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El daño no patrimonial en el derecho contractual comparado

Non-property damage in comparative contract law

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ABSTRACT: The contribution presented in this paper explores the trajectories of constitutionalism in its history, which accompanies the most relevant events of the modern era. The author has set out to highlight the interrelations of social factors, the interests of natural and legal persons, the role of states and of political groups and parties, and ideological anchors, as the main elements that lead to constitutional texts being placed in the leading role in the social fabric where they are today. The most novel expressions of constitutionalism are explored, among which the definition and recognition of the rights of nature constitutes one of the most novel and important forms of its expression.

KEY WORDS: civil law, law, civil liability, non-pecuniary damage, contract.

RESUMEN: La contribución que se presenta en este trabajo explora las trayectorias del constitucionalismo en su historia, que acompaña a los acontecimientos más relevantes de la era moderna. El autor se ha propuesto destacar las interrelaciones de los factores sociales, los intereses de las personas físicas

y jurídicas, el papel de los Estados y de los grupos y partidos políticos, y los anclajes ideológicos, como los principales elementos que llevan a que los textos constitucionales se sitúen en el protagonismo del tejido social en el que se encuentran hoy. Se exploran las expresiones más novedosas del constitucionalismo, entre las que la definición y el reconocimiento de los derechos de la naturaleza constituye una de las formas más novedosas e importantes de su expresión.

PALABRAS CLAVE: derecho civil, derecho, responsabilidad civil, daño no patrimonial, daño moral, contrato.

JEL CODE: D23, B25.

INTRODUCTION

Non-pecuniary damage is one of the figures with the greatest legal development in comparative doctrine and in the jurisdictional headquarters of European and Latin American countries. It is defined as an affection, suffering or distress that affects a person causing pain, grief, or anguish, directly impacting his or her moral assets (as opposed to pecuniary damage, the consequence of which entails an economic decrease). This is why its notion is linked to the theory of non-contractual civil liability in cases where a wrongful act is materialized, however, due to the social and economic changes that have emerged in the community over the years, its conception today is very different from its primitive origins. For example, we currently find that in almost all legal systems reparation is allowed in the form of a monetary sum or that some jurisdictional bodies and even Civil Codes admit compensation within the framework of a convention between two or more persons under certain specific parameters, which until a few years ago was unheard of in the international legal order.

As the years go by and societies adapt to new realities, legislators, judges, and jurists adapt primitive legal concepts to the emerging circumstances, with a view to achieving material justice that guarantees peace among citizens, just as it happened in primitive peoples, the difference lies in the variation of the applicable judicial forms and remedies, which gives us a positive trace in the balance of global legal development. There are various doctrinal discussions on certain theories of law that have been left in the past, today many of them are not even referred to, they simply appear in some sources with the sole objective of enriching the legal study and others are still in force in the current panorama, but the arguments that sustain them have lost their validity in the legal field.

Such is the case of the inadmissibility of the reparation of non-pecuniary damage in the sphere of contractual obligations; if we analyze the origin of this category of damage, we find its roots in Roman law, where the use of the terminology *damnum* was excluded in the cases involving non-pecuniary injuries experienced by a subject, taking special relevance in the sphere of a private tort of iniuria described in D.47.10.1, as a series of actions characterized by the willful conduct of a subject (Cardilli, 2010).

D'Ors et al. (1975) point out about the definition of iniuria that:

The name "iniuria" comes from the fact that it is done unjustly, for everything that is done unjustly is said to be done unjustly. In a more special sense, the offence is called iniuria; sometimes we mean by the word iniuria the injury done culpably, as we are wont to say in regard to the *Aquilian Law*; at other times, we call injustice iniuria, for, when one has given sentence unjustly or

unjustly, we say that injuria is suffered by the judge; and I think it is said injuria because it is without right or justice, as if we said the opposite of *iuriam*; and the affront or “contumelia” from *contemnere* or *contemnere* or to despise. (p. 640)

The first references to the obligation to repair an injury caused to another can be found in the wording of the second point of Table VIII of the Law of the XII Tables, where it was established that *if membrum rupsit ni cum eo pacit, talio esto*, i.e., in the case of a person causing a fracture of a limb to another person, the Law of Talion should be applied. The legal right that was intended to be protected by this regulation was the physical integrity of the free man, hence the legal assumptions involved injuries such as *membrum ruptum* or *os fractum*.

Subsequently, through the praetor’s interpretations, the hypotheses of *iniuria* also began to include those that harmed the moral personality of others. The notion of *iniuria* was extended through the edicts referring to *convictum* or *ademptata pudicitia*, ending with the publication of a general edict regulating all denigrating acts against another person; this is how the conception of *iniuria* was extended to include in general all injuries to the moral or social personality of the individual (Sánchez, 2012, pp. 338-339).

According to what Ulpianus established in D.47.10.15.15, for the reparation of damages for *iniuria* to proceed, *animus injuriandi* was required, aimed at hurting, hitting, beating, insulting, verbally or in writing the offence to affect the person’s honour or reputation; in which case, the legal protection was the *Actio Iniuriarum*, a criminal action that granted the condemned person the taint of infamy. If the facts giving rise to this legal remedy were serious, the penalty was

established by the Praetor. In determining the penalty, the way it was imposed, the context and the personal circumstances were considered. It could be waived with the *dissimulatio* of the aggrieved party (D.47.10.11.1) (Del Valle, 2012).

The purpose of the *actio iniuriarum* action was:

To obtain a sentence that, in principle, was proposed by the plaintiff himself, who had to evaluate the offence that had been committed against him, although when the insult was very serious, the appraisal was carried out by the praetor; subsequently, the judge carried out the evaluation to impose the sentence, which could not exceed the estimate made. Moreover, in those cases in which the assessment of the offence had been made by the praetor, the judge did not usually reduce the sentence in view of the magistrate's authority. (Guerrero, 2002, pp. 20-21).

Nor does Justinian's doctrine reflect a notable antecedent of the compensation of extra-pecuniary damage as an entity that can be valued in the body of the sentence. It contains the refinement of the concept of *damnum*, on which the bases of tort liability would be based, which according to Cerami (1995), would develop through three ways: *i*) the marginalisation of the penal character of the tort action, with the strengthening of its compensatory function; *ii*) the configuration of the tort action as a general procedural means to obtain the *damni culpa reparatio*; and, *iii*) the configuration of fault as a necessary presupposition of liability for damages.

In the Code of the Seven Partidas (drafted in Castile during the reign of Alfonso X, with the aim of achieving legal uniformity in the kingdom), with deep-rooted influence of the

Justinian doctrine, a broad and outlined notion of compensable damage is established, regulating the damages caused to patrimonial goods of any nature and the acts that degrade the physical integrity of a person.

It follows, then, from the wording of the above provisions, that non-pecuniary damage, since its origins, has been linked to civil liability arising outside the boundaries of the contractual sphere; feasible due to the intrinsic characteristics of this type of injury, since due to its intangibility and unpredictability it is incompatible with the economic and predetermined connotation that an agreement entails.

Although various jurists, for example Gayoso Arias (1918), consider that “no self-respecting man could or should accept money in exchange for moral pain” (p. 234), considering that “fame and honour are in a certain sense unethical of money” (p. 235), the question posed by Chartier (1996) is still relevant today:

Is it conceivable that today, the highest and noblest feelings of those around us, of our fellow human beings, can be affected without any kind of responsibility being incurred and that, on the other hand, the slightest damage to our heritage can give rise to reparation?

The answer is clearly No, without specifying the origin of the relationship between the persons involved.

Some countries such as France, Italy, the United Kingdom, the United States, among others, have overcome the arguments that for years have prevented the reparation of non-pecuniary damage in the contractual sphere, assessing specific cases that have reached the heart of their courts, in which they have decided in favour of the victim, thus rescuing the role of

the jurist as a cultivator of justice and honoring Celsus' ancient definition of law understood as *l'ars boni et aequi*, professing the knowledge of the good and the equitable, separating the just from the unjust, discerning between the lawful and the unlawful, desiring to do good, not only for fear of being punished, but also with the exhortation of rewards. In this sense, we will now analyse the development of this thesis in recent years in the light of comparative law.

1. NON-PECUNIARY DAMAGE IN COMPARATIVE CONTRACT LAW

The claim for contractual non-pecuniary damage has had several stages in the development of its consolidation in the domestic laws of the countries based on the *common* and *civil law* systems. The first of them unfolds, approximately until the middle of the 20th century, in which there was a forceful and unanimous rejection of this indemnifying condition justified in the natural exclusion based on the patrimonial nature of the contract. The second is circumscribed to the acceptance of this claim in certain conventional categories involving legal weaklings whom the system should protect (workers, consumers, among others), and the third is characterized by the establishment of jurisprudential criteria (source of law), in which mechanisms are created, such as the “cumulative liability”, through the concrete analysis of particular cases in which compensation for non-pecuniary damage is approved in favour of the creditor, as a consequence of the non-performance of a contractual performance.

Thus, international organizations, whose aim is the harmonization of private law, have developed certain works containing principles that include precepts applicable to civil law, with a view to the evolution and legal innovation of this

branch. The admissibility of the claim of this category of damage in a convention has not escaped this debate, considering that the legal systems present important differences in their treatment. One of the most significant initiatives in this area is that of the Contract Law Commission, which published the Principles of European Contract Law (PECL), integrated in the *Common Frame of Reference* (CFR) of the *Study Group on a European Civil Code* and the *Acquis Group. European Research Group on Existing EC Private Law*¹.

Chapter 9 of the PECL on *remedies for non-performance* contemplates, in its section 5 entitled *damages and interest*, Article 9:501 (*right to damages*), which recognizes the possibility of compensating non-pecuniary damage caused by a breach of contract. In this sense, it states: (1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108. (2) The loss for which damages are recoverable includes: (a) non-pecuniary loss; and (b) future loss which is reasonably likely to occur.

Article 3:701 (*right to damages*) of the CFR sets out this same criterion, with the additional precision of including within non-economic damages, suffering and impairment of quality of life, providing as follows: (1) The creditor is entitled to damages for loss caused by the debtor's nonperformance of an obligation, unless the non-performance is excused. (2) The loss for which damages are recoverable includes future loss which is reasonably likely to occur. (3) "Loss" includes economic and non-economic loss. "Economic loss" includes loss of income or profit, burdens incurred and a reduction in the value of property. "Non-economic loss" includes pain and suffering and impairment of the quality of life.

1 Official website: https://ec.europa.eu/info/departments/justice-and-consumers_en

Likewise, the International Institute for the Unification of Private Law (known by the acronym UNIDROIT, by its French name: *Institut international pour l'unification du droit privé*), in the paper referring to the *Principles of International Commercial Contracts*, last published in 2016, expresses in the text of its article 7.4.2 (full compensation) that: (1) The aggrieved party is entitled to full compensation for harm sustained because of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, considering any gain to the aggrieved party resulting from its avoidance of cost or harm. (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

Therefore, the first paragraph includes the right of the aggrieved party to full compensation for damage suffered as a consequence of a breach of contract, and the second paragraph includes compensation for non-pecuniary damages, which, according to the comments published in its content, can mean pain and suffering, loss of certain comforts of life, aesthetic prejudice, etc., as well as those arising from attacks on honour or reputation, and compensation can take different forms of reparation, and it is up to the Court to decide which of them ensures adequate compensation.

Contrary to these precepts, the United Nations Convention on Contracts for the International Sale of Goods (signed in Vienna on 11 April 1980), rejects the compensation of any kind of non-pecuniary damage for the non-performance of an obligation prescribed in an agreement; Thus, Article 74 states that “damages for breach of contract incurred by one party shall include the value of the loss suffered and the value of the profit lost by the other party as a result of the breach”, so that it only refers to pecuniary damages, without any mention

of the non-pecuniary category. In this case it sounds logical due to the commercial nature of the object of the contract that is regulated in said convention, however if as a consequence of the non-performance of an obligation expressed in a written agreement, it violates a fundamental right, it would matter little the commercial essence of the sale of goods, in any case it would be in the sphere of the contractual non-pecuniary damage that can be compensated, in accordance with the treaties and constitutions mentioned *above*.

In European Community law, in accordance with the jurisprudential criteria that some local courts have been adopting in recent times, several legislative initiatives have been enacted that expressly recognise this thesis, such as, firstly, Council Directive 90/314/EEC of 13 June 1990, refers to the non-performance of package travel contracts (repealed by Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015) and states that compensation for injury must cover non-material damages, in particular for loss of enjoyment of the trip caused by substantial problems in the performance of the services agreed.

Secondly, Directive 2000/78/EC of the European Council (27 November 2000) establishing a general framework for equal treatment in employment, and Directive 2002/73/EC of the European Parliament and of the Council (23 September 2002) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and on equal opportunities for men and women in the labour market. 2002/73/EC of the European Parliament and of the Council (23 September 2002) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training

and promotion, and working conditions, provide that Member States shall introduce into their national law such measures as are necessary to ensure real and effective remedies for disadvantages suffered by a person as a result of discrimination (Articles 17 and 6.2 respectively). Similarly, Council Directive 2000/43/EC (29 June 2000) on the principle of equal treatment between persons irrespective of racial or ethnic origin provides for the admissibility of effective redress for discrimination, being effective if the compensation includes the non-material damage caused to the person discriminated against.

Latin America, for its part, has not organised its states with a view to building a community with solid institutions whose legal guidelines have an impact on the domestic law of each country, despite the fact that this mission represented an important goal within the values of the 19th century independence movements identified in projects such as Gran Colombia (1819-1831), the Mexican Empire (1821-1823), the United Provinces of Central America (1823-1824), the Federal Republic of Central America (1824-1839) and the Peruvian-Bolivian Confederation (1836-1839).

Their attempts at integration have been basically limited to the regional economic and political sphere, creating entities such as the Latin American Free Trade Association (LAFTA), the Latin American Integration Association (LAIA) or the Latin American and Caribbean Economic System (SELA), and intergovernmental organisations such as the Andean Community of Nations (CAN) and the Southern Common Market (MERCOSUR), the Bolivarian Alliance for the Peoples of Our America (ALBA), the Union of South American Nations (UNASUR) and the Community of Latin American and Caribbean States (CELAC), most of which aim to impart a legal

regime based on the common economic and social realities of the Latin American territory.

From the point of view of the integration of law, the most transcendental is the Organisation of American States (OAS) created on 30 April 1948, with the aim of achieving in its Member States an order of peace and justice, promoting their solidarity, strengthening their collaboration and defending their sovereignty, territorial integrity and independence (Article 1 of the OAS Charter); However, in contractual matters there is no treaty regulating the reparation of non-pecuniary damage, the closest legal link to this thesis is the obligation that it imparts to the States in the protection of fundamental rights set out in the aforementioned Pact of San José, Costa Rica.

It is important to mention that in recent times, it has been recognised that Latin American law integrates a legal sub-system that has its own unitary elements, whose socio-cultural base has been identified in the Roman-Ibero-Indigenous block, receiving its legal form from Roman law. These common features stand out in the social-democracy based on the real equality between people and the universalism of its law; in fact jurists of great prestige in the internal order of their countries have come together to create various harmonisation projects that qualify the principles of Latin American law, such is the case of the Group for the Harmonisation of Law in Latin America (GADAL) (2021) whose objective is the drafting of a Framework Code of Obligations with the purpose of elaborating a general theory in Latin America, whose purpose is circumscribed to:

Respond to the demands of renovation, integration and reorganisation of Latin American private law or, in general, to the need for legal security in harmony with the principles and values that guide the Latin

American legal sub-system, especially the protection of the human person, respect for fundamental rights, equality, justice and good faith. (p. 3).

In the manifesto of this Latin American Harmonisation Group GADAL (2021):

On a large scale, the legal systems of the Latin countries share: *i)* the tutelage and protection of fundamental rights and human rights (as we have expressed in the preceding pages) through their Constitutions and the signing of international treaties; *ii)* the supremacy of their Constitution protected by ordinary and extraordinary mechanisms with the aim of guaranteeing respect for the Magna Carta; *iii)* the updating of substantive regulations, by doctrine or jurisprudence in response to the resolution of problems specific to the region; *iv)* the enactment of special laws regulating private law matters with legal solutions different from those established in the Civil Code; *v)* the establishment of an equal legal system between persons linked in a relationship in which they are objectively in an unequal situation; *vi)* the local interpretation of legal concepts and rules, taking into account the legal tradition of each Latin country; *vii)* the implementation of comprehensive regional regulatory frameworks with a view to local socio-economic development. (p. 2)

Initiatives such as these have had a forum within the Universities, within a purely academic sphere. In the case of this Group, it can be affirmed that the drafting of the Framework Code of Obligations is the first of them that aims to form an instrument of consultative reference for Latin American doctrine and jurisprudence; however, it is a project that has not

yet been published in its entirety, so that the admissibility of the claim for non-pecuniary damage in the contractual sphere could not be taken as a reference in the thesis.

The common denominator between the legal systems of different nations, either because it is established by legislation or by jurisdictional criteria, is centred on a variety of solutions regarding the recognition of the appropriateness of compensation for non-pecuniary damage as a remedy for the non-performance of an agreement entered into between two or more persons, a determining factor being the qualification of the damage that is admitted and the requirements for its estimation. Undoubtedly, the tendency has been to rule out any claim containing this type of claim, although more and more frequently, the Judges have considered that the economic nature of an agreement does not prevent the compensation of non-pecuniary damages.

1.1. United Kingdom

Initially, the UK case law was very decisive in its criteria, stating that the nature of non-pecuniary injuries was incompatible with the economic nature of the contract. However, over the years, it has become more flexible in its position by carrying out exhaustive analyses in some particular cases and by pointing out some exceptions to the traditional rule.

One of the case law precedents used by the English courts to deny the possibility of compensation for non-pecuniary damage in the contract is established in the *House of Lords* Judgment on the case of *Addis vs Gramophone Co. Ltd.* (1909), in which an employee (*Mr. Addis*) claimed damages for non-pecuniary loss caused by his wrongful dismissal. *Mr. Addis* was the manager of *Gramophone Co. Ltd* in the city of Calcutta.

In October 1905 he was given 6 months' notice of dismissal as required by law and a successor was appointed to his position, and the company took steps to prevent *Mr Addis* from acting as manager during his notice period, which resulted in his return to England 2 months after the notice of termination.

In the judgment, *Lord Loreburn* held that in the case of dismissal without notice, the employer must pay compensation, taking into account that the compensation is reduced to the period of notice omitted and cannot in any way include compensation for hurt feelings, nor for the loss he has faced in being dismissed, which makes it more difficult to obtain a new job.

Lord Shaw of Dunfermline (1909) stated that compensation for intangible damages could not be considered in this case, as it fell within the prohibited grounds of the law, stating the following:

There remains, however, my Lords, a class of cases in which the injury accompanying the dismissal arises from causes less tangible, but still very real, circumstances involving harshness, oppression, and an accompaniment of obloquy. In these cases, unhappily, the limitations of the legal instrument do appear; these cases would not afford separate grounds of action because they are not cognizable by law. The very instance before your Lordships' House may afford an illustration. Here a successor to the plaintiff in a responsible post in India was appointed in this country, without previous notice given by the defendants; the successor enters the business premises to take, by their authority, out of the hands of the plaintiff those duties with which the defendants have by contract charged him, and he does so

almost simultaneously with the notice of the defendants bringing the contract to a sudden termination; while, even before this notice reached his hands, the defendants' Indian bankers had been informed of the termination of the plaintiff's connection with and rights as representing their firm. Undeniably all this was a sharp and oppressive proceeding, importing in the commercial community of Calcutta possible obloquy and permanent loss. Yet, apart from the wrongful dismissal, and on the hypothesis that the defendants are to be held liable in the full amount of all the emoluments and allowances which would have been earned by the plaintiff but for the breach of contract, there seems nothing in these circumstances, singly or together, which would be recognized by the law as a separate ground of action. If there should be, it will, on the principle I have referred to, remain; but if there be not, I cannot see why acts otherwise non-actionable should become actionable or relevant as an aggravation of a breach of contract which, *ex hypothesi*, is already fully compensated. (s. p.)

After using the previous judgement as an argument to deny compensation for contractual non-pecuniary damage, the Courts themselves change their criteria and show that contracts are not always commercial in nature, since not in all cases their content is necessarily linked to economic interests. Thus, another precedent was set in the 50's with the case of *Bailey v. Bullock*, in which a married couple sought damages due to the malpractice of their lawyer, who did not exercise the appropriate procedural actions to recover possession of a home in the possession of a third party, so that they were forced to reside for two years in the home of the wife's family, exposed to an *overcrowded home*. Damages

for inconvenience suffered were awarded, differentiating between *damages for inconvenience* and *damages for distress*, with the judgement emphasising that there is a distinction between the inconvenience or disappointment caused by the debtor's breach of its contractual obligation and the actual physical discomfort and discomfort caused by such breach.

In the same terms, in 1991, the case of *Watts vs Morrow*² was decided, concerning a dispute arising from the falsity of the information contained in an expert report ordered by the plaintiffs, which indicated the habitability of a house they intended to purchase in a rural area for holiday purposes. Relying on the provisions of the document in question, they proceeded with the purchase of the property, only to discover later that the report was erroneous and that the house was in urgent need of renovation.

With regard to non-pecuniary damage, it is stated that the breach of a contractual obligation does not generally lead to anguish, frustration, anxiety, disgust, anger, tension or aggravation for the affected party, due to the unforeseeable nature of these reactions, but in cases where the purpose of the contract is to provide pleasure, relaxation or peace of mind, damages may be recognised if the result is different from the one actually obtained, without this involving a financial nature.

Another of the judgments in which the Courts follow this line of argument is the case known as *Farley v. Skinner*, which arose from a dispute arising from the falsity of an expert report on the measurement of the noise produced by planes landing at Gatwick airport, in a country house that the claimant

2 In the same vein, other judgments also compensate moral damage resulting from living in unhealthy premises (*Patel v. Hooper & Jackson* 1999), or from the impossibility of inhabiting a dwelling affected by serious defects (*Holder v. Contryside Surveyors*, 2003).

intended to buy, which was located close to the airport. Trusting the veracity of the information provided by the expert, he proceeded with the purchase and occupation of the house, when he became aware of the nuisance and inconvenience, especially during the hours of air traffic. The *House of Lords* determined that the risk of the existence of aircraft noise was a determining factor for the peaceful enjoyment of the property, in this sense, the falsity of the information presented by the expert generated damages due to the impossibility of obtaining this enjoyment.

A clearer example of this can be seen in cases of breach of package travel contracts, the purpose of which is to provide the obligee with welfare, rest or pleasure. In *Jarvis v. Swan's Tours*, a dispute arose out of a package travel contract, which included a two-week stay at a hotel during the ski season, as well as a range of activities for hotel guests and ski equipment. When the claimant and his family went there to receive the services of the contracted package, they noticed that they fell far short of what had been promised, for which he requested compensation for pecuniary and non-pecuniary damages for disappointment, distress, displeasure and frustration.

In this regard, the *Lord Justice, Edmund Davies* (1972) points out:

When a man has paid for and properly expects an invigorating and amusing holiday and, through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that his disappointment must find no reflection in the damages to be awarded. And it is right to add that, in the course of his helpful submissions, Mr. Thompson did not go so far as to

submit anything of the kind. Judge Alan Pugh took that view in *Feldman v. Allways Travel Services*, noted in 1957 Current Law Year at paragraph 934. The highly experienced senior County Court Judge there held that the correct measure of damages was the difference between the price paid and the value of the holiday in fact furnished, “taking into account the plaintiff’s feelings of annoyance and frustration. (s. p.)

For its part, the well-known *Law Commission*, an independent statutory body set up by the Law Commissions Act 1965 to keep under review the law of England and Wales and to recommend reforms where necessary, in its *paper* entitled *Damages for Personal Injury: non-pecuniary loss*, lists as arguments against the recognition of non-pecuniary loss: (i) the offensive nature of monetary compensation for this type of damage, (ii) the fact that no amount can be adequate to compensate for personal injury, (iii) the cost of compensation for non-pecuniary loss, (iv) that there is a punitive element in the recognition of non-pecuniary loss; and, (v) that these damages constitute a barrier to recovery.

It also points out that if a functional approach is taken to non-pecuniary injuries, they would have to be analysed in terms of the cost of replacing the benefit, so that only economic damages could be compensated; however, the Commission itself eventually recognised the need to assess this category, concluding that the vast majority of victims thought that they should be admitted and opted to recommend that their recognition should be retained in the area of civil liability.

From the above, it can be seen that the general rule in the British legal system is not to admit the claim for non-pecuniary damage for breach of contract, taking into account

that the commercial nature of the contractual relationship means that the psychological suffering produced by the non-performance of an obligation within the framework of this pre-existing relationship is considered part of the risk assumed by the contracting parties, excluding from this rule, by way of case law, the following agreements (with the terms of these exceptions being progressively broadened in recent years): (i) contracts whose non-performance causes bodily injury or produces *physical inconveniences* to the obligee (*Hobbs v. L. & S.W. Railway Co.*; *Watts v. Morrow*; *Farley v. Skinner*); ii) contracts whose purpose is to provide the obligee with well-being, rest, pleasure, or to avoid certain inconveniences (*Jarvis v. Swan's Tours*), delimited by the doctrine (Mckendrick and Worthington, 2005) in two cases: i) when the purpose of the contract is an immaterial benefit and this is not satisfied; and, ii) when there is a breach of a consumer contract.

1.2. United States of America

The American *common law* recognises as non-pecuniary damage those damages that arise as a consequence of a wound, injury or observable harm, known as *parasitic damages*, which in turn are divided into two categories i) non-pecuniary damage as parasitic damage, originating from a physical wound or injury caused to a person, which includes *pain and suffering*, *emotional distress*, fear, anxiety and other emotions experienced by the victim due to an act that violates a legally recognised interest; and, ii) non-pecuniary damage as a basis for an independent action; a precept initially rejected by the Courts, until 1823, when the *United States Circuit Court for the District of Massachusetts*, in *Chamberlain vs. Chandle r* (suit brought against the captain of the ship Pearl for engaging in vulgar and disrespectful conduct towards the plaintiff passengers), allowed a claim for

non-pecuniary damages for mistreatment and injury to a family during a voyage from *Woakoo* Island to Boston (Kircher, 2007).

The common law of North America initially denied protection for certain non-pecuniary damages of a personal nature, on the grounds that these were not considered to constitute a legally protected interest. This premise has been modified over time, and nowadays a recurring criterion in the courts of the United States is the admission of claims for emotional damages when they have been inflicted. This development has arisen after the filing of a series of lawsuits in which the Judges relaxed their previous reasoning, as a result of the obviousness of some circumstances, for example:

i) *Edward W. B. Canning v. The Inhabitants of Williamstown* (1848) in which the *Massachusetts Supreme Judicial Court* found in favour of the plaintiff, ordering the Town to pay compensation for an emotional injury suffered as a result of a defect in a bridge in the town of *Williamstown*. The plaintiff fell 15 feet onto rocks and stones in the creek after the bridge gave way while he was crossing with his carriage, causing injuries to his cheek, leg and other parts of his body. He applied to the Court for compensation for the great terror and mental suffering he experienced as his life was in grave danger, with the jury to assess the physical and mental damages, taking into account his anguish, as well as the risk and danger involved.

(ii) *J. H. Hill et al. v. H. H. Kimball* (1890) before the *Supreme Court of Texas*, in which a married couple brought an action for damages against their landlord for breaking and entering their rented home. Mrs. Hill was in a remarkably advanced state of pregnancy, so that any undue exaltation could cause irreparable damage to her health. In full knowledge of this, the defendant arrived at the plaintiffs' home and

assaulted, in the presence of the plaintiff, two black people in a boisterous and violent manner, accompanying his attack with profane language, even causing blood to be drawn. As a result, the mother-to-be was frightened, which caused labour pains, leading to a subsequent miscarriage, seriously damaging her health. The Court, despite finding no precedent for such an action, awarded compensation for non-material damages.

(iii) *Engle v. Simmons* (1906) decided by the *Alabama Supreme Court* in a suit brought by *Damages for Personal Injury from Wrongful Act* against Mr. *Simmons*, who violently entered the home of *Mary P. Engle*, a married and pregnant woman, in the absence of her husband, causing her personal injuries inflicted without physical violence. Despite asking her to leave the house, he expressly refused to do so, proposing to take an inventory of the property, threatening what he would do with it in return for the debt he owed to the plaintiff's husband. This situation caused the woman distress, leading to the premature birth of her unborn child. The Court ordered the defendant to pay compensation to the victim by virtue of her right to the peaceful enjoyment of her residence, so that any invasion of her residence generates an obligation to compensate her.

US law also establishes as a general rule the inadmissibility of non-pecuniary damage in the contractual sphere. The rationale has mainly been the unforeseeability of non-pecuniary damage at the time of the conclusion of the convention. The Courts have pointed out that frustration or displeasure caused by the non-performance of an obligation are common feelings in any contractual relationship and are part of the risk assumed by the parties.

This criterion is accepted by both doctrine and jurisprudence. On 3 April 1980, the *Court of Appeals of*

California, in the case *Allen v. Jones*³, established that damages for breach of contract correspond to those arising from the non-performance of an obligation within the framework of a convention or those foreseen by the parties, being necessary, in most agreements, the negotiation of commercial transactions, in which a feeling of distress or frustration, which allows differentiating it from an agitation or annoyance, is not foreseeable for any of the parties involved.

The foreseeability of damage, as an indispensable requirement for its compensation, is regulated in section 351 of the *Restatement (Second) of Contracts*⁴ entitled *Unforeseeability and Related Limitations on Damages*, where it is expressly stated that: (1) *Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.* (2) *Loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.* (3) *A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation, i.e. it remains a general rule that damages are not recoverable where the obligor could not foresee them as a result of its breach at the time of the conclusion of the contract.*

3 In the present case Carl Allen sues Nicholas Jones for *damages for mental distress* he suffered when he learned that the cremated remains of his brother, which the defendants had promised to ship to Illinois, were lost in transit, the empty box arriving at its final destination, and his whereabouts were unknown.

4 It is a legal treatise in the second series of the *Restatements of the Law*, recognised and frequently cited by American courts and intended to inform judges and lawyers of the general principles of common law of contract. It is considered a non-binding source used in the areas of contracts and commercial transactions.

This precept is not absolute, since section 353 (*Loss Due to Emotional Disturbance*) of the same instrument provides two exceptions: *recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result*, so that compensation for frustration and emotional disturbance caused by breach of contract is admitted when: i) the breach has caused bodily harm or ii) it is of such a kind as to cause serious emotional disturbance.

In accordance with this line of argument, the American courts have admitted these two alterations to the rule and have declared the admissibility of non-pecuniary damage within the contractual framework in some particular cases: i) *Stewart v. Rudner* of the *Supreme Court of Michigan*, relating to the result of a badly performed caesarean section, where the admissibility of non-pecuniary damage is concluded, due to the evident mental anguish and suffering experienced by the plaintiff; and, ii) *Hill v. Sereneck* of the *Court of Civil Appeals of Alabama*, concerning the breach of a contract for the construction of a house, concluding that, in cases in which it is demonstrated that the non-performance of the contract causes mental anguish or suffering, resulting in emotional or mental damages, these are compensable.

It is worth noting that case law has also admitted the action for compensation for non-pecuniary damage in contracts for funeral services, construction of housing, medical services or package travel contracts, flight delays leading to the loss of holidays, service contracts subject to an essential term, among others; all have in common that their purpose includes satisfying non-pecuniary interests, whose injury produces the typical frustration, annoyance, discomfort or emotional discomfort to the creditor, which in these cases would be totally foreseeable.

With regard to the applicable regime in the United States of America, we can conclude that despite the existence of a general rule of not recognising the applicability of the action for non-pecuniary damage in the conventions, various exceptions have been granted in jurisdictional venues, as well as in non-binding rules that serve as a guide for judges and jurists, which allow, under specific conditions, the claim for this category of damages, either because they are understood as contractual damages or because they are delimited within the system of *torts*, taking into account that the typology of the contract is fundamental for the judges to decide whether a compensation of this category could be admitted or not.

1.3. France

The French legal system has developed favourable theses, especially at the jurisprudential level, on the admission of compensation for emotional damage in the contractual framework. French jurists have been one of the most prominent, in the comparative law of the nineteenth century, for being pioneers in this matter within the *civil law* system, not only because their code has served as a basis for legislators who are responsible for drafting substantive rules within their countries, but also because their doctrine has influenced the innovation of modern law.

The French *Civil Code* establishes the general principle of performance of obligations in Article 1147, stating that *the debtor is condemned, if necessary, to pay damages and interests either because of the non-fulfilment of the obligation, or because of the delay in fulfilment, whenever the non-fulfilment is not justified by a foreign cause which does not justify the non-fulfilment of the obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause*

étrangère qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part. In the same sense, Article 1150 states: *le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est n'est point par son dol que l'obligation n'est point exécutée.*

The wording of both contemplates the principle of contractual civil liability, according to which the obligor will be condemned to pay damages when it does not fulfil the obligations stipulated in a convention or when the performance is late, unless it can be justified through a non-imputable extraneous cause, limiting the compensation of the damage to the existence of the requirement of foreseeability at the time of the conclusion of the contract, with the exception of cases of bad faith, in which case the provisions of Article 1151 apply, i.e. *dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention*; therefore, the losses suffered by the creditor will be included, as well as the gains of which he would have been deprived (loss of profit), as a consequence of the immediate and direct non-performance of the agreement.

The position of the doctrine regarding the recognition of contractual non-pecuniary damage has been very firm due to the absence of exhaustive limits established in the substantive rule. The admission of this category is justified by the *principle of integral reparation*, regulated by article 1147 and following articles of the *Code*, so that the damage caused to the victim must be compensated independently of its nature. The non-performance of a performance pre-established in an agreement implies in itself a loss for the creditor, as the debtor is obliged to

repair such damage, regardless of its economic nature or not, it is sufficient that it has occurred.

Planiol and Ripert (1935), in their *Traité pratique de droit civil français*, state that non-material damage must be taken into account in the same way as material damage, whether the civil liability arises from a contract or from the commission of a wrongful act, thus stating:

The creditor can only obtain compensation if he proves that the non-execution or the delay in the execution of the obligation caused him a damage. Sans cela de quoi se plaindrait-il? Sans intérêt, pas d'action. C'est pour cette raison que l'art. 1147 dit que "le débiteur est condamné, s'il y a lieu...". Il se peut, en effet, que l'exécution réelle n'eût procuré aucun avantage au créancier. On cite as an example the case of the grocer who omitted to produce in an order, as he had been ordered to do by his client, alors qu'il n'aurait pas obtenu du notaire qui a omis de faire inscrire l'hypothèque de son client el peut établir que l'hypothèque non inscrite était primée par d'autres qui absorbaient la totalité du Prix de l'immeuble, de sorte que son client, même inscrit, n'eût rien obtenu du tout. Quant au simple retard, il arrive très souvent que le créancier n'en éprouve aucun dommage appréciable. If this damage exists, and it depends on the circumstances, reparation is due to the grower. Le dommage moral est à prendre en considération au même titre que le dommage matériel, quelle que soit la nature de la responsabilité. (p. 158)

One can appreciate the evolution, over time, in the decisions of French judges, which have as their object the resolution of disputes leading to the reparation of damages caused to a person. The openness given to the interpretation

of the *principe de réparation intégrale* provided for in the *Code* has been present in its jurisprudence in a firm and unanimous manner. The first cases arose in the context of so-called accidents at work, from the industrial revolution onwards, but even today the court continues to affirm that *it is a principle that every victim of an injury, whatever its nature, has the right to obtain compensation from the person who caused it* (Motifs de l'arrêt, 2012).

The broad interpretation of the full reparation of damage does not entail the unlimited opening of the compensation of non-pecuniary damage in a contract, since its uncontrolled application can give rise to jurisprudential precedents far removed from justice, even opening the possibility of generating abuses, especially because the majority of the legal world agrees with the purpose of the monetisation of such a subjective damage as moral damage (indirect compensation), since its intrinsic value cannot be questioned for any reason. This is where the judge's criterion plays an important role. The wording of the *Code*, as shown above, is a generalised text, and it is therefore the responsibility of the courts to determine whether this category of damages is appropriate in each specific case, for example, whenever the breach of an obligation relates to an object that has moral value, or when it violates the religious feelings of an individual, or when the breach of the contractual relationship affects the reputation of one of the parties, or when it results in indirect dismissal, among others.

For its part, as in the United Kingdom and the United States of America, French case law has considered that non-pecuniary damages are inherent to the breach of contract that prevents the enjoyment of the holiday, in the same way as in the United Kingdom and the United States of America, in

agreements for the purpose of contracting package holidays or holidays. One of the most important rulings on the matter was issued by the *Cour de Cassation* on 4 November 1992, where this criterion was established, despite the fact that the *Arrêté du 14 juin 1982 relatif aux conditions générales de vente régissant les rapports entre les agences de voyages et leur clientèle* indicates in its article 9 that only material damages are applicable.

1.4. Italy

The compensation of non-pecuniary damage in Italy is regulated for the first time in the text of the *Civil Code* of 1942, in which, according to Article 2059, *non-pecuniary damage must be compensated only in the cases determined by law*. This provision represented, at the time, the updating of Italian civil law, in line with what was already being developed in comparative law. Italian society was not the same as in 1865 (date of promulgation of the previous *Codice Civile*), the reality went beyond the legal structure in force at the time, it was necessary to guarantee a broad protection of the non-economic interests of the citizens, however there was a notable distrust of the legislator, which resulted in the normative restriction of the reparation of this category of damage (Salvadori, 1979, p. 258).

Once the *Codice* was published, and with the presentation of some controversies before the local courts, two contradictory interpretative currents arose in case law and doctrine. The first one related to the identification of non-pecuniary damages only under the concept of “subjective moral damage” (or *pretium doloris*, understood as the transitory psychic suffering produced as a consequence of an injury suffered, with special exclusion of injuries to the integrity and health of a person considered as material damages) (Franzoni, 1995; Thiane, 2002), leaving out the protection of other types

of harm to the person, and the second corresponding to the interpretation of the clause “*casi determinati dalla legge*” and the feasibility of extending its application to other areas that are not limited to offences punished by criminal law (Scognamiglio, 1957), as indicated in Article 185 (*restituzioni e risarcimento del danno*) of the *Codice Penale*, according to which *ogni reato, che abbia cagionato un danno patrimoniale o non patrimoniale, obbliga al risarcimento il colpevole e le persone che, a norma delle leggi civili, debbono rispondere per il fatto di lui*.

With the restricted interpretation of the current body of law, an important category of interests that were emerging in society were excluded, which did not correspond to the criminal nature of the preceding provisions, nor could they be framed within the content of article 2043 of the *Codice Civile* (*qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*), but which necessarily needed to be protected in the Italian legal system.

Thus, in favour of the prevalence of the values of the person and of the thesis that the traditional imposition of the inappropriateness of the inappropriateness of the compensability of injuries to fundamental rights is inadequate, the doctrine and the courts began to consider the insertion of factual assumptions that the legislator, through various bodies of law, recognises as feasible for the claim of non-pecuniary damage, which in some cases could even be interpreted in an analogical manner (Astone, 2012).

This tendency began to gain strength after the historic sentence of the *Corte Costituzionale* No. 184 of 14 July 1986, which affirmed the compensability of biological damage, without taking into account the negative economic effects. For

the judge, the aforementioned article 2043 must be clarified in accordance with the provisions of article 2 of the *Constitution*, in the light of the extensive interpretation based on the evolution of the right to compensate not only pecuniary damages in the strict sense, but also all those that hinder the activity of the human person and therefore, in an autonomous manner, and without any limits, biological damage. From this point onwards, emotional damage is no longer limited exclusively to moral damage, as it includes biological damage, understood as the injury to the psychophysical integrity of the individual as such, considered acceptable on a medico-legal level, which can be defined as the damage caused to non-economic interests of social relevance, among which are the fundamental rights of the subjects.

In the chapter entitled “*Considered in law*”, the Court (1976) analyses the change in the terminology of “moral damage” with that of “non-pecuniary damage”, revealing that *such reasons are unequivocally clarified by the same ministerial report to the definitive draft of the criminal code of 1930, where reference is made, above all, alla scelta operata in sede di risarcimento di danni morali (“Il carattere generale di tale principio, incompatibile con una enunciazione di casi tassativi di applicabilità, mi ha indotto a non limitare la risarcibilità del danno morale a casi particolari, come taluno aveva suggerito”)* e si offre, successivamente, la ragione della nuova locuzione usata per indicare il danno morale subiettivo: “*Quanto alla designazione del concetto, ho creduto che la locuzione “danno non patrimoniale” sia preferibile a quella di “danno morale”, tenuto conto che spesso nella terminologia corrente la locuzione di “danno morale” ha un valore equivoco e non riesce a differenziare il danno morale puro da quei danni che, sebbene abbiano radice in offese alla personalità morale, direttamente o indirettamente menomano il patrimonio*”.

Another important aspect is the definition of biological damage and its difference with subjective non-pecuniary damage. Thus, it is indicated that *biological damage constitutes the event of the injurious health event, while subjective moral damage (and pecuniary damage) belong to the category of damage - consequence in the narrow sense.... The subjective moral damage, which is sustained in the psychological disturbance of the offended party, is damage - consequence, in its own sense, of the illicit act injurious to health and constitutes, when it exists, a condition for the liability of the victim; the biological damage is, instead, the event, internal to the health-damaging fact, which must necessarily occur and be proved, and we cannot expect to find out about the possible consequences external to the event itself (moral or patrimonial) without the complete realisation of the latter, including, obviously, the event of the deterioration of the psycho-physical integrity of the offended party. Biological (or physiological) damage is specific damage, it is a type of damage, identified with a type of event. Subjective moral damage is, instead, a type of damage - consequence, which can derive from a numerous series of types of event; just as a type of damage - consequence, an objective condition of liability, is patrimonial damage, which, in turn, can derive from different typical events.*

Italian jurisprudence has given rise to various decisions that have regulated the various aspects of the subject of *non-patrimonial damage* and which are a central guide in the legal development of this concept, among which are the following:

i) Ruling No. 233 of the Corte Costituzionale (2003), where it is held that the *traditional assertion that the non-patrimonial damage protected by art. 2059 cod. civ. si identificicherebbe con il cosiddetto danno morale soggettivo*, as long as in the framework of a bipolar system of patrimonial and non-patrimonial damage,

a costituzionalmente orientata interpretazione dell'art. 2059 cod. civ, tesa a ricomprendere nell'astratta previsione della norma ogni danno di natura non patrimoniale derivante da lesione di valori inerenti alla persona: e dunque sia il danno morale soggettivo, inteso come transeunte turbamento dello stato d'animo della vittima; sia il danno biologico in senso stretto, inteso come lesione dell'interesse, costituzionalmente garantito, all'integrità psichica e fisica della persona, conseguente ad un accertamento medico (art. 32 Cost.); or finally the damage (often defined in doctrine and in jurisprudence as systemic) deriving from the injury of (other) interests of constitutional rank inherent to the person.

ii) Judgments Nos. 8827 and 8828 of the Corte di Cassazione Civile (2003), in which non-pecuniary damage was admitted for the loss of the parental relationship produced by a *plurioffensive event*, in the first case for the *damages related to the tetrapresi spastica ed alla atrofia cerebrale da asfissia neonatale da cui era affetto*, assumendo che l'infermità era stata determinata da *errori diagnostici e/o da comportamenti omissivi del personale sanitario dell'ospedale dove il bambino era nato il 15/4/1982 a seguito di parto cesareo* e il secondo per *tutti i danni, patrimoniali e non patrimoniali, da essi subiti, sia iure proprio che iure hereditatis*.

The Court of Cassation, in both judgments, determined the division and independence between article 2059 of the Codice Civile and article 185 of the Codice Penale. It states that *non-patrimonial damage must be considered as a broad category, comprising any hypothesis in which there is a value inherent to the person other than the objective moral damage*, finding support, on the one hand, in the *progressive evolution verified in the discipline of this sector, contrasted by the new legislation and jurisprudence in relation to the protection of non-patrimonial damage*, la sua

accezione più ampia di danno determinato dalla lesione di interessi inerenti alla persona non connotati da rilevanza economica and on the other hand, in the jurisprudential evolution sollecitata dalla sempre più avvertita esigenza di garantire l'integrale riparazione del danno ingiustamente subito, non solo nel patrimonio inteso in senso strettamente economico, ma anche nei valori propri della persona (art. 2 Cost.).

A bipolar system of compensatory protection of the interests of the individual can therefore be configured, in which *patrimonial and non-patrimonial damage coexist, made up in turn of biological damage in the narrow sense, objective moral damage and the various and subsequent pre-judgements as a consequence of an injury to a protected constitutional interest, taking into account that tutte le volte che si verifichi la lesione di un tale tipo di interesse, il pregiudizio consequenziale integrante il danno morale soggettivo (patema d'animo) è risarcibile anche se il fatto non sa configurabile come reato. And it should be noted that in the equitable settlement of subsequent judgements, the judge cannot disregard what has already been recognised for the recovery of the objective moral damage, in relation to the aforementioned unitary function of the recovery of the damage to the person.*

iii) Le Sezione Unite Nros. 26972, 26973, 26974 and 26975 of the Corte di Cassazione civile (2008), in which the judges sought to limit the expansion of a new conception of damage, known as *systemic damage*, defined as *any damage of a nature that is not merely emotive and internal, but objectively acceptable, provoked on the habitual behaviour of the subject, which alters his or her life and relational assets that were his or her own, inducing him or her to make different life choices in terms of the expression and realisation of his or her personality in the external world.*

The compensation of this type of damage does not result from a settlement derived from an autonomous classification of the damage, because, according to the Court, it *does not emerge, within the general category of “non-patrimonial damage”, as a subcategory, but as a mere descriptive synthesis, where the different denominations (moral damage, biological damage, damage due to loss of parental relationship) adopted by the twin judgments of 2003, and received by the judgment, N. 233/2003 of the Constitutional Court, are understood. 233/2003 della Corte Costituzionale.*

The Supreme Court censured the conduct of the so-called *giustizia di prossimità* in which ample protection is granted to injuries that do not entail the need for compensation, because they consist of *disagi, fastidi, disappunti, ansie ed in ogni altro tipo di insoddisfazione concernente gli aspetti più disparati della vita quotidiana che ciascuno conduce nel contesto sociale.* In this sense, the so-called imaginary rights such as *the right to the quality of life, to the state of well-being, to serenity: in short, the right to be happy,* do not fall within the catalogue of *essential damage*, so that beyond the cases determined in ordinary law, only the detriment of an inviolable right inherent to the individual person is a source of non-pecuniary liability for compensation.

The possibility of extending the list of cases prescribed for the compensation of non-pecuniary damage is admitted. However, as regards the payment of mental damages in the contractual framework, the dominant doctrine in Italy, as in most countries, initially refused to admit this possibility, arguing that fault in a contract plays an important role in determining the scope of the non-performance of a performance, which has a pecuniary connotation, so that in this context there cannot

be room for a claim of a moral nature, since its essence does not represent the object of an obligation in the proper sense (Scognamiglio, 1957).

There was a limit caused by the restrictive interpretation of Article 2059 of the *Codice Civile*, which limited its applicability only to cases of liability for an unlawful act, in particular those arising from the commission of a criminal offence, and in no way alluded to cases of obligations established in a prior agreement. Hence, the thesis of negation was seen on two important grounds, i) the topographical location of Article 2059 within the *Codice Civile* (*Titolo IX dei fatti illeciti*), exclusively referred to the non-contractual field; and ii) the patrimonial nature of the contractual legal bond.

Another part of the doctrine (De Cupis, 1979; Russo, 1950; Asquini, 1952; Barassi, 1964), based on the jurisprudential tendency to use an “*interpretazione costituzionalmente orientata*” of the laws, has expressed itself in favour of a broad perception of the aforementioned provision, applying an analogical extension with respect to the wrongs of contractual liability, since it is the only rule of the *Codice Civile* that regulates the compensation of non-pecuniary damage. There is no express legal prohibition within the body of law that excludes the claim for non-pecuniary damage in a convention, which is why the content of this article must be analysed as a general solution that allows for the elimination of all uncertainties and discussions on the matter (De Cupis, 1979).

A contract that has been studied from this perspective in the European Union, and which is worth mentioning at this point, is undoubtedly that which has as its object the enjoyment of package tours, regulated by the above-mentioned European directive CEE 314/1990, adopted by Italy and accepted by the

local legislator with Legislative Decree No. 111/1995. 111/1995, which established, in its article 15 entitled '*responsabilita' per danni alla persona*', that *the damage deriving to the person due to the inadequacy or unsatisfactory execution of the services that form the object of the tourist package is punishable within the limits of the international conventions that regulate the matter, of which Italy or the European Union are a part....* The only legal case in which compensation for non-pecuniary damages is allowed as a consequence of the non-fulfilment of a contractual obligation is the one and only legal case in which compensation for non-pecuniary damages is allowed.

In case law, as stated above, the decisions of the *Corte Costituzionale* and the *Corte di Cassazione Civile* of 2003 and 2008, opened the way for the inclusion of non-pecuniary damage in the contractual relationship, as the interpretation of Article 2059 aimed at taking into account the constitutional precepts, allows the reparation of the injuries caused to a person in the sphere of his fundamental rights protected in article 2 of the Magna Carta of the Italian peninsula, according to which *the Republic recognises and guarantees the inviolable rights of man, both as an individual and in the social formations where his personality develops, and requires the fulfilment of the non-derogable rights of political, economic and social solidarity.*

In the text of Judgments Nos. 26972-26975 of the *Corte di Cassazione Civile*, non-pecuniary damage is expressly mentioned with respect to contractual liability in the following terms:

i) *The non-patrimonial damage resulting from the failure to fulfil obligations, according to the prevailing opinion in doctrine and jurisprudence, was not considered risarcibile. The obstacle was due to the lack, in the discipline of contractual liability, of a rule analogous to art. 2059 c.c., which is detailed in matters of wrongful*

acts. In order to aggirare l'ostacolo, in the case in which, in addition to inadequacy, a violation of the principle of *neminem laedere* would be configurable, the jurisprudence had elaborated the theory of *cumulo delle azioni*, contractual and extra-contractual. Apart from its dubious dogmatic foundation, the thesis does not resolve the question of the recovery of non-patrimonial damage in the broad sense, because it brings it, in relation to the non-contractual action, within the strict limits of art. 2059 c.c. in collegamento with art. 185 c.p., sicché il risarcimento era 114 condizionato alla qualificazione del fatto illecito come reato ed era comunque ristretto al solo danno morale soggettivo.

ii) The constitutionally oriented interpretation of art. 2059 c.c. now allows us to affirm that also in the area of contractual liability, the recovery of non-pecuniary damages is a given. From the principle of the necessary recognition, for the inviolable rights of the person, of the minimum protection constituted by the compensation, it follows that the injury of the inviolable rights of the person that has determined a non-pecuniary damage entails the obligation to compensate such damage, whatever the source of the liability, contractual or extra-contractual. If the non-fulfilment of the obligation determines, in addition to the violation of the obligations of economic recovery assumed with the contract, also the injury of an inviolable right of the person of the creditor, the protection of the non-pecuniary damage may be based on the action of contractual liability, without having to go back to the background of the accumulation of actions.

iii) What interests of a non-pecuniary nature can be considered important in the area of contractual obligations, is confirmed by the provision of art. 1174 c.c., according to which the performance that forms the object of the obligation must be susceptible of economic valuation and must correspond to an interest, also non-pecuniary, of the creditor. The identification,

in relation to the specific contractual hypothesis, of the interests included in the area of the contract which, in addition to those with patrimonial content, present a non-patrimonial character, is aimed at establishing the concrete cause of the negotiation, to be understood as a synthesis of the real interests that the contract itself is directly aimed at realising, beyond the model, also typical, adopted; synthesis, and therefore concrete reason, of the contractual dynamics.

iv) In the area of contractual liability, compensation will be regulated by the rules set out in the matter, to be read in a constitutionally oriented sense. L'art. 1218 c.c., in the part in which it provides that the debtor who does not fulfil the due performance is liable for the compensation of the damage, cannot therefore be referred only to the patrimonial damage, but must be considered comprehensive of the non-patrimonial damage, as long as the failure to fulfil has determined damage to the inviolable rights of the person. The same wider content is found in art. 1223 c.c., secondo cui il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta, riconducendo tra le perdite e le mancate utilità anche i pregiudizi non patrimoniali determinati dalla lesione dei menzionati diritti. D'altra parte, la tutela risarcitoria dei diritti inviolabili, lesi dall'inadempimento di obbligazioni, sarà soggetta al limite di cui all'art. 1225 c.c. (non operante in materia di responsabilità da fatto illecito, in difetto di richiamo nell'art. 2056 c.c.), restando, al di fuori dei casi di dolo, limitato il risarcimento al danno che poteva prevedersi nel tempo in cui l'obbligazione è sorta.

Thus, Italy has recognised both in its rules and in its courts that non-pecuniary damage must be compensated within the framework of the recognition of the fundamental rights

inherent to a person, on the basis of a *constitutionally oriented interpretation* of Article 2059 of the *Codice Civile*, significantly broadening the concept of non-pecuniary damage, extending its notion beyond subjective non-pecuniary damage.

1.5 Venezuela

In the Venezuelan legal system, non-pecuniary damage finds its legal basis in Article 1196 of the Civil Code (1982), which provides that:

The obligation of reparation extends to any material or moral damage caused by the unlawful act. The judge may, in particular, award compensation to the victim in case of bodily injury, violation of his or her honour, reputation or that of his or her family, or personal liberty, as well as in case of violation of his or her home or of a secret concerning the injured party. The judge may also grant compensation to relatives, relatives of the victim, or spouse, as reparation for the pain suffered in the event of the victim's death. (art. 1196).

With the drafting of the Civil Code that came into force in 1942 (repealed in 1982), the recognition that the courts of first instance and even the former Federal Court and Court of Cassation had been giving to emotional injuries materialised, incorporating in its provisions (still in force to date) the admission of the claim for non-pecuniary damages caused by the commission of an unlawful act. Previously, in the absence of legislation on the matter, judges had begun to admit, in cases of tort liability, that a person could suffer injuries to both their financial and moral assets.

The Venezuelan substantive civil legislation has its foundation in the French-Italian project of obligations and

contracts of 1927 (in fact Article 1196 of the Civil Code is a copy of its provision No. 85), elaborated by a commission of eminent European jurists of French and Italian origin with the purpose of unifying the rules of both countries, using as reference the Italian Civil Code of 1865 and the French one of 1804 in force at the time, and incorporating the advances of the legal science in the last years. As was mentioned in previous apices, the development of non-pecuniary damage in these countries was propitiated at the jurisprudential level, not in positive law, which was replicated in each of the nations that over the years have incorporated into their legal order the European tendencies, product of the inheritance of the *civil law* legal system.

Of all the categories of damages contained in the Venezuelan legal system, moral damages is the one that has had the greatest jurisprudential relevance, firstly because questions have always arisen within the doctrine that do not find answers in the interpretation of the normative text, but in sentences derived from judges who in their capacity as operators of the law have had to dictate, and secondly because of Article 1196 itself, which leaves it to the discretion of the courts to estimate an injury that by its very nature has been considered inestimable.

The terminology used to identify a pecuniary injury suffered by a person in Venezuela is that of “moral damage”, mainly because that is what the Civil Code itself calls it, although the doctrine tends to distinguish two classifications of this: (i) those damages linked to material damage, which affect the social part of the moral heritage of an individual, such as their reputation or that which falls on their physical appearance, called aesthetic damage, important for those who live off their image; and, (ii) those that disturb the affective or sentimental

part of a subject, such as the pain experienced by someone who suffers the death of a relative/friend or that which originates from a state of anxiety or worry (Domínguez, 2017, p. 244); what characterises the difference between one concept and the other is the possibility of the quantification of the harm.

While some countries establish scales in their legislation to justify the determination of the *quantum* of non-pecuniary damages, Venezuelan law leaves the estimation of the quantification to the discretion of the judge, which is why the Venezuelan courts are obliged to follow the jurisdictional criterion issued almost 20 years ago by the Social Cassation Chamber of the Supreme Court of Justice, in its judgment No. 144 of 7 March 2002 (Case: Hilados Flexilón C.A. vs José Francisco Tesorero Yáñez. vs José Francisco Tesorero Yáñez), where it established that any judge hearing an action for non-pecuniary damages must examine the specific case by analysing the following aspects: *i*) the entity (importance) of the damage, both physical and psychological (the so-called scale of moral suffering); *ii*) the degree of culpability of the defendant or his participation in the accident or unlawful act that caused the damage (depending on whether it is objective or subjective liability); *iii*) the conduct of the victim; *iv*) the degree of education and culture of the claimant; *v*) the social and economic position of the claimant; *vi*) the economic capacity of the claimant; *vi*) economic capacity of the defendant; *vii*) possible mitigating factors in favour of the liable party; *viii*) the type of satisfactory compensation that the victim would need to occupy a situation similar to that prior to the accident or illness; and, finally, *ix*) pecuniary references estimated by the Judge to assess the compensation that he considers equitable and fair for the specific case. In this way the objectivity of the amount is ensured, the Judge must indicate in the grounds for

his decision, the prior analysis of all these points, thus justifying the reasons that led him to quantify the claimant's claim in the amount specified.

Regarding the admissibility of the claim for this classification of damage as a consequence of the breach of a pre-established obligation by the parties to an agreement, the doctrine and jurisprudence have been pronouncing on the matter for some years. There are contradictions in the positions expressed on the matter, both jurists and judges have not been unanimous in identifying a unison criterion in this regard, on the one hand it is established that in Venezuela contractual and non-contractual civil liability coexist, being able to generate in the former the reparation of moral and material damages (Domínguez, 2017, p. 252), since they are not mutually exclusive and find the object of their claims in the cases in which the so-called "cumulative liability" is verified. In the opinion of Domínguez (2017), the expression *cumulo de responsabilidad* is not appropriate, since this figure:

It does not imply that the subject can accumulate two indemnities for the same act, which would be absurd because they are two different regimes, notwithstanding the unity of civil liability. Rather, it is a matter of 'choice'. In effect, it is a question of deciding whether, faced with the same event, the subject can take the path of contractual civil liability or, on the contrary, that of non-contractual liability. (p. 287).

On the other hand, moral damage is not a consequence of the non-fulfilment of a contractual obligation, in addition to the fact that it is only contemplated in our legislation in the liability for a wrongful act (Maduro, 2003, p. 897).

In Judgment No. 176 of the Civil Cassation Chamber of the Supreme Court of Justice of 20 May 2010 warns “of the new criterion widely developed by prominent Argentine, Chilean, Brazilian, Spanish and other authors, in relation to the viability of moral damages derived from contractual breaches, as well as judgments of the Chamber itself (...) which are in clear contradiction with the statement offered by the appellant according to whichin matters of contractual liability there is no compensation for moral damages...” and points out that “the impossibility of requesting moral damages as a consequence of breach of contract is an outdated thesis, as the current trend is the compensability of moral damages in matters of obligation, provided that certain circumstances and conditions are verified, which will have to be established in each specific case”; however, to the contrary, in decision no. 644 of 22 October 2014 of the same chamber states that “moral damages are only contemplated in our legislation in liability for wrongful acts..., as enshrined in article 1.196 of the Civil Code”.

In any event, in Venezuela both the majority of the decisions of the Supreme Court and the doctrine have been in favour of the admissibility of the admissibility of moral damages in the contractual framework, finding the solution to justify this thesis, in accordance with the Venezuelan legal system, in the finding of the applicability of the aforementioned “cumulo de responsabilidad”, which leads to the coexistence of contractual and non-contractual liability, whenever a wrongful act arises on the occasion of or in relation to a contract, the non-performance of which gives rise to material and non-material damages.

Mélich-Orsini argues that there is a doctrinal current that is inclined to accept cumulative liability under certain circumstances, i.e. in order to allow the rules applicable to tort

liability to be applied, it would be necessary that a different harmful fault be joined to that which consists of the mere violation of the contractual obligation. This would presuppose two conditions: *i*) that the act implies the “violation of a legal duty independent of the contract”, and *ii*) that the damage caused by that act consists of the “deprivation of a pecuniary or moral good other than the benefit itself assured by the contract”. The first one excludes any idea of a contest of actions when the defendant has not violated any duty other than his contractual duties, even if such violated duties are not expressly agreed but those that are considered implicit according to the text of positive law; and the second one excludes any application of the provisions regulating tort liability when the damage suffered by the victim is limited to the loss of advantages derived from the contract (Melich, 2006).

1.6. Latin America

Latin Americans followed the trend developed by the countries of the European Union on this issue. Some decided to reform their Civil Codes in order to incorporate non-pecuniary damage within the doctrine of contractual civil liability, overcoming the arguments previously put forward in their own legal systems, and others have supported this thesis on the basis of binding case law pronouncements by Supreme Courts or Tribunals, applicable in the seats of their jurisdictional bodies.

By way of summary, the following table shows the regulations in force in various countries in the Americas, which over time have increasingly accepted this theory, unless such an assumption is expressly prohibited by law.

	Propriety Contractual Non-material Damages	Regulations
Argentina	-) Acceptance of the Civil Code.	-) Article 522 of the Civil Code, drafted by <i>Dalmacio Vélez Sársfield</i> and in force from 1871 until 2015, established that “in cases of compensation for contractual liability, the judge may sentence the liable party to compensation for the moral damage caused, in accordance with the nature of the event giving rise to the liability and the circumstances of the case”. -) Jurisprudence: Chamber K of the National Chamber of Civil Appeals, 15 August 1994. Case: <i>Emilio Cornejo v. Ricardo Maiztegui</i>, agreed on the compensation of moral damages in favour of the plaintiff caused by the lack of restitution of a property in the framework of a lease contract (<i>Hernández et al.</i>, n. d.). -) The very new Argentine Civil and Commercial Code (approved by law 26.994 Enacted according to decree 1795/2014) unifies the standing regime in the contractual and non-contractual sphere without making reference to whether the damage arises from the non-performance of an agreement or from the duty not to harm another.

Bolivia	-) Denial of the Civil Code.	-) Article 994 of the Bolivian Civil Code: “I. The injured party may request, when possible, compensation for the damage in kind. Otherwise, compensation must be assessed by evaluating both the loss suffered by the victim and the lack of profit insofar as they are a direct consequence of the harmful event. II. Moral damage must be compensated only in the cases provided for by law. III. The judge may equitably reduce the amount of compensation when fixing it, considering the financial situation of the liable party who has not acted maliciously”.
Chile	-) Silence of the Civil Code. -) Jurisprudential acceptance through the interpretation of Article 1556 of the Civil Code.	-Article 1556 of the Chilean Civil Code: “Compensation for damages includes consequential damages and loss of profits, whether they arise from the obligation not having been fulfilled, or having been fulfilled imperfectly, or from the delay in its fulfilment. With the exception of those cases in which the law expressly limits it to consequential damages”. -) The Supreme Court ruled for the first time in favour of the applicability of compensation for non-pecuniary damages for breach of contract in 1994, becoming a binding criterion in 2001 (Domínguez, 2017).

Colombia	-) Silence of the Civil Code. -) Denial of the jurisprudence of the Supreme Court of Justice. -) Acceptance in the text of the Commercial Code in contracts of carriage.	Article 1006 of the Colombian Code of Commerce: ‘the heirs of the passenger as a result of an accident occurring during the performance of the contract of carriage, may not exercise cumulatively the contractual action transmitted by the deceased and the non-contractual action derived from the damage that his death has personally caused them; but they may try it separately or successively. In either case, if it is proved, there shall be compensation for the damage in default’.
Ecuador	-) Denial of the Civil Code. (-) Denial of Jurisprudence	Article 1572 of the Ecuadorian Civil Code: “Compensation for damages includes consequential damages and loss of profits, whether they arise from the non-fulfilment of the obligation, or from its imperfect fulfilment, or from the delay in its fulfilment. Except in those cases where the law limits it to consequential damage. Also exempt are the damages for non-pecuniary damage determined in Title XXXIII of Book IV of this Code”.
Peru	-) Acceptance of the Civil Code.	-Article 1322 of the Peruvian Civil Code: “Moral damage, when it has been incurred, is also susceptible to compensation”.

Mexico	-) Acceptance of the Civil Code.	-Article 1916 of the Federal Civil Code: Moral damage is understood as the affectation that a person suffers in his or her feelings, affections, beliefs, decorum, honour, reputation, private life, physical configuration and appearance, or in the consideration that others have of him or herself. Moral damage shall be presumed to have occurred when the freedom or physical or psychological integrity of persons is unlawfully violated or impaired. When an unlawful act or omission causes non-pecuniary damage, the person responsible for it is obliged to compensate it by means of monetary damages, regardless of whether material damage has been caused, both in contractual and non-contractual liability. The same obligation to repair moral damage shall be incumbent on those who incur in strict liability in accordance with Articles 1913, as well as on the State and its public servants, in accordance with Articles 1927 and 1928, all of the present Code...”.
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Table 1: Moral damages in Latin American countries

Own elaboration

It is evident from the foregoing that in Latin American comparative law, in most countries, the thesis that denies compensation for non-pecuniary damage for breach of a contractual obligation has been overcome; however, the jurists and judges of some countries still hinder the opening of this thesis. Thus, three fixed positions can be identified: i)

the express recognition in the Civil Codes or in special local laws; *ii*) the taxing civil regulation that delimits assumptions in which an action for compensation for non-pecuniary damage is applicable in certain contracts; *iii*) the admission and development of jurisprudential criteria by virtue of the absence of legislation on the matter; and, *iv*) the express prohibition in the legal bodies.

CONCLUSIONS

The discussions generated around the category of non-pecuniary damage have notably developed a body of innovative jurisprudence and doctrine in the light of the study of modern law. Today we can not only affirm that suffering has a price without triggering a moral dispute, but also that the contractual relationship between the person who suffers it and the one who causes it is not a limit to rule out its immediate reparation.

To annul the idea of compensation for this classification as being contrary to the economic function of the contract, or to assert that the requirement of foreseeability of the contractual damage prevents its possible regulation within a convention, as it is indeterminable for the effects of the obligor (by ignoring the scope of non-performance), are arguments which, in the foundations of a current legal order, do not enjoy any validity. This is why judges, in their role as interpreters, have had to rethink their criteria and create new equitable parameters in which, on the one hand, the aggrieved party's need to compensate for the moral injury suffered and, on the other hand, the debtor's certainty of knowing the consequences of non-fulfilment of an obligation coexist.

The doctrine has also understood the need to overcome the fundamentals that oppose the moral prejudice to the

contract. There are more and more jurists who agree to the possibility of its compensation, developing editorial lines, for academic purposes, where they establish conjectures appropriate to contemporary times or creating organisations with the aim of harmonising the law, highlighting the urgency of updating the substantive rules, many of them in force since the last century, due to the disuse and ineffectiveness of their content.

The materialisation of the incorporation of these new currents in the local legal instruments is a fact that has been manifesting itself in the codification of the civil rules for some years now. The discussion on the applicability of this proposition has been left in the past in the legislations of some Latin American countries, today their Codes adopt a new category of damage in the contractual sphere, writing one more chapter in the legal history of civil liability, which will serve as a basis for the members of the legislative power of other nations to replicate their example and formalise what is happening in the seat of their courts, taking into account the essence and function that has kept this institution in force to date.

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