeavored so strongly to avoid. In this case, as De Cupis explained, the formal elements of loss are not limited to the legal norm expressed by law; instead, they 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 réparable*). Cadiet[34] explains that,

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[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).

[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)

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.[36] [37] A future or eventual loss, *i.e.*, one 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 direct when it results from a harmful act or event. This criterion engages with causality and addresses problems arising from establishing a causal link between the plaintiff's action and the victim's loss. Finally, the subjective elements of loss refer to its legal value, *i.e.*, the importance a society places on protecting such interests. This value has to do with substantive law and 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. Instead, their main objective is to create a method for determining when a specific 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*

(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.).

for the harm or loss and *dommages-intérêts* for the actual monetary awards. This division 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 coherency. It would also contradict the influence under which the *Code* was drafted. The French method is then a set of rules that aim to provide the means to discover which of the many daily losses that individuals suffer should be legally protected without explicitly limiting a victim's claims.

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 to the point that commentaries by German legal scholars have been likened to descending a pyramid composed of a significant 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 their intended public. 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

[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.

secular world for general concepts. It was designed to be systematic and scientific to a degree rejected by the French drafter, and the effects are apparent in the law of delict.

In contrast to 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, Article 823 of the BGB only lists specific protected rights that, if infringed upon, can render an individual liable for damages. Zimmermann[44] posits 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 addressed under contract law, as they are not among Article 823's protected absolute rights.[45]

Four requirements must be satisfied to file an action under Article 823 of the BGB: 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 a 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. Although the legal science of the 19th century influenced the BGB, the drafters

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43 ZIMMERMANN, *supra* note 2, at 1036.

44 *Id*. at 905.

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).

were opposed to defining harm or loss.[47] The result is 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, and property. The last clause, concerning other rights, is related to the concept of *Rechtswidrigkeit* and serves to limit liability. Therefore, it was unnecessary to devote energy or time to creating an abstract concept of harm or identify its differences with the idea of loss. Furthermore, during the late 19th century in Germany, the only type of loss 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 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*

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[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).

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 loss to be construed as synonymous. Furthermore, by providing a list of legal interests that must be infringed upon 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's model presents the material and formal elements of harm as equivalent under German law.

So far, the discussion has centered on 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 listed and the courts are not concerned with identifying new losses to redress, as these interests have been assigned a clear position and value within the legal system.

Ⅲ. UNLAWFULNESS

Having established how the philosophies behind codification processes 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.

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[49] ZIMMERMANN, *supra* note 2, at 824.

However, most codes do not explicitly state that an unlawful action or loss must occur to 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 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 against the law. Therefore, it was more similar to the modern idea of illegality than unlawfulness. However, with the advent of the *ius commune* the focus shifted from the illegality or unlawfulness of the act to negligence (*culpa*) or intent (*dolus*).[53]

Regardless, since the function and role of delictual and tort liability have changed from purely punitive to compensatory, the standard of unlawfulness under negligence and intent have also transformed to reflect this change more accurately. 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 Judge 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.

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[50] There are some exceptions to this trend, the better-known being Article 823 of the German BGB. However, Article 2043 of the Italian Civil Code, Article 438.1 of the Portuguese Civil Code as well as Article 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.

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 Law scholarship regarding unlawfulness, with most scholars asserting that unlawfulness 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]

By 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

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55 *Id*. at 1520. According to Montijano, the language of Article 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 Article 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.

56 Biagio Petrocelli, *La Antijuricidad (Segunda Parte)*, 46 Revista de la Facultad de Derecho de México 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).

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.

A. THE CONCEPT OF UNLAWFULNESS

A certain degree of clarification is needed before discussing the concept of unlawfulness. As mentioned above, unlawfulness has been used to qualify the act committed by a defendant. However, understanding unlawfulness under comparative law requires more than a superficial 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]

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[58] George P. Fletcher & Steve Sheppard, American Law in a Global Context:

They correctly assert that *Recht* includes the law as a formal legal rule and 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, or rather statutory law, is narrowly construed as the formal legal rules established by the legislature.[60]

By contrast, De Cupis 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 that should be granted a legal remedy.[61] This interpretation commands an understanding of what "unlawfulness" entails. According to De Cupis, unlawfulness refers to something against the law.[62] Thus, an exact knowledge of the law is required to determine whether something is unlawful.

For De Cupis, *diritto* has three meanings.[63] The first refers to the legal rules that form a particular system, 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

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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.

63 De Cupis, *supra* note 5, at 84.

of conduct (*diritto soggetivo*). Finally, the third meaning concerns 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 concluded that unlawfulness is the recognition, under the dominant social conscience, granted by legal rules to a particular 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 an explicit legal prohibition, an act might be unlawful even if there is no explicit statute that declares it so. Furthermore, under the concept of *diritto oggetivo*, the question arises of whether legal rules can indeed 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, the act in question must be legally relevant and violate a legal rule.[65] Only then can that harm or loss be considered to have legal relevance. Finally, De Cupis stated that unlawfulness can also refer to the infringement of a subjective right. However, in these cases, since an explicit legal rule protects rights, the infringement of a subjective right is inherently an infringement of the *diritto oggetivo*.[66]

De Cupis's argument is instrumental in 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

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64 *Id.* at 85.

65 DE CUPIS, *supra* note 5, at 86.

66 *Id.* at 86, 88.

harm and loss that does not need to be expressly 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 under the broader legal principle of *alterum non laedere*.

However, Common Law presents a more difficult challenge even if unlawfulness can be explained under the French system using the above abstract methodology. 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]

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[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.

He has further stated:

> *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 the 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 wrongfulness is compatible with Common Law, at least at an abstract level, as every system includes certain losses that do not grant a claim

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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).

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, 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]

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70 *Id.* at 40.

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 "*júrídico*." However, in this context, it is used to mean "conforming to a legal rule." The English term "lawful," while not completely

Sessarego notes that legal norms regulate every human conduct in one way or another, so the idea of unlawfulness, *i.e.*, something that opposes such standards, is not possible. An unlawful act, he has argued, would require human conducts 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 explained, since civil liability can be considered a loss to the aggressor, their actions would not be unlawful *per se* in the sense that they infringe upon a legal rule. 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 for such an act. According to Sessarego, this would be a "lawful" conduct; the main issue is whether it falls within the purview 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 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 result is the same, whether the unlawfulness refers to the

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adequate, is used instead.

[76] Sessarego, *supra* note 73, at 6.

behavior, the outcome, or both will serve as a basis for 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 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, Merkles posited 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:

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

[78] In regard 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 an 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).

[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).

> *[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 unlawfulness should not apply to a specific 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 is the true owner. On the other hand, any claim against the thief depends solely on the reproachability of their 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 synonyms. However, illegal conducts are unlawful, 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 cases. First and foremost, through the limit it imposes on individual liberties, by declaring an act illegal, the law effectively and directly restricts particular behaviors. In this regard, by limiting protected rights, the BGB is arguably establishing the idea of illegality rather than unlawfulness. However, as previously mentioned, *Rechtswidrigkeit* is broader than a simple contravention of formal law.

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[80] Ibid.

[81] Ibid. 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.

As similar argument can be made for unlawfulness. By proclaiming an act unlawful *per se* in the case of civil liability, the courts effectively limit an individual's and society's actions, regardless of whether any actual loss arises from such behaviors. This limitation, in effect, contradicts the reparatory nature of civil liability. However, it provides a certain degree of legal stability, as the widespread adoption of a specific interpretation would change the nature of the conduct from unlawful to illegal. Nevertheless, in contrast with criminal liability, the issue remains that including the requirement of an unlawful conduct in civil liability cases confronts individuals with the fact that specific behaviors will result in a legal punishment without offering any accurate 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 someone suffers 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 to forgo that qualification, at least under the sphere of delictual liability. This is especially true under De Cupis's 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 behavior caused a loss for the victim, the defendant would not be liable unless such a loss surpasses a certain threshold. Key examples of this are

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

cases that deal with abuse of rights. The defendant's conduct in these types of cases is 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. Instead, it requires that the loss suffered by the victim must be "unjust" (*danno ingiusto*). Hence, liability requires another element besides fault,[83] in contrast with the second use of the word *danno* in Article 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 no methods can define loss in all relevant situations.[85] However, an issue arises from the term, as the concept of just is inherently subjective.

Furthermore, an unjust loss could refer to the result of an unjust act, or the loss itself is considered unjust.[86] Discussions regarding the meaning of unjust have occupied the forefront of scholarship for years. Nevertheless, courts have simplified the term into two elements.[87]

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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 Samage 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.

Initially, Italian commentators followed the theories of the time, supporting the idea that the unjust requirement referred to the defendant's behavior. Therefore, the expression *danno ingiusto* resulted from the imprecise language in the provision, with the correct reading of Article 2043 conveying that any unjust act produces a loss.[88]

Critics of this theory relied on a literal reading of Article 2043, which suggested that the term unjust referred unequivocally to the harm, not the act. Furthermore, if the unjust requirement concerned the defendant's act, 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 refers to a legally protected interest, in which case justification causes become much more critical.

Courts have ruled that the expression "unjust" is composed of two elements. First, the loss must be *non iure*, *i.e.*, the result of an act that does not conform to law (*diritto*) or to which the law grants no justification cause.[91] This justification cause 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 remain an issue, as the Italian Civil Code does not explicitly regulate the matter. Nevertheless, the traditional view is that exercising a right cannot be grounds for

88 Paolo Franceschetti, La Responsabilità Civile 65 (2009) (It.).

89 *Id.* at 66.

90 *Ibid.*

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.

liability under the Roman maxim *qui iure suno utitur neminem laedit.*[93] The solution lies in how 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 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] Instead, losses resulting from that act must be considered unlawful, 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 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 the code was typified. Therefore, only those rights that could be opposed *erga omnes* were worthy of legal protection.[97]

In 1971, 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 Article 2043 excluded rights *in personam*, such as contractual obligations. However, the Court reversed its position, reasoning that the term unjust under Article 2043 referred to a harm that was both *contra ius* and *non iure*.

Furthermore, the Court held that this principle did not distinguish between absolute and relative rights. Therefore, the club's relative

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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.

97 *Id*. at 23.

98 Cass., sez. un., 26 gennaio 1971 no. 174 (It.).

rights, i.e., the contractual relations with Meroni or, as the Court expressed, a credit right, should be protected. However, the discussion then shifts from the nature of the rights *in personam* to the issue of causation.

This dual approach by the Italian courts can be applied to any system, regardless of explicit language that requires unlawfulness. An unlawful loss indicates a loss that the victim has no legal obligation to withstand.[99] Justification causes, such as self-defense, *force majeure*, exercising 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's theories demonstrated, harm and loss are concepts not limited to statutory rules, but rather more deeply rooted in basic societal rules that form the background of any civil liability system. These are visible in how Common Law and 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 similar in their roots, nevertheless adopted different views on the matter of loss. Regardless, both the *Code* and the BGB adhere to De Cupis's 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.

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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 Article 90 of the Colombian Constitution.

However, as not every loss is legally protected, only those that meet specific 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 tortfeasor's conduct over the loss suffered by the victim. The BGB exhibits a similar pattern, limiting the number of legal losses that warrant a claim. On the other hand, the French model is the 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. Unlawfulness's primary goal is to limit the circumstances in which an individual is liable to another for any loss. However, confusing unlawfulness with illegality results in pseudo-criminal system under 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 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 the law – a formal element – but because such an action decreased the victim's favorable situation. 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 said party must endure. The reason for this is explained by the unlawfulness of the individual's conduct. However, the same arguments introduced above 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.

In cases of abuse of rights, the issue of liability does not hang on the defendants' conduct, as they were acting within their rights. Instead, it regards the degree to which such a right affects the plaintiff' s situation. For example, whether courts will rule in favor of the individual who built a fence within their 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 crucial, 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, a defendant is not liable when there is a justification cause because their behavior is no longer unlawful. Hence, the question arises why the act is no longer considered unlawful is critical. 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. 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. A defendant's act becomes permissible only in those few cases where the possibility of a loss outweighs a real loss; it has little to do with the formal law.