FROM PRIVATE-LAW ROOTS TO INTERNATIONAL NORM: AN INVESTIGATION INTO MORAL DAMAGE AND PECUNIARY REPARATIONS IN TRANSNATIONAL AND INTERNATIONAL LAW

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Abstract: Recourse to pecuniary awards as a remedy for moral damage (also called non-pecuniary damage) has become an international norm in modern times. The impetus or inspiration for this development at the top came from below, that is it came from the private law traditions of civil law and common law, though of course it may be debated as to which tradition was the decisive influence. What seems important is that the notions which emerged at the transnational and international levels have surpassed the products of those traditions. The assimilated ideas received and redeveloped at the supranational level have, in turn, passed back down to national courts and national laws. This has an impact in both common law and civil law. There has been a constant circulation and rotation of ideas passing back and forth through various conduits which link the vertical levels. By investigating the evolution and growth of the concept of moral damage and the generalised remedy to compensate it, this article will attempt to throw light upon the process by which ideas derived from private law spread, evolve and re-emerge as norms of international law.

Keywords: moral damage; non-pecuniary loss; human rights; pecuniary awards; European Convention on Human Rights

I. Introduction

Recourse to pecuniary awards as a remedy for moral damage (also called non-pecuniary damage) has become an international norm in modern times. Under principles of public international law the violation of an international law obligation or the breach of any engagement gives rise to an obligation to make full reparation. Full reparation means that all damage, moral and material, must be included within the assessment.¹

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¹ The International Law Commission’s articles on the Responsibility of States (ILC Articles) provide that:

“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”.


[(2015) 2:2 JICL 305–321]
The essential principle is that reparation must, as far as possible, “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”. In pursuing the goal of full reparation, international tribunals such as the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, the International Criminal Court make frequent use of a pecuniary award (possibly in tandem with other measures but sometimes by pecuniary means alone) to help reverse the consequences of an illegal act.

The impetus or inspiration for this development at the top came from below, that is it stemmed from the private law traditions of civil law and common law, though of course it may be debated as to which tradition was the decisive influence. What seems important is that the notions which emerged at the transnational and international levels have surpassed the products of those traditions. The assimilated ideas received and redeveloped at the supranational level have, in turn, passed back down to national courts and national laws. This has an impact in both common law and civil law. There has been a constant circulation and rotation of ideas passing back and forth through various conduits which link the vertical levels. By investigating the evolution and growth of the concept of moral damage and the generalised remedy to compensate it, this article will attempt to throw light upon the process by which ideas derived from private law spread, evolve and re-emerge as norms of international law.

II. The Obscure Notion of Non-Pecuniary Loss

Non-pecuniary loss or moral damage is a universally acknowledged form of damage. The instances are ubiquitous. They are readily found in the fields of family law, contracts, torts, commercial law, criminal law, administrative law, constitutional law, civil rights, personality rights, human rights, and public international law. And yet, the concept remains confusing and somewhat unfamiliar to many lawyers.

There are possibly several reasons why the concept of non-pecuniary loss remains confusing. For one thing the subject is academically neglected and seldom taught. It is almost entirely omitted in the curriculum of our law schools, even the elite ones. A further factor is that the nomenclature is relatively

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4 I am basically referring to American law schools where it receives little or no mention in courses devoted to torts, contracts, remedies or constitutional law, though it is an important remedial tool in all of these subjects. If discussed at all in courses on torts it may come under the heading of “pain and suffering” or possibly in connection with defamation, while other examples are generally ignored.
new and circulates in national systems under different names.\(^5\) If we look to its history, this form of loss had no special name or designation before the nineteenth century.\(^6\)

The most important reason for confusion is that the leading expressions — “moral damages” and/or “non-pecuniary loss” — are themselves opaque and uninformative. They are obscure in meaning and contain no inherent boundaries. Scholars have been unable to provide much more than a negative formulation of the core idea,\(^7\) so that at one extreme we may have only a default receptacle into which every imaginable form of non-patrimonial injury can be thrown, or, at the other extreme, we may be cleaving to a narrower, classical concept restricted to the protection of human feelings and emotions.\(^8\) This classical view is sometimes taken to be the appropriate international law standard,\(^9\) but, as I shall argue, it does not well explain the applications and understandings presently found at the national and international level.

**III. Five Traits of Non-Pecuniary Loss**

As mentioned earlier a clear, positive definition of moral damage has proven quite elusive, but this does not prevent us from considering its principal traits. I would suggest there are five of them.

The first trait of non-pecuniary injury is that the damage is irreversible and irreparable. It is insusceptible of repair, restoration, recapture or treatment. Thus grief, anxiety, pain and suffering, once endured, are irreparable. Pain cannot be undone or erased once it has been felt.

Second, this damage, as an economist might say, is to goods or interests which have “in themselves no economic price or value on a financial market”.\(^10\) Since the
goods or interests have no market value, the loss is one which “cannot be undone with money”. Money is inherently incommensurate with non-pecuniary injury, but money is used to redress it.11

Third, a pecuniary award in compensation for non-pecuniary loss is a “second best” means of palliating the injury. It is “second best” because other remedial measures are thought to be comparatively superior to it in reversing or combating the effects of the damage. Thus a range of “natural” or “in-kind” remedies such as a retraction, apology, judicial declaration, publication of judgment, order of specific performance, distancing of the offender, conducting an investigation, seizure of materials, and cessation orders are thought to achieve more than money can achieve to bring about restitutio in integrum. Of course not even these means will ever fully erase an irreparable harm. There will still be some restitutionary shortfall which a pecuniary award may help to fill.12

Fourth, the pecuniary amounts that will be awarded by courts are global sums and have no structure. There are no objective steps to the calculations and largely for that reason they are unreviewable.13

Fifth, the absence of any award structure means that the line between compensation of the victim and punishment of the offender can never be demonstrated objectively. Hence these awards are almost always open to the interpretation or the reproach that they are a covert form of punitive damages. Let us examine several examples to see whether the same traits can be observed in the field of human rights.

IV. Moral Damage and Human Rights

The area of human rights is one of the most fertile fields in which moral damage occurs, and the decisions of human rights tribunals permit us to observe in a concrete setting the characteristic traits of moral damage.

11 Ibid. This trait, as the authors point out, involves a “paradox”: A harm that cannot be undone with money is, by the tort or contract law in nearly all countries, in fact routinely compensated through money.

12 The second-best nature of the remedy seems to be recognised by the European Convention on Human Rights which calls for the subsidiary use of this remedy:

“[T]he Court finds that there has been a violation of the Convention … and if the internal law of the high Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”. (Art. 41, ECHR).

13 The lack of structure leads to the persistent reproach of arbitrariness. Patrick Atiyah famously said, “All such damage awards could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today”. Patrick Atiyah, Accidents, Compensation and the Law (London: Weidenfeld & Nicolson, 2nd ed., 1975) p.188. Some national judges make unofficial use of tables and baremes to keep such awards consistent, see “Introduction” in Vernon Valentine Palmer (ed), The Recovery of Non-Pecuniary Loss in European Contract Law (Cambridge, UK: Cambridge University Press, 2015) p. 14.
At the outset it is important to bear in mind that:

“Monetary compensation is, in practice, by far the most common international remedy for human rights violations. It is the only remedy, other than declaratory relief, regularly ordered by the European Court of Human Rights, and it is also regularly ordered by the Inter-American Court of Human Rights, along with other remedies. Compensation is the remedy typically granted ... by international claims commissions. It is the primary remedy that the International Criminal Court statute contemplates being given to victims”.

Under the European Convention of Human Rights (ECHR) these awards are called “just satisfaction claims”. The award of just satisfaction is not considered an automatic consequence of a finding that there has been a violation of a right guaranteed by the ECHR. The wording of Convention states that this award is designed to be subsidiary and conditional. It is to be used when the domestic law “allows only partial reparation to be made”, and even then only “if necessary”. For equitable reasons, the mere finding of a violation could in some cases constitute in itself sufficient just satisfaction, without the need to grant financial compensation. Nevertheless, despite this language as to the subsidiary or residual nature of the measure, financial awards are in fact a primary tool and a front-line remedy in the field.

A revealing example of the role played by monetary awards in Strasbourg is afforded by the case of Trabelsi v Belgium in 2014. Here the European Court of Human Rights found that Belgium wrongfully extradited a Tunisian national to the United States for prosecution as a terrorist, in violation of the prisoner’s right under the Convention (art.3) to be protected from inhuman and degrading punishment. Trabelsi had already served a sentence in Belgium for attempting to blow up a Belgian military base.

Trabelsi was tried and convicted in the United States of Al-Quadea-inspired acts of terrorism and received an irreducible life sentence. According to the jurisprudence of the Strasbourg Court, however, an irreducible life sentence is incompatible with Convention guarantees against inhumane punishment. His extradition was wrongful because US law offered only the possibility of a presidential pardon, and there was no legally prescribed mechanism with pre-established criteria for the review of life sentences. A life prisoner might thereby have minimal or no prospect of review or earlier release. Prior to the extradition

14 M Baderin and M Ssenyonjo (eds), International Human Rights Law: Six Decades After the UDHR and Beyond (Farnham: Ashgate, 2010), s.3.2.
15 See Practice Direction issued by the President of the Court, 28 March 2007.
16 See art.41 ECHR, n.12.
17 Ibid.
18 ECHR 247 (2014), application no 140/10.
19 See Vinter v United Kingdom (application no 66069/09).
Belgium had not demanded or received from US authorities concrete assurances that such review would ever take place. Furthermore, the government granted the extradition in violation of the Court’s “interim measure” which called on Belgian authorities to hold the extradition in abeyance until further decision.20

The Court stated that by breaching the interim measure Belgium “deliberately and irreversibly lowered the level of protection of the rights set out in Article 3 of the Convention which Mr. Trabelsi had endeavoured to uphold by lodging his application with the Court”.

The Court ordered Belgium to pay Mr Trabelsi (by then serving his irreducible sentence in the United States) €60,000 for the violation of his Convention rights. Of course Trabelsi’s wrongful extradition produced irreversible damage to him that could not be undone by money alone (a chance to serve a shorter sentence was entirely lost). The damage to his liberty interest had no market value, and the Court could give no structure or objective components to its award of €60,000. If one wished to question the Court’s claim that the award was purely compensatory, one is free to do so. It would not be possible, however, to demonstrate one way or the other what the sum represented. In addition, it is unclear that the award issued as a residual or subsidiary remedy. As mentioned previously, a just satisfaction award should not issue unless the domestic law allows “only partial reparation to be made”. But whether Belgian law actually has such a deficiency received no investigation or mention. The issuance of the award seems to be quite routine rather than residual.

A second illustration of the reliance upon pecuniary awards arose in Cyprus v Turkey in 2014.21 Here the Grand Chamber of the ECtHR awarded a global sum of €30 million for the non-pecuniary loss sustained by the families of some fourteen hundred and fifty six “missing persons” who disappeared as a result of the Turkish invasion of Cyprus. The Court also awarded another €60 million for the non-pecuniary damage suffered by the enclaved residents of the Karpas peninsula. Nominally these combined awards are the largest in the history of the Convention thus far. The moral damage sustained by the families was apparently an affective loss — their grief, anxiety, and mourning for lost loved ones. Their grief was an irreversible loss to an affective interest with no market value. The case was ostensibly an inter-state proceeding, but the Court directed the award to be paid to Cyprus for redistribution to its nationals.

Interestingly, in a concurring opinion two judges of the Grand Chamber, while strongly supporting the decision (calling it “the most important contribution to peace in Europe in the history of the European Court of Human Rights”), now argued (approvingly) that the large monetary award against Turkey was not compensatory. It should be seen as punitive damages for Turkey’s armed intervention against another member state. In this view, while art.41 would seem to exclude any compensation exceeding full reparation, nevertheless “full” reparation

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20 The interim measure was in effect at the time of the extradition. The Belgian government had made three requests for the Court to lift it.

21 Grand Chamber, 12 May 2014, application no 25781/94.
can only be achieved if and when the need for prevention and punishment in the specific circumstances of the case has also been satisfied. Only then is satisfaction “just”. On this reasoning, punishment of the aggressor properly merges with compensation of the victim, and the punitive purpose, hidden in a global sum without parts, depends largely on judicial assertion (or denial) of its existence.

In *Tsirlis and Kouloumpas v Greece*, the ECtHR awarded damages for the Greek military’s arbitrary detention of two religious ministers (Jehovah’s Witnesses) for some twelve or thirteen months for failure to serve in the military. The military authorities blatantly ignored prior rulings by Greek courts which had recognised the Jehovah’s Witnesses as a legitimate “known” religion whose ministers were statutorily exempt from military duty. The domestic courts of Greece recognised the illegality of their detention but refused to grant them any compensation for the time they were unlawfully detained. The Strasbourg Court awarded a lump sum to each minister (GRD 8,000,000 and GRD 7,300,000 respectively), specifically noting that a part of it was intended to cover their non-pecuniary damage. The Court stated: “The very fact of their deprivation of liberty must have produced damage of both pecuniary and non-pecuniary nature”.

These just satisfaction awards affect not only the countries before the Court. They have direct repercussions for all the signatory states, especially in those legal systems which may not even recognise or compensate for moral damage. Wide impact occurs because the Convention and the Strasbourg jurisprudence reach directly or indirectly into the legal order of a signatory state. In some cases it may even autonomously bypass domestic law restrictions on moral damage.

In a case brought before the Czech Constitutional Court, the Czech Supreme Court ruled that no pecuniary award could be made for the non-pecuniary loss of a prisoner who was punished twice for the same crime, in violation of the principle *ne bis in idem*. According to the Supreme Court, the Civil Code only recognised the recoverability of actual damage (*damnum emergens*) and lost profits (*lucrum cessans*) and there was no legal basis on which to make a compensatory award to the prisoner. The Czech Constitutional Court, however, annulled this decision, ruling that the fundamental guarantees of the ECHR are directly applicable and self-executing in the (monist) Czech domestic legal order.

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22 Joint concurring opinion of Judge Pinto de Albuquerque and Judge Vučinić, paras.13–15. The opinion claims that the practice of the Court has in reality been permitting punitive damages in disguise in seven classes of cases, despite official pronouncements to the contrary.

23 Case of *Tsirlis and Kouloumpas v Greece*, 29 May 1997, application nos 19233/91 and 19234/91.

24 Compensation schemes for wrongfully convicted prisoners are authorised by statute in an increasing number of jurisdictions in the United States. See [http://edition.cnn.com/interactive/2012/03/us/table.wrongful.convictions](http://edition.cnn.com/interactive/2012/03/us/table.wrongful.convictions) (visited 22 Oct 2015). Wrongful conviction compensation statutes set a minimum or maximum amount of compensation for each day or year spent in prison, for example, Florida provides $50,000 per year, up to a maximum of $2 million; California provides a maximum of $100 per day. These statutes should be considered mechanisms for redressing non-pecuniary harm.


26 On the monist nature of Czech legal system, see AJ Bělohláveh and N Rozehnalová (eds), *Czech Yearbook of International Law* (Huntington NY: Juris Publishing, 2010) para.9.05.
Therefore compensation for this violation of the Convention (art.5.5) was required, regardless of the domestic legal framework.

The jurisprudence of the ECtHR also inspires national courts to revise their view of moral damage and adopt the liberal Strasbourg approach. The French Conseil d'Etat, for example, recognised that unreasonable delays in administrative proceedings constitute a fault in the public service and can give rise to state responsibility, but in Magiera v Luera27 it explicitly abandoned the previous view that state liability required evidence of a faute lourde. It expressly recognised responsibility based on simple fault, consciously adopting the exact criteria used by the ECtHR.28

The Convention’s treatment of moral damages can be a liberalising force in countries with a dualist legal order. The Human Rights Act (1998) in the United Kingdom makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. Under the Act, the UK courts are statutorily obliged to take account of the principles of the ECtHR in their rulings. UK courts have thereby gained new powers to grant damage awards (a just satisfaction award) for the non-pecuniary harms resulting from the breach of those rights.29

V. An Assimilation from Below

A review of the Strasbourg jurisprudence makes clear that a number of fundamental private-law concepts have been received and assimilated at the international level.

The first of these is the orthodox view that such indemnities are purely compensatory in nature and contain no punitive aims or components. This may be called the received opinion of international law.30 The logic of strict compensation (while not always convincing even to the judges themselves)31 rests upon a dogmatic argument derived from the vocation of civil liability. It was a logic imposed when the action to recover moral damage was first detached from its penal-law underpinnings and transformed into an autonomous civil action under “natural law” codes.32 This evolution will be discussed in more detail in the next section.

A second assimilation is that most, if not all, of the varieties of moral harm originally recognised in the private law sphere were transplanted (vertically as it were) and accepted at the level of transnational and international law. Thus injuries such as physical pain and suffering, which is of course one of the oldest and

27 CE Ass 28 juin 2002, no 239575.
28 On the merits, the Conseil found that the delay in the administrative proceeding had been unreasonable (completion of the expert report alone had taken four and a half years), had caused disquiet and troubles for the complainant, and awarded the sum of FF30,000.
31 As we saw earlier in Cyprus v Turkey (n.21) and text.
most universally recognised instances in private law, have long been considered a legitimate element of damages. Other recognised heads of moral damage were vertically transferred as well, such as loss of enjoyment of life, loss of affection of a loved one, loss of consortium with a spouse, harm to reputation, intrusion on privacy, harm to personality rights, unlawful detention, interference with parent/child relations, loss of amenities and recreational ability, loss of any of the five senses, harm to marriageability, and distress over disfigurement.33

Parrish, Newton and Rosenberg suggest that the source for these broad assimilations has been the influence of the civil law tradition. “This may reflect the fact that the civil law tradition has been instrumental in shaping public international law”.34 This observation is not inaccurate, but it should receive clarification and qualification. On the one hand, referring to the “civil law tradition” implies that it is a monolith, when in fact it is actually sharply divided over the recovery of moral damages. European minds diverged over this subject centuries ago, and differing laws were enacted that remain divergent to this day. It will be convenient for my purposes to distinguish between liberal and conservative traditions on the Continent. Some types of moral damage just listed, for example loss of affection, are actionable only in more liberal civil law systems and not recoverable in more conservative systems. Furthermore, it may be unhistorical to conclude that the civil law alone has been responsible for shaping broad acceptance of moral damage at the transnational and international level. The Common Law, though in a somewhat ungeneralised way, protects most of these legal interests and has provided a model of its own for international assimilation.35 Furthermore, a relatively strong impetus for increasing the application of moral damage awards on the Continent is now flowing from the effects of constitutional guarantees. In this regard constitutional values are producing a top-down restructuring of the private law.36

We may now turn briefly to look at certain differences to be found in the civil law tradition.

35 It may be recalled that the Lusitania Mixed Claims Commission cited selected common law cases in support of the recovery of the victims’ “affective loss”. See Mixed Claims Commission, United States and Germany, Opinion in Lusitania Cases (1 November 1923), available at http://www.rmslusitania.info/primary-docs/mcc/opinion/ (visited 22 Oct 2015).
36 Nowhere perhaps is this more apparent than in Italy, where a variety of constitutional guarantees — free development of personality, serenity in the home, privacy, health and parenthood — have greatly facilitated the recovery of moral damage. The Codice Civile’s well-known provision attempting to confine awards to moral damages to the “cases provided by law” has been largely rewritten or circumvented by the implications of these constitutional guarantees. See Palmer, The Recovery of Non-Pecuniary Loss in European Contract Law (n.6) pp.402–403.
VI. The Civilian Tradition — Liberal and Conservative Wings

France was probably the first country in Europe to develop the concept of moral damage and to redress this damage under its Code Civil with pecuniary awards. The French example proved highly influential with, though not always replicated by, the judiciaries in Belgium, Spain, Portugal, Italy and Greece. These countries may be identified as the Liberal Regimes on the continent. It is this wing of the civilian tradition, as opposed to civil-law countries identified as conservative regimes, which has deeply influenced modern international law and practice.

To elaborate briefly, in the nineteenth-century French judges and doctrinal writers developed the action for moral damage through a broad reading of its Civil Code provisions in tort and contract. They succeeded in bringing about an autonomous action for moral damages in which recovery was not predicated, as had been the case before, upon the commission of a crime that repressed this harm. The civil action’s emancipation from the requirement of an antecedent criminal offence not only permitted the civil action to have a wider-ranging scope than the criminal law (the crimes repressing moral damage were *numerus clausus* and each crime had rigid contours or triggering elements), but here was the beginning of the dogmatic view that every pecuniary recovery for moral damage was purely compensatory and not a private fine. Apparently it was not in theory admissible under a civil code to mix repression with reparations. The penal law alone had the vocation (and the procedural safeguards) for punishing the defendant. (Yet since the civil assessment had no particular structure, and amounts were unreviewable on appeal, they could easily fulfil a penal function without being avowed.)

A watershed event in the evolution of the action occurred in the 1833 pharmacy case decided by the *Cour de Cassation*. Here the Procurator General, M Dupin, coined the expression “un préjudice tout moral” and he advanced the decisive arguments as to why the pharmacists of Paris should receive compensation under the Code Civil for an injury to their *honneur*. A further milestone was reached in the *Affaire Rachel* in 1858 wherein the court banned the unauthorised marketing of sketches and photographs of an artist on her deathbed, and thus recognised an injury to her right of privacy and the right to control her own image.

The last three decades of the nineteenth century witnessed a flourishing jurisprudence. New interests were subsumed and brought under the protection of the action, such as the interests of affection, of marriage and family life, liberty of thought, respect for the dead, and good morals. Particularly striking was the line of decisions recognising an action for *pure* loss of affection. Here family members were compensated for their grief and suffering over the death of or injury to a spouse.

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37 On the decisive steps, see Palmer, “*Dommages Moraux: L’Eveil Francais Au 19ème Siècle*” (n.32) pp.7–21.
38 See *Baget v Rosenweigh*, Cass. (Ch. Réunies) 15 juin 1833, Sirey 1833.I.458.
39 *Trib Civ Seine*, 16.6.1858, D.1858.3.62.
or child, even when they had sustained no loss of support or material loss due to the
direct victim’s injury. The emotional damage was compensable even though it was
to a secondary or ricochet victim. (It was partly on the basis of these affective loss
decisions that Umpire Edwin Parker found, in the Lusitania mixed-claims opinion
in 1923, that there existed a well-established right in international law for relatives
of the deceased victims to recover for their mental suffering.)\(^{40}\) The action flowered
in other aspects as well. It lay in favour of a husband victimised by a man’s adultery
with his wife, for the distress of parents who worried about the safety of their child,
for the embarrassment of an individual who was entered as a candidate for political
office without his consent. Throughout this development moral damage was freely
recoverable in contract as well. Thus the action \textit{ex contractu} was placed on an equal
plane with the action in tort.\(^{41}\)

We may therefore conclude that France and her liberal siblings provided
positive authority for the construction of the modern general action recognised in
international law. The civil law of Germany and other conservative regimes like
Austria and Sweden, however, stood in contrast.

German thought in the nineteenth century was wary and hostile regarding the
recoverability of immaterial loss. German writers recoiled at the idea of a plaintiff
receiving money for damage to reputation, honour or emotions. The authors of the
1809 Baden code, for example, deliberately suppressed any possible action and
stated forcefully:

\begin{quote}
“In local legislation, it has always been considered unworthy of a free
individual to permit his honor to be appraised in an estimatory action for
damages or his emotions to be assessed through an indemnification for
pain and suffering, allowing himself thereby to be treated as an object of
commerce”.\(^{42}\)
\end{quote}

That same ethical objection was shared by the codifiers of the BGB who carefully
excluded an action under the civil code and left honour and dignity to be protected
by the criminal code. Thus the very interests which the old \textit{actio injuriarum}

once served to protect at Roman Law were now omitted from the BGB’s list
of subjective rights,\(^{43}\) and those few instances where immaterial loss could be
recovered were confined to “the cases provided by law”. Given the preventive
design in the code, injuries resulting in mere distress, grief or humiliation, would

\(^{40}\) 1 November 1923, \textit{Mixed Claims Commission, United States and Germany}, Opinion in the Lusitania
Cases, available online at http://www.rmslusitania.info/primary-docs/mcc/opinion/.

\(^{41}\) See Palmer, \textit{The Recovery of Non-Pecuniary Loss in European Contract Law} (n.6) Ch.3, pp.63–76.

\(^{42}\) Official Advisory Opinion, Baden Civil Code, quoted in H Stoll, “The Consequences of Liability:
Remedies”, \textit{IECL} (Vol 11, 1983). See also, Gustav von Hartmann’s statement in 1888 that such an
action “runs counter to the most profound German sensibilities ....” \textit{Der Civilgesetzentwurf, das
Aequitätsprincip, und die Richterstellung} (Freiburg: Magnier 1888) AcP73, p.364.

\(^{43}\) See BGB, s.253 (2) (replacing s.847 after reforms of 2002).
not be compensable under the BGB so long as they remained in their “pure” form. Mere grief over the death of a loved one, or concern for another’s safety, would not normally reach the thresholds demanded by the code unless they were transformed into a violation of one of the recognised subjective rights.

VII. The Evolution of an Objectivised Notion of Non-Pecuniary

A. Loss in the international arena

As mentioned earlier, the classical view of moral damage is closely tied to human suffering and distress. The concept is basically about the protection and reparation of human feelings, emotions, and personality rights — the victim’s être as distinct from his avoir. Pain, grief, humiliation and so forth are very real injuries, and thus it was thought, perhaps as early as the sixteenth-century by the Neo-Scholastics, that there can be no full restitution without also restoring the psychological equilibrium of the victim. The sentient damage may arise in conjunction with corporal injuries (for example, pain and suffering, or loss of amenities), or damage to cherished property (for example, the destruction of a wedding album, a personal diary, a prize racehorse) or they may arise from a direct assault to the senses, as in the case of insulting words, grief over a lost loved one, and so forth.

The classical view is sometimes taken to be the appropriate international standard. Jagusch and Sebastian state “moral damages compensate for mental distress, whether it arises from pain and suffering, insult, loss of reputation or the loss of company of loved ones”. Since mental distress is, in their view, the essence of the damage, they conclude that companies and corporations, which have no nerves, soul or humanity, cannot experience moral damage and should not be compensated for it. “[They] do not suffer mental distress in any meaningful sense”.47

As we shall see, however, that conclusion seems to be at odds with the growing international jurisprudence which recognises the claims of legal persons (corporations, companies, and associations) to recover non-pecuniary loss. A distress-based view of this harm will probably also suggest that accident victims who have been reduced to a comatose or vegetative state, who no longer feel any pain or distress, can suffer no moral damage while in that state and should be denied

44 To be sure, they were protected to some extent obliquely or parasitically, that is, as an accompaniment of some recognised injury (eg pain and suffering accompanying bodily injury or an injury to health) or as the result of an emotion transformed by its own intensity into a recognised injury (eg severe distress becoming psychiatric illness). See Palmer, The Recovery of Non-Pecuniary Loss in European Contract Law (n.6) p.47.
46 See Peterson “Moral Damages in Investment Arbitration” (n.9) pp.53–54.
47 Ibid., p.55.
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compensation. But here again, that does not reflect the law in many jurisdictions. The moral damage of the unfeeling victim is widely recognised, despite an utter lack of subjective awareness.48

The distress-based, classical conception is far from being an anachronism but it nevertheless is, in my view, rather too narrow and restrictive to account for the expanding varieties of non-pecuniary harms currently recognised and applied by national and international tribunals. The idea of non-pecuniary harm and moral damage recognised at the international level has begun to indicate a depersonalised and objective conception that has evolved beyond the protection of distress.

English common law might be considered one of the sources of a flexible international concept, for English law has in some cases adopted an external, rights-based point of view of non-pecuniary loss. Sometimes English damage awards appear to function as compensation or satisfaction for the sheer infringement of some right or some protected interest, independent of whether any other consequence occurs.49 The common law appears to protect legal interests involving liberty, property and autonomy for their own sake, even when no injury to feelings or suffering has occurred. Plaintiff may recover non-pecuniary loss for false arrest or for trespass to land, though he or she had no knowledge or awareness of the wrongful act at the time.50 Important awards have been made for interference with personal autonomy, even though autonomy is a value which is not coextensive with emotional equilibrium. In case of wrongful conception, for example, the parents of an unexpected child may receive a “conventional sum” (on top of the mother’s pregnancy claim) to compensate for the loss of parental autonomy (i.e., their loss of control over family size, reproductive future, and the ability to lead their lives as they would wish).51 The injury in such a case is the loss of the right to exercise a fundamental parental choice. The award of a conventional sum (£15,000) did not function as a solatium for distress and damaged feelings, but simply to compensate a right-bearer for the loss of an important right.

A rights-based approach to compensation was recently taken in the landmark judgment involving the Mirror “phone hacking” scandal. Mr Justice Mann, in Gulati v MGN Ltd, held that the eight plaintiffs were certainly to be compensated for their aggrieved feelings, but that was only one part of their compensation. There should also be compensation for the infringement of the right of privacy itself which

48 Courts in Germany, Austria and France, for instance, have made such awards. See Winiger, Koziol, Koch and Zimmermann (eds), Digest of European Tort Law (n.7) p.659 et seq. and Zimmermann, “Comparative Report” (n.7) p.706 et seq.
resulted from the hacking or “blagging” conducted by the defendant. His opinion took pains to separate the infringement issue from the other heads of damage:

“Those values (or interests) are not confined to protection from distress, and it is not in my view apparent why distress (or some other emotion), which would admittedly be a likely consequence of an invasion of privacy, should be the only touchstone for damages. While the law is used to awarding damages for injured feelings, there is no reason in principle, in my view, why it should not also make an award to reflect infringements of the right itself, if the situation warrants it. The fact that the loss is not scientifically calculable is no more a bar to recovering damages for ‘loss of personal autonomy’ or damage to standing than it is to damages for distress. If one has lost ‘the right to control the dissemination of information about one’s private life’ then I fail to see why that, of itself, should not attract a degree of compensation, in an appropriate case”. (Emphasis added.)

One may similarly find a more neutral and objective concept of non-pecuniary loss developing in the English law of contract. Here awards for non-pecuniary loss are possible in noncommercial cases without any reference to claimant’s suffering or distress. These recoveries take place in the cases in which an object of the contract was to afford pleasure, relaxation or peace of mind. Thus in Ruxley Electronics Ltd v Forsyth (1996) the House of Lords approved a pecuniary award for the diminished enjoyment of a pleasurable amenity — a swimming pool. The pool was incorrectly constructed to a depth of six feet in the diving area, instead of to a depth of seven feet, six inches. There was no patrimonial loss because the construction oversight had no effect on the market value of the property. The award compensated the owner for his reduced enjoyment, which cannot be easily transposed into reparation for his suffering.

The classical notion inevitably must cede ground to a more impersonal kind of moral damage in cases where the recovering party has no feelings to injure and is not even a human being. Recent French jurisprudence recognises that corporations and other legal persons may recover moral damage and this type of moral damage is necessarily a more detached and objective conception. The Cour de Cassation,

52 [2015] ESHC 1482 (Ch).
53 Ibid., 111. The court’s awards were not typical global calculations. The non-pecuniary losses were divided into components, and the court distinguished (and assigned individual amounts) to the invasion of the privacy right itself, as distinct from the mental distress and upset flowing from it. Interestingly the damages assigned to the invasion of the right were in most cases higher and more substantial than the amounts allocated for upset and distress.
55 Regarding the scope of this exception, see Farley v Skinner [2002] 2 AC 732.
by its decision of 15 May 2012, ruled that corporations sustain moral damage recognised by the *Code Civil* and should be compensated.\(^{56}\)

This case concerned a claim for damages brought by a corporation (La Pizzeria) against the parties who developed a pizza business and sold it to plaintiff corporation. It was alleged that the vendors violated the non-compete clause in the contract of sale by soliciting the corporation’s clientele. The plaintiff *société* sought to recover €700,000 in economic loss and €50,000 in moral damage. The court of appeal of Pau awarded the corporation €60,000 for its economic damages, but stated peremptorily that a *société* has no right to recover moral prejudice (“elles ne peuvent pretendre à un quelconque préjudice moral …”). However the *Chambre Commercial* of the *Cour de Cassation* quashed that part of the judgment, stating that the Court of Appeal had violated arts.1382, 1383 and 1147 *et seq.* of the Civil Code. The clear inference was that the words “dommages et intérêts” appearing in these provisions refer to both patrimonial and moral damage, and nothing prevents a corporation from asserting such loss.\(^{57}\)

French courts have also recognised that fishing and hunting federations may sustain moral damage when defendant’s wrongful act thwarted or impeded the organisation’s mission or purpose. Where pollution damaged the environment and prevented the use and enjoyment of the spaces and activities which the federation sought to protect, it received an indemnification for its internal damage. In the decision of 10 April 1997 the *Cour de Cassation* awarded a sum to a fishing federation for environmental damage to fish and crayfish which it sought to protect.\(^{58}\) In another decision the High Court found there was moral damage to a federation merely on the basis that an environmental regulation was violated by the defendant, though no physical damage to the environment actually resulted from the violation. The increased risk of harm to the environment caused by the violation was sufficient to engender non-pecuniary harm to the federation.\(^{59}\)

Thus federations or associations are seen as sustaining moral or non-pecuniary damage without any need to fictionalise or anthropomorphise their “distress”. It may be observed that the meaning of moral damage has been stretched in these cases, perhaps in two ways:

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\(^{57}\) This type of ruling of course will extend beyond actions on contracts and non-compete clauses. For example, a French enterprise recovered moral damages when an employee wrongly accused it of sexual harassment. Cass Ch Soc 18 février 2003, no 495.

\(^{58}\) Crim 10 avr 1997, no 52, p.4.

\(^{59}\) Cass, 8 juin 2011, no 10–15, D, 2011.1691, obs G Forest. One may compare a recent decision by the Conseil d’Etat. An association devoted to the protection of flora, fauna and wild animals (ASPAS) complained of a decree issued by the prefect that ordered the destruction of certain “offensive” animals. The Association succeeded in having the decree annulled, but it failed to obtain compensation for moral prejudice. The Conseil d’Etat did not object in principle to the association’s right to bring suit for moral damage, but ruled that ASPAS failed to demonstrate how the faulty decree produced direct and certain damage to the association’s purpose or mission. CE, 6ème/1ère SSR, 30/03/2015.
Firstly, it has now gone beyond the role of protecting the emotional security of natural persons. Moral damage is here conceived as a detriment to abstract social interests and goals, as embodied in entities with idealistic and altruistic missions. Secondly, the notion of moral damage thereby takes on an objective and depersonalised nature.

The injury seems to be a legal entity’s collective aims, its mission — a matter articulated in documents — rather than subjective loss experienced by individuals. The courts have seen the desecration of the environment as causing a prejudice to a federation’s chartered purpose, to its raison d’être (its collective aims and altruistic interests) as opposed to its wealth or property, its avoir. This type of injury, which seems devoid of any corporal or material nexus, is arguably a new form of pure moral damage. As Marta Torre-Schaub recognises:

“… if one wishes to recognize the moral damage of legal persons, it is no longer necessary to speak of feelings (sentiments), because these nonhuman juridical persons do not have them … It is all the more required to aim higher, if you will, and to evoke harming the legal person in its being (être) and not its wealth (avoir)”.  

It is increasingly recognised that corporations enjoy a broad array of human-rights protections under the European Convention of Human Rights. The right to peaceful enjoyment of one’s possessions, for example, applies to corporations (art.1 of Protocol 1) under the express terms of the article. Even without express language, other guarantees are thought to apply as well, for example procedural rights like the right to a fair trial under art.6, the right to no punishment without a specific law under art.7, and the right to an effective remedy under art.13. The protection against discrimination (art.14) and freedom of assembly and association (art.11) could also apply in favour of corporations.

Human rights violations usually inflict non-pecuniary loss, and the Court has in fact made just satisfaction awards in favour of corporations. For example, it has ruled that a corporation is entitled to freedom of speech, to the right of privacy, and to the judicial determination of legal rights within a reasonable time. In Comingersoll SA v Portugal (2000) a company sustained moral damage due to

60 “Le préjudice moral”, available at www.serdeque.paris1.fr/fileadmin/serdeque/Marta_Torre-Schaub_Préjudice_moral.pdf (visited 22 Oct 2015) (… si l’on souhaite reconnaître un préjudice moral aux personnes morales, il faut justement ne plus parler de sentiments, puisque ces personnes juridiques non humaines n’en ont pas …. Il faut viser plus haut, si l’on veut, et évoquer ce préjudice atteignant la personne morale dans son être et non dans son avoir, dans son patrimoine.).
61 There are of course a few notable exceptions, for instance the right to marry and the right to life.
62 This is said to be the sole article in the Convention expressly stating that it applies to corporations. Nevertheless it clearly shows that Convention rights were always intended, at least in some respects, to apply to legal persons. Winfried HAM van den Muijsenbergh and Sam Rezai, “Corporations and the European Convention on Human Rights” (2012) 25 Pac McGeorge Global Bus & Dev LJ 43, 49.
63 Ibid.
the abnormally protracted handling of its civil dispute in Portugal, in violation of art.6.64 The Court awarded PTE 1,500,000 to cover the company’s non-pecuniary loss. In Société Colas Est v France (2002) the Court ruled that governmental raids on French corporate offices violated proper respect for their “home” (under art.8) and ordered €5,000 to be paid for their non-pecuniary loss.65

VIII. Conclusion

International tribunals make wide use of pecuniary awards to compensate for claims of moral damage or non-pecuniary loss. This type of damage and the pecuniary reparation of it have become a recognised international norm which was derived from the civil-law (its liberal wing) and the common-law legal traditions. The concept of moral damage being applied, however, remains an elusive and debatable subject. It has confusing labels, lacks a positive definition, and continues to evolve beyond its original sources. I have attempted to sketch five principal traits of this damage but these do not in any way place boundaries or limits upon its scope. When, where and why moral damage should be recognised and remedied depends on whether one applies a narrow, wide or even open-ended concept of this damage. This article tries to trace its current use and development through an inductive approach which takes account of a broad range of evidence. One of the principal findings is that the classical, distress-based conception derived from civil and common law, though far from being an anachronism, has become too narrow and restrictive to account for the expanding varieties of non-pecuniary harms currently recognised and applied by national and international tribunals. A more objective, rights-based conception of moral damage is particularly evident in the jurisprudence of the European Convention on Human Rights. This evolved concept has also begun to appear in the domestic decisions at the national level. Moral damage can no longer be confidently described as a non-patrimonial injury to the health, comfort or emotional security of individuals. A depersonalised concept is found in decisions which treat the sheer infringement of a right as an independent form of moral damage. The growing recognition that corporations and federations also sustain moral damage and should be compensated for their loss is further evidence of a shift of paradigm.

64 2000-IV, ECHR 355. The Court stated that:

“[A]ccount should be taken of a company’s reputation, uncertainty in decision-planning, disruption in the management of the company … and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team”.
