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Non-Economic Losses under Japanese Law from a Comparative Law Perspective (4)

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I. HISTORICAL DEVELOPMENT¹

The previous chapter has described how 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 is understood in contemporary 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. Likewise, the punishment for accusing a woman of adultery was one-third mina of silver, and the penalty for a slave woman who swore at her mistress was to be scoured with salt.²

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and Current State of the Law of Non-Economic Harm – A Comparison Between the U.S., Panama and Japan-* (2014) (unpublished master's thesis, University of Hokkaido) (Japan).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

The Code of Hammurabi also established punishments for similar offenses. For example, the sentence 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, they could seize their accuser's house. However, with the development that took place under the rule of Roman law, individuals gained 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 idea 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 defined *injuria* as an act contrary to law and recognized that *injuria* might refer to a loss caused by negligence, particularly regarding insults. Furthermore, in D.47,10,1,139, he states that *injuria* could be caused by things and words, with things in this context referring to the damage done using hands. The digest then

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* 1050–1053 (1996).

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

establishes a set of actions for the various forms of *injuria*.

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, instigators were liable regardless of the other people who shouted, provided they 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 disrepute to another, which was enough to invoke liability.⁶ For example, misusing

⁴ See: Maria Jose Bravo Bosch, *La Conducta Punible en una Injuria Verbal Proferida en Público*, 29 *Revistas de Estudios Historicos-Juridicos* 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).

⁶ For a more detailed exposition see ZIMMERMANN, *supra* note 3, at 1057.

mourning dresses by individuals who were not family members was considered an insult.⁷

The *pater familiae* could sue for offenses against those under his protection. For example, under the *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 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

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).

¹³ ZIMMERMAN, *supra* note 3, at 1059.

¹⁴ *Id.* at 1060.

Zimmerman has explained that a purely mental element was not indispensable to establish liability, as proving lack of intention did not excuse the wrongdoer.¹⁵ Even though it was a private action with a monetary 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 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 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 essential contribution of common law to the law of

¹⁵ *Id.* at 1060–1061.

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.

emotional harm is the tort of assault under the writ of trespass to the person, 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 claim damages.

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 statutes started to regulate and punish defamation, excising it from the jurisdiction of the church and introducing it into the king's courts. These statutes were primarily 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 plaintiffs had to prove that the defendant had accused them of a specific crime. The defendant was only liable if the statement was an explicit accusation against the plaintiff. Thus, the

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).

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.

defendant's words were of significant 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 other.*" This statement would most like meet the criteria for defamation in most modern legal traditions. 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 holding the defendant responsible in all but the clearest of cases, resulted from 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 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 unfitness to perform a particular trade, profession, or office. The third class was

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.

the imputation of specific diseases – the words plaintiffs could prove had caused them some economic loss. Plucknett called these classes slanders *per se*, i.e., words that a plaintiff could cite to bring an action of slander without proving financial 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 prove the existence of an economic loss, i.e., that the defendant's actions had 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 wrongdoer's actions.

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*

²⁷ Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Col. L. Rev. 546, 561 (1903).

²⁸ PLUCKNETT, *supra* note 21, at 432.

²⁹ Veeder, *supra* note 27, at 563.

³⁰ PLUCKNETT, *supra* note 21, at 433.

justified in showing their truth, but written words are punishable in respect the very fact that they were 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 based on political reasons rather than any particular legal rationale. Absolutist governments do not tend to receive any 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. The U.S. 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

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."*

of the development of claims for non-economic damages, as common law does not contain a concept of loss as it is traditionally understood under the French tradition. Damages is the name given to the remedy given to victims for their loss. However, an abstract concept of loss is not necessarily an element for tort liability, as the tortfeasor's conduct and its relation to the victim are more pertinent factors.

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 other similar emotions experienced by plaintiffs due to a previously recognized legal wrong are classified as parasitic.³³ In early cases, this usually implied the existence of physical injury. There are multiple cases in which the jury was instructed to take into account a victim's suffering as part of the injury when calculating damages.³⁴ By contrast, in some cases, such as illegal seizure, physical injury was not necessary.³⁵

Regarding the second category of non-economic damages, *i.e.*, independent claims regardless of physical injury, the courts of the late 19th century opposed granting remedy to claims brought for emotional distress alone. The courts cited five primary reasons³⁶: lack of precedent³⁷, the potential flood of litigations it could provoke³⁸,

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). Plaintiffs 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*

public policy³⁹, remoteness of the damage⁴⁰ (*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 injury⁴¹.

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 attributed 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

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).

⁴² *Lynch v. Knight*, (1861) 9 H.L.C. 577, 11 Eng. Rep. 854.

*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 from physical illness. Nevertheless, the court refused to grant 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 mid-to-late 19th-century common law, these three cases served as precedents when denying claims for non-economic damages that were not parasitic. 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:

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

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).

*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 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 caused physical harm to her. That proposition

⁴⁷ *Chamberlain v. Chandler*, 3 Mason 242, 5 F.Cas. 413. 415 (1823).

⁴⁸ *Wilkinson v Downton*, (1897) 2 Q.B. 57.

*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 because the defendant's behavior was abhorrent to the court. Although damages were more punitive than compensatory, this is one of the earliest significant cases in common law regarding non-economic damages. Furthermore, even before *Wilkinson*, U.S. courts were granting remedy in cases in which the

⁴⁹ *Id.* at 59.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

conduct of the tortfeasor triggered miscarriage, even if the victim suffered no direct physical injury.⁵²

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 was considered worthy of reparation.⁵³ For example, wrapping a dead rat in a sandwich that frightened a plaintiff gave rise to liability⁵⁴, but a proposal of illicit sexual relations would not grant an offended woman a claim for damages⁵⁵. In these later claims, the “loss” of the victim is arguable 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. Instead, 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

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 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).

Magruder⁵⁷ 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 case, unembarrassed by the notion that the interest involved is beyond the pale of legal protection.*⁵⁸

The issue of addressing these new torts became even more apparent with the first Restatement of Torts. 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

⁵⁷ Magruder, *supra* note 55, at 1058.

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.

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:

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 experiencing 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 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 Restatement of Torts 46 (Supp. 1948).

⁶³ Ibid.

*(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 more inclined to recognize a claim for emotional damages when the defendant's conduct was "outrageous," though the meaning was unclear. The Restatement advises that outrageousness is not determined by intent or malice. Instead, it must be intolerable when regarded from the standpoint of a civilized community.⁶⁵ A behavior can also be deemed outrageous because of the actor or 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 it were caused, might result in illness or bodily

⁶⁴ Restatement (Second) of Torts § 46.

⁶⁵ DAN B. DOBBS, *The Law of Torts* 827 (2000).

⁶⁶ Kircher, *supra* note 19, at 802-805.

*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 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 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, recovery would be denied 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.

Some states⁷¹ follow the "physical manifestation" rule, under which emotional harm must produce a physical sign of its existence.⁷² In

⁶⁷ Restatement (Second) of Torts § 313 (1).

⁶⁸ Restatement (Second) of Torts § 436 (A).

⁶⁹ Kircher, *supra* note 19, at 810.

⁷⁰ *Ibid.*

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 *Ibid.*

other words, the plaintiff must prove the existence of emotional harm through a visual manifestation of objective and verifiable physical symptoms.⁷³ However, symptoms such as nightmares, headaches, or weight loss are not considered physical manifestations of emotional distress. This rule is restrictive because it denies remedy to plaintiffs who do not present a physical manifestation of their distress, even if the existence of said distress is a matter that can be presumed under the circumstances.

Finally, some states⁷⁴ 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 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 they are a bystander to whom the act was not directed, but not in the subject they are the direct victim.⁷⁷

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. In others, the defendant did not touch the plaintiff but caused them to suffer a grievance that was perceived through a bodily reaction.

In the U.S., the nature and existence of non-economic losses and their remedy are not disputed. However, one main issue is the amount

⁷³ DOBBS, *supra* note 65, at 838.

⁷⁴ Hawaii, New Jersey, North Carolina, Ohio, Oklahoma, Tennessee, Washington, Wisconsin, Kentucky.

⁷⁵ For example, *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).

a victim receives as damages. Since the 1970s, the tort reform movement has advocated for limiting the amount that can be granted in cases of punitive 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 because these non-economic damages are challenging to quantify 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

As of 2020, nine states have constitutional prohibitions against damage caps.⁸¹ Arizona, Arkansas, Kentucky, Pennsylvania, and Wyoming ban caps for general tort liability, while New York, Ohio, Oklahoma, and Utah prohibit caps for wrongful death cases. Damage caps vary depending on the type of claim in the case of non-economic damages. For example, only eight states have caps for non-economic damages for general tort or personal injury cases⁸², or product liability cases⁸³. For medical malpractice cases, however, there are two types of caps. Connecticut, Indiana, Louisiana, Nebraska, New Mexico, and Virginia have caps for the total damages amount for economic and non-economic damages. By contrast, Alaska, California, Colorado,

⁷⁸ DOBBS, *supra* note 65, at 1071-1072.

⁷⁹ *Id.* 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 (2007).

⁸¹ Center for Democracy and Justice, *Caps on Compensatory Damages: a State Law Summary*. <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary>.

⁸² *Ibid.* Alaska, Colorado, Hawaii, Idaho, Maryland, Mississippi, Ohio, and Tennessee.

⁸³ *Ibid.* Alaska, Colorado, Idaho, Missouri, Maryland, Mississippi, Ohio, and Tennessee.

Hawaii, Iowa, Indiana, Massachusetts, Massachusetts, Maryland, Michigan, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nevada, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin have either a complete or partial cap for non-economic damages.⁸⁴

There have been multiple litigations concerning caps⁸⁵, with some being struck down, 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.⁸⁶ In Alabama and Oregon, the caps were struck down in personal injury cases, but upheld in wrongful death cases.⁸⁷

In Illinois, caps were repealed because they were considered a legislative remittitur that violated the separation of power clause in the state constitution.⁸⁸ In New Hampshire, caps were overturned because they violated the equal protection clause.⁸⁹ The Oklahoma Supreme Court ruled that caps violate the Oklahoma constitution⁹⁰. Finally, Missouri overturned the caps as a result of a special law.⁹¹

⁸⁴ Ibid.

⁸⁵ For more see: US Law Network, 2019 50-state Analysis of Liability Damages Caps. Available at: https://www.uslaw.org/wp-content/uploads/2022/01/2019_50-State-Analysis-of-Liability-Damages-Caps-Compendium.pdf.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ *Beason v. IE Miller Services, Inc.*, 441 P. 3d 1107 (2019).

⁹¹ American Medical Association Advocacy Resource Center, Caps on Damages (2017). Available at: https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/caps-on-damages_0.pdf.

Moreover, in Wisconsin⁹², Texas, and Ohio⁹³, courts had struck down previous laws that established caps on non-economic damages. Still, new laws were enacted afterward and have not been repealed or struck down.⁹⁴

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.⁹⁵ The ecclesiastic courts adopted and interpreted Roman law to compose basic principles of justice under the Christian fate.⁹⁶ This influence cannot be overstated, as civil law resulted from a centralized governmental power.⁹⁷ Consequently, any development of the concept of personality rights has been heavily guided by Christian thinking. As Tobeñas stated, “*Christianity laid the indestructible moral foundations on which the acknowledgment of the individual personality rights would rise.*”⁹⁸

⁹² The Wisconsin Supreme Court rejected a constitutional challenge to the cap in 2018. *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, 2018 WI 78 (2018).

⁹³ However, in 2022, the Ohio Supreme Court overturned the caps on plaintiffs who have suffered permanent and severe psychological injuries. Nevertheless, from the wording it appears that the rejection should be narrowly construed. *Brandt v. Pompa*, Slip Opinion No. 2022-Ohio-4525 (2022).

⁹⁴ American Medical Association Advocacy Resource Center *supra* note 91.

⁹⁵ Louis Perret & Graciela Fuentes, *El Sistema Jurídico del Derecho Civil en el Siglo XX, in LA CIENCIA DEL DERECHO DURANTE EL SIGLO XX*, Universidad Autónoma de México 639 (1998) (Mex.).

⁹⁶ *Id.* at 640.

⁹⁷ *Ibid.*

⁹⁸ I JOSE CASTAN TOBEÑAS, *Derecho Civil Español Común y Foral* 337 (1971) (Spain).

Under the *ius naturalism* proposed by Thomas Aquinas, human dignity played an instrumental role in developing these types of interests. This school of thought argued for the concept and importance of natural law, which was formative for the political ideas of the time. A clear example is the Declaration of the Rights of Man and of the Citizen.⁹⁹ 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.¹⁰⁰ Personality rights, as understood today, are of Germanic origin and were introduced to France via the writings of Roguin,¹⁰¹ *La règle du droit*.

There are three theories regarding personality rights.¹⁰² 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 multiple rights. An early draft of the BGB followed this theory, but it was ultimately rejected.¹⁰³ Most scholars and courts favor the second theory, which posits that an individual's personality is protected under several substantives rights, each related to the various manifestations of an individual's personality.¹⁰⁴ The main disadvantage of this theory is that it limits the protection of these

⁹⁹ 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.).

¹⁰⁰ José Javier López Jacoiste, *Una Aproximación Tópica a los Derechos de la Personalidad*, 39 Anuario de Derecho Civil 1059, 1066 (1986) (Spain).

¹⁰¹ 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.).

¹⁰² 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/alalde1.pdf?sequence=1>.

¹⁰³ Trujillo, *supra* note 99, at 144.

¹⁰⁴ *Id.* at 21.

interests to those recognized by a legal rule, which became a problem during the Second World War in totalitarian regimes.¹⁰⁵

Finally, the third theory admits the existence of multiple rights that nevertheless derive 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 personality rights only warrant protection if considered substantive rights. Therefore, it must first be determined if personality rights can be regarded as 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.^{106 107}

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 vital interests, such as life, 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.¹⁰⁸ There are also social and individual rights within civil liberties, such as reputation and

¹⁰⁵ Ibid.

¹⁰⁶ Trujillo, *supra* note 99, at 22.

¹⁰⁷ 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 99, at 146-147.

¹⁰⁸ Vide, *supra* note 101, at 262.

privacy. Moreover, in some cases, both mental and physical health have been classified as types of interests.¹⁰⁹

A valuable example of the law of non-economic losses is *las Siete Partidas*, 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 their parents, grandparents, or great-grandparents, or by servants against their master, in which case the accused was not allowed to prove their comments 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 those sources of the law were not necessarily Roman.¹¹⁰ 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 opinio doctorum*.¹¹¹

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

By contrast, countries that followed the French system did so under the premise of rejecting previous law, instead searching for legal

¹⁰⁹ Ibid.

¹¹⁰ Perret & Fuentes, *supra* note 95, at 640.

¹¹¹ *Id.* at 642.

principles that could be applicable under the new nationalist conception of the state. Therefore, the development 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, 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, 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.¹¹²

V. DEVELOPMENT OF THE CONCEPT OF “DOMMAGE MORAL”

Dominguez explains *dommage moral* is the fruit of the courts' endeavors, either by filling the void in a statute when there is no express rule on the subject or by extending the interpretation of a restrictive text to cases that, at first glance, are excluded.¹¹³ Furthermore, Dominguez¹¹⁴ argues that the evolution of *dommage moral* progresses in three stages. In the first stage, these losses are accepted under the delictual liability system, which she has called an improper *dommage moral*. During the second stage, harms do not

¹¹² *Id.* At 646.

¹¹³ Carmen Dominguez Hidalgo, *La Indemnización por Daño Moral. Modernas Tendencias en el Derecho Civil y Comparado*, 25 *Revista Chileno de Derecho* 27, 31 (1998) (Chile).

¹¹⁴ *Ibid.*

directly or indirectly affect a victim's economic interests, which is termed proper *dommage moral*. Finally, 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*, formed in the tradition of canon law, introduced the idea of morality to delictual liability under the figure of *culpa*. This dictated that any legal and moral rules used to determine liability must be approached not only under the idea of *culpa*, but also through an analysis of a victim's personal circumstances and necessities. Thus, *dommage moral* does not express a specific legal phenomenon. Instead, it signifies a constantly updated and changing category of losses.

In this regard, both common and civil law have treated non-economic losses similarly. 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. Initially, France had permitted non-economic losses to be taken into account when calculating damages, but only in cases with their genesis in criminal liability.¹¹⁵

In the 1833 Dupin affair^{116 117}, a group of pharmacists intervened in criminal proceedings against unlicensed individuals selling remedies. *procureur général*. In reference to the plaintiffs' loss, Dupin coined the

¹¹⁵ Dominguez, *supra* note 113, at 33.

¹¹⁶ Cass. Ch. Réunies 15 Juin 1833 S.P. 1833. I. 458.

¹¹⁷ VERNON V. PALMER, The Recovery of Non-Pecuniary Loss in European Contract Law 64 (2015).

term “*un préjudice tout moral*.” The court understood these prejudices to be due to the defendants’ acts. Even though the plaintiffs could not prove that they had suffered any economic loss, they had nevertheless suffered an attack on their honor as pharmacists. Dominguez notes 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.¹¹⁸ 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, a 1912 case¹¹⁹ is considered the first that recognized non-economic losses.¹²⁰ A newspaper article 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,¹²¹ and harming them results in

¹¹⁸ Dominguez, *supra* note 113, at 33.

¹¹⁹ S.T.S. Dec. 6, 1912 (Spain).

¹²⁰ 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. 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).

¹²¹ 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

*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 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.*¹²²

The legal basis for this decision was Article 1902 of the Spanish Civil Code. However, the court also utilized the seventh *partida* to rule in favor of the plaintiff.¹²³ Casado notes that this ruling does not recognize pure *daño moral*, as it only granted remedy because the acts of the newspaper had the potential to affect the future state of the plaintiff indirectly. The first case that employed the term *daño moral* occurred in 1917.¹²⁴

In Chile, even though the French Code influenced Andres Bello, he never intended for Article 2314 of the Chilean Civil Code to protect non-economic losses.¹²⁵ 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.”¹²⁶ The first instances of moral loss in Chile were

to a material good. However, the courts and scholarship in Latin America have expanded the term to include social and non-economic values.

¹²² Blanca Casado Andrés, *El Concepto del Daño Moral Bajo el Prisma de la Jurisprudencia*, 9 Revista Internacional de Doctrina y Jurisprudencia 15 (2015) (Spain).

¹²³ *Id.* at note 14.

¹²⁴ S.T.S. Dec.14, 1914 (Spain).

¹²⁵ 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 (Inigo de La Maza ed., 2006) (Spain).

¹²⁶ Corte Suprema de Justicia (C.S.J.) (Supreme Court) 5 de noviembre de 2001, R.D.J. T. 98, secc. 1°, p. 234 (Chile).

not under defamation but rather emotional suffering due to the death of a relative¹²⁷ or from injury. Traditionally, the first case that recognized *daño moral* in Chile was in 1922.^{128 129} 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 distinguishing between Article 2315 and Article 2329 of the civil code. It held that Article 2315 only applied to harm to objects, while Article 2329 applied to harm to persons. Article 2320 does not define harm; therefore, the court stated that harm refers not only to bodily injury but also to emotional distress, and moral harm was the *pretium doloris*.¹³⁰

In Colombia *daño moral* was first recognized in the Villaveces case of 1922.¹³¹ Article 2341 of the Colombian Civil Code is almost identical to Article 2314 of the Chilean Civil Code. The plaintiff owned

¹²⁷ Corte de Apelaciones de Santiago (C. Apel) (Santiago court of appeals) 27 de julio de 1907, R.D.J. T. 4, sec. 2^a p. 139 (Chile).

¹²⁸ Corte Suprema de Justicia (C.S.J) (Supreme Court) 16 de diciembre de 1922, R.D.J. T. 21, sec. 1^a, p. 1053 (Chile).

¹²⁹ 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. 1^a, p. 529 (Chile).

¹³⁰ For more on the distinction between Articles 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).

¹³¹ 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.).

a mausoleum that held the remains of his late wife, which municipal workers erroneously removed. The plaintiff sued for 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 indicated that the plaintiff had suffered emotional distress. The court asserted that Articles 2341 and 2356 of the Colombian Civil Code could not be construed as to limit remedies to only economic losses. Honor, reputation, personal dignity, pain, and suffering are all considered losses when they result from 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 developing 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 Article 1196 of the 1922 Venezuelan Civil Code,¹³² which granted damages for slander victims and their family and for unlawful entry and revealing secrets. Article 1916¹³³ of the Mexican Federal Civil Code of 1928

¹³² Article 1196: The obligation to compensate covers all types of material or moral losses that result from the unlawful act. The judge can specially award compensation for the victim in the cases of bodily injury, an affront 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.

¹³³ Article 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 responsible of the act. This compensation cannot exceed a third of the amount granted as damages for civil

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 1916¹³⁴ and adding Article 1916bis to produce perhaps one of the most

liability. This shall not apply to the cases governed by Article 1928. Translation by the author.

¹³⁴ Article 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 Article 1913, as well as the State and public official, under Articles 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 article:

comprehensive statutes on non-economic losses. The new language of Section 1916 also influenced Article 1644a of the Panamanian Civil Code, amended in 1992.¹³⁵

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 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.

¹³⁵ Article 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 Articles 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

In 1968, an amendment to Article 1078¹³⁶ of the previous Civil Code of Argentina introduced claims for non-economic losses. Article 1322¹³⁷ 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 1984¹³⁸ 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 define non-economic losses within their statutes, 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 Domínguez¹³⁹ calls a negative approach. Under this view, the first step is to define economic losses, after which any losses that do not fit that

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 author.

¹³⁶ Article 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.

¹³⁷ Article 1322: Moral losses must be compensated in the event they arise. Translation by the author.

¹³⁸ Article 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.

¹³⁹ I CARMEN DOMÍNGUEZ HIDALGO, *El Daño Moral* 33 (2000) (Chile).

category are considered non-economic.¹⁴⁰ 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 of an individual's personality rights. 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 undoubtedly result from 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.¹⁴¹

Dominguez¹⁴² asserts 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 main goal is to repair all types of losses. She has further concluded that the idea of a 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 protected as moral

¹⁴⁰ 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).

¹⁴¹ Dominguez cites this as one of the criticisms against the negative approach. Dominguez *supra* note 125, at 40.

¹⁴² *Id.* at 43.

losses. Furthermore, as a concept that evolves with society and constantly renovates to reflect contemporary views better, these interests should not be approached under a *numerus clausus* system.¹⁴³ Duarte y Noroña, quoting Jimenez Gomez, note that the protection of the moral interest of the individual is not only the protection of a class of legal interest, but also an efficient method to prevent the collapse of society.¹⁴⁴

Medina¹⁴⁵ posits 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 argues, is a strictly positive concept of non-economic losses, as it does not require any reference to economic losses. He 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.

In contrast with property and other rights, an individual's spiritual, cultural, and social interests 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 notions of morality, good and bad, influenced scholars and societies throughout Europe.

¹⁴³ Casado Andres, *supra* note 122, at 7.

¹⁴⁴ Alicia Elena Pérez Duarte y Noroña, *El Daño Moral*, 53 Boletín Mexicano de Derecho Comparado 625, 629 (1985) (Mex.).

¹⁴⁵ 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).

The protection was not based on some utilitarian ideals but came as an expression of the natural law movement. Even now, the level of protection granted to these interests varies depending on the country. In addition, it can indicate 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 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.

Societal and religious values are also profoundly present in the courts' interpretation of 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 U.S., such an event would be viewed as producing a legally relevant loss.¹⁴⁶

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 delictual or tort liability

¹⁴⁶ Mauro Bussani & Marta Infante, *The Many Cultures of Tort Liability, in Comparative Tort Law: Global Perspectives* 11, 24 (Mauro Bussani, Anthony J. Sebok eds. 2015).

rules. Therefore, losses that result from physical injuries, 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. Regarding how non-economic or moral losses are treated under civil liability rules, countries can be divided into three groups. The first groups include 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.¹⁴⁷ Under the French model, non-economic losses have been mentioned under specific terms, such as *souffrances morales ou physiques*, *préjudice esthétique*, *préjudice d'agrément*, and in some cases, different amounts are granted for each of these losses.¹⁴⁸ Furthermore, the French courts have developed their concept of *dommage moral* based on human dignity and respect towards the individual,¹⁴⁹ 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 pet¹⁵⁰ and damage to property¹⁵¹; under contract

¹⁴⁷ Dominguez, *supra* note 113, at 33.

¹⁴⁸ CEES VAN DAM, *European Tort Law* 363 (2ed., 2013).

¹⁴⁹ Dominguez, *supra* note 113, at 34.

¹⁵⁰ S.A.P.de Oviedo Nov. 16, 1999 (Spain).

¹⁵¹ 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

liability¹⁵²; for psychological trauma, nuisances¹⁵³, or judicial errors¹⁵⁴; and others. The list of losses has no limit. Instead, each case is considered 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. For example, in Mexico, Article 1915 of the Federal Civil Code grants a special claim for physical injuries that result in death or any disability.

The final group is comprised of countries that limit these types of claims to cases established explicitly under a statute, which in most cases tends to be their civil code, such as in Germany and Italy.¹⁵⁵

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.

¹⁵² 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.

¹⁵³ S.A.P. de Álava Oct. 22, 1999 (Spain) No elevator Access for elderly people.

¹⁵⁴ S.A.P. de Málaga Oct. 15, 1998 (Spain)

¹⁵⁵ Bolivia based Article 994-2 of the Civil Code on Article 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 Histórico Comparativa*, in *Derecho Civil y Romano Culturas y Sistemas Jurídicos Comparados* (Adame Goddard coord.) 337, 347 (2006) Guatemala only admits claims for non-economic losses in two cases. Article 1656 of the Civil Code grants damages for slander, and Article 225 in the cases of pregnancy that result from rape. However, Articles 226-3 and 4 limit the liability of the father in the cases the mother had sexual relations with another person, or in cases where, during the time of conception, it would have been impossible for the alleged father to have had sexual relations with the mother.

Although in Germany, the limitation established by Article 847 was removed after the 2002 reform via Article 253¹⁵⁶, claims for non-economic losses are limited to cases established by law. However, Article 253-2 provides a claim in cases where a victim's body, health, freedom, or sexual self-determination have been affected as a part of the constitutional protection of personality rights.¹⁵⁷

Furthermore, emotional distress as a non-economic loss is only recognized in cases where the victim's condition surpasses normal levels of grief, and such a result is foreseeable.¹⁵⁸ Relatives do not have a claim for emotional distress in the case of the victim's death, as Article 844 only grants damages for funeral costs and the infringement of the right of maintenance. However, if their condition surpasses normal levels of grief, they might be able to claim damages under Article 253.

By contrast, the development of claims for non-economic losses a 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.¹⁵⁹

¹⁵⁶ 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).

¹⁵⁷ Gerald Spindler, Oliver Rieckers, *Tort Law in Germany* 42 (2011).

¹⁵⁸ Van Dam, *supra* note 148, at 177.

¹⁵⁹ 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, Università Ca'Foscari Venezia) (It.).

Article 1151 of the 1865 Italian Civil Code was a textual copy of Article 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

However, even though the admissibility of non-economic losses was a subject of discussion in the realm of civil liability, Article 38 of the criminal code of 1889 explicitly stated judges could grant damages for felonies that affected the honor of the victim or the family, even if no “loss” was caused. Furthermore, Article 7 of the criminal procedure law of 1913 allowed for a civil claim in cases of crimes against individual liberties, honor, unlawful entry, and breach of correspondence even if no “loss” had occurred.¹⁶⁰ In 1930, a new criminal code was enacted. Article 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 specific crime. However, the influence of Article 185 would be genuinely felt once the Civil Code of 1942 was implemented.¹⁶¹

In 1942, Italy enacted a new Civil Code influenced by the BGB, which introduced the idea of unlawfulness in the area of delictual liability. Regarding non-economic losses, Article 2059 of the new code limited claims to cases explicitly determined by law. This effectively meant that the notion of redressable loss under Article 2043 of the Italian Civil Code was limited to economic losses. This created a situation in which non-economic losses and the theories regarding them in civil liability had to be approached under a sort of *renvoi*. The obvious solution was Article 185 of the criminal code. Therefore, liability for non-economic losses under the Italian system became

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 159 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.)).

¹⁶⁰ Salvadori, *supra* note 159, at 10–11.

¹⁶¹ Interestingly enough, Article 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.

numerus clausus, and 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 several classifications of non-economic losses in the Italian system. The Genova Court ruled that physical harm did not only affect an individual's earning potential; 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 Article 2059, which the court upheld. The second had a more profound impact on the interpretation of the law. The plaintiff argued that Article 2043 of the civil code was incompatible with Articles 3,¹⁶² 24,¹⁶³ and 32¹⁶⁴ of the Italian Constitution, as it only

¹⁶² 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.

¹⁶³ 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.

¹⁶⁴ Article 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/constituzione_inglese.pdf

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 Article 32 of the Constitution, was not only a social interest but also an absolute primary right of the individual. 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 Article 32 of the Constitution could be used in conjunction with Article 2059 of the Civil Code, the latter governing cases in which the loss could not be quantified directly, *e.g.*, cases regarding an individual's health. 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 Article 2059 and that Article 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 due to a physical injury that could be considered a crime and by invoking Article 185 of the criminal code.

In 1981, the Court of Cassation ruled 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 that affects a person's life. Therefore, any infringement on such rights can be subject to reparation, regardless of whether the victim suffered a monetary loss. Furthermore, it defined *danno biologico* as any infringement on the mental and physical integrity of an individual,¹⁶⁵ not limited to earning potential, which also affects every aspect of daily life in its economic, biologic, social, cultural, and aesthetic spheres.

However, the most significant development occurred in 1986 when

¹⁶⁵ This was later redacted into Article 5.3 of the Legge. N. 57 del 2001.

the Constitutional Court reviewed the issue of the constitutionality of Article 2059. On that occasion, the Court had the opportunity to unify various interpretations of Articles 2043 and 2059. The Court began by saying that the *danno non-patrimoniale*, as established in Article 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 Article 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 Article 2043, *danno biologico* should be considered a type of redressable harm.

This interpretation meant Italian law housed three types of claims for delictual liability. Harms that caused economic losses and cases of *danno biologico* fell under Article 2043 and could be brought forth without the need for a special law. Furthermore, under this new reading of Article 2043, claims for *danno biologico* included economic and non-economic losses.^{166 167} Article 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 Article 185 of the criminal code.

¹⁶⁶ 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.

¹⁶⁷ 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.).

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 Cassation¹⁶⁸ ruled that a *danno esistenziale* was present in a case where a father did not fulfill his obligations towards his son. It reasoned that Article 2043, when construed per the language of Article 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 of *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 Article 2059 of the Civil Code. The Court overturned the traditional case law regarding Article 2059 in the context of Article 185 of the criminal code, holding that *danno non-patrimoniale* was not limited to the idea of a *danno morale soggettivo*. Instead, it protected all losses related to a value inherent to the individual, concluding that when the infringed interest is granted constitutional protection, that is enough for it to be redressable as *danno non-patrimoniale* under Article 2059.

However, Article 185 of the criminal code still established a claim for non-economic losses only in criminal cases. To address this issue, the Court held that although Article 2059 does limit claims for *danno non-patrimoniale* to those established by law, *i.e.*, Article 185, those interests that have been granted protection via the Constitution could serve as the basis for a claim without the need for a specific rule under the law. Hence, 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 soggettivo*. Later the same year, the Constitutional

¹⁶⁸ Cass., sez. un., 7 giugno 2000 no. 7713, in *Foro Italiano*, 2001, pg. 187 (It.).

Court¹⁶⁹ yet again addressed the constitutionality of Article 2059. The Court, following the precedent set by the Court of Cassation, upheld the notion that Article 2059 did not only grant claim for *danno morale soggettivo*, but also for *danno biologico* as the infringement of the rights granted by Article 32 of the Constitution, and *danno esistenziale*, considered the loss that resulted from the violation of other constitutional rights inherent to the individual as a human being.

In 2005, the Court of Cassation,¹⁷⁰ following the precedents, elaborated by ruling that Article 2059 protected non-economic interests, either in an explicit manner, *i.e.*, Article 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*.¹⁷¹ More recently, in 2008, the Court of Cassation addressed the issue of non-economic losses in four rulings on the same day.¹⁷² 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 antequiridico*) required by Section 2043 in the case of non-economic losses.

Paraguay also adopted a third category of loss under Article 1985 of the civil code, harm to the individual (*daño a la persona*), which was

¹⁶⁹ Corte Costituzionale (Corte Cost.) (Constitutional Court) 11 luglio 2003 no. 233, Giur. it. 2004, 1129 (It.).

¹⁷⁰ Cass., sez. un., 15 luglio 2005 no. 15022 (It.).

¹⁷¹ Quantification in BASIL MARKESINIS et al., *Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline* 84 (2005).

¹⁷² 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.).

influenced by Italian scholarship and case law.¹⁷³ Sessarego asserts that this is the result of the humanist influence of a legal philosophy under which the fundamental rights of the individual are protected. He argues that *daño a la persona* produces a series of detrimental changes in a person's psyche that result from an infringement of any personality right and do not affect the victim's patrimony.¹⁷⁴ Moreover, in describing the harm to the individual, he posited that moral loss (*pretium doloris*) is a sub-genre of harm to the individual¹⁷⁵ that is comprised of any psychosomatic harm¹⁷⁶ and any harm to the life project of the victim.

The life project of the individual, according to Sessarego, emerges from the freedom and temporary nature of the human being. While it might develop throughout the years, its planning takes place in the present.¹⁷⁷ By nature, this type of harm affects how individuals decide to live their life to such an extent that it loses meaning. It is a type of harm that affects the *raison d'être*.¹⁷⁸

However, scholarship regarding the harm to the individual is not precise. Even though it was inspired by the Italian scholarship and case law of the 1980s, the language suggests that harm to the individual is a type of *danno evento*, of which emotional distress and

¹⁷³ Schwerter, *supra* note 155, at 345.

¹⁷⁴ Juan Morales Godo, *El Daño a la Persona en la Jurisprudencia Nacional e Internacional*, 9 Revista Jurídica "Docencia et Investigatio" 57, 68 (2007) (Peru).

¹⁷⁵ 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.

¹⁷⁶ 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).

¹⁷⁷ *Id.* at 24.

¹⁷⁸ *Id.* at 28.

some other losses result. If this were the case, the classification refers to a kind of harmful event rather than any actual legal interest protected by law.

For this reason, most scholarship outside Paraguay has not accepted the term harm to the individual. 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*.¹⁷⁹ The Court associated the concept of a life project with the personal fulfillment of the individual, which is based on the options available to develop their life and achieve their goals. Therefore, any infringement or detriment results in an objective reduction of the individual's freedom.¹⁸⁰

In Niños de la Calle vs. Guatemala, the Court held that the right to life could not 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.¹⁸¹

In the Cantoral Benavides vs Peru case,¹⁸² the plaintiff was a young individual accused of treason, arrested without a warrant, and denied access to a lawyer. Moreover, he was subjected to public defamation by being presented in the media as a terrorist. During his arrest, he was forced to sign documents confessing to the crime, and was tortured by the officers in charge of the prison. He was acquitted

¹⁷⁹ Loayza Tamayo vs. Peru Sep. 17, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33 para. 147.

¹⁸⁰ *Id.* para 148.

¹⁸¹ Niños de la Calle" (Villagrán Morales y otros) Vs. Guatemala Nov. 19, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63.

¹⁸² Cantoral Benavides Vs. Perú Aug. 18, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69.

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. Afterward, 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 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.

National courts have also adopted the notion of a life project as a type of protectable legal interest. For example, 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 victim's behavior, such as quitting sports activities or interactions with other people. The Council 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 connections with other individuals, the maintenance of a routine or activities, their role in society, and any prospects.

The Council 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

A critical issue regarding non-economic losses is their nature. In discussing non-economic interests, Mazeud and Tunc divided them into two groups: the social *dommage moral* and the emotional

dommage moral.¹⁸³ Reputation, honor, trust, and other social interests are found under the former, while feelings such as personal love are included in the latter. In other words, an individual's ethical and emotional interests can be external or internal.

This distinction became 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 losses rests on whether or not patrimonial interests have been affected. Any moral harm that affects an economic interest is considered objective. By contrast, subjective moral harm affects a victim's non-economic interests.¹⁸⁴ The Colombia and the Costa Rican Supreme Courts¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷ 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 monetary 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.

¹⁸³ HENRI MAZEUD, LEON MAZEUD, ANDRÉ TUNC, 1 *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 387 (6 ed., 1965).

¹⁸⁴ Jorge Cubides Camacho, *Obligaciones* 298 (2005) (Colom.).

¹⁸⁵ 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).

¹⁸⁶ 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.).

¹⁸⁷ Ibid.

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 a loss of income and, therefore, cannot be considered non-economic.¹⁸⁸

The second approach, following the distinction made by Mazeud and Tunc¹⁸⁹, addresses the issue through the nature of objective and subjective moral losses and the plaintiff and defendant's burden of proof. Subjective moral losses result from an infringement on the internal circumstances of the victim, *e.g.*, physical pain, emotional distress, etc., making their consequences known only by the victim. By 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.¹⁹⁰ The Colombian Supreme Court also adopted this approach when it held that moral losses affect the moral patrimony's social and emotional spheres.¹⁹¹

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

¹⁸⁸ 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.).

¹⁸⁹ Ivan Hunter Ampuero, La Prueba del *Daño Moral* 11 (April 2005) (unpublished B.A. thesis, Universidad Austral de Chile) (Chile).

¹⁹⁰ 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.).

¹⁹¹ Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 23 de abril de 1941, GJ T. 41 (Colom.).

*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.*¹⁹²

The Costa Rican Supreme Court also adopted this approach in 1979¹⁹³ when it ruled 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.*”^{194 195}

¹⁹² Corte Suprema de Justicia (C.S.J) (Supreme Court) 26 de diciembre de 2001 (Pan.).

¹⁹³ Corte Suprema de Justicia (C.S.J) (Supreme Court) Sentencia número 114 de las 16 horas del 2 de noviembre de 1979 (Costa Rica).

¹⁹⁴ 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 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).

¹⁹⁵ 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

In Chile, case law has not explicitly recognized this distinction, requiring a certain degree of proof in cases of objective moral losses.¹⁹⁶ However, the Supreme Court also follows this approach for physical injury and death of a victim.¹⁹⁷ The Argentine courts also employ a similar approach.¹⁹⁸ The courts typically make use of this distinction in cases where a family member has perished due to 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.¹⁹⁹ For example, the Colombian

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.

¹⁹⁶ Ampuero, *supra* note 189, at 11.

¹⁹⁷ Corte Suprema de Justicia (C.S.J) (Supreme Court) 14 de junio de 2001, Rol de la causa: 2036-2001 (Chile).

¹⁹⁸ Cciv. y Com. La Plata, Sala 3ª/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 Cia. 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.).

¹⁹⁹ 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).

courts have established that the *in re ipsa* presumption only applies to the close relatives of a victim.²⁰⁰ The presumption extends to infants who have been raised by a person without being legally adopted by them, provided the existence of such a relationship has been proven.²⁰¹ Nevertheless, in cases where the defendant can prove a strained relationship 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 child's death.²⁰²

Traditionally, the U.S. followed the English common law rule under which tort claims were personal actions, *i.e.* they perished with the victim.²⁰³ However, this rule was considered inadequate, which led to the creation of two causes of action: wrongful death and survival claims.²⁰⁴ A survival claim is a claim by the deceased's estate against the defendant for any cause of action the former had before perishing.²⁰⁵ On the other hand, a wrongful death claim is an independent claim that relatives, spouses, children, parents, etc., have against the defendant,²⁰⁶ regardless of the existence of a survival claim.

B. CRIMINAL LAW

The role of criminal law in the context of civil law claims has

²⁰⁰ Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 17 de julio de 1992 Radicado 6750 (Colom.).

²⁰¹ Consejo de Estado (C.E.) Sala de lo Contencioso Administrativo, Sección Tercera, 26 de marzo del 2008, Expediente 18846 (Colom.).

²⁰² Obdulio Cesar Velasquez Posada, *Itinerario Jurisprudencial Del Daño Moral en Colombia, in* COLOMBIA RESPONSABILIDAD CIVIL Y DEL ESTADO 63, 112 (2009) (Colom.).

²⁰³ DOBBS, *supra* note 65, at 803.

²⁰⁴ *Id.* at 804.

²⁰⁵ *Id.* at 805.

²⁰⁶ *Id.* at 805.

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. Article 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 Article 185 of the Italian criminal code. In this case, criminal law was 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. Article 95 of the 1937 criminal code limited damages to 2000 Pesos in cases where the quantification of moral loss was either difficult or impossible, a rule the civil courts maintained for many years. In 1974,²⁰⁷ the Supreme Court of Colombia adjusted its approach. The Court ruled that under the language of Article 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 enacted in the event that criminal justices had to rule on the matter. In the same ruling, the Court fixed the new limit at 30,000 Pesos for cases where the deceased victim was the plaintiff's child. The limit was set in accordance with 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.²⁰⁸

²⁰⁷ Corte Suprema de Justicia (C.S.J) (Supreme Court) Sala. Cas. Civil 27 de septiembre de 1974 Gaceta judicial T. 148. p. 248 (Colom.).

²⁰⁸ 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 Pesos 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 202, at 84.

In 2000, the criminal code was amended, and the standard of 2000 Pesos was abandoned. Instead, Article 97 established a new standard using the legal minimum wage, setting the new limit at a 1000 monthly minimum wage amount. In 2002²⁰⁹, 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 fundamental rights to their nationals, and in most cases, to foreigners. The most common approach is to protect these rights via other laws, such as civil or criminal codes. In this regard, few constitutions grant a claim for moral losses. The issue is whether or not the infringement of these rights can form the basis for a claim in cases where a statute does not grant them explicit protection.²¹⁰

The countries that protect 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 law to develop constitutional rights. Costa Rica is one example of such a system. Article 41²¹¹ of the Costa Rican

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.).

²⁰⁹ Corte Constitucional (C.C) (Constitutional Court) 29 de octubre de 2002 C-916 (Colom.).

²¹⁰ The issue of the direct application of constitutional provision will not be touched upon.

²¹¹ Ocurriendo a las leyes, todos han de encontrar reparación para las injurias

Constitution protects the victim's body, property, and moral interest. In turn, Article 1045²¹² of the civil code covers general delictual liability, while Article 197²¹³ protects the administrative code, under which non-economic losses are remedied.²¹⁴

In the Brazilian Civil Code, Article 186 enshrines the general clause for delictual liability, which grants protection to constitutional rights in the context of private law. The Brazilian Constitution, in Article 5,²¹⁵ protects life, freedom, equality before the law, and property. Furthermore, sub-section 5²¹⁶ explicitly grants remedy for economic and non-economic losses and any reputation infringement. Sub-Section 10²¹⁷ protects the privacy and reputation of an individual and establishes the right to sue for damages in cases of infringement,

o daños que hayan recibido en su persona, propiedad o intereses morales. Debe hacerseles justicia pronta, cumplida, sin denegación y en estricta conformidad con las leyes.

²¹² Todo aquel que por dolo, falta, negligencia o imprudencia, causa a otro un daño está obligado a repararlo junto con los perjuicios.

²¹³ 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.

²¹⁴ 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).

²¹⁵ Translations of the Brazilian Constitution in English available at: <http://english.tse.jus.br/arquivos/federal-constitution>. Article 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:

²¹⁶ 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;

²¹⁷ 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;

while sub-Section 49²¹⁸ ensures the physical and moral integrity of inmates. Finally, Article 114-6²¹⁹ establishes remedy for pecuniary and non-pecuniary losses that arise from a work contract.

Chile also follows this approach. Article 19-1²²⁰ of the Chilean Constitution protects a person's life, and physical and mental integrity, and Article 19-4²²¹ covers private life and reputation.^{222 223} Article 19-7 sets forth several instances in which the liberty and security of an

²¹⁸ XLIX – prisoners are ensured of respect to their physical and moral integrity;

²¹⁹ Article 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;

²²⁰ 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.

²²¹ The respect and protection of private life and the honor of the person and his family.

²²² However, before the 2005 amendment, Article 19-4 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 Article 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).

²²³ Prior to 2008, Article 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 Article 19-26 of the Constitution. Tribunal Constitucional de Chile, Sentencia de 10 de junio de 2008, Rol 943-07. Article 19-26 reads: The security

individual are protected. In the case the Supreme Court rules that trial or imprisonment was unlawful, erroneous, or arbitrary, sub-Section i²²⁴ grants any individual absolved of a crime compensation for any resulting monetary or moral losses.

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 Article 93-7 of the Constitution. When the court finally got the opportunity to rule on the issue, media associations opposed the possibility of Article 2331 being declared unconstitutional, as it would limit the freedoms of speech and of the press. *La Libertad de Expresión 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 Article 2331.

Articles 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).

²²⁴ Once definitive dismissal, or absolution 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 protect non-economic interests via constitutional provisions 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 2²²⁵ 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 must be regulated by law. Moreover, Article 245²²⁶ establishes the liability of public officers and the state for infringement of constitutional rights that results in economic or non-economic losses. For a long time, no law regulated claims for non-economic losses, as mandated by Article 2 of the Constitution.²²⁷ Article 115-3 of the criminal code grants both victims and their families remedy for non-economic losses arising 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 resulted from a provision in the civil code.

However, no specific statute granted broad protection of non-

²²⁵ Article 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 Constitution of El Salvador is available at: <http://confinder.richmond.edu/admin/docs/ElSalvador1983English.pdf>.

²²⁶ Article 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.

²²⁷ In principle, Article 2080 of the Civil Code grants remedy for any loss that is a result of malice or negligence. On the other hand, Article 2081 is a textual copy of Section 2331 of the Chilean Civil Code, and the same restrictions apply.

economic losses. In 2015,²²⁸ the Supreme Court ruled that these types of provisions, in which the Constitution mandates that a particular right or action be regulated by law, are not some simple declarations of intent. Instead, they are true constitutional orders that must be fulfilled. Furthermore, the Court recognized that non-economic losses were covered under several statutes. Nevertheless, said statutes only governed their specific cases and did not rule upon moral losses as a whole, *i.e.*, the content and minimum 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 an intent to defame. It also regulates the liability of the state for this type of loss.

Any infringement on an individual's personality rights, regardless of the legal provisions involved, is grounds for remedy. Similarly, losses resulting from an abuse of rights, defamation, or a substantial infringement on an individual's life project are protected. However, claims can only be brought forth by the victim and do not pass to relatives in cases of death.

Finally, the third group of countries adopted the approach Italy used to expand claims for non-economic losses. This approach demands a direct application and protection of constitutional rights without requiring a specific statute besides a general delictual liability.

²²⁸ Corte Suprema de Justicia (C.S.J) (Supreme Court) 23 de enero de 2015 no.53-2012 (El Sal.).

The Family Code also contains many sections that establish claims for non-economic losses. Under Article 97,²²⁹ the guilty spouse in a divorce must pay reparations that include economic and moral losses. Furthermore, Article 122²³⁰ grants the surviving spouse a claim for economic and non-economic damages against the party responsible. Article 150 establishes that both a mother and child can claim economic and non-economic losses against the father once paternity has been confirmed.²³¹

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 fundamental rights in that their existence does not depend upon a specific statute. Nevertheless, they form the pillars of modern societies, and their protection is the utmost priority. However, even as fundamental 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 human rights cases, the defendant is usually the state.

²²⁹ Article 97: The spouse responsible for the dissolution of the marriage is responsible of any material or moral losses that the other spouse suffers. Translation by the author.

²³⁰ Article 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.

²³¹ 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.

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 acted as a private party, the suit can be brought at a national level or, in cases in which an international treaty allows, to a supranational court. Furthermore, in human rights cases, infringement is usually a basis for claims, regardless of any specific losses. The number of victims is generally higher 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 critical and is usually at the forefront.

Some jurisdictions, such as the U.S., have established a direct claim for deprivation of rights²³² 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. Therefore, human rights violations are a barometer that measures the relationship between a state and its nationals.

By contrast, while established under constitutional rules,

²³² 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.

personality rights are usually protected under a specific law, *e.g.*, 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 state's role becomes that of an arbiter. Under Roman law, individuals were granted a certain degree of *potestae in se ipsum*, which was protected by the *action injuriarum*. However, as understood under modern law, personality rights are a product of the second half of the 19th century.²³³ 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 their content. Otherwise, personality rights are 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 person's name, image, likeness, or other similar rights,²³⁴ as well as the right of publicity, which was first written about in an 1890 paper by Samuel Warren and Louis Brandeis.²³⁵ Warren and Brandeis's papers is often quoted as the origins of privacy law, at least in the U.S.A, private life was granted legal protection even before its publication.²³⁶ For example, in 1868 the French *Loi Relative a la Presse* prohibited newspapers from publishing private matters.

Whiteman explains that there are cultural differences in how the

²³³ 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.).

²³⁴ DOBBS, *supra* note 65, at 1310.

²³⁵ Samuel D. Warren, Louis D. Brandeis, *The Right to Privacy*, 4 Harvard Law Review 193 (1890).

²³⁶ Ruben Rodriguez Samudio, *Del Derecho de Privacidad al Derecho de Protección de Datos*, 49 Anuario de Derecho 180, 181 (2020) (Pan.).

U.S.A and Europe understand privacy.²³⁷ He posits that American privacy is focused on liberty and protecting the individual from the state while European privacy is mostly concerned with individual dignity and limiting the reach of mass media.

By contrast, the courts first used the term right of publicity in the case of *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.*,²³⁸ in which the Court of Appeals of the Second Circuit acknowledged the existence of a right of publicity that could be waived as a property right.²³⁹

However, the main difference between personality rights as understood by 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 proprietary right.²⁴⁰

By contrast, privacy is not recognized under English common law. In *Kaye v. Robertson*,²⁴¹ 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

²³⁷ James Q. Whiteman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 *The Yale Law Journal* 1151 (2004).

²³⁸ *Haelan Laboratories, Inc v Topps Chewing Gum, Inc*, 202 F 2d 866 (2nd Cir, 1953).

²³⁹ 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).

²⁴⁰ 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).

²⁴¹ *Kaye v Robertson* [1991] FSR 62. However, the Human Right 1998 incorporated the European Convention of Human Rights, which protects privacy. More recently, the The Data Protection Act 2018 govern how the government and private institutions use private information.

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*.²⁴² 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 under the civil law do not directly correlate to their common law counterpart. This makes finding commonalities difficult and further presents a challenge when the losses produced by infringing these rights are viewed as non-economic losses. The *Wainwright* ruling is an example of the *a posteriori* approach that prevents the adoption of general abstract concepts under the common law.

Furthermore, as we have argued elsewhere²⁴³, the 2010s saw the birth of the Chinese privacy model. Under this new model personal

²⁴² *Wainwright v Home Office* [2003] UKHL 53.

²⁴³ Ruben Rodriguez Samudio, *Modelos Normativos de Privacidad en las Ciudades Inteligentes*, 52 *Revista de la Facultad de Derecho y Ciencias Políticas* 609 (2022) (Colomb.).

privacy yields to social order which contrast to the American model with its protections against the state. While this new model is still new, it has nevertheless left its mark in the current legal discourse regarding human and constitutional privacy rights.

In the same manner mass media led to the development of privacy rights in common and civil law, digital technologies resulted in the transformation of personal privacy, from the right to be left alone or to not have private matters divulged, to a control over certain types of information. Whiteman wrote his paper well before the advent of social media, nevertheless, his conclusions have been proven correct by the approaches taken by the U.S. and Europe. The latter passed the most comprehensive set of privacy rules under the General Data Protection Regulation, while the U.S. still struggles to come to term with nation-wide privacy regulation. By contrast, the Chinese model aims to grant the individual a certain sense of control while maintaining strong oversights over data.

The dignity-driven European model has seen the creation of new non-economic interests, and example of which the right to be forgotten. Moreover, the GDPR creates multiple safeguards and right concerning the collection, processing, and transference of personal data. Since the GDPR establish strict rules for transferring data its effects have been felt globally as countries must meet those standards if they are to handle European citizens' personal information.

VII. SUMMARY

The historical review carried out in this chapter 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 punitive, and the change in value given to individuals resulted in greater protection. Furthermore, advances in technology, particularly the development of printing techniques, resulted in broadening 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 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 model. Instead, they introduced the idea through the infringement of social interests or family ties. Even when drafters of a particular code, such as the De Bello code, opposed the idea of granting remedy to non-economic losses, social pressure led 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 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 role to the criminal proceedings. In some cases, only criminal liability grants the victim a claim for non-economic losses.

Constitutional rights are somewhat different, 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 use these rights to expand the number of cases in which victims can claim damages.

Thus, the idea of non-economic losses acting as a punitive mechanism and later as a negative concept, *i.e.*, one which is only be defined via its comparison to economic losses, has been replaced by a set of rights protected in the same manner as economic rights. This change is 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 to specific issues, such as abortion or same-sex marriages. On the other hand, the infringement of rights has become 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 symbolic value.