MORAL DAMAGES IN BRAZILIAN LAW

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I. THE COMPENSABILITY OF MORAL DAMAGES

Torts is one of the areas of the law most profoundly modified in response to changes in both facts and values. A profound controversy with respect to patrimonial damages continues to rage as to whether subjective or objective liability should determine both the degree of imputability and the extent of compensation owed by the tortfeasor. No less profound have been the differences of opinion about the legal nature of "moral damages[1]" and when and how they should be compensated.

For a long time, Roman law was the prevailing tradition in Brazil. Under Roman law, damages that were solely moral were not compensable. This was due to the specious argument that *pretium doloris* was not compensable because it was unquantifiable and hence could not be reduced to a monetary value. Through the efforts of our finest doctrinal writers and magistrates, the opposite doctrine gradually won out in Brazilian law. Now the prevailing opinion, as has been emphasized by a majority of the Justices of the Federal Supreme Court, is that despite the system adopted by the Civil Code, recovery of purely moral damages can be supported by Articles 1547, 1548, 1550 and 1553 of the Civil Code.[2] This

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[1] Moral damages is the civil law's analog to the common law's concepts of pain and suffering, as well as reputational injury.

[2] Art. 1547. Indemnification for libel or slander shall consist of compensation for the damage resulting to the offended party.

Sole paragraph. If the latter cannot prove material prejudice, the offender shall pay him twice the fine for the respective criminal penalty in the highest degree. (art. 1.550).

Art. 1548. A woman whose honor has been offended has the right to recover from the offender, if he cannot or will not repair the harm through marriage, a dowry corresponding to his own condition and state:

I. If a virgin and a minor, she has been deflowered.

II. If an honest woman, she was raped or frightened by threats.

III. If seduced with promises of marriage.

IV. If abducted.

Art. 1550. Indemnification for an offense to personal liberty shall consist in the payment of damages suffered by the offended party, and in them shall be included a sum calculated in the terms of the sole paragraph of art. 1547.

Art. 1553. In cases not provided for in this chapter, indemnification shall be fixed by judicial determination.

opinion is also supported in uncodified statutes, such as Law 5.250 of February 9, 1967, and Law 4.117 of August 27, 1962, which permit redress of moral damages to be judicially determined.

This prevailing opinion is apparent in the Draft of the new Civil Code, Bill No. 634-B of 1975, which has already been approved by the Chamber of Deputies. Article 186 of the Draft provides: "Whoever, through voluntary action or omission, negligence or imprudence, violates a right and causes damage to another, even if exclusively moral, commits an unlawful act."

Today, the Constitution of October 5, 1988 has superseded all arguments about the proper interpretation of statutory texts has been definitely superseded by the Constitution of October 5, 1988. Article 5 (V) of the new Constitution provides: "The right of reply is assured, in proportion to the offense, as well as compensation for pecuniary, moral, or reputational damages." The wording of this constitutional provision places the problem of moral damages in a slightly different form from the way it is usually put. It settles the issue of the compensability of moral damages. It still remains to be seen, however, what is meant by moral damages in light of the well-known differences of opinion concerning this aspect of civil liability.

II. DEFINING MORAL DAMAGES

A. THE DIVERGENT VIEWS OF MORAL DAMAGES IN FRANCE AND GERMANY

In comparative legislation, a divergence has arisen between the French and German concepts of moral damages. The French expression *dommage moral* translates literally as moral damages and is a term that has been adopted by the numerous countries following the French civil law tradition, *i.e.*, Brazil with the phrase *dano moral*. The Germans, on the other hand, refer to *non-patrimonial damages*, or damage *der nicht Vermogonschaden ist.*[3] This divergence is not merely verbal, but involves problems of substance. German and Italian jurists do not always regard *dommage moral* and *non-patrimonial damages* as synonymous or equivalent. Adriano de Cuppis, for example, is of the opinion that the term "non-patrimonial damage" is broader, since it refers to any non-patrimonial interest. "Moral suffering and sensations of pain fail to include all the damages that do not produce harm to one's patrimony. Loss of prestige or public reputation, for example, constitutes non-patrimonial damages, regardless of the pain or complaint (*rammarico*) of the person who suffers it."[4]

This difference in terminology has become even more accentuated with the growing legal protection of *personal rights*, whose injury creates a duty to compensate. This has given rise to talk of a third genus, that is, *personal damages*,

[3] Articles 253, 847 and 1.300 of the German Civil Code (BGB). This orientation also has been adopted by Italy in Article 2.059 of its 1942 Civil Code.

[4] *See* the entry *Danno* in *Enciclopedia del Diritto*, Varese, t. XI, p. 628 (1962).

situated somewhere between *patrimonial* and *moral damages*. When used in this sense, the expression personal damages obviously does not encompass damages that affect a person's physical or mental ability, such as occurs in labor accident cases, but only those damages affecting one's personal integrity or dignity.

A pioneering work distinguishing between personal damages and moral damages is an essay by Renato Scognamiglio. He observes that "if moral damages, as such, refer essentially to the subjective and intimate sphere of personality, one cannot understand how such damages can be included in this category when, on the contrary, they have repercussions in external relations." [5] Despite considering moral damages caused to the personality through their social aspects (*e.g.*, reduction of one's prestige and esteem in society in general) to be distinct from moral damages, i.e. considered *per se* (referring to "pain, inner suffering (*patemi d'animo*), in sum, mental anguish"), Scognamiglio ends up opting for the dichotomy between patrimonial and non-patrimonial interests. Incomprehensibly, he places damages caused to one's personality within patrimonial damages. As I shall explain, such damages are, on the contrary, a form of moral damages.

B. OBJECTIVE AND SUBJECTIVE MORAL DAMAGES

Serious doubts still persist with respect to what is included in moral damages. These doubts are further complicated by Article 5 (V) of the new Brazilian Constitution, which refers to moral damages and reputational damages (literally, damages to one's image). The term "image" in this constitutional provision does not refer to a person's physical likeness but rather to his *ethical dimension* before the community, necessarily implying moral damages.

As the doctrine and case law develop, they may impose upon the concept of personal damages (damage to one's reputation in society) a *tertium genus* between patrimonial damages (unrelated to any property that a person may enjoy, but rather to property that exhibits, in the words of De Cuppis, "characteristics of externality, pecuniary value, and a correspondence to an economic need") and moral damages, which properly refers to states of mind, to suffering and painful sensations affecting intimate subjective values.

Without excluding the possibility of a tripartite division of damages, one can distinguish clearly between objective and subjective moral damages. Objective moral damages affect the moral status of a person in his community by hurting his reputation. Subjective moral damages are the subjective psychological or emotional harm suffered by a person, the pain and suffering that are essentially unknowable but which demand unequivocal compensation. A typical case of subjective moral damages, in accordance with the terminology proposed in this essay, is when someone's inner self is hurt by the wrongful death of a parent or child. This fits entirely within the concept of purely moral damages as generally defined by the great majority of writers. A typical case of objective moral damages is when, on the contrary, the harmful act is directed at a person's social status or reputation, diminishing his standing in public opinion. This does not mean that

[5] *Rivista di Diritto Civile*, Part I, p. 283 (1957).

diminution of an individual's respectability may not be accompanied, as is generally the case, by understandable mental suffering. Such suffering, however, is part of objective moral damages, as a reflex, even if it does not exist, such as when the offended person is only outraged by the affront he has received.

III. THE OVERLAP BETWEEN MORAL AND PATRIMONIAL DAMAGES

Having established, in the foregoing summary, the juridical nature of moral damages in its two interrelated configurations, we must recognize that moral damages and patrimonial damages often go together. Examples where they go hand-in-hand are numerous, such as a homicide which, besides grief, brings material prejudice to the victim's dependents, or a defamation that not only causes mental suffering, but also substantially hurts the victim's societal reputation, resulting in his being treated as a pariah.

The two types of liabilities come under different headings but are not mutually exclusive; rather they are reciprocal and complementary. Otherwise, the indemnification called for in specific cases would be incomplete. One should remember the well- known warning of Clovis Bevilaqua,[6] in his commentary on Art. 1.537 of the Civil Code:

> For the exact determination of the indemnification owed for a homicide (and this precept extends to the causer of a death even when his action is not criminal, *ex vi* Art. 1.540), it is necessary to consider both the *economic* and *moral* aspects, as stated in a notable decision by the Appellate Court of Ancona. (emphasis by Clovis).

The Third Group of the Civil Chambers of the former State of Guanabara decided correctly in holding that: "Moral damages may be awarded without prejudice to compensation for material damages."[7] Prior to the enshrining of the "inviolability of the right to life" in Article 5 of the 1988 Constitution, one had to resort to the concept of moral damages to legitimize, for example, the right of parents to be compensated for the death of a pre-pubescent child, even though the child was not gainfully employed. Under the present constitutional configuration of inviolable human rights, such compensation may be claimed in its own right as patrimonial damages, without prejudice to the concurrent claim for moral damages *per se* for the suffering caused by the loss of the child. Correctly viewed, we have two distinct but interconnected facts. One is the death of a child capable of making future contributions to the support of his family, which implies a patrimonial injury capable of pecuniary compensation. The other is the suffering inflicted upon the child's family, which implies a purely moral injury.

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[6] Drafter of the Brazilian Civil Code.

[7] Recurso de Revista No. 5.717, Civil Appeal No. 19.409, Revista de Jurisprudência do Tribunal de Justiça do Estado da Guanabara, vol. 19, p. 137.

Moral damages entered our positive law through judge-made law, which cannot be praised too highly. The doctrine sanctioned by *Súmula* No. 491 of the Federal Supreme Court does not exclude compensation for moral damages[8] which, as we have seen, refers either to the intimate mental sphere injured by the pain a person suffers or to the injury to his social reputation.

The redress of patrimonial damages has its own *ratio petendi*. Clovis Bevilaqua, in a lucid commentary on Art. 1.540 of the Civil Code, observed that "ordinarily, indemnification is a consequence of an unlawful act but, in a few cases, the liability is purely objective, resulting simply from a harmful act," which eliminates any concern about subjective elements.

IV. STANDING TO SUE FOR MORAL DAMAGES

Determining who should have standing to bring a cause of action for moral damages, based upon the trauma provoked by the tort, is a delicate problem. Standing was the stalking-horse of those opposed to recovery for moral damages, beginning with Gabba, who, as Aguiar Dias has reminded us, considered the indeterminate nature of the group of persons harmed a conclusive argument against permitting recovery for moral damages.[9]

Wilson Souza de Melo is correct in observing that this objection does not prevent compensation for moral damages if sufficiently plausible criteria are followed, starting with the family ties that ordinarily give standing to bring damage actions, such as children for their parents and vice versa, siblings for each other, or spouses for each other. There "should always be a presumption *juris tantum* for injury to family members."[10]

The provisions of the present Constitution on family law[11] prohibit exclusion of concubines and natural or illegitimate children from those with standing to file an action for moral damages. Indeed, such connotative categories are expressly prohibited.

The question of standing should always be viewed in concrete situations. There is no reason to exclude "a priori" from standing to sue for moral damages people linked to the victim by strong ties of friendship, which are sometimes more significant than mere blood relationships. In the area of moral damages, prudent judicial discretion should not always be replaced by purely formal criteria.

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[8] The *Súmula* is a collection of brief rules of law that have become firmly established by the appellate courts. Until revoked, these rules are binding upon the lower courts and will ordinarily be followed by the courts that have established them. *Súmula* No. 491 provides: "An accident causing the death of a minor child is subject to indemnification even though the child was not gainfully employed."

[9] Aguiar Dias, 2 Responsabilidade Civil 333 (Rio: 1944).

[10] Wilson Melo da Silva, O Dano Moral e sua Reparação p. 675, no. 283 (Rio: 1983).

[11] Const. of 1988, art. 226 § 3 and 227 § 6.

V. DETERMINING THE AMOUNT OF MORAL DAMAGES

Moral damages is an area where one has to grant broad discretion to the judges, who examine the facts in concrete settings. Here the existence of lacunae in our legal system is undeniable. One can only utilize Article 1.553 of the Civil Code, which calls for the fixing of damages by the judge according to predetermined rules. Here we have a procedural rule that translates into a problem of substance, related to the criteria for fixing an award. These criteria cannot be those usually applied to patrimonial and economic matters, precisely because of the "non-patrimonial" nature of moral damages. The criteria that should be applied to fixing moral damages should reflect the legal nature of such damages, or better, the *objective that one seeks to satisfy through compensation for such damages*. I think Ripert is incorrect when he states that ordering the tortfeasor to pay moral damages is punitive rather than compensatory in character. In his view, a *civil penalty* is being imposed under the guise of compensation.[12]

In my opinion, the two objectives of compensation and the punishment are joint and complementary rather than mutually exclusive, a position also taken by Artur Oscar Oliveira Dedo.[13] There is no call, however, to speak of satisfying a desire for revenge in order to legitimize the punitive sanction applicable to the inflicter of moral damages, a position taken by Von Tuhr in his *Treatise on Obligations*. Retaliation to compensate for the suffering caused by the party responsible for the damage does not seem to me to be compatible with the law. The law applies compensatory sanctions in concrete cases in order to achieve the desirable end of securing an equilibrium in values between the offender and the victim. More appropriately, Rene Savatier speaks of a *satisfaction compensatoire* (compensatory satisfaction).[14]

The question should not be dealt with solely in terms of the relationship between the tortfeasor and his victims, but also from the point of view of *societal interest*. This interest requires the fullest redress compatible with the facts of the case, be granted, with the concomitant function of serving as an example, so as to deter the occurrence of similar injuries.

This additional punitive character of the redress of moral damages makes it impossible to apply generally, via a supposed analogy of parameters appearing in laws designed to govern specific cases. An example is Articles 51 and 53 of Law 5.250/67, which fix criteria for indemnification for an insult published by a journalist, permitting a maximum recovery of 20 times the minimum wage.In such a case, how one can speak of analogy? Analogy presupposes the equivalence of what Pontes de Miranda calls the "factual foundation" and which, in my view, always leads to a "factual axiological foundation". Where there is no correspondence between the presupposition of facts and values, the use of analogy can lead to serious errors.

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[12] Ripert, A Regra Moral nas Obrigações Civis 352 (trans. Osório de Oliveira, São Paulo: 1937).

[13] Entry on Dano Moral-Reparação, Enciclopédia Saraiva, vol. 22, pp. 289 *et seq.*

[14] *La Théorie des Obligations*, 3d ed., p. 93, Paris (1974).

The same opinion, issued by the Appellate Court of the State of Paraná, in Civil Appeal 1.018/88, that resorted to this incorrect analogy, had earlier recalled, appropriately, two important lessons by Karl Larenz and by Wilson Melo da Silva:

> Karl Larenz teaches that in placing a value on pain, one should take into account not only the extent of the offense, but also the degree of fault and the *economic situation of the parties*, since in moral damages there is, properly speaking, no indemnification, but only compensation or satisfaction to be given for that which the tort feasor did to the victim (Derecho de Obligaciones, t. II, page 642).
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> Wilson Melo da Silva, in his work "O Dano Moral e sua Reparação"; 3d ed. Forense: 1983, p. 670, states that Article 82 of the Brazilian Telecommunications Code (Law 4.117/62), expressly determines that "in the calculation of moral damages the judge shall take into account, notably, the social or political position of the offended party, *the economic situation of the offener*, the intensity of the animus to offend, and the gravity and repercussions of the offense (emphasis supplied).

Here we have proper guidelines, consistent with the precepts of the prevailing doctrine, according to which legal hypotheses should be judged *"in concreto"*, with attention given to the complex of social, economic and psychological circumstances in which the event takes place. This is to be inferred from the school of juridical concreteness, which include distinguished jurists such as Larenz, Kal Engisch, Recaséns Siches, Alf Ross, Roscoe Pound, and to which I have tried to make my own contribution in *Direito como Experiência* (Law as Experience).

Thus, the fixing of the amount of compensation for moral damages can not fail to consider the economic situation of the tortfeasor. Otherwise the penal sanction, which is an integral part of the reparation that can be requested, becomes merely illusory.

In conclusion, judicial determination, provided for in Art. 1.553 of the Civil Code, should have the broadest possible spectrum, subject only to the prudent discretion of the judge. His decision should be guided not only for analogy (for a legal text addressed to a specific case is unreliable), but also in accordance with general principles of law, taking into account a multiplicity of operative factors.