

## General introduction

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The study of non-pecuniary loss (or moral damages) in European contract law involves one of the most important and controversial subjects in modern law. Not only in Europe but around the world, legislators, judges, and scholars still have divided opinions about the legitimacy and efficacy of pecuniary compensation for moral damages, and there are general concerns about the increased resort to them as a matter of delictual and contractual responsibility. This study is, to our knowledge, the first comparative work to focus on the particular role of moral damages in the law of contract. It is clear from this research that the recoverability of moral damages in European contract law is on the rise. The movement has been uneven – and certainly is not finished – but even some of the most historically illiberal systems are moderating the restraints they once imposed. It is producing not only a growing parity in the status of pecuniary damages *vis à vis* non-pecuniary damages in general, but also a greater willingness to admit non-pecuniary damages into the realm of contract law. As we shall see, in some countries this movement is constitutionally and transnationally driven. Some of the current impetus to recognize moral damages in private law derives its thrust from the guarantees and values found in national constitutions. Protected values such as privacy, reputation, family life, serenity of the home, and free development of personality have clearly pressed down upon the private law in the areas of tort and contract. These constitutional guarantees have to varying extents inspired new readings of old codal concepts like “damage” and “*lucrum cessans*,” thus expanding the text to include the non-pecuniary damage. Even codal provisions restricting non-pecuniary damage to “the cases provided by law” may be relaxed by regarding the constitutional guarantees themselves as

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part of the “law.” Geopolitically, the dissolution of the Soviet Union in 1991 also contributed to the trend. The former socialist states of Eastern Europe were thereby freed of doctrinaire objections to the compensation of non-pecuniary damage.<sup>1</sup> Furthermore, the frequent reparation of non-pecuniary interests by the higher European jurisdictions (the ECJ and ECtHR) continues to set a liberal example for the national judges.<sup>2</sup> And the trend of the modern transnational law itself is not without importance. All of the recent uniform laws for international commercial transactions now expressly permit the recovery of non-pecuniary damage resulting from a breach of contract.<sup>3</sup> The Draft Common Frame of Reference (DCFR) recognizes both economic and non-economic loss and seems to minimize any distinction between the two types of damage.<sup>4</sup> Thus at many levels in European law, and not merely in so-called liberal jurisdictions, there are multiple signs that moral or non-pecuniary damages in European contract law are on the rise.

<sup>1</sup> The Soviet Union held to a “deep-seated belief in the impropriety and impossibility of compensating for any losses other than material ones.” H. McGregor, “Personal Injury and Death,” vol. 9: *Torts*, Ch. 9, No. 35, p 15 (J.C.B. Mohr 1973). It was believed that recovery for non-pecuniary harm would result in the commodification of personality rights and run contrary to Marxist teaching and general principles of socialist law. See Th. Vondracek, *Commentary on the Czechoslovak Civil Code* 32 (Dordrecht/Boston: Nijhoff 1988); Zweigert and Kotz, *Introduction to Comparative Law*, vol. 2, (2<sup>nd</sup> edn. 1987) p 385. In Romania, where courts adhered to the Soviet position since the 1950s, the Supreme Court recently approved an award for the pain and suffering of a permanent invalid who received injuries in an automobile accident. See Romanian Supreme Court decision, no. 1387, 14 March 2002, summarized in Winiger, et al, *Essential Cases on Damage* p 606. Moral damages were also awarded to the wife of a writer who was unjustly convicted and imprisoned during the Communist era. C. Alunaru and L. Bojin, “Romania,” Chapter XXII in H. Koziol and B. Steininger, *European Tort Law* (2008) pp 542–553.

<sup>2</sup> See ECJ 12 Mar. 2002, Case C-168/00 *Leitner v. TVI Deutschland GmK. & Co.* See also ECJ, C-63/09 (passenger recovers non-material damage *ex contractu* for loss of luggage by airline); see also ECJ 13 Oct. 2011. As to the ECtHR, see *Zdanoka c. Lettonie*, 17 June 2004. The ECtHR, apparently influenced by the Interamerican Court of Human Rights, has increasingly included in its judgments non-pecuniary types of relief (*des mesures non pécuniaires de réparation*). See Sophie Chevallier, “Le particularisme de la jurisprudence de la Cour Interaméricaine des Droits de l’Homme,” <http://m2bde.u-paris10.fr/node/2375>.

<sup>3</sup> See the Unidroit Principles, §7.4.2; the Principles of European Contract Law, PECL Art. 9:501; the European Contract Code (Pavia) Art. 164 (1). Cf. CISG 74. The CISG (Vienna Convention), however, does not allow recovery of moral damage. See Peter Schlechtriem, “Non-Material Damages – Recovery Under the CISG?” 19 *Pace Intern’l Law Rev.* 89 (2007), available at [www.cisg.law.pace.edu/cisg/biblio/schlechtriem15.html](http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem15.html)

<sup>4</sup> See Ch. von Bar and E. Clive (eds.) *Principles, Definitions, and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, vol 4 (2009), Art VI-2: 101(1).

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An investigation limited to the context of contract law may seem, at first glance, to be a rather technical and narrow endeavor, and yet the focus of this work is never really restricted to contract. An inquiry of this kind continually moves back and forth between tort and contract, and the law of tort must be constantly held in view. Indeed, it is arguably the case that all developmental stages *ex contractu* were built upon the historical stage already reached in the law of tort. Historically tort went first in protecting personality rights and immaterial interests.<sup>5</sup> Over the past two hundred years, tort law created the vocabulary and categories of recoverable non-pecuniary harm, which contract law would take over. In modern law, the pace of convergence has apparently quickened; the gap has narrowed. This is not to imply, however, that the remaining gap is insignificant or will soon disappear entirely. The recovery of non-pecuniary loss is still subject very clearly to differing rules and double standards in a number of European legal systems. What may be considered a normal and routine component of a tort victim's injuries<sup>6</sup> may turn out to be an unrecoverable element in his contract claim. Greece and Poland, for example, are still essentially "tort only" in their approach. A contractual party may have no action for moral damages unless defendant's breach can be considered an independent tort violation. That leaves a remedial gap, for not every breach of contract can be turned into a delict.

So far as we know, the various forms of non-pecuniary damages have not been gathered and classified in prior research efforts. It was clear to

<sup>5</sup> Personality rights, in Jean Dabin's words, refer to "rights whose subject is the component elements of the personality considered in its manifold aspects, physical and moral, individual and social." Quoted (in translation) in Gert Bruggemeier, "Protection of Personality Interest in Continental Europe: The Examples of France, Germany and Italy, and a European Perspective" in Niall Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law – A Comparative Perspective* (Dundee: Dundee University Press 2009). See further, E.H. Perreau, "Des droits de la personnalité," 8 RTDC 501 (1909); R. Lindon, *Les droits de la personnalité* (Paris: Dalloz 1974); Pierre Kayser, *La protection de la vie privée* (3rd edn., Paris: Economica 1995).

<sup>6</sup> In the United States, the United Kingdom, and Italy, the moral damage component of tort awards is said to constitute one-half or more of the total amounts awarded in personal injury cases. Some state legislatures in the United States have enacted caps to restrict the recoverable levels of these damages; on the other hand, the English Law Commission considered the levels were too low and called for raising them. See Richard Lewis "Increasing the Price of Pain: Damage, The Law Commission and *Heil v. Rankin*," 2001 Mod. L. Rev. 64: 1; Law Commission Report No. 257 (1999). See also Markesinis, Coester, Alpa, and Ullstein, *Compensation for Personal Injury in English, German and Italian Law* 84 (2005).

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us that these loss forms could not be usefully classified on the basis of separating tort actions from contract actions. The types of moral damages recognized in tort, whether they stem from bodily injury, property damage, or the violation of personality rights, are potentially the same kinds of damage that may be caused by the breach of a contract.<sup>7</sup> Of course, there is less frequency or likelihood of “tort-like” injuries occurring in the context of contract, but where they do occur the same types of injury are actionable. Bearing this in mind, we offer in the Appendix a glossary of terms and a taxonomy of the types of moral damages recognized by European legislators and courts.<sup>8</sup> This compilation cannot pretend to be exhaustive or definitive, but it should allow the reader to follow our analysis more easily.

### Non-pecuniary loss and moral damage – definitional considerations

The expressions “non-pecuniary loss” and “moral damage” did not make their appearance in judicial decisions and legal literature until nearly the middle of the nineteenth century. Furthermore the exact origins and meaning of these terms are fairly obscure. Moral damage is widely used today in many French-influenced systems such as Italy (*danno morale*), Spain (*daño moral*), and Belgium (*dommage moral*), while in Germany the preferred terminology seems to be immaterial loss or non-pecuniary loss (*nicht Vermögensschaden*).<sup>9</sup> In addition, many other expressions – economic/non-economic loss, patrimonial/nonpatrimonial loss, tangible/intangible loss – are also encountered in cases and literature. Among common law judges and commentators the term “non-pecuniary loss” seems to have the widest currency,<sup>10</sup> but it is not a well-defined category in the English common law’s scheme of damages. Non-pecuniary damages, when at all recoverable at common

<sup>7</sup> For example, an airline’s misperformance of its contract with the passenger may result in death and suffering, and a surgeon’s breach of contract with his patient may cause disfigurement, distress, and loss of amenities.

<sup>8</sup> See Taxonomy, Appendix.

<sup>9</sup> See BGB §253 II. The term *Schmerzensgeld* refers specifically to pain and suffering ancillary to physical injury. It is usually reserved for this type of immaterial loss.

<sup>10</sup> W.V.H. Rogers, “Non-Pecuniary Loss Under English Law,” in W.V.H. Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Springer 2001) p 54; G.H. Treitel, *Remedies for Breach of Contract* (Oxford: Oxford University Press 1988), pp 194–196; A.I. Ogus, *The Law of Damages* (London: Butterworth 1973) pp 194–218.

law, are included within general damages.<sup>11</sup> In light of the great variety of terms in usage across Europe, we will regard them as interchangeable with non-pecuniary loss, even though that remains an opaque and undefined conception with open-ended parameters.

### Beyond a negative conception

A negative definition of non-pecuniary damage is widely accepted in the literature. No matter the synonyms we use, the basic idea is always the polar opposite of pecuniary loss. For example, one author, after defining pecuniary damage to mean “losses which are concerned with a person’s wealth,” then simply adds: “all other losses are ‘non-pecuniary.’”<sup>12</sup> Similarly, law-and-economics scholars maintain: “Non-pecuniary losses can be characterized as losses that are suffered by damaging goods or interests which have in themselves no economic price or value on a financial market.”<sup>13</sup> Reinhard Zimmermann states, “The only universal, if trivial, truth is that non-pecuniary damage is all damage that is not of a pecuniary nature. . . . [I]t appears to be very difficult, if not impossible, to define the concept positively.”<sup>14</sup> René Savatier writes that moral

<sup>11</sup> They are also strongly identified with the concept of “aggravated damages.” See Harris, Campbell, Halson, *Remedies in Contract & Tort* (2<sup>nd</sup> edn., London: Butterworths 2002) pp 580–582. A possible analogue of moral damages in English law is the concept of *solatium*, which entered the common law lexicon due to Scottish law influence. Nevertheless the concept has not sent down deep roots, and the usage south of the Tweed is “sparse and apparently haphazard.” See Eric Descheemaeker, “Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Theory” to be published in E. Descheemaeker and H. Scott (eds.), *Iniuria and the Common Law* (Oxford: Hart Publishing 2013), chap. 4. Another term associated with non-pecuniary loss in the English context is the award of a “conventional sum.” As explained by Lord Hope, a conventional sum refers to “the means by which an English court arrives, as best it can, at a figure for the damage suffered which is incapable of being calculated arithmetically. . . . The award is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment.” *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, at para 71.

<sup>12</sup> “Non-Pecuniary Loss Under English Law” in W.V. Horton Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Vienna: Springer 2001) p 54. Compare his description at p 246 (“loss which is not damage to a person’s assets or wealth or income and which is therefore incapable of being quantified in any objective financial manner by reference to a market”).

<sup>13</sup> Siewert D. Lindenbergh and Peter P.M. van Kippersluis, “Non pecuniary losses,” in Michael Faure (ed.), *Tort law and Economics, Encyclopedia of Law and Economics* (Cheltenham: Edward Elgar 2009) pp 215–227.

<sup>14</sup> Reinhard Zimmermann, “Comparative Report,” in B. Winiger, H. Koziol, B. Koch, R. Zimmermann (eds.), *Digest of European Tort Law, Vol 2: Essential Cases on Damage* (Vienna: De Gruyter 2011), p 708.

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damage denotes “every human suffering not resulting in a pecuniary loss.”<sup>15</sup> Aside from the vagueness of this negative formulation, Savatier hereby identifies moral damages with “human suffering.” Other authors also stress the tie to suffering and/or emotional distress.<sup>16</sup> In this way, the concept is chiefly associated with the protection and reparation of human feelings. This seems too narrow, however, to describe the wide varieties of non-pecuniary harms recognized in European systems and this includes France itself. It is, of course, accurate enough in describing a personal injury victim’s pain and suffering, or a family’s grief over the death of a loved one, but it will fail to account for other recognized varieties of non-pecuniary loss that cannot be described that way. For example, under English law non-pecuniary loss is compensated for false arrest or for trespass to land, even when no patrimonial harm is done and though plaintiff had no knowledge or awareness of the wrong.<sup>17</sup> Here the common law apparently protects legal interests concerning liberty and property that have no necessary connection to feelings or suffering. There are many instances when the law adopts an external rights-based point of view instead of a focus on the victim’s inner emotions.<sup>18</sup> To go no further than some of the contract situations studied in Part II of this book, there is no suffering when a car owner simply loses the use of her vehicle due to a mechanic’s delay in repairing it, nor when a young architect loses an opportunity to advance his career by designing an important municipal structure, or even when a vacationer’s package tour proves disappointing.<sup>19</sup> If a homebuilder deprives the promisee of the pleasures of a swimming pool exactly seven-feet deep (by furnishing instead a pool only six-and-one-half feet deep), it would seem strange to say that the

<sup>15</sup> Quoted in Yves Chartier, *La réparation du préjudice dans la responsabilité civile* (Paris: Dalloz 1983) p 152.

<sup>16</sup> See Bernard Beignier, *L'Honneur et Le Droit* (L.G.D.G. 1995) (linking moral damage closely to honor and reputation); Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Vienna: Jan Sramek Verlag 2012) pp 112–113, 117–118 (identifying the damage with suffering and “negative emotions”); suffering is also the core notion for Malaurie and Aynès: “Toute peine est indemnisable,” *Droit Civil-Les Obligations* (1995/96) pp 144–45. See also P. Visser and J. Potgieter, *Law of Damages* (Claremont: Juta 1993) pp 27–28.

<sup>17</sup> See below the discussion of English law, Chapter 4, at notes 12–13 and text.

<sup>18</sup> For Robert Stevens, monetary damages are often awarded as a substitute for a right infringed, independently of whether any other consequence occurs. See *Torts and Rights* (Oxford: Oxford University Press 2007) pp 59–91. For the argument that the Roman *actio iniuriarum* adopts the “external” rather than the “internal” point of view and protects the right to reputation, even for “non-sensory persons” and thus regardless whether wounded feelings could be possible, see Eric Descheemaeker, “Three Keys to Defamation: Media 24 in a Comparative Perspective,” 130 *SAIJ* (2013) pp 435, 437.

<sup>19</sup> See cases 6.6, 6.8, and 6.9, below in Chapter 6.

breach caused the homeowner to “suffer,” and yet there was recovery of non-pecuniary loss in such a case.<sup>20</sup> Similarly, the violation of political and civil rights can cause non-pecuniary harm, yet without any element of “suffering.” Our study of contract and tort cases in comparative perspective therefore suggests the need for a wider (and perhaps more neutral) conception than “suffering.”<sup>21</sup>

The more difficult problem with the expression “non-pecuniary loss,” however, is that it has no parameters nor any content of its own. It is essentially vague and can easily become a default receptacle for any injury to a protected legal interest in which no pecuniary damage is involved. Perhaps it is only an attempt to define a type of damage by flagging its insusceptibility to precise monetary measurement. If so, it is strange to expect the incommensurateness issue to reveal much about the nature of the damage in question.<sup>22</sup> There are other means to redress moral damage than by a money indemnity, and so to look for the essence of the harm in terms of its problematic liquidation into money misses the mark. The same damage can be repaired by natural restitution and court-ordered measures, such as retraction, apology, judicial declaration, publication of judgment, specific performance, distancing the offender, seizure of materials, cessation orders, and so forth.<sup>23</sup> It is commonly understood that a monetary indemnity is but a second-best remedy, as compared to the comparative superiority of natural restitution.<sup>24</sup>

<sup>20</sup> Ruxley Electronics Ltd v. Forsyth [1996] AC 344.

<sup>21</sup> This is not to suggest that the meaning of moral damage is or should be the same in each country. To the contrary, we recognize there are country-by-country variations which need to be taken into account. For instance, Michele Graziadei writes, “Today, in Italy, *danno morale* is a narrow category – much narrower than the French *dommage morale* [sic] – that belongs to the wider genus of *danno non patrimoniale*. The latter comprises all forms of non-pecuniary loss.” “Liability for Fault in Italian Law” in Nils Jansen (ed.), *The Development and Making of Legal Doctrine* (Cambridge: Cambridge University Press 2010) p 152. Appreciating the narrower scope of the Italian conception, as opposed to the wider French conception, is obviously critical. We are only suggesting the need to recognize a sufficiently neutral conception that will permit all variations to be included in the discussion at a European level.

<sup>22</sup> It has been well said that “[i]f one considers the true nature of damage, it is essentially something which has a real (and not an arithmetical) nature. Therefore damage need not be measurable in money (which is characteristic of patrimonial damage). Visser and Potgieter, *Law of Damages* (pp 27–28).

<sup>23</sup> Most varieties are canvassed in P.-D. Ollier and J.-P. Le Gall, “Various Damages,” IECL, Vol XI, Ch. X, Nos. 94–104 (J.C.B. Mohr 1981) pp 87ff.

<sup>24</sup> But, of course, *in natura* relief may not eliminate all the moral harm that has been done. There is typically a restitutionary shortfall that a court may seek to fill by conjoining a monetary indemnity.



As already mentioned, it is very difficult, perhaps impossible, to state the meaning of moral damages in a positive and comprehensive manner. Some attempts that are arguably positive statements come at such a high level of generality that they are not particularly informative.

Among modern codes, however, the Mexican Civil Code provides a rather successful and comprehensive statement about the nature and scope of moral damages. Mexican C.C. Article 1916 declares, “By moral damages is understood the detrimental impact sustained by a person in his feelings, affections, appearances, honor, reputation, private life, physical integrity and physical aspect, or in the consideration that others have of him.”<sup>25</sup> This locates the harm in the detrimental impact on personality rights, physical integrity, and other protected interests. The provision was added to the Mexican Code in 1982, and we may note it does not attempt to define the damage by means of its method of assessment, nor does it make feelings or sufferings the sole focus. Furthermore, in keeping with another modern tendency, the Code provides that moral damages are recoverable in all branches of obligations. The responsible party, whether as tortfeasor or contract breaker, may be held to an indemnification in money. In case of damage to dignity, honor, reputation, or consideration, there may also be reparation *in natura* – the publication of the court’s judgment in the news media at the defendant’s expense.<sup>26</sup>

<sup>25</sup> Mexican C.C. 1916, amended in 1982.

<sup>26</sup> According to Vargas, this 1982 amendment of the Civil Code ran contrary to traditional Mexican civil law. To be recoverable, the damage must be the consequence of an illicit act, and there must be proof that the damage was sustained. Moral damages are also recoverable in actions based upon strict liability and in actions against public authorities. See J. Vargas, “Mexican Law and Personal Injury Cases,” 8 San Diego L. Rev. 475 (2007). For another Latin American codification of the subject, see “agravio moral” in Argentina CC Arts. 522 and 1078.

Interestingly, the Civil Code of the Russian Federation (1994), in contrast, eschews a definitional attempt and sets forth an extensive list of “nonmaterial values” it is prepared to protect. Harms to these values constitute “moral damages,” which may be remedied by pecuniary awards and other remedies, including retractions, rebuttals, and findings of truth. See Russ. CC (1996) arts. 150–153, and 1099–1101. Article 151 provides: “If moral harm (physical or moral suffering) has been caused to a citizen by actions violating his non-property rights or infringing on other nonmaterial benefits belonging to the citizen, as well as in other instances provided by law, the courts may impose on the offender the duty of monetary compensation for the said harm” (Osakwe transl., Moscow University Press 2000). This represents, of course, a historic shift in thinking for Russia and some former socialist-law countries. See *supra* n. 1.



## Pecuniary vs. Non-pecuniary: Is there a middle zone in the bipolar structure?

Whether the violation of a right or interest happens to produce “pure” non-pecuniary loss or “pure” pecuniary loss, or whether it instead produces both *concurrently*, depends upon economic circumstances, the state of science and technology, and the type of right or interest invaded.<sup>27</sup> Some of the “purest” forms of moral damage will result from sheer bereavement over a lost loved one, or an invasion of privacy, false imprisonment, marital infidelity, insulting words or insolent actions (e.g., a slap), and so forth. Sometimes no proof of pure moral damage is legally demanded: it is presumed to exist.<sup>28</sup> In some scenarios, however, moral *and* patrimonial damage are mixed together. For example, defamation primarily gives rise to reputational loss and loss of honor, but in certain instances economic losses are mingled.<sup>29</sup> Disfigurement may cause physical pain and severe mental distress, but in the case of models and actresses it may also reduce their earnings and career possibilities. The wrongful death of a family member typically causes mixed damage to the decedent’s relatives, who may receive *solatium* for their grief and pecuniary damages for lost support. The victim of a personal injury commonly has economic claims for medical expenses and loss of earnings, along with non-economic claims for pain and suffering, loss of amenities, and so forth.

These “mixed” situations occupy a large “middle zone” in our traditional bipolar conception of damages. How such damages fit together and how we distinguish them from each other is not always clear. When there are serious personal injuries, for example, the overall damage is typically divided into five headings: medical expenses, loss of future earnings, pain and suffering, loss of amenities, and possibly shortened life. A jurist would immediately say the first two headings on the list are pecuniary and the last three are non-pecuniary. Though plaintiff’s

<sup>27</sup> Defamation is an example of a wrong that may cause both forms of loss concurrently. Early civilian authors were prone to see the damages of a disfigured woman in this light. See Pieter Pauw, “Aspects of the Origin of the Action for Pain, Suffering and Disfigurement” 1977 J.S. Afr. L. 244, 245.

<sup>28</sup> That is true in a number of English torts deemed to be “actionable per se,” such as defamation, false arrest, and breach of confidence. As to the latter tort, see *Cornelius v. De Taranto* [2001] EMLR 12; *Archer v. Williams* [2003] EWHC 1670 (QB); *Mosley v. News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

<sup>29</sup> For discussion of three strands to reputation (as property, honor, and dignity), see Robert C. Post, “The Social Foundation of Defamation Law: Reputation and the Constitution” 74 Cal. L. Rev. 691 (1986).

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injury is indivisible and arose from a single event (for example, an automobile accident), his damages are sorted into two parts. It is an artificial division, of course, because that part called non-pecuniary is not intrinsically different from that part of the physical injury called pecuniary loss: both types are corporeal injuries. The non-pecuniary part is not (in any causal sense) a consequence of something prior: they were received at the same moment. Furthermore, the non-pecuniary injury is not “intangible” or “invisible,” as so often non-pecuniary injuries are claimed to be. The injury can be seen and touched and is not “immaterial.”<sup>30</sup> The difference is actually due to the non-treatability and irreparability of the injury deemed to be non-pecuniary. Once the limits of treatment are exhausted and after the “consolidation” of the victim’s condition, they have no further patrimonial consequence. Injuries that heal and/or respond to treatment have caused pecuniary damage, but if plaintiff has lost his leg or his hand and endured pain and suffering, this is considered non-pecuniary. That part which cannot be undone by money or cannot be cured by medicine – i.e., the unresolved residue of injury – this is largely what we mean by “non-pecuniary loss” in personal injury cases.<sup>31</sup> But the line drawn between the same injuries may change over time, depending upon medical advances and treatability. Aesthetic damage that in the past was considered irreparable and presented only pure moral damage, may now have become patrimonial damage, at least for the medical costs of corrective surgery.

### The eye of the beholder: Requalifying the damage

It was observed long ago that when pecuniary harm has been sustained but is extremely difficult to prove or to quantify, courts may quietly reframe or reconceive the damage as non-pecuniary in order to give

<sup>30</sup> L. Mazeaud and A. Tunc, *Traité Théorique et Pratique de la Responsabilité Civile*, vol. 1 (6th edn. 1965) p 394, no. 293.

<sup>31</sup> Interestingly, it was noted in the eighteenth century that if an offense to the person caused irreparable injury (e.g., resulting in the loss of a limb or an organ) the wrongdoer’s liability should go beyond the injured person’s actual or patrimonial damages (“*oultre les dommages intérêts actuels*”). In that instance he should be obliged to pay a life pension. The apparent reason was to cover the residual non-pecuniary loss which the victim experienced. Francois Dareau, *Traité des Injures*, vol. 2 (Paris: Nyon 1785) p 60. The close link between irreparable bodily harm and resulting moral damage is noted by A. Weill and F. Terré, *Droit Civil: Les Obligations*, No. 611 (4<sup>th</sup> edn., Paris: Dalloz 1986), p 628.