

# Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape

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*Omnis condemnatio pecuniaria est<sup>1</sup>*  
*Liberum corpus nulum recipit aestimationem<sup>2</sup>*

## INTRODUCTION

This paper is a study of the ideology, language, topography, architecture and nomenclature of compensation for non-pecuniary loss in Europe. It aims at throwing light on the meaning of concepts and compensation categories and comparing solutions in different jurisdictions. It is work done in the context of the Common Core of European Private law project, fundamental research in what is common and uncommon in European private law.<sup>3</sup>

Redress for non-pecuniary loss from personal injury has gradually increased in importance and is now placed centre-stage in all jurisdictions, but both ontologically and topographically, shows a polymorphism and presents exciting challenges. Not only is the terminology of compensation different within the narrow central-case personal injury claim, but mapping personal injury redress in different jurisdictions reveals a broader picture of polymorphism emerging from intersecting systematic divisions of liability regimes, perceived aims of civil and criminal liability, judicial and doctrinal development of concepts and ontological categories of damage and assessment methods, and the practical needs of litigation funding and resort to third-party payers for purposes of loss allocation. In addressing, and, hopefully, illuminating the complexity of non-pecuniary loss in personal injury, this paper aims at also illuminating the question on how best to

<sup>1</sup> 'All court judgments are judgments to pay damages'.

<sup>2</sup> 'The body of a free man accepts no monetary estimation'.

<sup>3</sup> On the Common Core of European Private Law project, its methodology, aims and prospects, see Bussani, M & Mattei, U (1996-1997) 'The Common Core Approach to European Private Law' (3) *Columbia Journal of European Law* 339.

deal with compensation of personal injury that has dominated Tort scholarship in the last few decades. It starts with a look at the intellectual foundations of the European cultures of monetary compensation for personal injury, and the values underpinning such a translation into money of some of the most personal and intimate losses. These values are seen to have undergone a transformation with the rising significance of fundamental rights and the overarching value of human dignity after the human rights abuses in Europe in the twentieth century. Compensation cultures are expressed in legal concepts and terms with different shades of meaning and emphasis on the fundamental themes of liability and compensation and the meaning of personal injury itself. The paper will look into the importance of these shades of meaning in the main European traditions, and their place in the architecture and nomenclature of personal injury compensation in different jurisdictions. In understanding architectures and nomenclatures, it is important to distinguish between ontology of harm (i.e. the medical description of harm) and normative nomenclature (i. e. the legal terminology used in the juridical assessment of harm), the former inevitably common in all jurisdictions but the latter, also inevitably, different. Beyond an effort of understanding the different nomenclatures, this study will compare and assess their limits and the areas of uncertainty remaining after years of evolution, with some final reflections on the current state of play and challenges laying ahead.

## THE IDEOLOGY

The global legal landscape shows types of harm morphing into liability regimes in different jurisdictions. Types of non-pecuniary harm belonging in some jurisdictions to the common nomenclature of personal injury, (for example *domage moral* –moral damage-in French law or *danos psicofisicos* –psychophysical injuries-in Spanish law) appear in other jurisdictions as special categories of liability: for example, nervous shock (English law), unwanted birth (German law, English law). In several jurisdictions the compensation of non-pecuniary harm is linked to the standard of liability. No-fault regimes tend to exclude or restrict compensation of such harm, with some notable exceptions.<sup>4</sup>

I have written on the globalization and contemporary importance of Civil liability law (Tort law) elsewhere.<sup>5</sup> It is today clearer than ever before that monetary compensation for harm that follows from finding a person or an organization responsible for a civil wrong is an indispensable tool of national and global justice.

While the philosophical and cultural foundations of the Common law traditions of Tort law are, simply, empirical-utilitarianist and, in the case of American Tort law, also liberal-pragmatic, Tort law in the Civil law tradition carries a heavier load of philosophical and doctrinal baggage. In the European, and also Latin American, legal traditions, there are Natural law influences on codes and case law, and important tensions between phenomenological/conceptual versus functional/descriptive views of liability for personal injury and compensation. The natural law heritage shows an unresolved conflict between

<sup>4</sup> But see the opposite in French and, now also, German, law, below. Significantly, the *EU Directive 85/374/EEC* excludes non-pecuniary losses from the no-fault regime of product liability it introduces, refusing to harmonize the laws of member states in this connection.

<sup>5</sup> See Banakas, S (2007) 'A Global Concept of Justice: Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World' in (67) *Louisiana Law Review* 1.

the fundamentally libertarian-individualistic view of *casum sentit dominus*<sup>6</sup> and the moralistic-republican view of *alterum non laedere*.<sup>7</sup> The Romanistic and Germanic sub-traditions of Tort liability for personal injury are broadly divided along these lines, as evidenced by the French (1804), and German (1896) Civil Codes. While the Tort law of the French Civil Code is founded on the *neminem ledere* principle, the Tort law of the German Civil Code shows greater affinity with the principle of *casum sentit dominus*. More important, however, is the more recent influence in Europe of the thinking of the phenomenological school (Schopenhauer),<sup>8</sup> brilliantly applied to the legal conceptual analysis by Rudolf von Jehring.

In the thinking of Jehring, clearly influenced by Schopenhauer, monetary compensation for loss, especially personal injury loss, is an indispensable foundation of social action, both in ancient and in modern society. More specifically, Jehring argued that money is the only equal and perfect reward for achievement or satisfaction for loss in social intercourse.

Another influential German thinker, Karl Binding, has remarked that while Criminal liability is about the irreparable, Tort liability is about the reparable: 'The source of punishment is an irreparable state of injustice; punishment is the diminution of another right for the purpose of making good this irreparable wrong; damage indemnification, in contrast, is the alleviation of a reparable condition violative of the law'.<sup>9</sup>

Obviously, following Binding's thinking, there is a need to identify the reparable and the irreparable. Is, for example, injury to reputation 'reparable' and, therefore, indemnifiable, or is it 'irreparable' and, therefore, only fit for punishment (by Criminal law)? Binding's influence was evident on the German Civil Code of 1986, in which the only injury to reputation covered by the law of civil liability was that to a person's financial reputation (evidently reparable in money), but not any other. Indeed, as will be discussed later in this paper, the German Civil code forbade in principle the compensation of non-material loss (in German: *immaterieller Schaden*) that might be considered as irreparable. Could the quite separate development of punitive damages in Tort law in the common law tradition be similarly seen as recognition that there is something irreparable to the victim that needs to be accounted for by the wrongdoer? This is more evident in US Tort litigation for personal injury, where the aims of Tort action clearly include deterrence, punishment and an after the event regulation, and where Tort law sometimes works as a 'private attorney general'. Punitive damages in order to remove the tortfeasor's profit from their wrong can be seen as removing the wrongful gratification for the sake of completeness of the legal order (see below Jehring's theory of interest).

But to return to Jehring,<sup>10</sup> it is evident that in his mind the violation of every interest is capable of reparation, indeed, for Jehring it seems that reparation in the form of monetary compensation is fundamental to every kind of social intercourse. Jehring draws from Schopenhauer for the importance of purposeful human action and the idea of interest as a key concept of social and legal ordering. Schopenhauer said: 'Will without interest is a

<sup>6</sup> That could be understood as meaning that the loss must be carried by the victim.

<sup>7</sup> Meaning 'do not injure another'. As in Justinian's Institutes *Inst.* 1, 1, 3

<sup>8</sup> See below note 9.

<sup>9</sup> Binding, C (1922), *Die Normen und Ihre Uebertretung* (Norms and their Violation) I, 4<sup>th</sup> ed. Leipzig 290; as translated by Stoll, H (1983) in *International Encyclopedia of Comparative Law*, vol. XI Torts, Chapter 8, *Consequences of Liability: Remedies* 3.

<sup>10</sup> Von Jehring, R (1877) *Der Zweck im Recht* (Law as a Means to an End) *Erster Band*, Leipzig

will without a purpose, that is to say an outcome without cause' (*'ein Wollen ohne Interesse ist ein Wollen ohne Motiv, also eine Wirkung ohne Ursache'*).<sup>11</sup>

To which Jehring added: 'Social intercourse is the complete system of egoism, nothing more' (*'Der Verkehr ist das vollendete System des Egoismus, weiter nichts'*).<sup>12</sup> And: 'Interest is the indispensable precondition of every act-acting without interest is as much nonsense as acting without purpose, it is a psychological impossibility' (*'Interesse ist die unerlaessliche Voraussetzung einer jeder Handlung-ein Handeln ohne Interesse ist ein eben solches Unding als ein Handeln ohne Zweck, es ist eine psychologische Unmoeglichkeit'*);<sup>13</sup> and 'There is no idea, like the idea of compensation, that has for human beings something so mandatory' (*'Es gibt keine Idee, die fuer den Menschen etwas so Zwingendes haette, wie die der Ausgleichung'*).<sup>14</sup>... Only money is capable to truly solve the task of social intercourse, i.e. to establish the real system of guaranteed full satisfaction of human needs [...] Money satisfies every need, the most noble and the lowest, and to every calculable degree, the highest as well as the smallest' (*'Nur das Geld ist im Stande, die Aufgabe des Verkehrs wirklich zu loesen d. h. das reale System der gesicherten Befriedigung der menschliche Beduerfnisse in vollender Weise herzustellen' 'das Geld befriedigt alle Beduerfnisse, die edelsten wie die niedersten, und in jedem beliebigen Maasse, in groessen wie in kleinsten'*).<sup>15</sup> Our personal freedom and independence is about being able and obliged to pay...on money clings not only our financial, but also our non-material independence' (*'Unsere persoenliche Freiheit und Unabhaengigkeit beruft darauf, dass wir zahlen koennen und muessen-im Geld steckt nicht bloss unsere oekonomische, sondern auch unsere moralische unabhaengigkeit'*).<sup>16</sup>

But how can we define an interest? An interest is the satisfaction of a need causing a feeling of gratification. More specifically:

- In the case of an economic or material interest: a need is satisfied by means of an economic or material nature, by using material goods or immaterial goods capable of having an exchange value;
- In the case of a moral interest: a need is satisfied through human faculties only, exercised freely and in relation to persons or things, but without the involvement of economic means and independently of the use of goods. For example, in the old pioneering judgment of the Court of Brussels, of 24 December 1884, an example of a moral interest is 'the enjoyment of movement, of which an accident victim had been deprived'. As Jehring demonstrated at some length, the recognition of such moral interests dates back to classical Roman law, in remedies such as those for *vera rei estimatio* (real value of the thing), *affectus* (emotion), *pietas* (piety) and other types of what one might call today non pecuniary harm.<sup>17</sup>

Jehring's bold affirmation of interest-based human existence fulfilled by monetary reward or compensation implies that the Law should aim at the compensation for the

<sup>11</sup> Schopenhauer, A (1860) *Die Beiden Grundprobleme der Ethik* (Two Fundamental Problems of Ethics) 2 ed, Leipzig 165.

<sup>12</sup> Ibid at 125

<sup>13</sup> Ibid at 58.

<sup>14</sup> Ibid at 124.

<sup>15</sup> Ibid at 127.

<sup>16</sup> Ibid at 128.

<sup>17</sup> But, significantly, see *Gaius in D 9, 3, 7*: In the case of an injury to the body suffered by a freeman, there can be no compensation for scars or any other disfigurement because of the general rule that the body of a freeman cannot be appraised financially (as is the case with the body of a slave or a son).

violation of both a material and a moral interest, and adds sense to the open-ended, broad regimes of personal injury compensation in the Romanistic sub-tradition, which place the compensation of non material harm on the same basis as the compensation of material harm (see details below). But it can also add sense, combined with Binding's views on the reparable and the irreparable, to the historical tendency of the Germanic sub-tradition to restrict compensation to that which is clearly reparable. Jehring would not object to not compensating that which is irreparable to the individual, i.e. the violation of a collective interest that cannot be broken down to specific individual interests. But he would, perhaps, object to the non-compensation of an individual moral interest if its violation affects the victim's non-material independence.

Another important development since Jehring's pioneering work, the seeds of which can be found already at the dawn of classical Roman law (the law of *iniuria*-insult) and, also the common law (the law of trespass to the person), is the emergence of a certain distinction between the compensation of an individual interest violated and the compensation for the violation of our (shared) human dignity. This accounts for serious questions facing contemporary personal injury compensation law in different jurisdictions, such as:

- Should the violation of personality rights be actionable *per se*, and such rights be afforded normative (Constitutional) protection irrespective of actual harm?
- Should the aim be to put the victim in the previous position they were before the wrong was done, or to make the victim 'whole'? Example of a tendency towards the latter is the compensation of the loss of amenity in English law, and the *prejudice d'agrement* (loss of enjoyment) in French law, of the unconscious victim.
- Should the measure of personal injury compensation be victim-individualization or victim-categorization? Again, this is a choice that divides personal injury compensation regimes, especially with regard to non-pecuniary harm, but, also, with regard to future loss of earnings.

This move from the individual to the (human) species, as it were, opens the floodgates for the reparation of the irreparable: Deterrence and enforcement of rights (the German doctrine of *Rechtsfortsetzungsfunktion*<sup>18</sup> of civil actions) are brought inside the calculus of personal injury compensation, sitting rather uncomfortably with more traditional ideas of corrective justice. Corrective justice demands the restoration of the victim's state to that before the wrong occurred. It seems an idea that fits Jehring's view of restoring with monetary compensation fairness in social intercourse. But aren't rights better enforced *in naturam*<sup>19</sup> (i.e. by specific performance)? In Jehring's home turf, the Germanic tradition, restoration *in naturam* has been the rule, whereas the common law tradition looks in principle to monetary compensation and the French tradition also seems to do the same (although there is no clear rule or principle about this in the Code Civil or case law). Admittedly, this difference is much more relevant in the case of compensation for property damage than in the case of personal injury where it is not possible to compensate *in naturam* for important types of harm, such as non-pecuniary harm.<sup>20</sup> Indeed, non-pecuniary harm is, according to one view<sup>21</sup> (not that of Jehring, obviously), impossible to compensate

<sup>18</sup> This almost untranslatable German legal concept means broadly 'legal development function'.

<sup>19</sup> Compensation in kind.

<sup>20</sup> But see below, the theory of satisfaction or 'gift'.

<sup>21</sup> See, generally, Abel, RL (1989-1990) 'A Critique of Torts' (37) *University of California at Los Angeles Law Review* 785

in money, without commodifying, and, therefore, devaluing, human dignity. In short, the move from individual interest to the dignity of the species encourages punitive, deterrent damages and reparation *in naturam*, wherever this is possible, rather than monetary compensation based on the violation of an individual interest. The difference of principle between monetary compensation and reparation *in naturam* is important in order to understand the global topography of personal injury compensation, especially the taxonomy of harm types and their treatment in jurisdictions under the spell of Germanic legal culture. As shown later, in such jurisdictions non-pecuniary harm types (in German: *Nichtvermoegeen Schaeden*) were (traditionally, but recently increasingly less so) viewed as in principle non-reparable in money, but quite properly so *in naturam*. Thus non-pecuniary losses are included without exception in the general rule of reparation *in naturam* of para. 249 of the German CC, but only compensatable in money in the cases envisaged by para. 253 art. 2 (see *infra*). By contrast, jurisdictions under the influence of the French legal culture are generally opposed to reparation *in naturam*, recognising in principle only a right to monetary compensation. Article 1382 of the French Civil Code imposes on a tortfeasor a duty to 'repair the harm' (*réparer*), caused by his fault without specifying if this should be reparation *in naturam* or monetary compensation. But article 1142 of the French Civil Code appears to be opposed to such reparation, declaring that "every duty to act or not to act results in damages in the case of non-performance by the debtor",<sup>22</sup> a position reflecting the natural law abhorrence of violation of personal freedom expressed in the maxim '*nemo potest praecise cogi ad factum*'.<sup>23</sup>

Indeed, it would appear that it is more challenging to 'compensate' non-pecuniary harm individually, than abstractly through punitive deterrent damages for violations of collective human dignity. According to one view, that of the Swiss scholar, Burckhardt, pain cannot be compensated, but the wrongdoer should be condemned to offer satisfaction (*Genugtuung*), to the victim with an award to restore the disturbed emotional and psychological equilibrium of the injured person.<sup>24</sup> This satisfaction can take the form of a sum of money, which is, however, only a means to the end of artificially providing the victim with a new and different pleasurable experience to counterbalance the painful experience, which itself cannot be put right. This broad theory of satisfaction for non-pecuniary harm is embedded in the Swiss Civil Code and the revised Swiss Code of Obligations, and also has been transplanted to the Greek and Turkish Civil Codes, but finds only a limited application in German law, where compensation (*Schmerzensgeld*<sup>25</sup>) is the primary purpose

<sup>22</sup> '*Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts en cas d'inexécution de la part du débiteur*'. The victim has no right of restitution in kind, according to the French case law: see Cour de Cassation, 2eme Chambre Civile (Second Civil Chamber) 12 juin 1954 *Dalloz* 1954 *Jurisprudence* 588; Cour de Cassation, 2eme Chambre Civile 23 avril 1959 *Bulletin Civil* 1959 I 182 no. 216. This position is criticized by leading authors who argue that the victim should be entitled to such restitution if it is possible, and should accept it if offered by the tortfeasor: see Mazeaud, L & Tunc, A (1960) *Traite Theorique et Pratique de la Responsabilite Civile* vol. III, nos 2304, 2305.

<sup>23</sup> 'Nobody can be forced to a specific act'. All the more surprising that reparation in kind, forcing the debtor to a specific act, is adopted as a principle by German civil law.

<sup>24</sup> Burckhardt, CC (1903) *Die Revision des Schweizerischen Obligationenrecht in Hinsicht auf das Schadensersatzrecht* (The revision of the Swiss Law of Obligations with reference to the law of damages) *Zeitschrift fuer Schweizerisches Recht* 23, 469-586. Burckhardt believed that satisfaction is not punishment, for it aims at healing the victim rather than wounding (punishing) the wrongdoer. See more in Stoll *supra* note 10: Remedies 9

<sup>25</sup> 'Money for pain'.

of non-pecuniary loss damages and satisfaction only a second additional purpose (dual function of damages)<sup>26</sup>. Significantly, and under the strong influence of the Constitution (*Grundgesetz*<sup>27</sup>), German law also envisages a third function for non-pecuniary loss damages, the so-called *Wuerderfunktion*,<sup>28</sup> in cases of personal injuries so severe that leave the victim completely unconscious with their personality totally destroyed, excluding any possibility of compensation or feeling of satisfaction. In such cases non-pecuniary loss damages will be awarded for the 'pure' loss of dignity suffered, in one sum without a breakdown of the award into different types of damages.<sup>29</sup> It may be argued, however, that although it would be quite right to underline the important function of Tort litigation to also provide individual moral satisfaction to the victim of a wrong, who can face directly and call the shots against the wrongdoer in the Civil trial (something which victims cannot do in Criminal trials), to view satisfaction as an alternative to compensation in the case of non-pecuniary harm does less justice to victims of personal injury, as Jehring's analysis clearly demonstrates, and has not found broader acceptance. Jehring's theory of interests has the advantage of encompassing both the need for economic/material justice and the need of restoring fairness and fair play in social action. But moral satisfaction can add an element of natural revenge that cannot be completely ignored when human beings (and not only human beings) are concerned. As put by Justice Oliver Wendell Holmes Jr., 'even a dog distinguishes between being stumbled over and being kicked'.<sup>30</sup> Rather fascinatingly, Jehring's theory of interests further implies not only a duty to compensate for the violation of an interest, but, also, quite possibly a *right* to do so: if money can make the wrong good for the victim, it should also, should it not, make the wrong good also for the wrongdoer? The ancient Roman law of *iniuria* illustrates this well, and the German Civil Code, true to its spiritual origins, accepts that the compensation of personal injury includes an element of atonement for the wrongdoer. This is even clearer in Austrian doctrine and case law where compensation for non-pecuniary loss is described as 'repayment of the injury caused'.<sup>31</sup>

A further challenge to individualism so eloquently propagated by Jehring has been the increasing complexity of social intercourse in the post-industrial era of mass production and circulation of goods creating entire industries of statistically unavoidable accidents. First, that implies that the community, in whose interests mass production and generation

<sup>26</sup> In Spanish law the Supreme Court and some scholars also speak of the 'satisfaction' of the victim as being the basis of the compensation of non-pecuniary harm, not in the sense of '*Genugtuung*', but in the sense of solace (*solatium*), damages allowing the victim to buy, if so wishes, alternative comforts: '*los duelos con pan son menos* (bread makes grief less). The Spanish Supreme Court refers to compensation as 'satisfaction for the suffering caused': see *Sentencias de Tribunal Supremo* (Judgments of the Supreme Court) 25.6.1984 [1984] RJ no. 1144. This evokes the functional approach to assessing the quantum, also known in Canada and certain US jurisdictions. In the US litigation process, pain and suffering damages have been described as a 'gift', sometimes, one might add, a generous one, from a jury anxious to show 'public sympathy and fellow-feeling', so that the plaintiff can purchase distractions and benefits to improve their quality of life.

<sup>27</sup> Basic Law as the German Constitution is still called after the reunification.

<sup>28</sup> 'dignity-function'.

<sup>29</sup> See Deutsch, E (1993) *Neue Juristische Wochenschrift* 784; Bundesgerichtshof (German Supreme Court) (1993) *Neue Juristische Wochenschrift* 1531, 1532; Oberlandsgericht Stuttgart (Court of Appeal of Stuttgart) (1994) *Neue Juristische Wochenschrift* 3016

<sup>30</sup> Oliver Wendell Holmes Jr., (1881) *The Common Law* Little, Brown, 3.

<sup>31</sup> See Bydliński, F (1965) 9 *Juristische Blätter* 183. See also articles 1323 & 1324 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch-ABGB*): in cases of intentional harm or gross negligence the tortfeasor is under an obligation not only to compensate for any harm, but also to pay damages to "extinguish the insult caused" ("*Tilgung der verursachten Beleidigung*")

of risk takes pace, must show solidarity, to a certain extent, to the unfortunate victims of such accidents, in the form of social security benefits and compulsory insurance arrangements: this would generally agree with Jehring's concept of interest-driven action, but poses questions of economic efficiency and management of claims against third-party payers, as well as questions of what to do with so-called collateral benefits to the victim, i. e. payments received by the victim which have been triggered off by the accident. Second, personal injury is, inevitably, not only commodified but, moreover, commercialised, because industrial and technological advances add to the complexity and cost of litigation and the reality on the ground demands that, if violated interests are to be compensated at all, new and innovative ways of reducing litigation and litigation funding must be found. The source of injuries is an important factor in this connection, with traffic, medical and industrial (employment) accidents competing for being the costlier, socially and economically. Importantly, low value claims are increasingly dealt with in special regimes that either shield insurers from excessive liability<sup>32</sup> or encourage out of court settlement. In some jurisdictions, like Spain, the biggest source of personal injury claims, traffic accidents, are subject to a special regime that restricts compensation, and in England pioneering new ways of third-party litigation funding have just been introduced. Parliament has also raised in England to 25,000 the ceiling of so-called Traffic Accident protocols, taking a considerable amount of potential litigation away from ordinary procedure onto a fast-track settlement mechanism.<sup>33</sup> In other jurisdictions, such as France, Germany, Portugal, no-fault systems for traffic accident injuries are designed to expedite insurance settlements and control the overall cost of such accidents, leading to faster, but considerably reduced, payoffs.

## THE LANGUAGE

The ideological complexity underpinning tort liability for personal injury in Europe is matched with linguistic uncertainty as to fundamental concepts, starting with the concept of liability itself. In terms of the main European legal traditions, expressed in the English, French, Italian, Spanish, Portuguese and German languages, the uncertainty starts with the undisciplined use of key concepts that are not clearly defined in the jurisdiction itself. European instruments of harmonization of private law that could have helped in sorting out the meaning of key concepts represent, unfortunately, an almost uninterrupted sequence of missed opportunities.<sup>34</sup>

<sup>32</sup> See in Italy art 32, comma 3ter, *Diritto Italiano* 24.01.2012 n.1, which modified comma 2 of art. 139 of law no 209/2005 on the Code of Private Insurance: "Injuries of a light nature that are not subject to clinical instrumental confirmation cannot be the ground for compensation for a permanent biological damage". ("*In ogni caso, le lesioni di lieve entità, che non siano suscettibili di accertamento clinico strumentale obiettivo, non potranno dar luogo a risarcimento per danno biologico permanente*"). On the Italian doctrine of *danno biologico* (biological injury) see *infra*. Also in England, the Ministry of Justice recently issued a consultation paper on Reducing the number and costs of whiplash claims: *A consultation on arrangements concerning whiplash injuries in England and Wales* December 2012, Consultation Paper CP17/2012; see also Parliamentary debates in <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/news/whiplash-report/>> (Retrieved 13.08.2015)

<sup>33</sup> *Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents*: available at:< [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_rta](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rta)> (Retrieved 13.08.2015)

<sup>34</sup> See on the disparity of terminology in European Private law legislation and case law Weitenberg, M (2008) 'Terminology' in Koziol, H & Schulze, R (eds.) *Tort Law of the European Community* Springer at 309 and following.



The English pair of concepts liability/responsibility finds some correspondence in the German concepts of *Haftung/Verantwortlichkeit*, while French law uses the single concept of *responsabilité* (Spanish: *responsabilidad*; Italian: *responsabilità*). The EU so-called prospectus directive of 2003<sup>35</sup> is an example of a missed opportunity to clarify the meaning and the correspondence of these basic concepts in the three different languages and legal traditions, because they are used as alternatives, which clearly they are not. Briefly, in English tort law responsibility is normally a question of fact, an indication, among others, of sufficient grounds to establish liability (e.g. in the case of assumption of responsibility for omissions or for a special negligence duty, such as a duty not to cause economic loss). The German concept of *Verantwortlichkeit* is used in German law in a way broadly similar to that of responsibility in English law. By contrast, *responsabilité* in French law means primarily liability in the legal sense, as used by jurisprudence and doctrine and despite the ambiguity of the texts, only if, however, it is used in the context of an application of a legal norm. Otherwise, it may well be used, even in a judgement, in a rather more colloquial sense (eg '*la personne responsable*'-the person responsible).

At the other end of the spectrum, another basic concept, expressed in English as compensation corresponds in French often with a concept that signifies both the act of compensating and the result of that act (indemnification or *indemnité*). The English concept of indemnity is often used to mean something different, a payment to the victim by a party other than the tortfeasor, or a payment by the tortfeasor to a party other than the victim.<sup>36</sup> The English pair of concepts Compensation or Reparation corresponds to the French *indemnisation or réparation*, and the German *Ausgleich or Ersatz*. The former refers in all legal traditions to monetary compensation, whereas the latter to restitution *in naturam* (above). But German doctrine also uses the pair of terms *Geldentschädigung /Naturalrestitution*<sup>37</sup>. Fair compensation corresponds to the French *compensation ou indemnité équitable* and the German *gerechter Ausgleich* or *billiges Ermessen*, which is the basis of assessment of non-pecuniary damages. While reasonable compensation in English law corresponds with *indemnité raisonnable* in the French legal tradition, the same notion is expressed as *angemessene Entschädigung* in the German legal tradition, as the term *Ausgleich* can only mean full compensation. In the case of non-pecuniary losses, the term *Wiedergutmachung*<sup>38</sup> is increasingly used as the preferred term, as such losses are by their nature impossible to fully compensate.<sup>39</sup>

The generic concept of personal injury is itself a concept that, perhaps because of its fundamental moral, social and economic importance, is also ill-defined and applied differently in different legal cultures. In English law, whereas very little can be said about the concept of 'personal', other than that in the present context it only applies to physical persons and that, in English law, a person begins to exist at the moment after

<sup>35</sup> 2003/71/EC amended by Directive 2010/73/EU.

<sup>36</sup> Interestingly, the *US Restatement Torts* (1979) paragraph 903 states as aims of Tort liability: 'to compensate, indemnify or provide restitution'.

<sup>37</sup> See Deutsch, E and Ahrens, H-J (2011) *Deliktsrecht, Schadensersatz, Schmerzensgeld* (Tort law, Compensation, Money for Pain) 4th edition de Gruyter 213.

<sup>38</sup> This term literally means "making good again", but can be rendered in English as reparation or, even, atonement.

<sup>39</sup> See recently Schubert, C (2013) *Die Wiedergutmachung immaterieller Schäden im Privatrecht* (The Restoration of non-material harm in Private law) Mohr.

birth,<sup>40</sup> 'injury' is a concept that invites some thought. It would appear that personal injury implies a physical encroachment upon someone's person, more precisely a hurtful invasion (lesion) of someone's corporal integrity. But today injury is a concept that can encompass in English law all kinds of loss or damage resulting from an interference with a person. Furthermore, injury is also used to denote encroachment upon an interest, e.g. injury to reputation, injury to feelings, injury to financial interests. In medical injury cases injury includes failure to prevent or cure a disease, or disability (for example, dyslexia<sup>41</sup>) or a violation of a person's autonomy, as in cases of wrongful birth<sup>42</sup> or uninformed consent.<sup>43</sup> French law uses as generic term the term *prejudice corporel* (corporal injury). It is clear that *prejudice corporel* includes, but may extend beyond, corporal lesions (*lesions corporelles*). Another important distinction in French law is that between 'prejudice' and 'dommage'. As pointed out in an important recent French report on the reform of the personal injury nomenclature,<sup>44</sup> the term 'prejudice' is normative-legal in nature and indicates an attack on the victim's patrimonial or extra-patrimonial rights. The new French nomenclature known as nomenclature *Dintilhac* (on which see extensively *infra*), adopts this normative terminology and its application is, significantly, for this reason, subject to the control of the *Cour de Cassation*. The term 'dommage' is, by contrast, factual in nature and its presence normally falls under the sovereign jurisdiction of the trial judge as a matter of fact. A leading practical manual on the French law of personal injury compensation points out that 'dommage' is in every instance translated into 'prejudice' with the combined intervention of professionals such as health experts, doctors, work-therapists, architects, accountants and, of course, lawyers!<sup>45</sup> Finally, German law uses the term personal injury ("*Koerper Verletzung*"), which is close to the French, but distinguishes health (*Gesundheit*) as a separate protected interest.<sup>46</sup>

In all three traditions it seems that personal injury 'damage' or 'loss' is primarily the harm resulting from a physical lesion to the body ('dommage' in French law, 'Schaden' in German law). Non-pecuniary harm which is not the result of such a physical lesion is treated by German and English law as a different category of harm, *Schockshaeden* or Nervous Shock. According to the German BGB, the person responsible for an unlawful invasion of another's corporal integrity or health has an obligation to offer reparation for any damage suffered, including, significantly, non-pecuniary harm. The new para 253 Part 2 of

<sup>40</sup> Under the *Congenital Disabilities (Civil Liability) Act 1976* (see also *The Human Fertilization and Embryology Act 1990*, and the *Nuclear Installations Act 1965*) a child can sue for personal injuries suffered before birth caused by the wrongful act of a third party (other than the mother), which resulted in the child being born with a disability.

<sup>41</sup> See *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619

<sup>42</sup> See *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52

<sup>43</sup> See *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134

<sup>44</sup> Rapport Lambert-Faivre (15 juin 2003): "*dommage*" relève de l'élément factuel, et "*prejudice*" relève du droit et exprime une atteinte aux droits subjectifs patrimoniaux ou extrapatrimoniaux subie par la victime» («Damage shows a factual element and injury shows a legal element and expresses an encroachment against subjective rights, patrimonial or non-patrimonial, suffered by the victim»): see Le Roy, M, Le Roy, J-D, and Bibal, F (2013) *L'Évaluation du Préjudice Corporel* (Evaluation of personal Injury) 19th ed. LexisNexis 2 following

<sup>45</sup> *Ibid*, 13 following

<sup>46</sup> Para. 823 I of German Civil Code (*Buergerliches Gesetzbuch-BGB*): '*Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet*' ("He who intentionally or negligently injures the life, body, health, freedom, property or other similar right of another is obliged to compensate the other for any resulting damage").

the German Civil Code (hereafter: BGB), extends the obligation to include non-pecuniary harm in the compensation of losses resulting from injury to body, health, freedom or sexual self-autonomy. This is a broad spectrum and has allowed German courts to include into the concepts of injury to body and health diverse pathologies such as an accident-induced drug addiction<sup>47</sup> and the encroachment upon pure affection interests.<sup>48</sup> Injury to health can also be painless,<sup>49</sup> but must manifest itself as a physical or psychological illness. “Illness” is defined according to the common, not medical-expert, view.<sup>50</sup> The definition of an injury to health adopted by the courts in Germany is, indeed, broad, coming close to the French principle of inviolability of the human person in articles 16 et seq. of the Code Civil. The German Federal Supreme Court for Civil law matters (*Bundesgerichtshof*, thereafter BGH) has held that health injury includes ‘any inducement of a state, which varies-in an adverse way-with that of the body’s normal functioning, it is inconsequential whether a condition of pain comes about or a drastic change of one’s existential orientation occurs’.<sup>51</sup> Equally broad seems to be the approach of the English House of Lords in their remarkable decision in the case of *Chester v Afshar*,<sup>52</sup> where the majority held that an invasion of a patient’s autonomy and dignity deserves the award of damages. An unavoidable, very small, risk of paralysis in a surgical procedure when it materialised was held to be compensable personal injury by the doctor who had failed to advise the patient of the risk before the operation. Nevertheless, the House of Lords made it clear in another important judgment in the combined appeals of *Rothwell v Chemical & Insulating Co Ltd*<sup>53</sup> that in the absence of any actual impact to health, a freestanding feeling of anxiety or depressive illness caused by the fear of eventually developing a disease is not a compensatable head of non-pecuniary loss.<sup>54</sup> In cases involving exposure to asbestos causing the development by the claimants of pleural plaques, it was held that anxiety or depressive illness caused by fear of contracting mesothelioma was not actionable against the employer, if the claimants remained without symptoms of a disease.<sup>55</sup> This is clearly a narrower view of what amounts to personal

<sup>47</sup> Palandt, O (2012) *Buergerliches Gesetzbuch* (German Civil Code) 71<sup>st</sup> ed. Para. 253 no 11

<sup>48</sup> *Muenchener Kommentar zum Buergerlichen Gesetzbuch* (Munich Commentary on the German Civil Code), (2007) 5<sup>th</sup> edition Band 2 Paras 241-432, Para 253 no. 9; see also Stoll, H (1993) *Haftungsfolgen in buergerlichen Recht, Eine Darstellung auf rechtsvergleichender Grundlage* Heidelberg 351.

<sup>49</sup> Jaeger, L and Luckey, J (2007) *Schmerzensgeld* 6<sup>th</sup> ed. at p 77, no. 298. Similarly broad is the approach of the courts in Austria where non-pecuniary harm includes the detriment to the sensory spectrum and the feeling of listlessness: von Bar, C (2009) *Non-Contractual Liability Arising out of Damage Caused by Another, Principles of European Law, Study Group on a European Civil Code* Oxford University Press 385. For Switzerland, see Huette, K & Landolt, H *Genugtuungsrecht* (Law of Satisfaction) (2013) Band 2 *Genugtuung bei Koerperverletzung* (Satisfaction for Personal Injury) by Landolt, H, Zürich/St. Gallen.

<sup>50</sup> Jaeger L and Luckey, J supra note 49 at 78, no. 300. Unwanted pregnancy and birth, even if normal and without complications, is treated as personal injury: BGH (German Supreme Court) *Neue Juristische Wochenschrift* 1995, 2407, 2408; Jaeger, L and Luckey, J supra note 49, at 77, no. 297; *Muenchener Kommentar zum Buergerlichen Gesetzbuch* Band 2 Para 241-432 5<sup>th</sup> ed. 2007 Para 253 no. 22. Similarly, in English law, see immediately below.

<sup>51</sup> BGH 14 June 2005, *Versicherungsrecht* 2005, 1238, as translated in von Bar supra note 53.

<sup>52</sup> [2004] UKHL 41; [2005] 1 A.C. 134;

<sup>53</sup> *Rothwell v Chemical & Insulating Co Ltd and another; Topping v Benchtown Ltd; Johnston v NEI International Combustion Ltd; Grieves v F T Everard & Sons Ltd and another*, [2007] UKHL 39; [2008] 1 A.C. 281

<sup>54</sup> The decision of the House of Lords in *Rothwell* has been reversed in Scotland by the Scottish Parliament enacting the *Damages (Asbestos-related Conditions) (Scotland) Act 2009*, which was upheld as valid legislation by the UK Supreme Court in *AXA General Insurance Limited and others v The Lord Advocate and others* (Scotland), [2011] UKSC 46.

<sup>55</sup> The House of Lords may have been motivated by a desire to counterbalance their generous approach to claims of mesothelioma victims in *Fairchild v Glenhaven Funeral Services Ltd*, [2002] UKHL 22

injury than that adopted by the BGH in Germany, above. And, as will be shown below, also French courts have gone exactly the opposite way in similar cases. Lord Hoffman pointed out in *Rothwell* that “Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not compensatable damage”.<sup>56</sup> His Lordship did not seem to accept that such a serious negligent alteration to the worse of a person’s normal state of health is *per se* injury,<sup>57</sup> or, alternatively, may be compensatable as a violation of a person’s private autonomy,<sup>58</sup> although the House of Lords held in *Rees v Darlington*<sup>59</sup> an unwanted but normal birth to be an actionable violation of a mother’s private autonomy, despite the absence of any injury.<sup>60</sup>

Inducement of a pathological state or condition seems to be a requirement for a personal injury to be present in both English<sup>61</sup> and German law.<sup>62</sup> Mere infliction of pain will not be enough unless it is the result of some injury to the body in the form of (direct or indirect) physical impact.<sup>63</sup> Working on the basis of a similar requirement of physical impact that renders the pain and suffering ‘measurable’ in Austrian law, the Austrian Supreme Court refused to award damages for pain and suffering to the wife of a man that left her and their marital home to live with another woman, causing her psychological disturbances of a pathological nature as a result, including insomnia, headaches, depression and psychoses.<sup>64</sup> The court held that appropriate remedies for the breakdown of a marital relationship are those of marriage and divorce law, and mere infidelity, or ‘loss of love’, was not sufficient to support a tort claim.<sup>65</sup> Similarly in Swiss law it is generally accepted that damages for non-pecuniary harm (known as *tort moral*<sup>66</sup>), are only available when the victim suffered a physical or psychological harm of certain gravity, as a result of an injury to the body or the victim’s personality.<sup>67</sup> But the Swiss federal tribunal was able to allow recovery of a husband’s pain and suffering claim resulting from the hurt and profound disruption of

<sup>56</sup> [2004] UKHL 41, at no. 2 *per* Lord Hoffmann

<sup>57</sup> And *a fortiori*, in view of the fact that an *unconsented* alteration of a person’s health to the better is, indeed, actionable and compensatable (albeit with nominal damages only) in English law.

<sup>58</sup> As held by courts in Germany and several other jurisdictions, see above no. 3. See also *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 above.

<sup>59</sup> [2003] UKHL 52.

<sup>60</sup> Their Lordships in *Rothwell* seem to have been persuaded by counsel’s argument that it would be against the principle of distributive justice to compensate those who suffer ‘no identifiable injury’. But, with respect, this begs the question of what is identifiable injury.

<sup>61</sup> See *Rothwell*, *supra*.

<sup>62</sup> See e.g. BGH *Versicherungsrecht* 1954, 116.

<sup>63</sup> See Wagner, G (2009) in *Muenchener Kommentar zum BGB* vol. V para. 823 no 71. Nevertheless the local court of Frankfurt (*Amtsgericht*) awarded €400 pain and suffering compensation to a train passenger on a German State Railway train resulting from the closure of all train toilets during a two-hour journey: *Amtsgericht Frankfurt aM*, 25 April 2002, *Neue Juristische Wochenschrift* 2002, 2253. This judgment is considered generally not to reflect the prevailing view on this issue. But it evokes comparisons with the recently discredited Italian doctrine of *danno esistenziale* (“existential injury”), on which more below.

<sup>64</sup> *Oberster Gerichtshof (Austrian Supreme Court)* (hereafter: OGH) 20 February 2003, 6 *Oberster Gerichtshof in Zivilsachen (Ob)* 124/0, SZ 2003/16

<sup>65</sup> Unless there was also an intention to injure the personality of the spouse (or, presumably, some physical harm caused in the process of leaving the spouse). Interestingly, the Austrian Supreme Court (in line with courts in many other jurisdictions) recognises claims for pain and suffering caused by bereavement: OGH 2 Ob 84/01v, *Zeitschrift für Verkehrsrecht* 2011/73 note E. Karner. Surely, as the French say, ‘*partir c’est mourir un peu*’ (leaving is dying a little)?

<sup>66</sup> ‘Moral tort’

<sup>67</sup> See Brehm, R (2013) *Berner Kommentar zum Schweizerischem Zivilgesetzbuch* (Bern Commentary on the Swiss Civil Code) Art. 41-61 OR art 47 no 12 following.

his relationship with his wife when she was left blind and severely disabled after a traffic accident. The court held that the husband was injured indirectly by the accident in his personality, as a result of what happened to his wife.<sup>68</sup>

To return to German law, if there is no real effect on the health or the physical person of the victim, compensation (*Ausgleich*) may not be possible, but can give way to satisfaction (*Genugtuung*: see *supra* on these notions).<sup>69</sup> German law in its aim of vindicating the pure loss of human dignity will compensate also the loss of the *Empfindungsfähigkeit* (capacity to feel) by the victim, awarding pain and suffering damages even when the victim cannot feel pain. After taking into account the Constitutional protection of human dignity in art 1 of the German *Grundgesetz*, the BGH has held that the non-material loss compensated in cases of personal injury included not only physical and psychical pains but also the incapacity to feel such pain. What is compensated here is the “destruction of personality caused by the removal of the capacity to feel” (*Zerstörung der Persönlichkeit durch Wegfall der Empfindungsfähigkeit*).<sup>70</sup>

Further afield in Europe, Spanish law uses the generic terms *danos* and *perjuicios* (losses and injuries) much in the same way as French law uses the terms *dommage* and *prejudice*. Interestingly, Portuguese legal doctrine originally rooted in the Romanistic tradition but under the spell of Germanic legal science since the introduction of the new Civil Code in 1967, uses the concept *frustração de uma utilidade que era objecto de tutela jurídica*<sup>71</sup> (frustration of a value that was the object of legal protection-also reminiscent of Jehring’s theory of interests) to denote a harmful invasion of an interest, and the term *dano real* (“real damage”) to denote physical harm. More pragmatic is the new Dutch Civil Code that uses a general concept of damage understood by academic doctrine to mean, much as in common parlance, any actual detriment.<sup>72</sup>

Important, but not very helpful, is the contribution to the basic terminology of European Private law. The European Court of Justice (ECJ) in its judgment in the case of *Nil*<sup>73</sup> seems to understand the French term ‘dommage’ in the sense of ‘harm’, and the term ‘prejudice’ as ‘damage’, in a confusion of the distinction between actual and ‘normative’ damage. The recital of the 1985 Product Liability Directive<sup>74</sup> translates “liability for damage resulting from a death or personal injury” as ‘reparation des dommages causés par la mort et par des lésions corporelles’ in French, and ‘Wiedergutmachung von Schädten, die durch Tod oder Koerperverletzungen verursacht wurden’, in German.

<sup>68</sup> *Tribunal Federal Suisse* (Swiss Federal Tribunal), 11 March 1988, *Arrets du Tribunal Federal* (Judgments of Swiss federal Tribunal) 112 II 118. See also *Tribunal Federal Suisse* 22 April 1986, *Arrets du Tribunal Federal* 112 II 226, where the court held that the wife of a car accident victim who had been rendered impotent because of his injuries was entitled to damages for her *tort moral*, resulting from the impossibility for the couple to have normal sexual relations and a family, which encroached upon her inherent individual rights, and *Tribunal Federal Suisse* 23 October 1990, *Arrets du Tribunal Federal* 116 II 519.

<sup>69</sup> See Slizyk, A (2013) *Beck’sche Schmerzengeld-Tabelle* 9th edition Beck no 53 following.

<sup>70</sup> BGH, 13.10.1992, VI ZR 201/91; Slizyk, *ibid.* no 216 following.

<sup>71</sup> See the analysis and references to Portuguese academic doctrine in von Bar above note 54 at 328 and following.

<sup>72</sup> See von Bar *supra* note 49 at 319.

<sup>73</sup> ECJ, C-259/96, *de Nil* [1998] ECR I-2915, para. 23. More on terminology in European Tort law legislation and case law in Weitenberg, M (2008) ‘Terminology’, in Koziol, H and Schulze, R (eds.) *Tort Law of the European Community* Springer, 309 and following. Also briefly, Wurmnest, W (2012) ‘Non-Pecuniary Loss’ in Basedow, J; Hopt, K and Zimmermann, R(eds) *The Max Planck Encyclopedia of European Private Law* Vol. II Oxford University Press.

<sup>74</sup> 85/374/EEC

Related to the discussion of the meaning of personal injury, is the debate, in all major traditions, between damage understood in the concrete sense of actual individual loss and damage understood in the abstract sense of the harm caused to a person or the legal order as a whole, as a result of the violation of a legal norm protecting that person's interests. Here the analysis of Binding and Jehring mentioned above has not, unfortunately, helped European legal traditions to proceed on a very rational path. Binding implied that such abstract 'normative harm' is irreparable to the individual and should be left for criminal law to sanction through criminal punishment, as Tort law can only concern itself with the reparable, actual harm. However, as the example of the tort of trespass to the person or land in English law shows, there may be reparation in Tort of the normative harm suffered by a person by means of restoring the status quo ante the normative rule has violated, in addition to any criminal punishment. These torts themselves are the damage, and are actionable *per se*. The purpose of the civil action is to vindicate important rights and if there is no actual harm the victim may only receive nominal (or, in French law, 'symbolic') damages.

The distinction between abstract, normative harm and concrete, actual loss should not be confused, however, with the distinction between pecuniary and non-pecuniary harm or loss,<sup>75</sup> such as pain and suffering or loss of amenity. Non-pecuniary harm in this sense can be seen, and perhaps should be more correctly seen (although there is an important debate about this, as concrete, actual loss as it always implies a detriment beyond the pure normative detriment of the violation of the legal norm, unlike, say, in the case of a 'harmless' trespass. That this detriment may not manifest itself (partly or entirely) materially does not imply that it is a purely 'normative' detriment, because in the case of such non-pecuniary losses the existential state of the victim is altered, as noted by courts in Germany and Italy, among others. The manifestation and actuality of non-pecuniary losses are, in other words, existential, sometimes physical, but not (entirely) material. They are, in fact, existentially more real and actual than, for example, future pecuniary losses, such as future losses of earnings. Future pecuniary losses do, of course, look more concretely reparable, in Binding's sense of the term, than present (and future) non-pecuniary losses. But this is an altogether different kind of discourse that refers to another, historically also important, distinction between 'calculable' and 'non-calculable' loss. Another German thinker, Mommsen,<sup>76</sup> in the same line of thinking, perhaps, as Binding, wrote that compensation or reparation, as a means of restoring the victim's status quo ante, can only be on the basis of calculating the difference between the victim's material assets before and after the wrongful act (*Differenzhypothese* in German and Austrian law, *dano de calculo* in Portuguese), and cannot, therefore, include any 'non-material' losses. This led to the evolution of a dogmatic distinction in several jurisdiction in the Germanic tradition between material and non-material damage<sup>77</sup> (*materieller und immaterieller Schaden*), and the emergence of a principle that only the former was capable of compensation or reparation,<sup>78</sup>

<sup>75</sup> Terms used interchangeably in this paper.

<sup>76</sup> Mommsen, F (1855) *Zur Lehre von dem Interesse* Braunschweig : Schwetschke 3

<sup>77</sup> The term 'material damage' as distinct from pure economic loss was also introduced in English law, in the (later overruled) House of Lords decision in *Anns v Merton LBC* [1978] A.C. 728, in a criticized effort to justify the compensation of the loss resulting from structural damage to buildings as non- pure economic loss: see Banakas, EK (1977) 'Defective Premises: Shall the Rate-Payer foot the Bill?' (36) *Cambridge Law Journal* 245-248.

<sup>78</sup> See original para. 253 BGB.

a distinction and a principle, however, that rapidly found a clear exception in the case of non-pecuniary harm resulting from personal injury. This distinction is, therefore, not particularly helpful or important in the context of liability for personal injury. But another distinction, not quite similar but also not entirely different, made traditionally in English law, is important: the one between actual, evidenced and calculable pecuniary loss by the time of trial, traditionally object of an award of special damages, and loss that is at large at the time of trial, whether pecuniary or non-pecuniary, traditionally object of the general damages award. This old common law distinction, originally very important to demarcate what losses need to be specifically alleged and pleaded from those that do not need to be so,<sup>79</sup> more accurately reflects the reality of the calculable or otherwise nature of different types of harm compensated, than any distinction based on their material or purely, or partly, pecuniary nature.<sup>80</sup>

## ONTOLOGY AND NOMENCLATURE: *SUMMA DIVISIO*

### Ontology and Nomenclature

We will return to the language challenge later on in this paper, looking at nomenclatures in detail. Now we need to turn our attention to another area of complexity in compensating personal injury. It is important to distinguish *the ontology* of harm caused to the person from the (official or de facto) *nomenclatures* used in different jurisdictions. The notion of ontology as used here refers to the different harmful consequences or harm types identified and medically evidenced by claimants in personal injury claims, and nomenclature to the normative categorisation and labelling of the harmful consequences as heads of damage for the purposes of assessment of damages by the law. Ontology is, largely, factual-empirical, nomenclature is, largely, normative.<sup>81</sup> The ontology of harm is for the trial judge to establish (or, as in the US, the jury) as a matter of fact, but the nomenclature is a matter of law, subject to control on appeal by higher courts. As an example, in France the judicially recognized ontology of suffering compensated under the normative loss type of '*souffrances endourees*' (pain suffered) in the nomenclature Dintilhac includes not only pain, anxiety, distress and the like, but also fear (for example, after a plane crash or a rape), and behavioral problems of isolation, avoidance, self-immersion, feelings of revenge or even rebellion caused by the personal injury.<sup>82</sup> It is important to compare harm types and nomenclatures and their relationship in different jurisdictions, and assess the impact of the presence or absence of nomenclatures on the strategy and implementation of compensation, in order to chart the way forward. Conceptually, it is also important to understand that the legal nomenclature may or may not correspond with medical or any other factual/empirical description of harm-types, at least not in all major jurisdictions.

<sup>79</sup> Jolowicz, JA (1960) 'The Changing Use of Special Damage and Its Effect on the Law' (18) *Cambridge Law Journal* 214; see also the classic account of McCormick CT (1935) *Handbook on the Law of Damages* West Publishing Co. 34 and following

<sup>80</sup> A distinction that has also appealed to the pragmatism of Scandinavian jurists, who distinguish between real/abstract and calculable damage.

<sup>81</sup> See above the analysis of the French concepts of '*dommage*' and '*prejudice*'.

<sup>82</sup> Le Roy, M; Le Roy, J-D and Bibal, F (2013) *L'Evaluation du Préjudice Corporel* 19th ed. Paris, LexisNexis, 120, no 123; see also below.

Even if the task is restricted to only the direct victim's personal harm, excluding third party harm, the comparative study of European jurisdictions reveals the spectrum of ontology of harm to be wide. For a variety of reasons, which we cannot examine here, so-called advanced, developed societies have experienced an increase of personal injury litigation that has been fuelled by "creative" ontology linked to scientific evidence, led by lawyers' self-interest and the growing sense of entitlement in the community. There is a debate in all jurisdictions (in this country led by, among others, the Law Commission), on the extent to which views of society should influence personal injury ontology and the level of awards, either through juries (as in the US), or Compensation Advisory Boards, or so-called legislative tariffs.<sup>83</sup> Another factor that has contributed to an ever-expanding ontology and, also, nomenclature, is the need to allocate losses between the wrongdoer, the victim and third party-payers, public or private, a need that has become urgent in the light of the rising social and economic cost of accidents, against the background of huge sovereign debts and austerity measures. There is an obvious interdependence of ontology and assessment regimes and methods, and almost everywhere, but particularly so in countries with large social security regimes, the impact of social security benefits available for injury or disability on nomenclatures is significant.

For these reasons and for the additional simple reason that human pleasure and pain, as well as human empathy for the suffering of others, express themselves in an infinite variety of ways,<sup>84</sup> ontology and nomenclature show in every jurisdiction profiles of overlapping or intersecting categories (e.g. 'physical', 'material', 'economic', 'pecuniary' harm or loss and (negative) definitions *a contrario*, (e. g. 'non-economic', non-pecuniary', 'non-material', non-physical). The anthropological model in use almost everywhere seems to be Cartesian: the mind is distinct from the body and an almost bodiless, after the accident, victim is often entitled to significant amounts of compensation,<sup>85</sup> through inventive methods that will be examined in a following section. Furthermore, although lack of logic and plenty of experience is said to be the privilege of the common law,<sup>86</sup> the comparative study reveals everywhere a challenging relationship between ontology and nomenclature, on the one hand, and rational-analytical precision, on the other. Examples: compensation for pain and suffering can overlap with compensation for loss of earnings, as, for example, emotional distress can cause loss of gainful activity. Loss of amenity or faculty can overlap in certain jurisdictions with a separately recoverable loss of enjoyment of life.<sup>87</sup>

<sup>83</sup> All three have been rejected by the English Law Commission: The Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* Law Com No 257 no. 3.111-3.188, available at <<http://www.open.gov.uk/lawcomm/>>

<sup>84</sup> 'The various forms of mental sufferings are as numberless as the capacities of the human soul for torturing itself': McCormick, CT (1933) *Handbook on the Law of Damages* at 316.

<sup>85</sup> Sometimes amounting to windfalls for those third parties close to them (relatives), as cynics never stop to point out.

<sup>86</sup> As a famous quote says the life of the law has not been logic; it has been experience', Oliver Wendell Holmes Jr., (1881) *The Common Law* 5.

<sup>87</sup> e.g. the French *préjudice d'agrément* (loss of enjoyment)



## Is there a *summa divisio* of personal injury loss in European jurisdictions?

In English common law a clear *summa divisio* has emerged between pecuniary and non-pecuniary loss. In the Civil law tradition this division corresponds to a *summa divisio* between the loss to the victim's patrimony and extra-patrimonial loss, seen as a loss of a purely personal, not financial, nature. For all intents and purposes non-pecuniary and extra-patrimonial loss are equivalent terms, and will not, therefore, be further juxtaposed in this study, and will be used interchangeably. But the ontological *summa divisio* has not always been that between pecuniary and non-pecuniary or extra-patrimonial harm in all other European legal traditions. It appears to have been the established *summa divisio* in English and French law for some time,<sup>88</sup> but not everywhere else. There is a strong Germanic tradition of a *summa divisio* between material and non-material loss, concepts explained above, non-material loss presently defined by a leading German scholar as 'such damage or injury as cannot, strictly speaking, be measured in monetary terms'.<sup>89</sup> This definition is broader than the classic Mommsenian definition of *immaterieller Schaden* already mentioned, and shows that non-material harm is understood by and large in Germanic systems as non-pecuniary harm. Whether or not, as a matter of analytical precision, the one term is preferable to the other is an interesting question: purists might argue that there is a fundamental definitional illogicality in the pecuniary compensation of non-pecuniary harm and that the German term might be preferable, especially if the pecuniary award for non-material harm can be seen as 'satisfaction' rather than,<sup>90</sup> or in addition to,<sup>91</sup> compensation. However, equally strong has been in Germany a tradition going back to Jehring who spoke of the importance of '*nicht-oekonomische Interessen*' ("non-economic interests").<sup>92</sup> Additionally, leading scholars in Austria have also put forward the important view that immaterial interests are in principle more important than material interests,<sup>93</sup> and even in the case of a violation of a material interest what is really compensated is

<sup>88</sup> Although almost everywhere in Europe until the beginning of the 20th century, non-pecuniary harm was hardly recognised: see the very interesting comparative study of Hidalgo, CD (1998) 'La Indemnización por Dano Moral, Modernas Tendencias en el Derecho Civil Chileno y Comparado' (The Compensation of Moral Injury, Modern tendencies in Chilean and Comparative law) *Revista Chilena de Derecho* vol. 25 no 1 2755. '*Battre monnaie de ses larmes est une étrange alchimie*' (beating with money one's tears is a strange alchemy): words of a French author, Morange, in Dalloz 1962 *Chronique* 15, summarizing the old moral objections to the recovery of non-pecuniary loss.

<sup>89</sup> Hans Stoll, H, supra, note 9, p. 17. Older German law and doctrine also used the Latin term *solatium* to denote damages for pain and suffering (see Zimmermann, R (1990) *The Law of Obligations* Oxford 1093), a term still used today in the same sense in Scots and South African (Roman Dutch) law: Reid, K and Zimmermann, R (eds) (2000) *A History of Private Law in Scotland* Vol. 2 Oxford University Press 529. The term *solatium* is still often used by lawyers in England and Wales today to denote damages for pain and suffering, when advising clients.

<sup>90</sup> As in Swiss doctrine.

<sup>91</sup> As in German doctrine.

<sup>92</sup> Von Jehring, R (1880) 'Ein Rechtsgutachten betreffend die Gaubahn' (A legal opinion concerning the local train) *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* Bd. 18, 59.

<sup>93</sup> Karner, E and Koziol, H (2001) 'Austria, Non-pecuniary loss under Austrian law' in W. V. Horton Rogers (ed.) *Damages for Non-Pecuniary Loss in a Comparative Perspective, Tort and Insurance Law* vol. 2 Vienna/New York Springer, 6. See also Strasser, R (1984) *Der Immaterieller Schaden im oesterreichischen Recht* (Non-material loss in Austrian law) 56 following, arguing that the compensation of pecuniary loss is itself aimed at protecting from indirect violations of the right of personality, and that the compensation of non-pecuniary loss from direct violations of this right, and should, *a fortiori*, be fully accepted. E. Karner and H. Koziol also point out that as quite often the victim's loss of wages is paid by the employer and medical costs by medical insurance, damages for non-pecuniary loss are the only compensation that the victim can get directly from the tortfeasor: *ibid* 7.

the personal loss of the material interest's owner. The authoritative Austrian author Franz Bydlinski draws an argument *a fortiori* from para. 1331 of the Austrian Civil Code (ABGB),<sup>94</sup> which allows the compensation of pecuniary loss resulting from damage to property, interpreting the protection of property as an indirect protection of personality rights. Is personal injury not a more important loss in that sense than property damage? In Germany, the new (after the 2002 reform) para. 253 BGB uses both the term non-material loss (in its title) and the term 'non-patrimonial' loss (in the text), presumably as meaning the same thing.<sup>95</sup> In a pioneering comparative study of Tort remedies, the classical German scholar Hans Stoll defines 'non-patrimonial loss' ('*Nichtvermögenschaden*'), as injury to a personal interest accompanied by a value loss for which there is no objective measure. Stoll criticises the use of the term 'non-material loss as misconceived and unable to embrace all forms of non-pecuniary harm.'<sup>96</sup> Injury types of this kind that are compensated indicate which personal interests deserve protection in a legal order's values, and this protection is closely linked to the protection of personality and develops with the extension of such protection.

Under German influence, the Italian Civil code in article 2059 also speaks of non-patrimonial loss, but doctrine and case law also use the term moral damage (*danno morale*) when referring to the loss addressed by article 2059. Important case law developments in Italy have introduced new terminology, *danno alla salute* (injury to health), or *dano biologico* (biological injury), comprising most of the heads of damage of non-pecuniary loss that are not included in the concept of *danno morale* in the sense of art 2059, as well the controversial new term *danno esistenziale* (existential injury). Similarly, Portuguese law uses the term '*Dano corporal-funcional-biologico*' (somatic and biological<sup>97</sup> devaluation of the person), as a non-pecuniary loss of *tertium genus*, next to the more common '*Danos non patrimoniais*' (non-patrimonial losses).

While French law still employs rather fondly the original generic term *dommage moral*, it now possesses the most detailed and advanced nomenclature, which is analysed in detail below. *Dommage morale* remains the preferred general term for non-pecuniary loss also in Belgian law,<sup>98</sup> despite its otherwise sophisticated distinction between separate heads, which compares very favourably with the latest developments of French nomenclature. The Dutch Civil Code adopts the simple terminology 'harm to the person in any other

<sup>94</sup> 'Wird jemand an seinem Vermögen vorzüglich oder durch auffallende Sorglosigkeit eines Andern beschädiget; so ist er auch den entgangenen Gewinn, und wenn der Schade vermittelt einer durch ein Strafgesetz verbotenen Handlung, oder aus Muthwillen und Schadenfreude verursacht ist, den Werth der besondern Vorliebe zu fordern berechtiget' ('If someone suffers property loss because of the malice or gross negligence of another, he has an action for compensation of the loss of profit, and, if the loss occurs through a violation of a criminal statute, or caused by wantonness or malicious delight, of the value of any special preference;').

<sup>95</sup> The older traditional term *Schmerzensgeld*, which was still used in the title, but not the text, of the now deleted old para. 847 BGB, has now been completely abandoned by the new para. 253, but is still in use in the Austrian Civil Code, art. 1325 ABGB. Compensation of physical pain was a very old tradition of customary German law long before the emergence of *dommage moral* in France and elsewhere: Slizyk, A (2013) *Beck'sche Schmerzensgeld-Tabelle* 9th ed. Beck 2 following; for a historical commentary on para. 253 see Schmoeckel, M, Rueckert, J & Zimmermann, R (eds) (2007) *Historisch-kritischer Kommentar zum BGB, Band II Schuldrecht: Allgemeiner Teil*, Mohr paras 241-432.

<sup>96</sup> Stoll, H (1993) *Haftungsfolgen* supra note 48, 342.

<sup>97</sup> Including biological harm of a psychological nature (*Danos biologicos de natureza psiquica*)

<sup>98</sup> Cousy, H and Droshout, D (2001) 'Belgium, Non-Pecuniary Loss in Belgian law' in Horton Rogers WV (ed.) *Damages for Non-Pecuniary Loss in a Comparative Perspective, Tort and Insurance Law* vol. 2 Vienna/New York Springer 30 following

(i.e. than pecuniary) way-*'ander nadeel'*.<sup>99</sup> The Spanish Supreme Court has been using interchangeably the terms *daño moral* or *daño no patrimonial* or *daño extrapatrimonial*, and in the case of personal injury authoritative authors in Spain have proposed, under the influence of the Italian doctrine of *danno biologico*, a third category, *dano corporal* (bodily injury). *Dano corporal* is the impairment of health or bodily or mental integrity of a human being, independent from the pecuniary and non-pecuniary loss that it produces.<sup>100</sup>

### **Summa divisio of non-pecuniary loss**

Another basic distinction recurrent in different jurisdictions, this time *within* the general head of non-pecuniary loss, is that between the injury itself followed by harm caused by the infliction of pain (pain & suffering) and harm caused by the deprivation of pleasure (loss of amenities), a distinction long established in English law.<sup>101</sup> French law, despite its long commitment to the compensation of pain and suffering, has no directly corresponding pair of basic concepts in the now established new nomenclature Dintilhac (on which see details *infra*), which is without doubt the most advanced at the present time in Europe. This is mainly due to the importance given in the French nomenclature to the event of the medical stabilization (in French *consolidation*) of the victim's injuries (when the victim's condition stabilizes for the future), something unique in terms of Comparative law. Pre- and after-stabilisation non-pecuniary loss is, in fact, a rather original and quite unique *summa divisio* in contemporary French law. Pre-stabilisation losses are treated as temporary, and after-stabilisation losses, whether new or remaining losses, are treated as permanent. This distinction also determines the prescription of claims (starting date will normally be the date of such '*consolidation*', which is determined by the medical experts), besides promoting clarity and precision as to what is taken into account in the non-pecuniary loss award. This is a distinction not to be confused with that of pre-trial and post-trial losses (known in several jurisdictions, including English law), or liquidated and non-liquidated losses. But there are bound to be cases in which the matter will need to be settled at trial, although if serious injuries are far from stabilised at the time of trial the court may award reviewable periodical payments for the future, or provisional damages (as indeed is now possible also in England<sup>102</sup> and also in Germany). Stabilization of injuries is, of course,

<sup>99</sup> Article 6:95 BW (*Burgerlijk Wetboek*). An excellent account of Dutch law is Wissink, MH and van Boom, WH (2001) 'The Netherlands, Non-Pecuniary Loss under Dutch Law', in Horton Rogers, WV (ed.) *Damages for Non-Pecuniary Loss in a Comparative Perspective, Tort and Insurance Law* vol. 2 Springer 155 following

<sup>100</sup> De Angel Yaguez, R (1993) *Tratado de responsabilidad civil* (Treatise of Civil Liability) Civitas 698; Vicente Domingo, E (1994) *Los danos corporales : tipologia y valoracion* (corporal injuries: typology and evaluation), Dikynson, Barcelona 323. In addition, Spanish courts recognise *pretium doloris* as a separate head from *daño extrapatrimonial*.

<sup>101</sup> See e.g. *West & Son Ltd v Shepherd* [1964] AC 326

<sup>102</sup> Provisional damages have been introduced in English law by section 32A of the *Supreme Court Act* 1981, inserted by section 6(1) of the *Administration of Justice Act* 1982. As Lord Hoffmann said in *Rothwell*, explaining why this statute was no help to the plaintiffs in that case, 'This provision allows a claimant to elect for an award of provisional damages for the injury which he has already suffered and enables him to avoid having to quantify his damages for the chance of developing further injury in the future; a calculation which is likely to result in his being either undercompensated (if the injury occurs) or overcompensated (if it does not)... But the statute does not support the aggregation theory. On the contrary, its insistence that provisional damages can be obtained only when there is a chance that a serious disease will develop "as a result of the act or omission which gave rise to the cause of action" makes it clear that it applies only where the claimant has a cause of action.': [2004] UKHL 41 at no. 2 *per* Lord Hoffmann. It is obvious that this was not a case, in his Lordship's opinion, of

not always, if not only rarely, medically certain, and victims may need, and are indeed allowed, to return to the court if things become unexpectedly worse after trial with a new action, based on the new symptoms. But injurers will not be allowed to do the same if the condition of the victim unexpectedly improves, as they are considered as bound by the judgment under the principle of *res judicata* (*autorité de la chose jugée*),<sup>103</sup> and must protect themselves against this eventuality, if it is more likely than not, by insisting on periodical payments at trial rather than accepting to pay a lump sum, as periodical payments will be reviewed and can be modified in the future, if necessary.

As a result of the distinction in France between pre- and after-stabilisation non-pecuniary losses, in the nomenclature Dintilhac the head of loss known as *deficit fonctionnel permanent* (permanent functional deficit) includes *souffrances* (pain & suffering) and *incapacité physique* (loss of amenities), as well as the loss of quality of life; whereas the head of loss *deficit fonctionnel temporaire* (temporary, i.e. before consolidation, bodily functional deficit), only includes temporary physical incapacity and temporary loss of quality of life (corresponding to temporary loss of amenities), and there is a distinct head of (temporary) *souffrances endourees* (corresponding to temporary pain and suffering). Permanent pain and suffering after stabilisation of the victim's injuries is presumably seen as directly affecting, and possible to include under, the (permanent) loss of quality of life. An important role is played in this connection in French law by the concept of *prejudice d'agrément*: this includes special hobbies and other pleasures enjoyed by the victim and adds a pragmatic element to the more normative nature of loss of amenity.

In German law too a clear dividing line between pain and suffering and loss of amenities does not exist, although some judicial decisions and German authors (usually versed in Comparative law) speak of the loss of “*die Annehmlichkeiten des Lebens*” (“amenities of life”).<sup>104</sup> Other jurisdictions work with different divisions of non-pecuniary losses: for example, in Italian law the *danno biologico* (biological harm) or *danno alla salute* (harm to health) includes pain and suffering and the loss caused by incapacity, whereas, in a relatively recent decision of the Italian Supreme Court, the term *pecunia lesae dignitatis* was used to refer to the compensation of the loss of dignity of a human person, instead of the traditional *pretium doloris*.

The difficulty of finding common ground of basic categorisation of non-pecuniary harm types is, naturally, compounded by lack of linguistic precision within jurisdictions. An example is again European Tort law as applied by the European Court of Justice (ECJ). In its *Grifoni* judgment<sup>105</sup> the Court provided the following basic categorization: in English ‘compensation for physical and non-material loss’, in French, ‘*indemnisation de son prejudice tant biologique que moral*’, and in German, ‘*Ersatz sowohl seines koerperlichen als seines seelischen Schadens*’. These can, of course, be valid as European Tort law categories, if the ECJ wishes

an injury that has not yet fully developed, but it was a case of no injury at all.

<sup>103</sup> See Gout, O (2011) ‘Le futur du dommage: aggravation et amelioration’ (The future of injury : aggravation and improvement) in *Gazette du Palais* 8-9 avril 2011 nos 98 and 99, 21.

<sup>104</sup> Stoll, H (1993), *Haftungsfolgen* supra note 48, 356.

<sup>105</sup> *Alfredo Grifoni v. European Atomic Energy Community* (no 1) [1990] ECR I-1203 Case C-308/87; (no 2) [1994] ECR I-341; see for a general commentary on this and other related cases Oliphant, K (2009) ‘European Tort Law: A Primer for the Common Lawyer’, in O’Cinneide, C Letsas, G Christopher Campbell-Ho, C (eds.) 62 *Current Legal Problems*, Oxford University Press 440 at 449; also Koziol, H & Schulze, R (eds.) (2008) *Tort Law of the European Community*, Wien, Springer; for Tort law in the case law of the ECHR see Fenyves, A, Karner, E, Koziol, H, Steiner, E (eds) (2011) *Tort Law in the Jurisprudence of the European Court of Human Rights* Walter de Gruyter.

them to be so, without necessarily being adopted by national liability regimes, given the fact that, perhaps fortunately, compensation for personal injury has not yet been wholly harmonized in the EU. It remains, however, remarkable that the Court refused to attempt a convergence of existing, and laboriously developed in all jurisdiction over lengthy periods of time conceptual bases of the *summa divisio*, and decided to introduce concepts new (such as ‘*seelischer Schaden*’) or old and controversial (such as ‘non-material loss’) in the legal terminology of the respective traditions. A reason for that may be, although this is doubtful, that the Court sees a need to develop a new, original nomenclature for European Tort law, but the language is loose and out-dated and the translation confusing.

## TOPOGRAPHY AND ARCHITECTURE

The German Civil Code (*Bürgerliches Gesetzbuch-BGB*) towers over the European landscape. It pays particular attention to the law of damages within a structure containing general principles applicable to all claims for damages, regardless of source or degree of liability in paras. 249-255. The law of damages is common to all sources of liability, but the availability of the remedy is decided according to the individual rules of each source of liability, for example, in the case of personal injury, by the new (post-2002) para. 253 II, and paras. 823 *et seq.*, on the law of torts (*unerlaubte Handlungen*). Apart from the principle of full reparation (*Totalreparation*), para. 249 also introduces the principle of *Naturalrestitution*, reparation *in naturam*, which as a remedy takes priority over damages.<sup>106</sup> Significantly, with regard to non-pecuniary losses, whereas no restriction applies to *Naturalrestitution*, when it comes to monetary compensation, described as ‘equitable’<sup>107</sup>, such compensation is only possible if there is an obligation to offer compensation for an injury to the body, health, freedom or sexual autonomy of a physical person<sup>108</sup> (new para. 253, part 2)<sup>109</sup>. Such compensation has traditionally been called, since the 17<sup>th</sup> century, *Schmerzensgeld* (“money for pain”).<sup>110</sup> The damages awarded as *Schmerzensgeld* have, primarily, a compensatory function (*Ausgleichsfunktion*), but satisfaction (*Genugtuung*) is also accepted as a secondary function, especially when the wrongdoer’s conduct is particularly reprehensible.<sup>111</sup> Significantly, the reform of the German Law of Obligations in 2002 extended the right of compensation for non-pecuniary harm to cases of injury caused without fault, i.e. strict liability. This has led to criticisms by commentators, who point out that because

<sup>106</sup> In contrast with the classical Roman law principle of *omnis condemnatio pecuniaria est* (all condemnations are pecuniary) (Dig 16)

<sup>107</sup> By its nature, non-pecuniary harm is not considered able to be fully assessed and its assessment must be left to the fair and equitable judgment of the court: more below.

<sup>108</sup> Para 823 I BGB imposes a general obligation of compensation in cases of injury caused by an unlawful and culpable invasion of these interests.

<sup>109</sup> For a recent dogmatic analysis see Claudia Schubert (2013) *Die Wiedergutmachung immaterieller Schäden im Privatrecht* (The Restoration of non-material harm in private law) Mohr.

<sup>110</sup> In Latin known as *pecunia doloris* or, in French, *prix de la douleur*: see for a historical comparison the contributions in Durant, B, Poirier J and Royer J-R (eds) (1997) *La douleur et le droit* (The pain and the law). As already mentioned, this term has been dropped from the new version of para. 253 after the reform of 2002.

<sup>111</sup> See BGHZ (*Entscheidungen des Bundesgerichtshofs in Zivilsachen*) (Decisions of the Federal Supreme Court in Civil law matters) 35, 363; BVerfGE (*Entscheidungen des Bundesverfassungsgerichts*) (Decisions of the Federal Constitutional Court) 34, 269; art. 45 of the Swiss Code of Obligations demands that monetary satisfaction is justified by the particular severity of the injury *and* fault of the tortfeasor, whereas the German Supreme Court treats these two conditions as alternatives: see Deutsch and Ahrens, H.-J. , *supra* note 37, 226.

*Genugtuung* implies a punitive function for *Schmerzensgeld*, something which is generally alien to the tradition of German Civil law, it should be disregarded altogether when there is liability without fault (i. e. no negligence or intention), and only be taken into account in cases of intentional harm or gross negligence.<sup>112</sup> This seems now to be accepted by the courts.<sup>113</sup> Nevertheless, the Regional Court of Berlin (*Landsgericht Berlin*) in a judgment in 2006 awarded € 3000 to a boy victim of an attack by the defendant's dogs for stress caused by the behaviour of the defendant's insurance company trying to settle by repeatedly offering disproportionately low amounts in settlement.<sup>114</sup> The defendant's liability for the injury caused by the dogs was strict, not based on negligence, but this did not shield him from liability for a non-pecuniary harm caused by the unacceptable behaviour of his insurers. Such unconscionable behaviour of the tortfeasor's insurer is generally considered by German courts as being against the principle of good morals (*gutte Sitten*), a cornerstone in the architecture of the German Civil Code, and an aggravating factor increasing the tortfeasor's liability.<sup>115</sup>

Restitution in kind is also the principal remedy under the Austrian General Civil Code (*ABGB*), para. 1323, which, however, does not distinguish between pecuniary and non-pecuniary harm, defining damage as any harm to the property, rights or person of another.<sup>116</sup> Non-pecuniary harm is compensated with damages for pain and suffering and for the loss of enjoyment of life caused by the injury. Unlike in Germany, in Austria such damages have purely a compensatory function and there is no additional function of satisfaction.<sup>117</sup> This approach necessitates a possibility of some 'objectification'<sup>118</sup> of the pain or suffering that must be linked, therefore, to physical injury to health. Thus the Austrian Supreme Court (*Oberster Gerichtshof*) refused to award damages for pain and suffering to the wife of a man that left her and their marital home to live with another woman, causing her psychological disturbances of a pathological nature as a result, including insomnia, headaches, depression and psychoses.<sup>119</sup> The court held that appropriate remedies for the breakdown of a marital relationship are those of marriage and divorce law, and mere infidelity, or 'loss of love', was not sufficient to support a tort claim unless there was also an intention to injure the personality of the spouse (or, presumably, some physical harm caused to her in the process).

By contrast, the Swiss Code of Obligations (*SCO*), closely followed by the Greek Civil Code in matters of extra contractual liability,<sup>120</sup> gives priority to the remedy of damages,

<sup>112</sup> Schiemann, G (2005) in *Staudinger Kommentar zum Buergerlichen Gesetzbuch* para 253 no 30; Palandt, O (2012) *Buergerliches Gesetzbuch* 71<sup>st</sup> ed. para. 253 no 11.

<sup>113</sup> See *Oberlandsgericht (OLG)* (Court of Appeal) *Saarbruecken* *NJW* 2008, 1166, 1168.

<sup>114</sup> *Landsgericht (LG) Berlin* 6 December 2006 *NJW* 2006, 702.

<sup>115</sup> The victim does not have a direct claim against the insurer for the stress caused by the insurer's behavior, but this behavior is taken into account in calculating the tortfeasor's overall liability for non-pecuniary loss, presumably on the basis that it is the insurer who finally pays; nevertheless, this practice of German courts may raise interesting questions of fault and imputation, as, obviously, tortfeasors have no control over the behavior of their insurer, and may be negatively affected in seeking future cover by the amount of liability they incur.

<sup>116</sup> "Schade heißt jeder Nachtheil, welcher jemanden an Vermögen, Rechten oder seiner Person zugefügt worden ist" ("Damage means any detriment that is inflicted on someone's property, rights or person").

<sup>117</sup> Karner E & Koziol, H (2003) 'Der Ersatz ideellen Schadens im oesterreichischen Recht und seine Reform' (*The Compensation of ideal loss in Austrian law and its reform*), *Gutachten fuer den 15 OJT II/1 24* following

<sup>118</sup> *Ibid.*, 23 following

<sup>119</sup> *Oberster Gerichtshof* 20 February 2003, 6 *Ob* 124/0, *SZ* 2003/16

<sup>120</sup> Article 914 of the Greek Civil Code

allowing exceptionally restitution in kind if possible,<sup>121</sup> but, interestingly, the SCO is more inflexible in not including non-pecuniary harm in the definition of actionable damage in art. 41 part 1, where it sharply distinguishes between pecuniary and non-pecuniary losses. Instead, non-pecuniary harm arising from a personal injury is dealt with distinctly, as the object of special liability in the SCO under art. 41, which sounds, in tone as well as in substance, more austere than para. 253 part 2 of the German BGB. Under Swiss law the judge can (but is not obliged), to grant equitable compensation as “moral reparation” in the light of the circumstances of each particular case.<sup>122</sup> The emphasis on moral reparation (satisfaction) rather than compensation for non-pecuniary harm is a hallmark of the Swiss tradition followed, again, by the Greek Civil Code. By contrast, Swiss law also belongs to a group of European jurisdictions that do not exclude recovery of non-pecuniary harm suffered by close relatives of victims of personal injury, and do not limit such recovery to cases of fatal injuries.<sup>123</sup> It recognises claims of indirect victims (relatives), not only in the case of wrongful death<sup>124</sup> but also in cases of grave personal injury of the primary victim, if, according to article 49 of the Swiss Code of Obligations, ‘inherent rights are injured’.<sup>125</sup> The Swiss Federal Tribunal (*Tribunal Federal*) has held, quite sensibly, that sometimes a grave injury may cause more intense suffering to close relatives than death.<sup>126</sup> Importantly, under a revised version of article 49 of the Swiss Code of Obligations, it is the gravity of the claimant’s injury, not the degree of the tortfeasor’s fault, which is the decisive factor.

German, Austrian, Swiss, and Greek law also deny recovery when pain and suffering is the injury, and is not the result of a bodily injury<sup>127</sup> or harm to personality or reputation or any other protected interest. Interesting in this respect is the architecture of the Dutch Civil Code, one of the most recent and widely acclaimed European codes. Article 6: 106, para. 1 of the Dutch Civil Code (*Burgerlijk Wetboek-BW*) allows the compensation of non-pecuniary harm in cases where there is a violation of a person only if it was the tortfeasor’s *intention* to cause such harm, and not a general intention to injure or mere negligence, a provision which severely restricts the scope of compensation. However, if that intention is present, non-pecuniary harm can be compensated even in the absence of a medically

<sup>121</sup> Art. 41 section 1: “*Celui qui cause, d’une manière illicite, un dommage à autrui, soit intentionnellement, soit par négligence ou imprudence, est tenu de le réparer*” (« He who causes, in an illicit manner, a damage to another, either intentionally, or negligently, is held liable to compensate for it »).

<sup>122</sup> Art. 47: “*Le juge peut, en tenant compte de circonstances particulières, allouer à la victime de lésions corporelles ou, en cas de mort d’homme, à la famille une indemnité équitable à titre de réparation morale*” (« The judge may, after taking into account the particular circumstances, allow an equitable compensation to the victim of personal injuries, or, in the case of death, to his family, under the head of moral reparation »).

<sup>123</sup> Other members of this group are Greek, French and Portuguese law below, and also in Lithuania by the Supreme Court, under the new *Lithuanian Civil Code* of 2000. In Sweden, the Swedish Supreme Court allowed recovery of a mother’s pain and suffering when her son was left vacillating between life and death after a fight, despite having first accepted that the *Swedish Tort Liability Act* (ch. 5 section 2) only provides for such recovery when the direct victim is dead, on the basis that this was an exceptional case in which the mother’s loss could be seen as a ‘typical and expected consequence’, of the intentional exercise of violence by the tortfeasor.

<sup>124</sup> In such a case all modern jurisdictions allow claims of close relatives-dependents of the deceased, but not all agree on what heads of such harm are recoverable by these third parties. Wrongful death damages are outside the scope of this paper.

<sup>125</sup> See also in Greece, where the law of extra-contractual liability is based on the architecture of the Swiss Code of Obligations, the decision of the Athens Court of Appeal 6055/1989, *Archeion Nomologias* 41, 776, which allowed the recovery of the wife’s pain and suffering caused by her husband’s car accident, which rendered him impotent.

<sup>126</sup> *Tribunal Federal Suisse* 22 April 1986 ATF 112 II 226.

<sup>127</sup> For the House of Lords decision in the English case of *Rothwell* see *supra* no. 3.

recognised physical or psychological illness. In a decision of the Dutch Supreme Court (*Hoge Raad*) of 2004,<sup>128</sup> the court held that the police who by failing to protect local residents from rioters caused them fear and severe insecurity feelings were liable to pay damages for this non-pecuniary harm. This was because there was a violation of their person, in the sense of article 6: 106, para. 1 *BW*.

Crossing over to French law and the Romanistic tradition in the Civil law topography, the irresistibly simple and clear architecture of the French Civil Code is built on the principle that all damage falls to be compensated, irrespective of its nature, on an even keel, if the general conditions of civil liability are present,<sup>129</sup> whether it is the result of a fault or, in the case of damage caused by a thing, without fault.<sup>130</sup> In his pioneering study '*L'intérêt moral dans les obligations légales*' ("The Moral Interest in Legal Obligation"), published in 1911, Pierre de Mallon distinguishes between what he calls '*intérêt économique*' ("economic interest") and '*intérêt moral*' ("moral interest") and finds no difficulty in accepting that they both deserve equal protection. Both are defined on the basis of the satisfaction of a need or the experience of a pleasure, in the case of the former through the intermediary of economic means, and in the case of the latter without such an intermediary, only through the free exercise of human faculties.<sup>131</sup> In their ground-breaking decision of 1833,<sup>132</sup> the united chambers of the *Cour de Cassation* affirmed the recovery of non-pecuniary harm as *dommage moral* declaring that the difficulty in its assessment should not deny the principle of its recovery on an equal footing as pecuniary harm. In 1923 the French Code of Criminal Procedure expressly refers to *dommage moral* as included in a crime victim's right of *action*

<sup>128</sup> *Gemeente Groningen v X, Hoge Raad* (Dutch Supreme Court) 9 July 2004 (2005) *NJ* 391

<sup>129</sup> This general clause applies also when damage is caused by the *puissance publique*, (public authority), which in France is subject to the separate jurisdiction of Administrative courts, headed by the *Conseil d'Etat* (Council of State); but, although the basic architecture is common, the detailed nomenclature adopted by the civil courts has not been so far adopted by the *Conseil d'Etat* in the administrative sector of civil liability: see details below.

<sup>130</sup> Article 1382 envisages intentional harm, article 1383 introducing liability for negligence or imprudence; article 1384 is interpreted as providing for strict liability of the keeper (guardian) of a thing that causes damage.

<sup>131</sup> *Intérêt économique* : La satisfaction d'un besoin, la réalisation d'une sensation agréable par l'intermédiaire d'un moyen économique, c'est-à-dire par l'usage des biens. ..tout ce qui est bon...choses matérielles ou immatérielles qui sont susceptibles de présenter une valeur d'échange ; (Economic interest :the satisfaction of a need, the experience of a pleasant sensation through the intermediary of economic means, that is to say through use of things...everything that is good...material or immaterial things that are susceptible to be presented as having an exchange value) *Intérêt moral* : la réalisation d'une sensation agréable par le seul jeu des facultés humaines, s'exerçant librement et à l'occasion des personnes ou des choses, mais sans l'intermédiaire de moyens économiques, indépendamment de l'usage des biens' (Moral interest : the experience of a pleasant sensation through the sole function of human faculties, experienced freely and in relation to persons or things, but without the intermediary of economic means, independently of the use of things): De Mallon, P (1911) *L'intérêt moral dans les Obligations Légales* (The moral interest in Legal Obligations) Caen 16.

<sup>132</sup> *Cour de Cassation, chambres réunies* (Cassation Court, United Chambers), 15.06.1833, *Sirey, Jurisprudence* (1833), 458, where the *Procureur général* (General persecutor) Dupin strongly supported an action for non-pecuniary harm saying : 'celui qui agit en pareille matière, selon la belle expression romaine plaide la cause de la douleur : *causam agit doloris*' (« He who acts in such a matter, according to the nice Roman expression pleads the cause of pain : brings an action for grief »). The latin expression *causa doloris* is common in Latin poetry

*'neu matri miserae tanti sim causa doloris,  
quae te sola, puer, multis e matribus ausa  
persequitur, magni nec moenia curat Acestae.'*  
("And don't let me be a cause of grief to your poor mother,  
my boy, who alone among many mothers dared to follow  
you, without thought of staying in great Acestes's city"):  
Vergil Aeneid IX 216



*civile* (civil action) in the Criminal court.<sup>133</sup> And the compensation of non-pecuniary harm (pain and suffering) of an indirect victim-close relative, when the primary victim is injured, was put beyond any doubt in a decision of the *Cour de Cassation* in 1977, which allowed the recovery of damages for such harm by the son of a man crippled in a car accident, deprived of his father's counselling and affection.<sup>134</sup> Such third party non-pecuniary harm only needs to satisfy the standard requirements of being direct,<sup>135</sup> certain and personal, requirements common to the recovery of all kinds of harm.

In Italy the rigid architecture of the Italian Civil and Criminal Codes led to a very original development of a new nomenclature by the courts, with the support of doctrinal writers. Before this development took place, the combination of articles 2059 *Codice Civile* (Civil Code) and 136 *Codice Penale* (criminal Code) resulted in the compensation of the victim's non-pecuniary loss ('non-patrimonial', *danno non patrimoniale*) only when the injurer's action was also a crime. In a ground-breaking judgment in 1986 the Italian Constitutional Court used article 32 of the Italian Constitution which protects health as a fundamental right<sup>136</sup> to rule that an injury to health (*danno alla salute*) was not a non-patrimonial loss in the sense of article 2059 and did not fall under the restrictions of that article, but was harm to be generally compensated in all cases under the conditions of the general clause of article 2043,<sup>137</sup> on an equal footing with patrimonial loss. The Constitutional Court went, indeed, even further in holding that the injury to health was always the 'first, essential, priority compensation that conditions every other one'.<sup>138</sup> In turn, the Italian Supreme Court (*Corte di Cassazione*) adopted a new terminology, the term *danno biologico* (biological harm) in a consistent jurisprudence, and held that all non-pecuniary harm, biological and 'moral', as well as pecuniary harm consequential to the personal injury, must be compensated by a single award, based on an equitable evaluation by the judge, without any further distinction between different heads of damage.<sup>139</sup> *Danno biologico* (biological harm) or *danno alla salute* (harm to health),<sup>140</sup> represents a 'reification' of all harm resulting from personal injury, and

<sup>133</sup> *Code de Procédure pénale* (Code of Criminal Procedure) art. 3 para. 2

<sup>134</sup> *Cour de Cassation, 2<sup>e</sup> Chambre Civile* (Second Civil Chamber) 23 May 1977, *Revue Trimestrielle de Droit Civil* 1977, 769, observations G. Durry. In Belgium courts have compensated the *pretium affectionis* of the owner of a pet, killed or injured, so far as its existence is clearly established, although awards are very modest: see *Cour d'Appel Mons* (Court of Appeal of Mons) 24 March 1997, *Revue Générale des Assurances et des Responsabilités* 1998, 12996. In this connection, a distinction is made between *pretium affectionis* for the loss or damage to inanimate things and such loss or injury to an animal. Details of Belgian law on this issue in Estienne, N (2002) *L'évaluation judiciaire des indemnités: dommages aux choses*, in Fagnart, J-L (editor) *Responsabilité, Traite théorique et pratique* Kluwer, 27.

<sup>135</sup> An 'indirect' victim can suffer 'direct' loss: the first is a factual; the second is a normative concept.

<sup>136</sup> '*La Repubblica tutela la salute come fondamentale diritto dell'individuo e interesse della collettività, e garantisce cure gratuite agli indigenti..*' ("The Republic protects health as a fundamental right of the individual and as a collective interest, and guarantees free care for those without means").

<sup>137</sup> '*Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.*' ("Any intentional or negligent act, which causes to others unfair harm, obliges the person who committed it to compensate the loss.") On the architecture of liability for non-pecuniary loss in Italian and other compared laws see below, next section.

<sup>138</sup> *Corte Costituzionale* (Constitutional Court) 14 July 1986 no. 184 (1986) *Foro Italiano I* 2053 commentary by G. Ponzanelli.

<sup>139</sup> See, *Corte di Cassazione* 31 May 2003 no 8827, *Giurisprudenza Italiana* 2003, 29 with a note by M. Suppa; but a more recent decision of the Corte di Cassazione seems now to recognize that non-pecuniary harm could be divided into pain and suffering and loss of quality of life: see more details below.

<sup>140</sup> The extensive case law linked to the development of these new concepts is discussed in Bargagna, M and Busnelli, F (eds) (1995) *La valutazione del danno alla salute* 3<sup>rd</sup> ed. Padova CEDAM, and Bargagna, M and Busnelli, F (eds) (1996) *Rapporto sullo stato della giurisprudenza in materia di danno alla salute* Padova, CEDAM.

is, in that sense, a term without equivalent in other jurisdictions. Following this dramatic development, the old nomenclature of patrimonial and non-patrimonial loss embedded in the Italian civil code has been radically altered. Firstly, *danno alla salute-danno biologico* is a new head in the list of compensated loss, and the list includes, secondly, the head other patrimonial loss and, thirdly, the non-patrimonial loss foreseen in article 2059, which is now confined to *danno morale*, described as a 'subjective *pretium doloris* characterized by a temporary, fundamentally transient, psychological upset' (now including *danno alla salute* of a third party, caused by suffering from a death of a relative).<sup>141</sup> Compensation of the first two is not subject to the restrictions of article 2059, and it is not limited to cases when the injurer's action is also a crime, but the compensation of the third still is. More recently, the *Corte di Cassazione* qualified this third loss type as *pecunia lesae dignitatis* compensation of injury to dignity), a compensation of the harm to the dignity of a physical person (*dignita delle persone fisiche*).<sup>142</sup> Furthermore, the compensation of the *danno alla salute-danno biologico* must be assessed on the basis of nationally applied functional incapacity scales-points (*tabelle*), whereas the *danno non-patrimoniale-morale* calls for an equitable compensation according to the judge's fair and reasonable assessment of the individual victim's moral suffering. The former is clearly seen as a *sui generis* loss of a double pecuniary and non-pecuniary nature, capable of economic assessment, whereas the latter as a pure non-pecuniary loss that cannot be objectively evaluated in monetary terms. The build-up of case law in Italy in recent years has, however, further blurred the originally rather clear vision of the architecture of the Civil Code, especially with the emergence of claims for so-called 'existential' harm<sup>143</sup> (*danno esistenziale*), which seems to be injury to feelings, emotions or disturbances of normal life not linked to any physical or psychological injury.<sup>144</sup> This new head of damage was dismissed by the *Corte di Cassazione* in a judgment of 2008, only to be resurrected in a different form by the same court in a decision of last year.<sup>145</sup>

Closer to France remains Spain, where the Supreme Court has ruled more than a century ago that recoverable loss from a tortious act under art. 1902 *Codigo Civil*<sup>146</sup> freely includes non-pecuniary loss (*daño moral* or *daño no patrimonial* or *daño extrapatrimonial*), as well as pecuniary loss (*daño patrimonial*).<sup>147</sup> Such loss may be presumed if personal injury is proved, much as general damages in the common law do not need to be pleaded or proved.<sup>148</sup> Writers define *daño moral* as the amount of loss of utility that cannot be

<sup>141</sup> *Corte Costituzionale*, 27 October 1994, no. 372 *Giustizia Civile I*, 3035, 1994, with commentary by Busnelli, F.

<sup>142</sup> *Cassazione civile*, Sez. III, 28 November 1996 no. 10606, *Responsabilità civile e Previdenza*, 1997 p. 393, case comment E. Navaretta.

<sup>143</sup> Supported by a number of scholars led by Professor Glendon from Trieste.

<sup>144</sup> This new head of damage proved particularly popular with small claim courts, (*Giudice di Pace*, Justice of Peace), with single judges showing sympathy for everyday frustrations suffered by their fellow citizens: e.g. *Giudice di Pace* of Palermo, 17 May 2004, awarded damages for *danno esistenziale* to a bride whose wedding shoe broke into pieces on her wedding day.

<sup>145</sup> See details below

<sup>146</sup> Which is similar to article 1382 of the French Civil Code, on which see *supra*

<sup>147</sup> The matter was put beyond doubt by a famous decision in 1912 of the Spanish Supreme Court (*Tribunal Supremo*) *Sentencias del Tribunal Supremo* (Decision of the Supreme Court) (STS) 6<sup>th</sup> December 1912, [*Roj* (*Repertorio Oficial de Jurisprudencia*): STS 142/1912]

<sup>148</sup> It is standard court practice in cases of personal injury to presume non-pecuniary loss. In certain other specific cases of injury of personality rights, such a presumption is introduced by legislation, for example, legislation for the protection of reputation and personal and family life, *Ley Organica (LO) 1/1982 de 5 mayo 1982, de proteccion civil del derecho al honor, a la intimidad personal y familiar y la propia imagen* (civil protection of reputation and personal and family life and one's own image). But proof of the victim's unconscious state by the

directly evaluated in money, after any kind of injury that causes recoverable damage. In particular, recoverable damage includes: (a) the corporal harm (*dano corporal*) that can be evaluated medically and objectively, (b) specific personal losses, such as loss of various amenities, verified medically but subjectively assessed, and (c) *dano moral stricto sensu*, such as mental suffering, pain, anxiety, grief or sorrow, not amounting to a medical illness.<sup>149</sup> In a judgment of the Spanish Supreme Court of 2000, this last category of *dano moral* seems to have been broadened to include harm akin to the Italian *danno esistenziale*: the Court awarded damages for the inconvenience, stress and discomfort suffered by the claimant because of the long delay of the return flight from his honeymoon.<sup>150</sup> This places Spain at the top end of jurisdictions with broad definitions of recoverable non-pecuniary harm. But it is important to note a significant separate development in Spain that has considerably dented the simple architecture of the *Código Civil*.<sup>151</sup> Special traffic accident compensation legislation, largely dictated by the car insurance industry, imposes tables of indemnification on the courts that do not distinguish between non-pecuniary loss, such as pain and suffering, and pecuniary loss, such as loss of earnings, all included in the unitary values of the tables and capped.<sup>152</sup>

In contrast to Spain, Portuguese law is closer to the Germanic architecture, also based on the importance of legally protected interests. *Danos non patrimoniais* (non-patrimonial harm) are reparable only if they deserve legal protection on grounds on their severity. Article 496 of the Portuguese Civil Code states that '(1) for the assessment of compensation regard must be had to serious non-pecuniary damage which therefore deserves the protection of the law'.<sup>153</sup> Unlike in the case of German law, where the compensation architecture is based on a specific typology of non-pecuniary harm provided by the law, the Portuguese approach allows more judicial discretion within the parameters of 'serious' non-pecuniary harm. When deemed serious enough to be recoverable, non-pecuniary loss is subject to an equitable assessment taking into account the degree of fault, the economic situation of both parties and other relevant circumstances.<sup>154</sup> Significantly, if the defendant

tortfeasor may affect the quantum of such damages, principally, by deducting damages for pain and suffering: see *supra* and *infra*.

<sup>149</sup> See Martin-Casals, M (2002), 'Hacia un baremo europeo para la indemnización de los danos corporales? (Is there a European standard for the compensation of personal injuries?)' in *Consideraciones generales sobre el Proyecto Busnelli-Lucas* (general considerations on the project Busnelli-Lucas) *Revista de Derecho Patrimonial (RDPat)* 19

<sup>150</sup> *Sentencia del Tribunal Supremo* STS 31 May 2000, RJ (*Repertorio de Jurisprudencia*) 2000/5089. This claim was based on a breach of contract but the Court's ruling applies equally to Tort claims. Such contract claims for loss of enjoyment of holiday are also allowed by more restrictive regimes, such as English or German law.

<sup>151</sup> See de Angel Yaguez, R (1995) *Algunas previsiones sobre el future de la responsabilidad civil (con especial atención a la reparación del dano)* (Some predictions on the future of civil liability, with special reference to the compensation of loss), *Civitas* 147.

<sup>152</sup> The controversial Road Traffic Liability Act of 2004 (*Ley de Responsabilidad Civil y Seguro en la Circulación de Vehículos a Motor*, 8/2004, de 29 de octubre) product of pressure from the insurance industry lobby, provides for a unitary assessment of both pecuniary and non-pecuniary losses in cases of personal injury resulting from a traffic accident, not related to the actual loss of the victim, and has been much criticised by scholars who have doubted its constitutionality and fairness: see Prieto, P (1996) 'Sobre la inconstitucionalidad del sistema para la valoración de danos personales de la Ley de Responsabilidad Civil y Seguro en la Circulación de Vehículos a Motor' (On the unconstitutionality of the system of evaluating personal injuries of the law on Civil Liability and Insurance in the circulation of motor vehicles) *AJA (Actualidad Jurídica Aranzadi)* no. 245 p. 4.

<sup>153</sup> Translation provided in K. Oliphant, K & Steininger, B C (2011) *European Tort Law: Basic Texts* A Pereira 204 following.

<sup>154</sup> Articles 494 and 496 (3) of Portuguese Civil Code.

is insured the second of these criteria is not taken into account when the victim pursues the claim directly against the insurer,<sup>155</sup> the latter not being, obviously, on an equal economic footing.<sup>156</sup> As is the case with French and Swiss law,<sup>157</sup> Portuguese law also recognises third-party non-pecuniary harm from the personal injury of a very close relative, such as a spouse.<sup>158</sup>

Although liability for intentional physical harm (trespass to the person), was as recently as at the time of Pollock considered by this great light of English law as primarily punitive, after *Donoghue v Stevenson* it became clear that liability can also be civil, compensatory, also in Negligence. The law of assessment of personal injury damages developed independently of any general principle or structure of the law damages in general, such as the general principles found in the Germanic tradition, particularly the General Part of the BGH. Non-pecuniary harm from personal injury has been treated always as a recoverable loss in this development, and the case law has adopted working categories of such harm as shown below. English law, like French law and unlike German law, does not place non-pecuniary harm in a special category of harm only exceptionally compensated, but unlike French law has no declared intention of always compensating it whatever its source or manifestation. In a quasi incremental development of precedent the current position is as stated in the leading treatise McGregor on Damages, recently endorsed by the Court of Appeal, as described in more detail below. This shows that specific types of non-pecuniary harm have been compensated in connection with specific torts and are exclusive to these. Thus, loss of amenity and pain and suffering, together with the newly established category of loss of congenial employment are exclusive to personal injury, loss of inconvenience and discomfort to the tort of nuisance, social discredit to the tort of defamation, while loss of enjoyment of a holiday has been compensated both as a result of a personal injury<sup>159</sup> and a breach of contract.<sup>160</sup> The view by English judges of non-pecuniary harm from personal injury is objective,<sup>161</sup> not functional or normative, so there is no scope for the development of a notion of 'somatic' or 'biological' harm as a distinct category, as in Italian law.

Personal injury is a distinct separate damages category in Scandinavian jurisdictions, the other two categories being damage to property and economic loss. All Scandinavian countries have autonomous Civil Liability statutes that are not part of a broader systematic codification of civil law, and these statutes provide specifically for the compensation of pecuniary and non-pecuniary losses arising from personal injury or death in a prescriptive way, intended, significantly, to discourage the further development of the nomenclature. In the case of non-pecuniary losses emphasis is placed on pain and suffering, and special provision is made for the harm to the feelings of the victim of an attack to their "freedom,

<sup>155</sup> See STJ (*Supremo Tribunal de Justiça*) 29 February 2000, *Sumarios de Acordãos Cíveis-Edição Annual 2000*, 70.

<sup>156</sup> The interesting question whether this makes good economic sense cannot be pursued here.

<sup>157</sup> See also art. 10:301 (1) of the *Principles of European Tort Law*.

<sup>158</sup> In a case, familiar also in these two other jurisdictions, in which the wife of a seriously crippled man in an accident was allowed damages of € 40000 for her loss in being left to live the life of a widow without actually being one, including the loss of sexual relations with her husband: STJ, 8 March 2005, in Geraldès, A (2007), *Temas de Responsabilidade Civil, II, Indemnização de Dano Reflexos* (Themes of Civil Liability, compensation of losses by reflection), Almedina.

<sup>159</sup> *Ichard v Frangoulis* [1977] 1 WLR 556

<sup>160</sup> *Jarvis v Swan Tours* [1972] 3 WLR 954 (CA)

<sup>161</sup> See *West v Shephard* [1964] A. C. 326, and the excellent discussion of these three approaches in Ogus, A (1972), 'Damages for Loss of Amenities: for a Foot, a Feeling or a Function?' (35) *Modern Law Review* 1.

peace, honour or person". The Danish and Norwegian legislation seems more restrictive, with compensation limited to those two types of non-pecuniary harm, whereas the Swedish provides for the compensation of three heads of non-pecuniary losses: "defect and detriment", which refers to permanent disability (loss of faculties and amenities), "pain and suffering", seen as dealing with more transient discomfort and "specific disadvantages" for harm that cannot be classified under the previous two headings<sup>162</sup>.

#### DETAILED NOMENCLATURES UNDER THE SPOTLIGHT

The need of adopting some method of separating heads of reparable damage and of following a more or less detailed nomenclature has been felt in most, if not all, contemporary jurisdictions, as judges are keen to show that they do not just grab a total figure of non-pecuniary loss from the air, so to speak, but do take into account in a consistent way separate loss types and add up the sums in order to achieve the final figure. That said, judges in all jurisdictions are all the same keen to emphasize that in order to achieve the almost universal goal of full compensation, they reserve the right to find the total greater or smaller than its parts and the final damages award is almost everywhere made as one general award for non-pecuniary loss. A good example of a widely held common position is that of the position of English law to the issue of the relationship of nomenclature and final damages award. Although both Parliament and courts, as well as legal practitioners, make use of different loss types in important ways and in order to advise victims more thoroughly on all possible aspects of their claim, the orthodox view prevailing still today is that all non-pecuniary loss must finally be compensated in a total sum of general damages, not broken down in its constituent parts, unless absolutely necessary, as in the case of the unconscious plaintiff when damages for pain and suffering and loss of amenity must be clearly distinguished.<sup>163</sup> In assessing the total award the judge must, however, start from apportioning a value to the various injuries and categories and related claims fixing a figure for each of them, and then stand back and look at the aggregate figure and consider if, as a total, represents a reasonable amount for the totality of the injury claim.<sup>164</sup> As an English judge put it recently:

"It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB<sup>165</sup> guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary".<sup>166</sup>

<sup>162</sup> *Swedish Tort Liability Act* ch. 5 section 1.

<sup>163</sup> Because only the latter are compensated in such a case: see *West v Shepherd* and more below.

<sup>164</sup> See, for example, *Sadler v Filipiak & Another* [2011] EWCA Civ 1728 at no. 2, *per* Etherton LJ

<sup>165</sup> Judicial Studies Board, now Judicial College

<sup>166</sup> [2011] EWCA Civ 1728 at no. 34 *per* Pitchford LJ.

This holistic conception of non-pecuniary loss is shared by French and German law and other major jurisdictions, and, in the case of the common law, is ingrained in the common law history of general damages as damages 'at large' that need not be specifically claimed or pleaded. It may be explained in different ways, both practical and ideological. One argument in favour may be that it is less open to the commodification criticism, as at the end of the day the judge has the freedom to determine an overall sum for non-pecuniary loss according to his or her conscience and reasonable judgment, not bound by price-tags for injuries and categories of harm, but only guided by nomenclatures and compensation guidelines or tables, such as the *Schmerzensgeldtabellen* in Germany, or in England *maxima* set and reviewed by the Court of Appeal, the Judicial College guidelines and the recording of awards in similar cases in *Kemp & Kemp*, for reasons of uniformity and relative certainty.

All this does not mean, of course, that nomenclatures and compensation tables are not necessary to make possible a meaningful discourse between victims, injurers, third party payers, including insurers, and, last but not least, lawyers, legislators and judges, as they are the only way to achieve certainty and uniformity and in order to help avoid not only the under-compensation, but, also, the overcompensation of the victim, when heads of damage are not properly defined and are confused. Thus the French *Cour de Cassation* despite its strong commitment to the principle of full compensation (*reparation integrale*) which dictates that the overall amount, according to the judge's fair and reasonable assessment, covers holistically all the victim's injuries and losses, has insisted that different heads of loss must not be confused in the judgment, for example, in one case, the aesthetic or disfigurement loss (*prejudice esthetique*) with pain and suffering (*souffrances*). Because of all the above reasons, reasonably clear, workable nomenclatures are everywhere considered very desirable, and the issue has also attracted the consistent interest of the EU and Council of Europe Institutions in promoting a clarification and systematic definition of nomenclatures of personal injury damages.<sup>167</sup> But little significant progress has been made in this direction in European law and also in most national jurisdictions, with the notable exception of France.

In France the pressure to modernise and clearly map the nomenclature, particularly of non-pecuniary harm, had been building up in the light of the importance of the solidarity principle in French political and social life, producing a need to identify more clearly those heads of damage for which Social Security agencies could be reimbursed for benefits paid to personal injury victims.<sup>168</sup> In principle, social security benefits were intended to indemnify

<sup>167</sup> See for example the *Council of Europe Resolution on Compensation for Physical Injury or Death, Resolution 75-7* of 14 mars 1975. Interestingly, the Council's recommendation adopts a generic nomenclature of: "*préjudice esthétique, douleurs physiques et souffrances psychiques*" (esthetic harm, physical pains and psychological sufferings) (nos. 11-13). In a separate development, a group of specialists was formed under the auspices of the European Parliament to look into the possibility of harmonizing European nomenclatures and insurance regimes for traffic accidents, under the chairmanship of Professor Francesco Busnelli, in which the author of this paper took part as an expert on English law. The group issued a declaration in its final meeting at the Academy of European Law in Trier, Germany, in 2000, which resulted in an European Parliament Proposal of a Draft Disability Scale in 2003: see Groutel, H (2000) *La rationalisation de l'appréciation médico-légale des préjudices non économiques* (The rationalisation of the medico-legal assessment of non-economic injuries) *Responsabilité civile et assurances* Repères.

<sup>168</sup> On the specific issue of recoupment of social security benefits, in England the Social Security (Recovery of Benefits) Act 1997 opts for the approach of 'listed' benefits (in Sch. 2, Col 2) leaving little for the courts to do (but see *Rand v East Dorset Health Authority* (no 2) [2001] PIQR Q1), and does not need to rely on a jurisprudential

pecuniary losses and not what were seen as ‘personal’ non-pecuniary losses (such as pain and suffering and the like), but the old head of damage, known for decades as *‘Incapacité Permanente Partielle’ (IPP)* (Partial Permanent Incapacity),<sup>169</sup> included all the consequences of incapacity, both pecuniary and non-pecuniary, and contributed to a significant degree to the uncertainty in this area. The need for a new more detailed and clearer nomenclature led to several reform proposals, most notably by groups chaired by Professor Lambert-Faivre and Judge Dintilhac,<sup>170</sup> a judge of the *Cour de Cassation* charged with the task of coordinating a working group mandated by the Ministry of Justice. The recommendations of this working group aimed at a methodical classification that would reassemble the different heads of damage were behind an important legislative reform of social security law that took place in 2006.<sup>171</sup> This legislation introduced a new principle on social security benefit reimbursements, according to which reimbursement claims by subrogation of social security organisations against third parties (tortfeasors and their insurers) must be exercised ‘head by head’ (*‘poste par poste’*) and only for those payments to the victim that compensate losses for which social security bodies had assumed responsibility, excluding losses of a “personal character” (*“à l’exclusion des préjudices à caractère personnel”*).<sup>172</sup> Tidying up the finances of social security organisations had, therefore, the considerable side effect of revolutionising the nomenclature of personal injury heads of damage, described by an eminent French expert as a ‘Copernican revolution’.<sup>173</sup> When recent legislation obliged the courts to detail all heads of damage in their awards the ‘nomenclature Dintilhac’ came handy and was quickly endorsed by the *Cour de Cassation* after a simple circular of the French Ministry of Justice.<sup>174</sup>

Before taking a closer look at the nomenclature Dintilhac, it is worth pointing out that the need for some general categorisation of compensating personal injury loss was also felt by English law, which first, unlike American law, abandoned the general practice of using juries to assess ‘damages at large’ in 1966,<sup>175</sup> and then, four years later, in *Jefford v*

development of an appropriate nomenclature, as in the case of the legislation in France.

<sup>169</sup> Measured according to the degree of incapacity, from minor to almost complete.

<sup>170</sup> *Rapport Lambert-Faivre sur l’Indemnisation du dommage corporel*, Octobre 2003 (Report Lambert-Faivre on the compensation of personal injury, October 2003), <<http://www.ladocumentationfrancaise.fr/ezexalead/search?SearchText=LambertFaivre+&cat%5BGroupeThematique%5D=&n=slDocFrancaise>> (Retrieved 13.08.2015); *rapport Dintilhac en vue de l’élaboration d’une nomenclature des préjudices corporels*, juillet 2005 (Report Dintilhac with a view of elaborating a nomenclature of personal injuries, July 2005), <<http://www.ladocumentationfrancaise.fr/rapports-publics/064000217-rapport-du-groupe-de-travail-charge-d-elaborer-une-nomenclature-des-prejudices>> (Retrieved 13.08.2015)

<sup>171</sup> *Loi n° 2006-1640 du 21 décembre 2006*.

<sup>172</sup> *Loi n° 2006-1640 du 21 décembre 2006* was meant to deal with general issues of the financing of social security but almost accidentally, as this was not originally its intention, this law introduced a new article 25 in the Social Security Code, modifying articles 31 of *Loi du 5 juillet 1985* and *Loi 376-1 C. séc. soc. : “Les recours subrogatoires des caisses contre les tiers s’exercent poste par poste sur les seules indemnités qui réparent des préjudices qu’elles ont pris en charge, à l’exclusion des préjudices à caractère personnel”* (“The subrogatory claims by social security authorities against third parties are exercised head by head with regard only to payments for harm that have been made, and excluding harm of a personal nature”).

<sup>173</sup> Pierre, P (2013), *‘La nomenclature des préjudices extrapatrimoniaux – Etat actuel du droit français’* (The nomenclature of non-patrimonial losses-Current state of French law) p. 1 (unpublished, copy on file).

<sup>174</sup> *Circulaire de la Chancellerie du 25 février 2007* (Circular of the Chancery, 25 February 2007); See *Cour de Cassation. 2<sup>ème</sup> chambre civile*, (Secnd civil Chamber), 28 mai 2009, n° 08-16829, *Responsabilité civile et assurances* 2009. *commentaire* 202, adopting several definitions of heads of damage proposed by the nomenclature Dintilhac.

<sup>175</sup> *Ward v James* [1966] 1 QB 273 (CA): The reason was, according to Lord Denning MR (t p. 29), that leaving the damages at large to the jury does not achieve the desirable goals of accessibility, uniformity and predictability of damages for personal injury victims.

*Gee*<sup>176</sup> adopted a clear distinction between three general heads of damage, which the judges ought to distinguish in assessing damages in personal injury cases: (1) Accrued pecuniary loss; (2) Non-pecuniary loss; (3) Loss of future earnings. This official nomenclature had previously being enriched with a sub-division of non-pecuniary loss damages in damages for pain and suffering and damages for loss of amenity.<sup>177</sup> Pain and suffering is understood in English law as referring to individual, personal, grief, distress discomfort and anxiety, including the so-called litigation anxiety and distress caused by the knowledge of a shortened life-expectancy. Loss of amenity is understood objectively as loss of physical integrity and human dignity of a complete person, including what is shown under the circumstances to be special, subjective, amenity losses, such as the loss of enjoyment of a particular activity, like playing a musical instrument, or the loss of an enjoyment of a sport.<sup>178</sup> Furthermore, damages for non-pecuniary harm may be seen as a gift to the victim, in the sense that no deduction of collateral benefits is allowed and no regard to the use of the money by the victim is paid. The Judicial College guidelines address a detailed ontology of types of harm, injuries and other conditions under the general head of non-pecuniary loss, and the case law has added a new head of damage to the nomenclature, the loss of congenial employment arising from a personal injury. This loss was said by a judge to be “well-recognised as a separate head of damage”,<sup>179</sup> and the leading reference work on the English law of Damages concedes that the courts regard it as a non-pecuniary loss separate from the loss of amenities.<sup>180</sup> Additionally, unwanted pregnancy now seen as a personal injury<sup>181</sup> represents a new head of non-pecuniary loss leading to the compensation of the birth of an unwanted child.<sup>182</sup> But if the nomenclature for non-pecuniary losses arising from personal injuries recognised by courts in England is currently restricted to three heads of damage (or four, with the addition of birth of an unwanted child loss,): pain and suffering, loss of amenities and loss of congenial employment, it is important to note that a broader nomenclature applies across the spectrum of Tort liability for non-pecuniary losses, beyond those arising from a personal injury *stricto sensu*, officially endorsed in the latest case of *Simmons v Castle & Others*,<sup>183</sup> by a top-heavy Court of Appeal.<sup>184</sup> The Court of

<sup>176</sup> [1970] 2 QB 130 (CA)

<sup>177</sup> Because of the former not being available to an unconscious victim: See more below. There is still no clear distinction in English law between loss of amenity as the loss of a faculty and loss of amenity as the loss of enjoyment of faculty.

<sup>178</sup> Pain is more personal, pleasure is more universal!

<sup>179</sup> See *Hale v London Underground* [1993] P. I. Q. R. Q30 at Q 39, Otton J.

<sup>180</sup> *McGregor on Damages* (2009) 18<sup>th</sup> edition, London, no. 35-270. This loss is also compensated in, among other jurisdictions, German law, but not as a separate head of damage: see among the cases *Oberlandsgericht Koeln, Versicherungsrecht* 1992, 714; *Muenchener Kommentar zum Buergerlichen Gesetzbuch* (2007) Band 2 Para 241-432, 5<sup>th</sup> ed. Para. 253 no. 41 486. German courts also compensate the change of school by the victim because of their injuries: see *Oberlandsgericht Hamm OLG Rechtsprechung* 1999, 256; *Muenchener Kommentar zum Buergerlichen Gesetzbuch* Band 2 Para 241-432 *id.*

<sup>181</sup> As *McGregor* supra, note 180, at 35-271, seems to accept. However, it is submitted that it is better seen as a violation of private autonomy and not *stricto sensu* personal injury, as is clear from the judgments of the House of Lords in the leading case of *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 A.C. 309. The issue cannot be fully discussed here, but such a view is consistent with a more conservative common law ideology that would be reluctant to expand remedies in the absence of physical corporal impact generally for violations of the right to private autonomy (despite the clear direction to the contrary by the Human Rights Act 1998). As already mentioned, unwanted pregnancy is seen as the mother's personal injury in German law: *supra*.

<sup>182</sup> Set in *Rees v Darlington Memorial Hospital NHS Trust* (above) at the “conventional” sum of £15000.

<sup>183</sup> [2012] EWCA Civ 1288

<sup>184</sup> The Lord Chief Justice of England and Wales, the Master of the Rolls and the Vice-President of the Civil



Appeal referred to the nomenclature used in the classic treatise McGregor on Damages,<sup>185</sup> recognising non-pecuniary losses from all torts as being of five kinds: (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, and (v) mental distress. There is no mention of congenial employment as a separate head of damage in cases of personal injury and we must assume that for the Court of Appeal in *Simmons* this head is subsumed to that of loss of amenities.

Returning to the nomenclature Dintilhac, which, because it is unique in its scope and detail in Europe and therefore ground breaking, deserves a more lengthy analysis, two general features need to be underlined: First, the basic distinction between temporary and permanent non-pecuniary losses, i.e. losses suffered before and after the medical stabilization of the victim's injuries, discussed earlier. The obvious advantage of the distinction for the victim must be that such losses can be proved with greater certainty and accuracy than (future) permanent losses over which payers have may have more room for dispute. Secondly, the nomenclature Dintilhac has been intentionally left incomplete, to allow the courts to add new heads of damage as they see fit in the exercise of their sovereign power to apply the basic principle of full compensation (*reparation integrale*).<sup>186</sup>

A third feature of the Dintilhac nomenclature is that is more detailed in setting out of both types and methods of assessment of non-pecuniary losses, than any other anywhere else in Europe or beyond. It also addresses with a certain degree of boldness the controversial issue of the extent to which compensation for non-pecuniary loss can be assessed on a normative, objective or functional, personal basis. The Dintilhac list starts with the "temporary functional deficit" ("*déficit fonctionnel temporaire*" (*DFT*). This is the temporary invalidity, partial or total, including all the consequences of the invalidity suffered by victims in their private lives, before the stabilization of their injuries and including the time of hospitalisation, the loss of quality of life and usual pleasures of normal life during the traumatic illness.<sup>187</sup> Usual pleasures of life include the temporal

Division of the Court of Appeal This was done in a consented appeal in which the main issue an increase by 10% of the amount of awards for personal injury and other damages from 1<sup>st</sup> April 2013, to facilitate implementation of the new legislation on litigation funding which removed the obligation of the losing party in personal injury litigation to pay the fee of the successful lawyer of the other party in conditional fee agreements, thus burdening the successful claimants' damages awards, which needed as a result to be increased by 10% to restore fairness, according to the author of the report behind the legislation..

<sup>185</sup> 18<sup>th</sup> edition, *supra* note 180, ch. 3.

<sup>186</sup> An important limitation of the nomenclature Dintilhac lies in the fact that, under the French system of a separate regime of administrative civil liability, subject to the administrative jurisdiction headed by the Council of State (*Conseil d'Etat*), it only applies to claims under the jurisdiction of the civil courts, and not claims that need to be submitted to the Administrative courts. Significantly, the Council of State has refused to follow this nomenclature: see *Conseil d'Etat, avis du 4 juin 2007, Lagier*, n° 303422 et 304214, *JCP (Jurisclasseur périodique) Sommaire* 2007, 1840, note G. Vachet. The Supreme Administrative Court insists in applying its own more limited nomenclature, recognizing the following heads of damage: recognized pecuniary losses are health expenses, expenses related to a handicap, loss of earnings, professional and educational consequences of the injury and other pecuniary losses linked to the injury. Recognized non-pecuniary losses continue to be compensated under a general head of damage or, in certain cases, by a classification more reduced than that used by civil courts, such as "physical and moral suffering" (*souffrances physiques et morales*), aesthetic loss (*préjudice esthétique*) and the troubles of everyday existence (*troubles dans les conditions d'existence*) considered independently from their pecuniary consequences. Thus victims of injuries caused by administrative employees (e.g. in public hospitals) may be treated differently and less favorably than victims of actions of private persons. This has been duly noted by commentators in France, who rightly point out that this discrimination is unfair for the victims, who cannot, of course, always choose where and by whom they are injured!

<sup>187</sup> This is the definition of the *DFT* by the *Cour de Cassation*: *Cass. 2e civ.* (Second Civil Chamber) 28 mai 2009 no. 16829, *Responsabilité civile et assurances* 2009, *commentaire* 202, *Revue Trimestrielle de Droit Civil* 2009, 534, note

loss of enjoyment by the victim until the time of stabilization of the injuries of a special recreational activity, sport or hobby known as '*prejudice d'agrément*' (see below).<sup>188</sup> It is clear that in nominating the basic non-pecuniary loss 'functional deficit', the Dintilhac nomenclature favours a functional quasi-scientific method of assessment by experts rather than a normative-objective method leaving the evaluation of this loss to the judge, as is the case in English law and certain other jurisdictions.<sup>189</sup> Next in the list of temporary losses is the head "suffering" (*souffrances endurées*), which covers the physical, psychological and moral suffering before the stabilization of the injuries.<sup>190</sup> This is graded on a scale of 1 to 7, again, by an expert. In specifying what is included under this head of damage, and as is generally the case with all injury types, French case law offers the richest *florilegium* of the judicially recognized ontology of suffering in Europe: including not only pain, anxiety, distress and the like, but also fear (for example, after a plane crash or a rape), and behavioral problems of isolation, avoidance, self-immersion, feelings of revenge or rebellion caused by the injury. It is significant to note again that suffering resulting from sexual or other assaults has to be pleaded and indemnified in detail (*poste par poste*), and that a general single claim for moral damage (*prejudice moral*) resulting from such an assault, is no longer acceptable.<sup>191</sup> Importantly, this head of damage, which evidently corresponds to the pain and suffering loss type in English law, merges with the 'permanent functional deficit' after the stabilization of the victim's injuries, and ceases to be a distinct head of damage.

Third in the French nomenclature of temporary non-pecuniary harm is the 'temporary aesthetic harm', referring to the change of the physical appearance of the victim between the injury and settlement or adjudication, also graded on a scale of 1 to 7 by an expert. This loss type particularly exemplifies the difficulty of keeping loss types separate in order to avoid overcompensating the victim, as it is possible that any disfigurement or aesthetic harm may impact on other heads of damage, such as the professional (earnings) loss, the functional deficit (for example, loss of one's voice, use of crutches) or the victim's sexual or family life and recreational activities,<sup>192</sup> which as seen below are considered separate heads of the nomenclature. Detailed nomenclatures can indeed have this effect of separate heads of damage intersecting and creating a risk of overcompensation, which is rather embarrassing as this was a risk that the adoption of a detailed nomenclature was intended to avoid in the first place. Ontologically, temporary aesthetic harm includes not only the disfigurement itself, but also such harm as that of the victim's self-perception being

P. Jourdain.

<sup>188</sup> There is no separate head in the nomenclature Dintilhac for such temporary loss, but if after the injuries are stabilized such a loss remains, it is recognised as a separate head of permanent loss. This seems sensible, as the temporary inability to enjoy a hobby that ceases after treatment and stabilization can be seen as difficult to assess on its own. Nevertheless, the Cour de Cassation, in its concern to uphold the fundamental principle of full compensation (*reparation integrale*), has insisted that a separate head of '*prejudice d'agrément temporaire*' (temporary loss of enjoyment), should be recognised by the courts, contrary to the line taken by Dintilhac.

<sup>189</sup> See Ogus supra note 161; this French technique is in line with previous practice, when the IPP was also measured 'scientifically' ("*au point*")

<sup>190</sup> Le Roy, M, Le Roy J-D, and Bibal, F, (2013) L '*Evaluation du Préjudice Corporel* (The evaluation of personal injury) 19th ed. LexisNexis 123

<sup>191</sup> See *Gazette du Palais*, 9 & 10 juillet 2009, dossier spécial, '*l'indemnisation des victimes de violences sexuelles*' (Special file : the compensation of victims of sexual violence).

<sup>192</sup> As, for example, if the victim does not dare to wear a swimming suit anymore and is, therefore, deprived of the pleasure of swimming (which would normally fall to be considered under the head of '*prejudice d'agrément*', on which see below)

diminished, or the change of the aesthetic habits of a sexually assaulted woman. It is a loss type that can be more significant as temporary loss, before stabilization of the victim's medical condition, than permanent. And it is highly subjective, both in duration and in terms of characteristics and personal circumstances of the victim, including age, gender, occupation, social and professional habits and the like.<sup>193</sup>

Moving on to future, permanent losses, the list Dintilhac confines the compensation of the 'permanent functional deficit' ("*déficit fonctionnel permanent*" (*DFP*), to the physiological only consequences of the incapacity caused by the injury, to the exclusion of all pecuniary ('patrimonial') consequences, such as future loss of earnings or professional losses, unlike the previously used head of loss known as IPP (*incapacite partielle permanente*-permanent partial incapacity). This was, besides, the main reason for which a new nomenclature was needed, as already discussed above. Thus damages awarded for permanent functional deficit are not subject to deduction on account of social security benefits paid for the invalidity, which are now clearly to be seen as aiming at the compensation of pecuniary consequences only. This is a position, with which English law and several other jurisdictions broadly, but not so clearly, agree.<sup>194</sup> As before Dintilhac, the evaluation of the *DFP* is in the hands of experts and is done on a percentage basis. Experts must take into account not only the impairment of physiological (physical or psychological) functions but also permanent pain (*douleurs permanents-douleurs fantômes*), the loss of quality of life, and the troubles of everyday existence, personal, family and social that continue after the consolidation of the claim.<sup>195</sup> While the impairment (incapacity) is still to be evaluated *au point*, as the *IPP* was under the earlier regime,<sup>196</sup> with each point's value being proportionate to the degree of incapacity and reversely proportionate to age<sup>197</sup> the pain and suffering (*souffrances*), although generally taken into account together with the evaluation of the degree of incapacity, sometimes requires a separate evaluation of its 'intimate aspect' (*aspet intime*)<sup>198</sup> from its functional aspect (*aspet fonctionnel*). The *DFP* comprising both pain and suffering and loss of amenities, is calculated, therefore, overall on an objective "scientific" basis. Any special subjective circumstances of the victim that add to this objectively functional loss are, however, to be taken into account separately, under the head of 'loss of enjoyment' (*préjudice d'agrément*), a head of damage already developed in the case law with many conceptual fluctuations, but now expected to be used with greater clarity, and in the more specific sense of regarding only the compensation of the loss of a specific activity, sport or leisure,<sup>199</sup> which the victim can prove they enjoyed regularly before the injury. In this sense

<sup>193</sup> Aesthetic loss is seen as much more serious, at its 'maximum', for an unmarried young woman and at its 'minimum', for example, for an aged man whose job does not involve beauty looks: Le Roy, M, Le Roy J-D, and Bibal, F, (2013) *L'Évaluation du Préjudice Corporel* (The evaluation of personal injury) 19th ed. LexisNexis 129.

<sup>194</sup> No deductions of so-called collateral benefits are allowed under English law from the part of the award intended to compensate the victim's non-pecuniary harm (pain and suffering and loss of amenity).

<sup>195</sup> *Cour de Cassation. 2<sup>ème</sup> chambre civile* (Second Civil Chamber) 28 mai 2009 n° 08-16829.

<sup>196</sup> But now the use of each point of deficit is limited to quantifying the incapacity only and is not taken into account to quantify also economic-professional consequences as before (see the criticism of the system of *calcul au point* by Lambert-Faivre, Y, & Porchy-Simon, S (2008) *Droit du dommage corporel, systemes d'indemnisation* (Law of Personal Injury, systems of compensation) Paris Dalloz, 6<sup>th</sup> edition, 227-230)

<sup>197</sup> Le Roy, M, Le Roy J-D, and Bibal, F, (2013) *L'Évaluation du Préjudice Corporel* (The evaluation of personal injury), 19th ed., Paris, LexisNexis no. 142, 133.

<sup>198</sup> E.g. depression, grief for lost bodily functions, suffering caused by medical treatment.

<sup>199</sup> According to the courts, this head of damage includes the victim's inability to engage in "activités spécifiques, ludiques, culturelles, sportives, de loisir, ou associatives" ("specific, ludic, cultural, sportive, holiday or mating

the French nomenclature is clearer than the English and the nomenclature in several other jurisdictions where both the objective physiological impairment and the subjective loss of enjoyment of a specific activity are dealt with under the same head of 'loss of amenity'. However, it should be noted that English and, also, German law, as well as other European jurisdictions, see as a separate *ontological* category the loss of the capacity to enjoy a sport, free time or a hobby, or even the chance to develop a hobby.<sup>200</sup> Significantly, and inevitably, in French law<sup>201</sup> this loss is compensated solely on the basis of the sovereign appreciation of the trial judge, i.e. normatively, not determined by expert "scientific" evaluation.

The list Dintilhac continues with the 'permanent aesthetic loss' (*préjudice esthétique permanent*), evaluated this time by experts on a scale of 1 to 7, a head of damage that aims to compensate the permanent aesthetic alteration suffered by the victim.<sup>202</sup> As in the case of the temporary aesthetic damage, the particular circumstances and complaints of the victim must be taken into account.<sup>203</sup> And again as in the case of the temporary aesthetic damage, permanent injury to physical appearance can be a constitutive element of other heads of permanent injury at the same time, such as *prejudice professionnel* (professional loss), *prejudice sexuel* (sexual loss), *prejudice d'établissement* (loss of establishment), or *prejudice d'agrément* (*supra*). The next head of damage is the permanent<sup>204</sup> "sexual loss", *prejudice sexuel*. The Cour de Cassation<sup>205</sup> accepts that there are three main categories of *préjudice sexuel*<sup>206</sup>: (a) *préjudice sexuel morphologique* (*morphological sexual injury*), which is the injury to primary and secondary sexual organs,<sup>207</sup> (b) *prejudice a la vie sexuelle elle-meme* (*perte d'envie ou de plaisir*) (injury to sexual life itself, loss of desire or pleasure), meaning the loss of the enjoyment of sex (loss of libido, loss of capacity to perform a sexual act, loss of capacity to achieve pleasure), and (c) *prejudice lie a la procreation* (Harm linked to procreation), the loss consisting of the impossibility or difficulty to procreate.<sup>208</sup> In view of

activities"), in which a person of the victim's age can normally engage: see *Cour de Cassation*. 2<sup>ème</sup> chambre civile (Second Civil Chamber), 8 avril 2010, *pourvoi* (appeal) no. 09-11634. The *Cour de Cassation* appears to accept that the *prejudice d'agrément* exists separately from the PFT even before the stabilisation of the victim's injuries: see *Cour de Cassation*. 2<sup>ème</sup> chambre civile (Second Civil Chamber) 3 juin 2010 *pourvoi* (appeal) no. 09-13246 and *Cour de Cassation* 2<sup>ème</sup> chambre civile (Second Civil Chamber) 4 novembre 2010 *pourvoi* (appeal) no. 09-69918 *Gazette du Palais* 13 juillet 2011. In the case of children who have not yet been able to develop a preference for any play or leisure activities, it is enough to prove that the injury deprived them of the opportunity of engaging in a particular activity normal to their age, without need to prove that they were actually doing so before they were injured, as is required in the case of adults.

<sup>200</sup> See for German law BGH 20.01.2004-VI ZR 46/03 *Neue Juristische Wochenschrift* -RR 2004, 671: for children, German law adopts an approach similar to that of French law, above: see *Oberlandsgericht* (Court of Appeal) (OLG) Koeln, *Versicherungsrecht* (VersR) 1992, 975

<sup>201</sup> Likewise in other jurisdictions.

<sup>202</sup> The manifestations of the *préjudice esthétique permanent* can be light (*léger*), medium (*moyen*), or important.

<sup>203</sup> 'particularités de la victime et doléances': see Le Roy, M, Le Roy J-D, and Bibal, F, (2013) *L'Évaluation du Préjudice Corporel* (The evaluation of personal injury) 19th ed. LexisNexis 144.

<sup>204</sup> This is the sexual loss after the stabilization of the victim's condition. There is in principle no separate head for *temporary* sexual loss, because before stabilization of the victim's condition such a loss is included in the temporary functional deficit (DFT) suffered by the victim: See *Cour de Cassation*. 2<sup>ème</sup> chambre civile (Second Civil Chamber) 3 juin & 4 juin 2010 *pourvoi* (appeal) no. 09-13246 & 09-69918, with the matter debated in the doctrine, see the note on these two decisions of A. Renelier, 'Vers une autonomie du *prejudice d'agrément temporaire*? (Towards an autonomy of the temporary loss of enjoyment?)' in *Gazette du Palais* 13 & 16 juill 2011.

<sup>205</sup> True to the Gallic tradition of being open about sex?

<sup>206</sup> *Cour de Cassation*. 2<sup>ème</sup> chambre civile (Second Civil Chamber) 17 juin 2010 *pourvoi* (appeal) no. 09-15842, *Bulletin civil* 2010 II no. 115.

<sup>207</sup> Including injury to such secondary erogenous zones such as mouth and breasts.

<sup>208</sup> Sexual loss, too, may overlap with other heads of damage: inability to procreate, for example, can be also

its nature, inevitably, evaluation of this head of damage is left to the sovereign assessment of the judge.<sup>209</sup>

It is, indeed, noteworthy that both the permanent aesthetic loss and the permanent sexual loss are singled out as separate heads of damage and not left to the general head of DFP,<sup>210</sup> and that so are, too, the remaining three heads of damage on the list Dintilhac: the “establishment loss” (*préjudice d'établissement*), the exceptional permanent losses (*préjudices permanents exceptionnels*) and the potential future non-pecuniary losses not actually occurred at the time of consolidation (*préjudices extrapatrimoniaux évolutifs*). The establishment loss refers to the loss of the chance to pursue a project of family life resulting from the consequences of the injury that continue after consolidation, the impossibility to marry and begin a family or interference with existing family life,<sup>211</sup> and it is a head of damage that must be compensated separately and not be confused with other neighbouring heads.<sup>212</sup> The risk of overlap here with the *prejudice sexuel* or *prejudice d'agrément* is obvious, but, as already seen, this is a risk that exists also with other specific heads of loss, and generally a common risk in a nomenclature in which heads of non-pecuniary losses are singled out in considerable detail.<sup>213</sup> Evaluation by the trial judge is normative (*pouvoir souverain du juge du fond*-sovereign power of the trial judge), done *in concreto* taking into account the age and other actual circumstances of the victim. Interestingly, under the head of exceptional permanent losses are taken into account cultural variations, for example, the inability of a Japanese person to bow as a sign of courtesy, or the singularity of the circumstances of the accident, such as the particularly traumatic effect of a mass accident or an assassination attempt. Finally, under the head of potential non-pecuniary losses can be compensated possible future development of an illness such as HIV/Aids or Creutzfeldt Jacob disease, mesothelioma and generally the risk of development of a pathology that affects the prognosis at the time of stabilization of the injuries.<sup>214</sup> In this connection, and

seen as an infirmity compensated under the head of functional deficit. See Le Roy, M, Le Roy J-D, and Bibal, F, (2013) *L'Évaluation du Préjudice Corporel* (The evaluation of personal injury) 19th ed. LexisNexis n. 152, 147.

<sup>209</sup> It is not surprising that this loss has been described as ‘protean’, both in its origin and in its manifestation: Le Roy, M, Le Roy J-D, and Bibal, F, *ibid.* (2013) 153, 148. Proof is necessarily complex, as it involves both objective and subjective elements such as, among others, age, personal situation, previous abstinence, intimacy, embarrassment, shame. In case of previous abstinence, compensation is not necessarily excluded, as abstinence is a form of exercise of sexual autonomy that has now been violated, and it acquires a completely different meaning when it becomes from voluntary enforced. This shows the importance of the functional aspect of this loss.

<sup>210</sup> But they are both included in the *DFT* (temporary functional deficit) and do not constitute separated heads of damage before the stabilization of the victim’s injuries.

<sup>211</sup> Thus the change of family conditions and structure, for example, the victim must now live with their parents, or cannot take care of children or old parents will be compensated under this head.

<sup>212</sup> *Cour de Cassation. 2<sup>ème</sup> chambre civile*, (Second Civil Chamber) 6 *janv.* 1993, *pourvoi* (appeal) no. 91-15391 *Bulletin civil* 1993 II no. 6;

<sup>213</sup> The loss of social and family life is also compensated in German law (*Stoerung des Familienlebens*), as well as several other jurisdictions, but not as a separate head of damage: *BGH Versicherungsrecht* 1982, 1141; *Oberlandsgericht Hamm Monatschrift fuer Deutsches Recht* 1975, 490, 491; *Muenchener Kommentar zum Burgerlichen Gesetzbuch* 2007 Band 2 Para 241-432 5<sup>th</sup> ed. Para. 253 no 42 486; see also Slizyk, A (2013) *Beck'sche Schmerzengeld-Tabelle* (Beck's Pain & Suffering Tables) 9<sup>th</sup> ed. Beck no 43 and following, for analysis of case law compensating the loss of family value time caused by the injury of the victim, and the particular moment it happened, such as during a family holiday or Christmas, or a family marriage, or School exams.

<sup>214</sup> See e.g., *Juriclassieur Periodique (JCP) G* 1995, I 3893, *Chronique G. Viney ;Revue Trimestrielle de Droit Civil (RTDC)* 1995 p. 626 observations P. Jourdain ; *Cour de Cassation. 2<sup>ème</sup> chambre civile* (Second Civil Chamber) 2 *avril* 1996, *Bulletin civil* 1996 II no. 88; *JCP G* 1996, I 3985, *Chr. G. Viney*. Under this head are compensated all so-called ‘evolving non-pecuniary losses that escape the stabilisation of the victim’s condition’ (*préjudices*

exercising its sovereign power to fill the gaps of the intentionally incomplete list Dintilhac in pursuit of the principle of full compensation (*réparation intégrale*), the Cour de Cassation openly recognises since 2010<sup>215</sup> an additional head of damages, the “anxiety loss” (*préjudice d’anxiété ou d’angoisse*),<sup>216</sup> repeatedly applied in cases of exposure to asbestos.<sup>217</sup>

More judicial additions to the list Dintilhac include the loss of “shortened life” (*préjudice de vie abrégée*),<sup>218</sup> only if the victim is conscious of their loss of a lengthier life, and the “loss of time to prepare” (*préjudice d’impréparation*), when the victim of inadequate information on a medical risk does not have proper time to prepare for the consequences of such risk materialising.<sup>219</sup> But eventually the *Cour de Cassation* indicated that too much judicial creativity<sup>220</sup> in developing the nomenclature could not be left unbridled and recently<sup>221</sup> reversed a Court of Appeal that wanted to compensate the non-pecuniary loss arising from the impossibility for the victim to unhurriedly seek medical care.<sup>222</sup>

Turning to German law, we find it different than both French and English law in its fundamental approach to nomenclature: there is, in fact, no official nomenclature of any detail. No normative categorisation into separate heads of damage of the ‘*Nichtvermogensschaden*’ (non-patrimonial loss), referred to in para. 253 BGB is attempted, either in the Civil Code or the case law. Instead, under the general scope of this term case law and commentators include a detailed ontology of non-pecuniary harm that compares, and sometimes exceeds, that addressed in the nomenclature of French law. The difference

extrapatrimoniaux évolutifs, hors consolidation), incurable conditions that are subject to further evolution (*maladies incurables susceptibles à évoluer*) and all evolving pathologies (*toutes pathologies évolutives*): see Le Roy, M, Le Roy J-D, and Bibal, F, (2013) *L’Evaluation du Préjudice Corporel* (The evaluation of personal injury) 19th ed. LexisNexis n. 152, 155, 156 and following

<sup>215</sup> *Cour de Cassation. Chambre Sociale* (Social Chamber) 11 mai 2010 *pourvois joints* (joint appeals) n° 09-42241 à n° 09-42257, Dalloz 2010. 2048, note C. Bernard ; 2011. 35, obs. O. Gout ; *Revue Trimestrielle de Droit Civil* 2010. 564, obs. P. Jourdain ; *Juriscasseur Périodique* 2010. 733, note J. Colonna et V. Renaux-Personnic ; *Chronique, responsabilité civile*, obs. P. Stoffel-Munck, et C. Bloch, n° 1015, n° 1. The assessment of this head of loss is done by the judge with reference to a reasonable person’s threshold of fortitude: see V. Wester-Ouisse, *Les préjudices d’angoisse et autres contrariétés* (2014) (The harm of anxiety and other contradictions), (unpublished paper, on file), 9.

<sup>216</sup> This is also included in the German ontology of compensatable injury: *OLG* (Court of Appeal) *Augsburg Recht* 08, nr. 2822; *BGHZ* 114, 284, 298, *NJW* 1991, 1948. (fear of HIV infection).

<sup>217</sup> *Cour de Cassation. Chambre Sociale* (Social Chamber), 4 déc. 2012, n° 11-26294, *Responsabilité civile et assurances* 2013, Etude 3, par C. Corgas-Bernard. Contrast the decision of the House of Lords in *Rothwell* (*supra*), where the anxiety of asbestos exposure victims who had already been physically affected by the exposure but had not developed any symptoms of an illness was not accepted as recognisable injury.

<sup>218</sup> *Cour de Cassation. Chambre Criminelle* (Criminal Chamber), 23 oct. 2012, n° 11-83770.

<sup>219</sup> *Cour de Cassation. 1<sup>ère</sup> Chambre Civile* (First Civil Chamber), 12 juill. 2012, n° 11-17510 ; see the English case of *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134, where this lack of preparation was instrumental in the House of Lords holding that the doctor’s failure to inform on the risk violated the patient’s private autonomy. But the HL did not single out this as a separate head of non-pecuniary loss resulting from the injury caused by the materialisation of the risk; instead, in an overall rather convoluted judgement, it was considered one of the factors that contributed to the doctor’s failure to inform being seen as a legal cause of that injury.

<sup>220</sup> It must be noted that the inviolability of the human body is specifically protected in France by new articles, 16-1 (“*Chacun a droit au respect de son corps... Le corps humain est inviolable*”) (Everyone has the right of respect for their body ... the human body is inviolable”) and following articles, inserted in the Code Civil in 1994, which give power to the courts to extend protection according to the principle of full compensation.

<sup>221</sup> *Cour de Cassation. 1<sup>ère</sup> Chambre Civile* (First Civil Chamber), 28 juin 2012, n° 11-19265.

<sup>222</sup> This judicial activity in extending the list Dintilhac has prompted new draft legislation (*proposition de loi* n. 419) aiming the improvement of the compensation of victims by allowing an introduction of a nomenclature for all pecuniary and non-pecuniary losses by a decree in Council (Council of State). This draft law had its first reading in the National Assembly in February 2010 and was sent for discussion to the Senate the same month. It is still under discussion at the time of writing.

remains that in German law several of the normative categories of the nomenclature Dentilhac are not recognisable separate heads of non-pecuniary loss but are detailed in judgments as ontological manifestations of such harm. Compensation for non-pecuniary loss is in a single award of *Schmerzensgeld* (money for pain). Significantly, the *Schmerzensgeld tabellen* (compensation tables for pain and suffering), which correspond to the tariffs or guidelines for assessment of non-pecuniary losses in other jurisdictions, contain a list of various injuries and injury-types, and other types of harm are thrown in as the judge strives to arrive at a reasonable and equitable compensation. The BGH has sometimes intervened to make clear that certain events should be seen as *Nichtvermeoegenschaden*, such as an unwanted birth, but only to make sure that they are seen as such and not as a separate head of damage. The lack of detailed nomenclature appears to allow greater freedom to German courts to accommodate an expanding ontology of medically or otherwise proved non-pecuniary harm,<sup>223</sup> unlike in France, where the detailed nomenclature, despite having been intentionally left incomplete, seems to predetermine to a significant extent any such expansion. But what is it that pulls French, and to a lesser extent, English law, to a direction different than that of German law in seeking a more detailed nomenclature?<sup>224</sup> If clarity as to the type of deductible benefits paid by third parties is the main reason for the explosion of nomenclature in France, surely everyone else ought to feel this need also. Perhaps part of the answer lies in the historical origins of *Schmerzensgeld* as a customary rule of old Germanic customary law that prevailed over the Roman law opposition to the recovery of non-pecuniary losses resulting from a personal injury suffered by a free man.<sup>225</sup> As alien to the Roman law tradition, *Schmerzensgeld* was left untouched by the *Pandektenwissenschaft*, (Science of the Digest) which in the 19<sup>th</sup> century laid the dogmatic foundations of contemporary German legal doctrine in the fertile soil of the Digest.

<sup>223</sup> See the long list in Slizyk, A (2013), *supra*, note 213.

<sup>224</sup> Interestingly, in Belgium, too, a jurisdiction very close to France, no official nomenclature has been adopted, although case law and doctrine use a typology of harm in assessing damages for non-pecuniary harm not so dissimilar to the French, with corresponding nomenclature sometimes in Latin: moral damage *stricto sensu*; physical pain (*damnum/premium doloris*); psychological damage; aesthetic damage; sexual damage (*premium voluptatis*); loss of pleasure and delight (*prejudice d'agrement*); extra damage as a result of the victim's young age (*premium iuvenilis*) Cousy, H and Droshout, D (2001), 'Belgium, Non-Pecuniary Loss in Belgian law', in W. V. Horton Rogers (ed.) *Damages for Non-Pecuniary Loss in a Comparative Perspective, Tort and Insurance Law*, vol. 2. Springer 30 following.

<sup>225</sup> The so-called *Schmerzensgeld* ('money for pain') has a long history in German law, and its origins are in old Germanic customary law: see, generally, Schmoeckel, M, Rueckert, J & Zimmermann, R (eds) (2007) *Historisch-kritischer Kommentar zum BGB, Band II Schuldrecht: Allgemeiner Teil*, (Historical-Critical Commentary on the BGB, Volume II, Law of Obligations, General Part) Mohr paras 241-432. In the 19<sup>th</sup> century and prior to the introduction of the BGB, the *Reichsgericht*, German Supreme Court before the second World War, had departed from the position of Roman law, then applicable within the *ius commune* of German states, that non-pecuniary loss from personal injury cannot be compensated because "the body of a freeman is not subject to evaluation": *Liberum corpus nulum recipit aestimationem* (D 9,3, 7). The *Reichsgericht* would apply instead an alleged rule of Germanic customary law traced back to the *Constitutio Criminalis Carolina* (*Peinliche Halsgerichtsordnung*) (Carolinian Crimina Constitution, Sentencing judicial guidelines) of 1532, articles 20 and 21: see more in R. Bilstein (1994), *Das deliktische Schadensersatzrecht der Lex Aquilia in der Rechtsprechung des Reichsgerichts* (The law of delictual compensation in the Lex Aquilia and the decisions of the Supreme Court), 88 following In *Entscheidungen des Reichsgerichts in Zivilsachen* (Judgments of the Supreme Court in Civil Matters) (RGZ) 8, 117 of 17 November 1882, the Civil Senate of the court held that compensation for non-pecuniary loss had to be calculated on the basis of the individual circumstances of the case, including the extent, intensity and duration of pain suffered by the victim. In this case the victim had a fragment of the attacker's knife lodged in his cheekbone undetected for 16 years causing severe health problems and frequent pain and illness.

But the Italian nomenclature is more detailed. Consisting of the three heads of *danno patrimoniale*, *danno biologico* and *danno morale* discussed earlier, it has been enriched by a very recent decision of the *Corte di Cassazione* which broadened considerably, and rather dramatically, the ambit of *danno morale*, defining it, as 'injury to the universal value of the human person, which is inviolable, and of which the legal protection must be full'.<sup>226</sup> The Court further distinguished between *danno morale* proper, being the internal subjective suffering on a strictly emotional level, and *danno dinamico-relazionale* (dynamic-relational loss), or alternatively called '*esistenziale*' (existential), consisting of the worsening of the conditions and habits, internal and external, of everyday life.<sup>227</sup> This clear division of *danno morale* in two separate heads, suffering and loss of quality of life is a novelty for Italian law. Depending on the circumstances of each case, the intensity, duration and other characteristics of the loss, the capacity of the victim to cope with the trauma and all other harmful consequences of the injurer's action, the victim has a right of full, non-equitable, compensation, by reference to nationally agreed tariffs (*tabelle*). The case itself was about the *danno morale* of close relatives, the widow and four children of a wrongfully killed person, meaning that the claimants had suffered no personal injury to health (*danno alla salute/biologico*) that might have justified such full compensation, but the language used by the Court is general and implies a principle not limited to cases of relatives' grief for wrongful death. As such, it opens the possibility of general recovery of 'pure' non-pecuniary loss, irrespective of physical injury, based on the fundamental and universal value of the human person, as the Court put it. It takes Italian law to a new ground, closer to French law where the inviolability of the human person is equally protected<sup>228</sup>, and ahead of other jurisdictions, where such loss is only recoverable under conditions in specific cases of wrongful death or nervous shock. It remains to be seen if this new definition of *danno morale* will be firmly established in the Italian nomenclature, the judgment of the Court having attracted immediate criticism by a leading writer in the field.<sup>229</sup>

A separate concept and autonomous category of *daño corporal* has also been recently developed in Spanish scholarship, under the influence of developments in Italy, as 'impairment of health or bodily integrity of the human being which is certain and real and independent of the pecuniary and non-pecuniary results that it produces'.<sup>230</sup> Additionally, the Spanish Supreme Court, in another development echoing Italian developments, recognises *pretium doloris* as a separate head of damage, additional to pecuniary ad

<sup>226</sup> *Cassazione civile, Sezione III (Section III), 17 aprile 2013, n. 9231, Pres. Carleo, Rel. Chiarini. Pm. Corasaniti*

<sup>227</sup> The existence (!) of *danno esistenziale* as a separate head of non-pecuniary loss was denied by the *Corte di Cassazione in Cassazione Sezioni Unite* (United Sections), 11 November 2008, no 26972; but lower courts continued to award damages in small claims for such loss raised by, for example, football fans denied the chance of watching a football match on TV due to technical problems of the broadcasting company: *Giudice di Pace* (Justice of the Peace) *Castellamare di Stabia* 10 February 2007.

<sup>228</sup> Article 16-1 following, *Code Civil* see *supra*

<sup>229</sup> See *Corte di Cassazione* 20 novembre 2012, n.20292, in *Danno e Responsabilità*, with comment by G. Ponzanelli, '*Non è tanto il danno esistenziale, ma il quantum il vero problema del danno non patrimoniale*' ('The real problem of non-patrimonial loss is not so much the existential loss but the quantum'); *Corte di Cassazione* 4 dicembre 2012, n.21725, in *Danno e Responsabilità* 2013, 294 with comment by Giulio Ponzanelli, '*Disservizi dell'amministrazione giudiziaria e danno non patrimoniale*' ('Service failures of judicial administration and non-patrimonial loss).

<sup>230</sup> De Angel Yaguez, R (1993) *Tratado de responsabilidad civil* (Treatise of Civil Liability) Civitas p. 698; Vicente Domingo, E (1994) *Los danos corporales: tipología y valoración* (Corporal Injuries: Typology and evaluation) J. M. Bosch p. 323.



non-pecuniary loss.<sup>231</sup> It is primarily the *causa doloris* of relatives of a wrongfully killed person, but, like in Italy, it does not seem to be limited to cases of wrongful death. The Spanish Supreme Court has taken a lead in the Romanistic tradition in clarifying this basic nomenclature in a recent decision.<sup>232</sup> The court applying a conceptual distinction between harmful event and harmful consequences (also known in Italian doctrine as the distinction between *danno evento* and *danno conseguenza*), held that “according to its origin, damage caused to property or to the rights of a person can be classified as property damage if it affects his pecuniary assets, biological damage if it refers to his physical integrity, or moral damage when it refers to his rights of personality”. The court went on to hold that in the case of all three harmful consequences both patrimonial and non-patrimonial losses are possible and equally recoverable.<sup>233</sup> Interestingly in Portugal also a distinction is made between ‘*dano corporal*’, perceived as functional (*biologico*), a ‘somatic and biological devaluation of the person’ including *danos biologicos de natureza psiquica* (biological harm of a psychological nature), considered as *sui generis* non-pecuniary harm or tertium genus (an amphibious creature), and *dano de afirmacao pessoal-dano a vida de relacao* (harm to affirmation of personal autonomy, including harm to a person’s social life, *dano sexual* (sexual harm), the so-called *premium juventutis* (youth premium), and other related non-pecuniary harm.<sup>234</sup>

## OVERVIEW OF THE EUROPEAN LANDSCAPE: AREAS OF UNCERTAINTY

The comparative study of non-pecuniary harm from personal injury reveals the importance of distinguishing the ontology of non-pecuniary harm from nomenclatures used by the courts. Ontology is in the hands of experts and lawyers, working together, sometimes in order to push further the limits of recovery. Nomenclatures are ways of managing the ontology of harm. The richness of ontology of harm in the experience of European courts reflects the most intimate aspects of social and personal values in each jurisdiction. But the European experience also shows the limits of nomenclatures. Zooming out on the European landscape we can see a number of areas of uncertainty that stand out.

First, important heads of injury and types of harm can overlap, even where the basic nomenclature is more general rather than detailed,<sup>235</sup> sometimes in unexpected ways. Several borderlines become fuzzy, because the nomenclature is not clear or adequate: such as pain and suffering and loss of future earning capacity,<sup>236</sup> pain and suffering and

<sup>231</sup> STS 29.12.1998, RJ 1998, no.9980, Rivero Hernandez, F in Lacruz Berdejo, JL (1995) *Elementos de Derecho Civil*, (Elements of Civil law), II, Dikynson 479.

<sup>232</sup> STS 27.7.2006 RJ 2006 no. 6548

<sup>233</sup> See Martin-Casals, M & Ribot J, in Winiger, B, Koziol, H, Koch, B and Zimmermann, R (eds) (2011), *Digest of European Tort Law*, vol. 2, *Essential Cases on Damage* De Gruyter 31, 32,

<sup>234</sup> See details in von Bar supra note 49, at 368.

<sup>235</sup> When the risk of overlap is greater as shown in the analysis of the French nomenclature *Dintilhac*, supra.

<sup>236</sup> Thus the German Appeal Court in *Jena*, in its judgment of 24.11.1998, *Neue Juristische Wochenschrift - Rechtsprechungsreport Zivilrecht* (Case law report: Civil law) (NJW-RR) 2000, 103 granted ‘aggravated pain and suffering damages’ to a top amateur athlete whose chances for a professional future were destroyed by his injury. Such aggravated pain and suffering damages are intended to compensate for the grave change of the victim’s future life, and the loss of his self-realisation potential, which is seen as a serious personality loss. They are assessed regardless of actual distress caused by such a negative prospect on the basis of a judicial assessment of an ‘ideal impairment’, which brings it closer to loss of amenity. The purpose of compensating a potential future loss of earnings is rather thinly disguised in such cases.

loss of amenity; pain and suffering and ‘mortal terror’; pain and suffering and fear of developing a disease; loss of faculty and loss of amenity; loss of pleasurable hobby or past-time and loss of amenity. In applying or revising nomenclatures under developing social demands, courts everywhere are charged with the duty to apply relatively simple and not very detailed rules and they do not always follow a consistent line, oscillating between different policies and goals.

Second, another area of uncertainty exists regarding the relevance of cognitive loss, i.e. the relevance of the victim’s awareness of their predicament and ability to feel pain or humiliation. The distinction between pain and suffering and loss of amenity can be useful in that respect, for while the former can only be cognitive in nature, the latter can, but does not need to, be so. Those jurisdictions that do not in principle distinguish between pain and suffering and loss of amenity are facing an additional challenge with claims of non-pecuniary harm when the victim is unconscious or in a permanent vegetative state, than those who do.<sup>237</sup> Those who do so distinguish are faced with the choice of whether to allow in such cases recovery for both, or loss of amenity only, because the victim cannot feel pain, or neither. While the compensation of cognitive loss only would be consistent with a mainly compensatory function of damages, ignoring the cognitive element would appear to be essential if the function of damages is to vindicate the injury to the human dignity of the victim. The diminution of human dignity caused by the injury clearly does not depend on whether the victim feels pain or is aware of the loss of amenity. Indeed, in jurisdictions like the German, in which human dignity is the most fundamental of fundamental human rights, the loss of the capacity to feel pain or be aware of the loss of amenity can in itself be seen as loss of a basic faculty of a complete human being that needs to be compensated.<sup>238</sup> Similarly, under Austrian case law, an unconscious victim can recover damages for pain and suffering because “... a detrimental effect on the structure of a person’s personality which makes that person unable to feel pain and suffering in contrast to well-being and joy and which thus deprives that person from its elementary human perception triggers liability for damages comprising the non-material damage suffered. Those deprived of their fundamental perception suffer at least an equal disadvantage as a person whose sensation of well-being is disturbed by

<sup>237</sup> No distinction between pain and suffering and loss of amenity in the Spanish Road Traffic Liability Act of 2004, which although applicable only to traffic accidents is applied more generally by the courts. As already noted such a distinction is made in other jurisdictions, either in the nomenclature, as in English law where they are separate heads of damage, and in French law, where they are diffused under more detailed specific heads of damage), or in the recognised ontology in the assessment of non-pecuniary loss damages, as in German law. More nebulous is the position of Italian law on this, where the *danno biologico* (biological harm) certainly includes the loss of amenity, although it is greater in scope than that, but it is not clear if it also includes pain and suffering, which may now be taken into account under the recently expanded notion of *danno morale* (moral damage), that seems to have absorbed the discredited *danno esistenziale* (Existential loss): see *supra*, *Corte di Cassazione* 20 novembre 2012, n.20292, in *Danno e Responsabilità*, with comment by G. Ponzanelli.

<sup>238</sup> See the discussion of the compensation in German law of a person’s *Wuerdenetschaedigung* (injury to a person’s worth) *supra*. However, if the victim dies immediately after been injured no compensation for non-pecuniary loss (*Schmerzensgeld*) is allowed, as death is no cause of action in German law. Close relatives in German law can only recover for the shock caused by the death of the victim, under the conditions of liability for shock injuries (*Schockschaden*) (liability comparable to liability for Nervous shock in English law): Deutsch, E and Ahrens, H-J (2013) *supra* note 37 no. 483, 223. But close relatives-dependents of the deceased also have personal claims for wrongful death in English law (Fatal Accidents Acts), in Austria and Switzerland (*supra*), in France (*dommage moral par ricochet*-moral damage by reflection), Spain (*dano moral*), Portugal and Italy (*danno morale*, see the recent *Cassazione civile, Sezione III, 17 aprile 2013 n. 9231 supra*)

*pain...*"<sup>239</sup>. Leading authors in Austria argue, moreover, that assessment of damages in such cases should proceed in an objective-abstract way, without taking into account the subjective situation of the victim who does not have any sensation of pain.<sup>240</sup> Equally in France, the *Cour de Cassation* has held in a judgment in 1995 that a chronic vegetative state "does not exclude an award of damages under any of the heads of recoverable damage" (*l'état d'inconscience totale d'une victime n'exclut aucun chef d'indemnisation*).<sup>241</sup> As put by an eminent French scholar, '*le préjudice n'est pas ce qu'en perçoit la victime, mais ce qu'un tiers extérieur peut constater*' (the loss is not what the victim perceives but what a third external party can verify).<sup>242</sup>

All these jurisdictions, however, would seem to accept that the unconscious state of the victim may affect the quantum of damages, which in some jurisdictions can be close to symbolic in case of complete unconsciousness. In Germany, the *Bundesgerichtshof* (BGH) had originally accepted that since one of the established aims of pain and suffering awards in personal injury cases under § 253 (2) *BGB* is to provide satisfaction ("*Genugtuung*") to the victim,<sup>243</sup> if the victim is unconscious and unable to feel any satisfaction when receiving the money, only symbolic damages can be awarded. But recently the BGH broke away from this precedent, referring to constitutional principles protecting human dignity (Art. 1 (1) of the German Constitution-*Grundgesetz*), and now accepts that at least in those cases where the injury leads to a "destruction of personality", a full and fair equitable compensation should be awarded.<sup>244</sup> The Dutch Supreme Court (*Hoge Raad*) also seems to accept, in a somewhat ambivalent judgment, that the fact that the victim is left temporarily unconscious (initially, but no longer completely unconscious later) is as such not enough to withhold compensation for pain and suffering, but is relevant in determining the

<sup>239</sup> *Oberster Gerichtshof (OGH) 23.4.1992, 6 Oberster Gerichtshof in 'Zivilsachen (Ob) 535, 1558/9, Ehe- und familienrechtliche Entscheidungen* (Austrian Supreme Court Marriage and Family law decisions) 69.111, reversing earlier case law. See also, OGH 31.8.1992, 8 Ob 581/92; OGH 14.1.1993, 2 Ob 66/92 *Zeitschrift für Verkehrsrecht (ZVR) 1993/150; Recht der Medizin (RdM) 1995, 116; OGH 11.3.1999, 2 Ob 192/97t ZVR 2000/54*: Death after 40 years of comatose unconsciousness without any perception or sensation, damages of Austrian Shillings 60.000 (=4360 €). This case law was hailed by the majority of the Austrian doctrine: Koziol, H (1997) *Österreichisches Haftpflichtrecht* (Austrian Civil Liability law) I, Manz, Wien, 3, 11/23; Karner, E (1999) *Der Ersatz ideeller Schäden bei Körperverletzung* (The Compensation of ideal damage in cases of personal injury), Springer, 123; Danzl, K-H, Gutierrez-Lobos, K and Müller, OF (2008) *Das Schmerzensgeld in medizinischer und juristischer Sicht* (Compensation for pain from a medical and legal perspective) 9th ed. Manz 121; *contra*: Huber, C 'Antithese zum Schmerzensgeld ohne Schmerzen – Bemerkungen zur objektiv-abstrakten und subjektiv-konkreten Schadensberechnung (Antithesis of money for pain without pain-Comments on the objective-abstract and subjective-concrete evaluation of damage), *ZVR* 2000, 218; Harrer, F in Schwimann, M (2006) *ABGB Praxiskommentar*, (Commentary on the practice of the General Civil Code) LexisNexis § 1325 no 78. Other jurisdictions that allow recovery of damages for pain and suffering by an unconscious victim include France as already seen.

<sup>240</sup> Karner, E *supra*, note 256 138; Karner, E and Koziol, H (2003) *Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform* (The Compensation of ideal damage in Austrian law and its reform), Manz 60; Danzl, K-H, Gutierrez-Lobos, K and Müller, OF (2008) *Schmerzensgeld* *supra* note 256, 121; Kossak, W in *Zeitschrift fuer Verkehrsrecht (ZVR) 2001, 229*; see also Huber, C in *ZVR* 2000, 231; Oberlandsgericht (OLG) (Court of Appeal) Wien *ZVR* 2001, 43.

<sup>241</sup> *Cour de Cassation, 2e Chambre Civile* (Second Civil Chamber) 22.02.1995, no. 92-18731 & no. 93-12644, *Bulletin Civil II*, 61 (two cases). This objective approach has now been established, after some hesitation in earlier cases, as it appeared be contrary to the principle of *reparation integrale*, fundamental principle of French law, which demands that the victim is not under- or over-compensated

<sup>242</sup> Philippe Brun, National Report France, in Banakas, S et al. (eds), *Personal Injury Compensation In Europe, The Common Core of European Private Law* (unpublished, forthcoming).

<sup>243</sup> BGH, 6.7.1955, BGHZ 18, 149.

<sup>244</sup> BGH, 13.10.1992, BGHZ 120, 1.

quantum.<sup>245</sup> Even more ambivalent seems to be the answer of Italian law. Some Italian courts have refused in the past to compensate the pain and suffering of an unconscious victim, on the basis that *danno morale* only exists when the victim is consciously waiting for his death,<sup>246</sup> thus disassociating pain and suffering, which was seen as *danno morale*, from *danno biologico* or *danno alla salute*, which is the injury to the physical or psychological integrity of the victim.<sup>247</sup> Other Italian courts, however, emphasize the fact that even when the victim is not conscious of their injury, the injury exists, and its existence does not depend on its awareness by the victim.<sup>248</sup> This view appears not to distinguish between pain and suffering and the actual injury to the victim's physical and psychological integrity, including both in the concept of *danno biologico*, and now seems to prevail in Italian case law. By contrast, in English law damages for pain and suffering are not available to an unconscious victim. Pain and suffering has been said to be 'an inherently subjective head of damage in the sense that it depends upon the existence of awareness in the victim of his plight'.<sup>249</sup>

Taking into account the consciousness or otherwise of the victim strengthens the compensatory character of the award but is contrary to the increasing demand for a normative protection of human dignity and personal integrity as a supreme good. We are a long way from Binding's provocative observation that compensation should be available for things that can be compensated, and for the rest we should be content with criminal law. The punitive character of any damages for non-pecuniary harm when the victim is in a permanent vegetative state is difficult to deny, and that applies also to damages for loss of amenities awarded in such cases.<sup>250</sup> But is that necessarily a bad thing? Criminal law is not at the victim's disposal, and not always on the victim's side, in the way that Tort law is. This is evidenced by cases where Tort law was able to deliver liability judgments when criminal law could only deliver non-guilty verdicts. All of that said, there is, furthermore, a common tendency across jurisdictions, with a few notable exceptions, not to compensate the loss of expectation of life (damages for reduced life expectancy),<sup>251</sup>

<sup>245</sup> See *HR (Hoge Raad)*, 20 September 2002, *Nederlandse Jurisprudentie (NJ)* 2004 112 note *JBMV* (Cornelisse/Lokhorst), and *Lindenbergh/Verburg* (2003), p. 372.

<sup>246</sup> *Corte di Cassazione*, 2 aprile 2001 n. 4783 in *Danno e responsabilita.*, 2001, 820, note by M. Bona; Tribunale di Roma (Roma Tribunal) 7 marzo 2002 in *Archivio giuridico della circolazione e dei sinistri stradali* 2002, 574; in *Giurisprudenza di Merito* 2002, 981.

<sup>247</sup> On these concepts see *supra*.

<sup>248</sup> *Corte di Cassazione*, 1 dicembre 2003, n. 18305, in *Danno e Responsabilita*, 2004, 143, note by M. Bona. Of the same opinion is the judgment of the *Corte di Cassazione*, 19 ottobre 2007, n. 21976, in *Danno e responsabilita*, 2008, 313, with note by Foffa; *Responsabilita civile e provvidenza*, 1995, 309, with note by Pellicchia; in *Giurisprudenza italiana*, 1995, I, 1, c. 1534, with note by Citarella; in *Foro italiano*, 1995, I, c. 1852, with note by R. Caso; *Corte di Cassazione*, 6 ottobre 1994, n. 8177, in *Foro italiano*, 1995, I, 1852, and *Corte di Cassazione*, 24 maggio 2001, n. 7075, in *Giustizia civile Massimario*, 2001, 1044.

<sup>249</sup> *West v Shephard* [1964] AC 326, at 349, per Lord Morris. Interestingly, in the Republic of Ireland, a jurisdiction where the English common law continues to have a considerable influence, a distinction is drawn on the basis of the degree or nature of the victim's unawareness. In *Cooke v Walsh* [1984] I.L.R.M. 208 medical evidence was submitted that the plaintiff, who was aged 11 at the time of the action, would never develop beyond the mental age of two and would have little or no awareness of his plight. The majority of the Irish Supreme Court held that as a result general damages (for pain and suffering and loss of expectation of life) would be moderate. However, in the case of *Hughes v O'Flaherty* (unrep). HC, 19 January 1996, the court refused to reduce an award for general damages on the basis of a plaintiff's lack of awareness. In that case the plaintiff had limited awareness of his plight. This suggests that any reduction will only take place in the most severe cases.

<sup>250</sup> European jurisdictions that clearly allow recovery of loss of amenities also when the victim is unconscious include England, Germany, Austria, France, Italy and the Netherlands: see references in previous notes.

<sup>251</sup> No damages for reduced life expectancy (lost years) in English law, after the introduction of the *Administration of Justice Act* 1982, section 1(1) b, but in assessing damages for pain and suffering the court should

or, indeed, the loss of life itself, i. e. damages for death.<sup>252</sup> This shows a preference for a compensatory function in this respect of the non-pecuniary damages award, which in some jurisdictions is difficult to reconcile with an increasing tendency to compensate the unconscious victim, even in a permanent vegetative state (PVS), or loss of amenities or the violation of physical integrity.<sup>253</sup> Is the loss of life expectancy, and, a fortiori, the loss of life itself, not the overwhelming manifestation of an overarching amenity loss that embraces all other amenity losses, i. e. the loss of the pleasure of being alive itself?<sup>254</sup> Or is death to

take into account any suffering caused or likely to be caused by awareness by the (conscious) claimant that his expectation of life has been reduced, and the 'lost years' are not taken into account in calculating future loss of earnings. Similarly in Germany: see the discussion of German case law in Slizyk, A (2013) *Beck'sche Schmerzensgeld-Tabelle* 9<sup>th</sup> edition Beck no 225, 100 following, and Austria. But damages for reduced life expectancy can be awarded in France: see *Cour de Cassation, 2e Chambre Civile* (Second Civil Chamber) 2 avril 1996, no 94-16576, *a contrario*, and in Italy, where the loss of life expectancy can be seen as a direct consequence of the *danno biologico* suffered by the victim.

<sup>252</sup> What is meant here is the victim's own claim against the tortfeasor for depriving the victim wrongfully of their life, not any claims of third parties for their own personal dependency loss arising from the victim's wrongful death, on which see below.

<sup>253</sup> A special, but different, issue is a claim for the anxiety and horror experienced by a conscious victim faced with imminent death. Since the victim is dead, the existence of such a claim is only meaningful if the victim's non-pecuniary loss claims, which have arisen before the victim's death, can be inherited as part of the victim's estate (below). Certain US jurisdictions have recognised a victim's claim for pain and suffering in cases where the time between their injury and their death is either extremely short, or almost zero: See, eg, *Landreth v Reed* 570 SW 2d 486 (1978): a child drowned, conscious pain was inferred and damages of \$30,000 were awarded. In England the House of Lords has held in *Hicks v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, that where the period of time between the injury and the death is short, damages for pain and suffering should not be awarded, and claims by the estates of three spectators crushed to death at a football stadium were denied on the basis that the period of time between the injury and death was too short. As a judge said in *Hicks*, 'The last few moments of mental agony and pain are in reality part of the death itself for which no action lies': Parker LJ in the Court of Appeal, [1992] 1 All ER 690. However, the *Judicial College Guidelines for the Assessment of General Damages* - new 11th Edition 2012, include such a 'short death fear' award. Interestingly, the matter has been discussed at some length in Austria where an authoritative view is that so-called 'fear until death' should be compensated if the tortfeasor's fault is serious (under paras. 1323, 1324 ABGB, Austrian Civil Code), the victim did in fact experience fear and that in some way such fear can be 'objectified' (e.g. imminent crash of an airplane, but not unsuspected sudden terrorist attack): Karner E and Koziol H (2003) *Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform* (The Compensation of ideal damage and its Reform), Manz, 66; Koziol, H (2002), 'Die Bedeutung des Zeitfaktors bei der Bemessung ideeller Schäden' (The significance of the time factor in the evaluation of ideal losses), in *Festschrift Hausheer*, Manz, 597 (603); comp. also Danzl, C-H (2002) 'Schmerzensgeld im Wandel: Neues zu den Voraussetzungen und zur Höhe des Schmerzensgeldanspruches' Money for pain is changing: Recent developments regarding the conditions and measure of the claim for compensation of pain and suffering, *Sachverständige (SV)* 2002, 73 (80f), in connection with the fear of death of the Kaprun funicular fire victims. Pain and suffering claims before death in German law have as a precondition that there is a severe bodily injury that leads to death. Even a short interval however, of 30 or 60 minutes between injury and death, suffices for the courts to grant a pain and suffering award (see *Oberlandsgericht (OLG) Hamm* (Hamm Court of Appeal), 22.2.2001, *Neue Zeitschrift für Verkehrsrecht (NZV)* 2002, 234, 30 minutes: EUR 2,500.00, *OLG Hamm*, 21.1.1997, *NZV* 1997, 233 1 hour: EUR 2,500.00), but plain mortal terror does not suffice. Under Italian law there is probably no *danno biologico* as death occurs almost immediately, but perhaps *danno morale*. The *Corte di Cassazione* has held in the past that at least 20/30 days before the death of the victim are needed for recoverable damage to exist (*Cass.* 30 June 1998, n. 6404, in *Danno e responsabilità*, 1999, 323, note Martorana; *Cass.* 26 September 1997, n. 9470, in *Giurisprudenza italiana*, 1998, 1589, note Bona; *Cass.* 23 February 2005, n. 3766, in *Foro italiano*, 2006, I, 2463), but other decisions have accepted that a few hours of suffering can be a compensable *danno morale* notwithstanding the very short agony of the victim (*Cass.* 31 May 2005 n. 11601, in *Riv. it. medicina legale* 2006, 3, 694; *Cass.* 6 August 2007, n. 17177, in *Archivio giuridico della circolazione e dei sinistri stradali*, 2008, 35; *Cass. civ. sezione lavoro* (Cassation Court Labour law section), 7 June 2010, n. 13672, *Danno e responsabilità* 2011, 1, 29, note Foffa).

<sup>254</sup> In cases of very severe injury to the victim the subjective pleasure of being alive may be doubted, but this is normally no ground on which the tortfeasor is allowed to claim any relief for the injury to the victim's physical integrity.

be seen as better than a life deprived of all amenities? Yet, most jurisdictions draw the line with death, which is not accepted as a cause of action belonging to the deceased. In common law the reason given for this has been not a philosophical but a pragmatic one, i.e. that dead people cannot sue.<sup>255</sup> But, of course, if wrongfully killed persons would have a claim arising from their own wrongful death, such a claim could be inherited as an asset of their estate and for the benefit of the estate and their heirs, who, being, presumably, alive, would be perfectly able to sue. Other non-pecuniary loss claims belonging to the deceased and arising from the personal injury that finally caused their death are, in fact, inheritable in a number of jurisdictions, but at the same breath some of these jurisdictions deny the existence, and inheritability, of a victim's claim for the loss of their own life. It seems odd that in legal orders where sanctity of life is a supreme legal principle decisive in many important areas of legal policy, no personal claim is recognised for wrongful deprivation of life, and, as recently proclaimed in the so-called (academic) Draft Common Frame of Reference of European Private law which purports to offer model rules for a common position of European jurisdictions on the matter, the loss of life should not be 'a legally relevant' damage' for the law of Tort.<sup>256</sup> Indeed, this does seem to be the position of most European jurisdictions.<sup>257</sup> The Italian *Corte di Cassazione*, for example, while holding that the loss of life itself is not *danno biologico*,<sup>258</sup> held that a person's life is an interest distinct from a person's health, certainly worthy of protection but only in criminal law.<sup>259</sup> Binding would have been pleased that finally, even if right at the end, a line is drawn in compensating the 'uncompensatable', but we cannot be so sure about Jehring. As a result, a tortfeasor who wrongfully kills outright a person without dependents accrues in most jurisdictions no liability to pay damages whatsoever, except, perhaps, funeral expenses,<sup>260</sup> or bereavement or third party shock losses, if third parties can establish grounds for such a limited personal claim. It is certainly cheaper to kill rather than wound. This puts the whole system of compensation in European jurisdictions for non-pecuniary loss into perspective.

<sup>255</sup> See *Baker v Bolton* (1808) 1 Camp 493, 170 ER 1033

<sup>256</sup> Death 'does not constitute legally relevant damage' for the law of Tort, so far as the deceased is concerned: von Bar supra note 49, 394.

<sup>257</sup> In German law, life is included in the interests protected by Tort law from unlawful invasions under para. 823 I BGB, but is not included in the list of injuries for which under the new para. 253 II BGB the victim may be awarded compensation for non-patrimonial loss. These are injury to the body, health, freedom and sexual self-determination (see *supra*). It appears that the justification for this is that the right to life ceases to exist with death, and, therefore, a compensation of its violation posthumously is not possible: see von Bar supra note 49. See also E. Deutsch, E and Ahrens, H-J, (2013) *Deliktsrecht*, supra note 37, no. 483, 223. The Austrian Supreme Court has made it clear that the compensation claims available to the deceased's close dependents under para. 1327 ABGB for loss of maintenance are personal and original claims of these third parties and not the deceased's: *Oberster Gerichtshof* 17.10.1963, *Entscheidungen des oesterreichischen Obersten Gerichtshofs in Zivil- und Justizverwaltungssachen* (Decisions of the Austrian Supreme Court in Civil Matters) (SZ) 36/133. Likewise in English law, while the rule that death is no cause of action remains (*Baker v Bolton*, supra), the maintenance and other claims of dependents under the Fatal Accidents Acts (see below) are personal third claims arising from the victim's wrongful death, notwithstanding the fact that they can be affected by the deceased's contributory fault. Under Dutch and Spanish law too, death is no cause of action, although Spanish authors are disagreeing with the consistent case law to that effect: see the references in von Bar, above note 53 at 395. Exceptionally, Portuguese courts recognise the loss of life as a recoverable loss, the claim being the deceased's original claim inheritable and to be exercised by the deceased's heirs: see details and references in v. Bar., supra note 49, p. 395.

<sup>258</sup> *Corte di Cassazione* 23 maggio 2003, no.8204, *Giustizia civile Massimario* 2003, fasc. 5.

<sup>259</sup> *Corte di Cassazione*, sezione penale, 30.01. 2003, no.7632, *Rivista Italiana di Medicina Legale (e del Diritto in campo sanitario)*, 2003, 694; *Cass.* 16 maggio 2003, no. 7632, *Foro italiano* 2003 I 2681.

<sup>260</sup> As noted by Harrer, F, in Schwiman, M, *ABGB Kommentar* supra note 239, Para. 1327 no. 1

A third area of uncertainty concerns the extent to which the impact of the victim's injuries on third parties must be taken into account, particularly when they cause to a third party a personal non-pecuniary loss, such as grief or psychological illness. Such non-pecuniary losses *par ricochet* or by reflection in certain jurisdictions are only recognised as independent personal losses of psychiatric nature by third parties under certain, limited, circumstances,<sup>261</sup> whereas in other jurisdictions are considered as third party claims linked to the direct victim's claim for personal injury.<sup>262</sup> This is an important difference in the treatment of legal claims of the *par ricochet* victims, and not only in the strict legal sense of the consequences of any defects of the direct victim's claim on the third party claim,<sup>263</sup> or insurability of liability or loss.<sup>264</sup> The latter approach also shows a higher value been placed on relations and family solidarity and affection, while the former is defiantly individualistic, and, sometimes, appears to be unfairly restrictive.<sup>265</sup>

Related to the issue of *par ricochet* losses, but clearly different in legal nature, is the question of the survival, or inheritability of a non-pecuniary harm claim after the victim's death.<sup>266</sup> In the light of what was said above about the impossibility of a claim for death, it must follow that in those jurisdictions where this is the case the issue of inheritability of the victim's claims can only arise if the victim is not killed instantly.<sup>267</sup> Unlike in the

<sup>261</sup> Liability for Nervous shock in England; liability for *Schockschaeden* (shock injuries) in Germany

<sup>262</sup> France, Austria, Switzerland

<sup>263</sup> For example, the relevance of the contributory fault of the direct victim.

<sup>264</sup> Cutting off *par ricochet* claims from personal injury would appear to make the liability risk more manageable for liability insurers, but *quaere?*

<sup>265</sup> Thus in English law close relatives who are so-called secondary victims of nervous shock can only recover if they witnessed the injury of the direct victim or its immediate aftermath, a restriction apparently dictated by the need to keep the floodgates of claims closed: see *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310

<sup>266</sup> Although the maxim *actio personalis moritur cum persona* (personal claims die with the person), seems to be universally recognised, the majority of European jurisdictions allow, sometimes under certain conditions, the survival of the victim's actions for the benefit of their heirs. The English Law Reform (Miscellaneous Provisions) Act 1934, Section 1(1) provides that 'all causes of action subsisting against or vested in [the deceased] at the time of his death shall survive against, or as the case may be, for the benefit of, his estate'. In order to avoid the defendant being liable twice over, the Act provides that while the estate can recover damages for any pecuniary and non-pecuniary loss suffered between the time of the accident and the time of death, no damages are recoverable either for prospective pecuniary or non-pecuniary loss. Under German law, apart from dependents' claims for financial support and funeral costs, exclusively regulated by National Accident Insurance law, no further claims in wrongful death cases are allowed, neither a *pretium mortis* nor bereavement damages or a pain and suffering, but the deceased victim's valid claim of *Schmerzensgeld* can be inherited, after the abolition of the old para. 847 BGB in 2002 and the introduction of the new para. 253 II. Inheritable are non-pecuniary loss claims in France, after two major judgments of the mixed chamber of the *Cour de Cassation, chambre mixte* (mixed chamber) 30 avril 1976, *Bulletin civil chambre mixte* 1976, p. 1 no. 2 and Cass., *chambre mixte* 30 avril 1976, *Bulletin civil chambre mixte* 1976, p. 2 no. 3, and also Belgium, Portugal (under the succession rules of art. 496 of the Portuguese Civil Code), Sweden, Ireland (Civil Liability Act 1961, s. 7(1)) and Austria (see *OGH* 11.07.2002, *ZVR-Zeitschrift fuer Verherrecht*-2004, 26), also Koziol, H & Welser, R (2006) *Buergerliches Recht* (Civil law), II, 2<sup>nd</sup> edition Manz 323), but not Greece. In Spain a recent judgment of the Supreme Court has gone against the tide in previous case law and doctrine, recognising the inheritability of non-pecuniary loss claims, even if the victim had not started proceedings while alive, as previously required (and as still required under Dutch law, art. 6:107 of the Dutch Civil Code): *Sentencias del Tribunal Supremo (STS)* 19.06.2003, RAJ (*Repertorio Aranzadi di Jurisprudencia*) 2003 (3) no 4244 p. 7941.

<sup>267</sup> Thus in Italy the courts accept the inheritability of non-pecuniary loss claims, including the claim for *damno biologico* (biological harm), provided the deceased survived the injury even if only for the very minimum of time, which is not to be defined a priori by the courts: see *Corte di Cassazione* 7 March 2003, n. 3414, in *Giustizia civile Massimario*, 2003, 485; *Cass. sezione penale* (Criminal section), 30.01. 2003, no.7632, *Rivista Italiana di Medicina Legale (e del Diritto in campo sanitario)*, 2003, 694; *Cass.* 16 May 2003, no. 7632, *Foro italiano* 2003 I 2681; *Cass.*, 14 July 2003, no. 11003, *Responsabilita civile e provvidenza* 2003, 1049.

case of *pecuniary* harm resulting from a personal injury, it cannot be argued that there is a valid *compensatory* reason for the heirs of the victim to inherit the non-pecuniary harm claim of the (previously injured and now) deceased victim. Again the fundamental issue is whether the non-pecuniary harm suffered by the deceased when they were injured is wholly or partly strictly personal and subjective, or if at least part of it is to be compensated objectively as a diminution of human dignity. Inheritability of the non-pecuniary loss claim of the victim would be consistent with the latter approach. The heirs' own personal non-pecuniary harm caused by the injury and, now, death, of the victim, is, of course, quite a separate matter, addressed by all jurisdictions, although, as we have just seen, only some among them recognise claims for third party non-pecuniary harm when the victim has not been killed.<sup>268</sup> Inheriting a non-pecuniary harm claim can also be seen as a punitive measure, and, especially in cases of very serious accidental injury for which tortfeasors are obliged or generally expected to be insured, an exercise in wealth distribution.<sup>269</sup> Nevertheless, it is consistent with the logic of allowing the vindication of the worth of human life and dignity in cases in which the remaining lifetime of the victim is too short to allow them to do so themselves, by the victim's heirs on their behalf.

### SOME FINAL THOUGHTS

At the most fundamental level, the debate on whether non-pecuniary harm from personal injury should be compensated or not has been won by the side which answers yes, although objections in principle keep flaring up the discussion from time to time.<sup>270</sup> This debate has moved on from the classical Roman view, the logic of which was irresistible in a society in which humans were divided into freemen and slaves. Personal injury is now seen as perhaps the most serious manifestation of a violation of the integrity of the human person and of human dignity. Non-pecuniary harm is the most intimate in nature harm that results from such injury, also closely linked with the victim's capacity to earn and enjoy material possessions. It is the increase of one's fair share of pain, and the decrease of one's fair share of pleasure, and as such should be as abhorrent to a utilitarianist<sup>271</sup> as it should be to a Natural lawyer.<sup>272</sup> The right to be compensated for personal injury (and the

<sup>268</sup> Quite reasonably courts in these jurisdictions refuse to distinguish between the personal effect on close relatives of a very grave injury and that of death. But third party losses have been in several jurisdictions seen as a step too far, and claims of close relatives are only allowed in cases of wrongful death, a limited and controlled exception, or if the result of personal nervous shock of the third party which is pathologically manifested (English and German law).

<sup>269</sup> Use of Tort law to achieve such a goal is seriously disputed: see Weisbach, DA (2003), 'Should Legal Rules be Used to Redistribute Income?' (70) *University of Chicago Law Review* 439

<sup>270</sup> These, including arguments put forward by the economic analysis school of thought, are critically assessed by Rogers, WVH (2001), 'Comparative Report', in Rogers, WVH (ed.) (2001) *Damages for Non-pecuniary loss in a Comparative Perspective*, Springer 247 and following, who concludes in favor of compensating fully non-pecuniary losses. For the economic analysis perspective in more detail see Faure, M (2000) "Compensation of non-pecuniary loss: an economic perspective", in Magnus, U and Spier, J. (eds) *European Tort Law, Liber Amicorum for Helmut Koziol*, Lang, Frankfurt am Main, 143.

<sup>271</sup> 'Nature has placed mankind under the governance of two sovereign masters, pain and pleasure.' Bentham, J (1789), *An Introduction to the Principles and Morals of Legislation*, ch. 1, 'Of the Principle of Utility', Oxford, Clarendon Press.

<sup>272</sup> As classically stated by *Ulpianus* in *D. 1.1.10pr* '*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*'. (Justice is the constant and perpetual will to give to everyone what they deserve. The precepts of law are the following: live honestly,



right to compensate<sup>273</sup>) has been accepted without much controversy<sup>274</sup> in contemporary societies as the civilised way to restore injustice to individual persons,<sup>275</sup> and it is even seen in some jurisdictions as a fundamental right protected by the Constitution and beyond the reach of politicians and the common legislator.<sup>276</sup> Money is not only the purest, but also the most civilised form of human interaction, as first detected by Mommsen and Jehring, and Tort law an unexpected healer of pain and of humiliation in contemporary societies.<sup>277</sup> Damages for non-pecuniary harm, far from commodifying and degrading personal integrity and dignity,<sup>278</sup> can be seen as an affirmation of the importance of these values in a society in which *talion*<sup>279</sup> ceased to be an option a long time ago. It is futile and makes little sense to justify the compensation in money of such harm in any other way.

The variety of architectures and the different approaches to nomenclature in Europe do not always lead to different results.<sup>280</sup> Despite their intimate character, the most serious types of such harms are in principle recognised as recoverable almost everywhere. At the more conservative end, represented by Germanic and common law jurisdictions, the presence of a medically verifiable pathological or psychological condition resulting from a physical lesion of the body is still considered as an important condition of recovery, but even here there are examples of judicial ontological creativity in order to extend the

do not harm another, give to everyone what they deserve).

<sup>273</sup> Jehring's idea, *supra*. Closure through compensation should be achieved for both parties, and a wrongdoer ought to be given the right of closure by fully compensating the victim.

<sup>274</sup> Relevant, but impossible to discuss in this paper, is the Tort reform debate in the US and the debate in the UK on the so-called 'compensation culture'. See for masterly summaries of opposing arguments in the US, Rabin, RL (1992), 'The Politics of Law Reform' (26) *Valparaiso University Law Review* 709-716 and Phillips, JJ (1992), 'Attacks on the Legal System-Fallacy of 'Tort Reform' arguments' *Trial* 106-109; for the 'compensation culture' debate in England see Morris, A (2007) 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (70) *Modern Law Review* 349.

<sup>275</sup> For restorative justice as a primary function of Tort law see Weinrib, EJ (1992) 'Thinking About Tort Law' (26) *Valparaiso University Law Review*, 717-722; Banakas, S (2002) 'European Tort Law: Is it Possible?', (9) *European Review of Private Law* 363-375; contributions to the Tort Symposium (2005) (5) *Journal of High Technology Law* 1. Restorative justice is also of increasing importance in Criminal law: see in the UK <<http://www.rjc.org.uk/>> (Retrieved 6.10.2015).

<sup>276</sup> In the US the Missouri Supreme Court has recently found that the State statute that limits noneconomic damages in medical malpractice cases to \$350,000 unlawfully infringes on a jury's constitutional right to determine the amount of damage that a person has sustained from medical negligence, and declared the statute unconstitutional and void: 376 S.W.3d 633 (Mo. 2012). Supreme courts in Alabama, Georgia, Illinois, New Hampshire, Oregon, Texas and Washington have also declared their state damages caps unconstitutional, although such caps remain in place in 33 other states. In France the Constitutional Court (*Conseil Constitutionnel*) has recognized a victim's constitutional right to obtain compensation for injury caused by the fault of another, under the principle of art. 1382 *Code Civil: Conseil Constitutionnel, decision of 23 October 1982 p. 3210*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1982/82-144-dc/decision-n-82-144-dc-du-22-octobre-1982.8004.html>> (Retrieved 6.10.2015). However, Dean Carbonnier sharply observed with his inimitable wit at the time of this judgment, that '*le droit à dommages et intérêts est un droit fondamental tandis que l'obligation de réparer, non*' ("the right of compensation is a fundamental right, whereas the obligation to compensate is not"), because the judgment does not seem to affect the status of any ordinary legislation on exclusion of liability. But even if there is no constitutional *duty* to compensate, should there not be a *right* to do so (see Jehring's thought *supra*)?

<sup>277</sup> See the brilliant eulogy and examples of the 'healing' function of Tort law in personal injury cases given by an eminent Canadian judge, Linden, AM (2005) 'Viva Torts!' (5) *Journal of High Technology Law* 139

<sup>278</sup> As forcefully argued by Abel, RL (1989-1990) 'A Critique of Torts' (37) *University of California at Los Angeles Law Review* 785

<sup>279</sup> The Old Testament rule of personal revenge, still applied in Islamic *shari'a* law today, allows victims to ask compensation from the wrongdoer, instead of his public punishment.

<sup>280</sup> Justifying the *presumptio similitudinis* (presumption of similarity), the hope and sometimes self-fulfilling prophecy of comparative law adventures.

right to compensation, wrongful birth being one of them,<sup>281</sup> and the failure to prevent the development of an illness or disability, such as dyslexia, another.<sup>282</sup> Recovery for the fear of contracting or developing an illness is still a dividing issue, with the Romanistic jurisdictions clearly open to it and common law jurisdictions still denying it. And it is again common law and German law that denies recovery of third party non-pecuniary harm,<sup>283</sup> with some jurisdictions close to Germanic legal tradition splitting ranks on the issue, whereas Romanistic jurisdictions deal with such harm in the context of a more relaxed overall approach to third party losses.

Having said that, the difference in architecture and nomenclature is not without interest. It shows that the interest of a comparative study may be mainly in properly understanding, and appreciating, such differences. To take one example, it is interesting why English and German lawyers never thought of linking the non-pecuniary harm of so-called 'secondary' victims of nervous shock to the personal injury claim of the immediate victim and deal with such harm as third party non-pecuniary harm, like French lawyers did, but created instead a separate basis of liability to accommodate it.<sup>284</sup> Arguably, the French is a more rational, and also more efficient in terms of transaction costs, way of dealing with such claims. It is also interesting that architectures of liability regimes inspired by ideology resulted in unique judicial creations in Swiss and Italian law, Swiss law developing a distinct basis of Tort liability, shadowing liability for pecuniary harm in cases of infringement of important personal rights, the 'moral tort' ('*tort moral*') to accommodate all non-pecuniary harm, and Italian law reifying non-pecuniary harm in the concept of 'biological harm' or 'injury to health' that can be subject to objective metrics and no longer needs to be seen as 'moral' harm.<sup>285</sup>

Detailed normative nomenclatures are rare, and the detail in the Dintilhac nomenclature introduced into French law is unparalleled in other legal systems. In the rest of the Romanistic jurisdictions, Italy, Spain and Portugal a more modest and less detailed nomenclature is used. The analysis and comparison of these nomenclatures in this paper shows that more detailed approaches have the advantage of greater certainty and a greater claim to fairness and equality (equality being a special concern in the French legal tradition). A detailed nomenclature like the nomenclature Dintilhac also allows a more careful analysis regarding certain harm types that are dealt with in other jurisdictions somewhat in a hurry. A good example is the distinction between the loss of amenity, classified as functional deficit in the nomenclature Dintilhac and assessed objectively on an incapacity scale, and the loss of the enjoyment of the related faculty by the victim, which is classified as prejudice d'agrément and assessed subjectively. This is analytically a better way of addressing the need of combining objective and subjective criteria in the evaluation of the loss of amenity,<sup>286</sup> serving at the same the important need of more clarity in the judicial evaluation of non-pecuniary harm. It is also analytically sounder to look at

<sup>281</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309

<sup>282</sup> *Phelps v Hillingdon B. C.* [2001] 2 AC 619 (HL)

<sup>283</sup> Unless it falls under the special category of nervous shock or *Schockschaeden* (Shock injuries)

<sup>284</sup> Any policy reasons for limiting recovery of such harm can be taken into account in the assessment of non-pecuniary harm damages.

<sup>285</sup> Interestingly, some neighbouring jurisdictions in the same tradition such as France did not follow suit, but some, like Spain, did, as a result of scholarly interest in the Italian construction.

<sup>286</sup> Compare the approach of English law in *West v Shepherd* [1964] AC 326

non-pecuniary harm in two stages, the stage before, and the stage after, the stabilisation of the victim's condition, as only the nomenclature Dintilhac does. Temporary non-pecuniary harm can be more correctly assessed if distinguished from the permanent after-effect of the injury. Arguably, a detailed nomenclature can enhance the degree of control that the courts exercise on awards, because the one head of damage-covers-all approach, exemplified by German law, leaves the field more open for creative ontologies of harm devised by claimants' lawyers and their medical and other experts. But it also carries, as shown in this paper, the risk of greater overlap between different heads of damage.

This paper does not discuss in detail the different approaches of contemporary jurisdictions with regard to the evaluation of non-pecuniary harm and the debate surrounding it,<sup>287</sup> but has touched upon the principal methods of assessment and their importance. In terms of principle, the evaluation of non-pecuniary harm raises the important issue of whether it can or should be done on an objective or a subjective basis, and the role of functionality or incapacity metrics. Suffice it to say here that most jurisdictions leave it to the judge's equitable and fair judgment to assess the loss, usually with the aid of national indices and tables to promote uniformity, and on the basis of a primarily objective assessment supplemented by adding something extra in the award for particular personal circumstances that exist in the particular case. Incapacity metrics are also used in some countries where relevant, for example in France and Italy, as has been shown. Their advantage is that they add to the scientific credibility of the basis of assessment, but when they are binding for the judge they stop the judge from assessing non-pecuniary harm in an objective way that is not solely based on expert evaluation but also takes into account society's feeling as to what is a fair award.<sup>288</sup> Interestingly, empirical evidence outside Europe shows that the layperson's perception of the seriousness, and engagement with the issue of compensation, of non-pecuniary harm from personal injury is intra-national and intra-communal, with no significant cultural variations.<sup>289</sup> A judicial objective assessment, to the extent that it is possible, should therefore also serve convergence of awards in different jurisdictions, although this is certainly also subject to local variations of economic conditions.

The evaluation of non-pecuniary harm raises additional issues of economic efficiency, loss allocation and social justice.<sup>290</sup> The principle of recovery, and the architecture and nomenclature used in the mechanism of recovery, are not themselves immune from such considerations. Comparative law shows awareness of these issues in most jurisdictions, especially in connection with the deductibility or not of so-called collateral benefits from non-pecuniary harm awards. In some jurisdictions, the importance of compensating non-pecuniary harm as a separate general head (for example, in English law), or, indeed, detailing the heads of recovery that fall under this category by means of an authoritative nomenclature (for example, in French law), is partly dictated by the desire to ring-fence such awards from claims of deduction of collateral benefits. Such ring fencing is obviously not economically efficient, but appears to be a strong public choice outcome. At the same

<sup>287</sup> This, it is hoped, will be the subject of a follow-up paper.

<sup>288</sup> Juries are still used in the US in assessing non-pecuniary loss damages but not without controversy.

<sup>289</sup> See the very interesting study by Kritzer, HM, Bogart, WA and Vidmar, N (1991) 'The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States' (25) *Law & Society Review* 499; no significant effect on compensation seeking of intra-national cultural variations in communities

<sup>290</sup> Matters to be explored in a follow-up paper.

time, the social cost of compensating non-pecuniary harm, especially of the very small or so-called 'trivial', but widely diffused kind cannot be overlooked, however strong the public pressure in favour of compensation might be. An aggravating factor is the greater medical uncertainty in the diagnosis of such widespread trivial types of non-pecuniary harm such as, for example, whiplash. Insurance industry pressure to reign in claims is in this area stronger than generally on non-pecuniary harm recovery. The concerns of the insurance industry are, of course, important, as it is to a very large extent the insurance industry that makes it possible for recovery to take place. But in the area of non-pecuniary harm in several jurisdictions the insurance industry is being wrong-footed by the strong emotional appeal that such harm seems to exercise both on the public and on the courts, and insurers have been punished for derisory offers of settlement.

Compensation for wrongfully inflicted non-pecuniary harm is increasingly seen in contemporary societies as a fundamental right, a right to the most effective remedy for violations of all fundamental rights. Jehring would be pleased. Furthermore, combined with procedural devices of group litigation, claims for non-pecuniary harm can have a broader social and economic impact, as shown by the American experience,<sup>291</sup> and may also serve as a private law remedy for larger, global wrongs,<sup>292</sup> when corporate veils are lifted and foreign direct liability of multinationals is accepted, especially for extensive physical injury and non-pecuniary harm caused to large numbers of individuals globally through violations of basic human rights. *Omnis condemnatio pecuniaria est* (all condemnation is pecuniary): this is a language that wrongdoers, personal and corporate, understand.

<sup>291</sup> See Beisner, JH, Shors, M and Davidson Miller, J (2005) 'Class Action 'Cops': Public Servants or Private Entrepreneurs?' (57) *Stanford Law Review* 1441

<sup>292</sup> See the contributions in Banakas, S (ed.) (2011) *Global Wrongs and Private Law Remedies and Procedures* Wildy, Simmonds and Hill.