"Weakness" in the context of the compensation of non-pecuniary losses in English law and French law

Arantxa Gutierrez,
PhD Candidate,
Edinburgh Law School,
University of Edinburgh

Résumé

Cet article explore comment les définitions négatives des « *non-pecuniary losses* » en droit anglais et du préjudice moral en France sont au cœur des asymétries dans le traitement juridique accordé aux préjudices économiques et non-économiques. Alors que les premières sont considérées comme « matérielles », la seconde catégorie se caractérise traditionnellement par sa qualité prétendument immatérielle. D'un point de vue historique et comparé, il est possible de constater une tendance commune, tant en droit anglais que français, ancrée dans une vision dualiste connue en philosophie comme le problème corps-esprit qui conçoit les préjudices moraux comme intrinsèquement immatériels. Dans ce contexte, diverses sources historiques constatent l'existence d'une idée sous-jacente de la faiblesse de la victime comme certains types de préjudices psychiques. Plus précisément, la compensation de la douleur morale a fait l'objet d'une stigmatisation et d'une reconnaissance légale relativement tardive par rapport à ce qui est perçu comme appartenant au domaine « physique » ou « corporel ». L'émergence du concept moderne de préjudices extrapatrimoniaux est également abordée en référence au rôle joué par l'École de Salamanque du XVI^e^ siècle dans la définition d'une fonction compensatoire de ces préjudices.

The internal coherence of English law and French law regarding the compensation of non-pecuniary losses can be tested by analysing how they conceive compensation for pain and suffering. In such context, the polysemic concept of weakness can be traced as a factor that explains a number of the asymmetries still persisting between what is conceived as being pecuniary as opposed to non-pecuniary, especially regarding the

legal regime governing some physical injuries, on one hand, and mental distress, on the other. In this presentation a general overview of the distinction between pecuniary and non-pecuniary will be outlined, to then move to a brief overview of the historical sources which explain how the law arrived at its current position, from a comparative perspective. It will be argued that there are a number of areas where incoherence still persists in the legal sphere, both in English law and French law, for reasons overcome long ago in other areas of knowledge such as Philosophy of the Mind and Cognitive Sciences.

The *summa divisio* between pecuniary and non-pecuniary losses

Generally speaking, negative definitions of non-pecuniary losses and *dommage moral* dominate the landscape not only in England and France, but also in many other countries. In part, such an approach may be appealing for the simple reason that it avoids addressing some complex questions. When a legal system such as the French contraposes *dommage matériel* and *dommage moral*, or English law divides losses between pecuniary and non-pecuniary, a certain symmetry is implied. It would seem as if they are two manifestations of a more general and unitary concept of *dommage* or loss. Yet defining one only by reference to the other produces a misbalance. The problem of such an approach is that it usually results in a mere enumeration of examples of non-pecuniary losses and the effort of providing a definition is soon abandoned.

Sometimes non-pecuniary losses are characterised as those infringements which do not represent an encroachment on the person's financial or material assets, such as physical pain or injury to feelings[1]. As it can be seen, the dichotomy is presented as an opposition between losses that affect material or financial assets and losses regarded as immaterial and non-financial, which is also a fairly common characterisation in French legal doctrine[2]. This labelling is problematic since there are cases when pecuniary losses can be immaterial such as pure economic losses, and *vice versa*, cases of material yet non-pecuniary losses as for example in personal injury claims. In other occasions, it is said that non-pecuniary losses are different from pecuniary losses because the sum awarded as compensation cannot be the precise equivalent of the loss[3]. Again, here it is

1. J. Edelman, J. Varuhas et S. Colton (dir.), *McGregor on Damages*, 20th ed., Sweet & Maxwell, 2018, para 2-001.
2. G. Viney, P. Jourdain et S. Carval, L*es conditions de la responsabilité. Traité de droit civil*, 2013, 4th ed., LGDJ, para. 254.
3. M. Jones and others (eds), *Clerk & Lindsell on Torts, 21st* ed., Sweet & Maxwell, 2014, para. 28-54; R. Mulheron, *Principles of tort law*, Cambridge University Press, 2016, p. 549. In the French context this can be seen, among others, in: H. Mazeaud, L. Mazeaud, J. Mazeaud & F. Chabas, *Leçons de droit civil. Tome 2, premier volume,*

possible to spot a recurrent argument which confuses the nature of the loss and the way it is measured, because even the process of assessing pecuniary losses can prove to be very speculative and the equivalence approximate rather than precise. It should be questioned whether this is really at the gist of the distinction between them or whether it provides any workable definition, as there are examples of pecuniary losses such as loss of future earnings which are not easy to measure. In addition to that, it is also possible to conceive remedies other than monetary compensation, as for example judicial declarations (condemnation for costs and nominal damages), restitution in kind (a judge may order a retraction of the defamatory statement), apologies, the restitution of letters which were obtained in violation of the privacy of communications, etc.[4] This simply stresses the fact that the nature of the loss cannot be defined by opposition to one single way of reparation.

Moreover, in legal and philosophical terms liability does not need to be grounded necessarily on economic terms, so the insistence in the possibility/impossibility of measuring non-pecuniary losses in monetary terms really misses an important point: that people should bear the costs that their conduct imposes on others, which can be viewed from an economic perspective, but can also be analysed at a more abstract level as simply meaning that one is responsible for his or her actions[5].

A further issue of great importance when mapping the current taxonomy of non-pecuniary losses in these two legal systems, is to distinguish the historical development of compensation for pain and suffering and other concrete losses, one hand, and how infringements of non-pecuniary interests have been compensated, on the other. This is so, because what legal systems regularly do is to differentiate the wrong and the concrete losses that arise from it, which can be either pecuniary or non-pecuniary. Yet a second possibility, is to make wrong and loss equivalents[6]. In other words, in the latter case the harm is abstract, because once the protected interest, for example in reputation, is violated that is actually the harm that has been suffered[7]. This means that a historical survey of the subject has to consider these two aspects when trying to understand what a legal system is doing in a given historical period.

Obligations : théorie Générale, Montchrestien, 1991, para 417; Ph. Malaurie, Ph., Aynès, L. & Ph. Stoffel-Munck, *Les Obligations*, LGDJ, 2013, para 248.

4. P.-D. Ollier et J.-P. Le Gall, "Various Damages" *in* A. Tunc (dir.), *International encyclopedia of comparative law, Torts,* vol. 11, Mohr Nijhoff, 1983, p. 87.

5. A. Ripstein, "Philosophy of Tort Law" *in* J. L. Coleman & S. J. Shapiro (dir.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, 2002, p. 661.

6. E. Descheemaeker, "Unravelling Harms in Tort Law", 2016, 132, *Law Quarterly Review*. p. 599.

7. *Ibid.*

Mental distress: from stigmatisation to its acceptance as a compensable head of non-pecuniary losses

Mental suffering as such, has been the object of an already long history of stigmatisation. In early medieval Christianity, the concepts of *dolor*, *labor* and *sudor* were often interlinked. *Dolor* came to be regarded as feminine, and as such undesirable and associated to weakness, so that a man worthy of prise could not suffer as it was considered emasculating[8]. Pain associated to physical work was equally stigmatised from a social perspective, given that it was linked to slaves and subjects who worked with their hands[9]. Nonetheless, at least from the twelfth century onwards, this strict view of pain gives way to new forms of representations of Christ and a suffering Virgin Mary, with the images of saints showing an evolving place of pain in western culture[10]. According to Christian theologians, pain could be seen as a good thing as they distinguished *dolor* (bodily pain) from *tristitia* (spiritual pain or sorrow)[11].

However, although there is a transition as to its social perception, in terms of compensation, it is not really possible to say that "pain and suffering" as a head of losses did fit the structure of reparation, since in any given award of damages it was not really possible to distinguish the part that belonged to physical and moral suffering, from the part of the award that corresponded to medical costs and other economic losses[12]. In that sense, suffering as a stand-alone claim was clearly not accepted. In other terms, even though its strict rejection was nuanced, it cannot be said the same regarding its capability of claiming it in court.

While not unavoidable, standard treatises in France, England or Germany often restrict the historical inquiry to the first express mentions of *dommage moral*, consideration of pain and suffering, or mentions to *Schmerzengeld*. This

8. In this cultural framework, God's cursing of Adam and Eve resulted in the former being confined to toil and sweat, while the latter was condemned to the pains of childbirth. See: P. Dauzat, "Regards médicaux sur la douleur : histoire d'un déni", 2007, 1, *Psycho-Oncologie*, p. 72.
9. *Ibid.*
10. *Ibid.*
11. Thomas Aquinas I-II, Q. 35, Art 2., 1º Objection: "It would seem that sorrow is not pain. For Augustine says (*De Civ. Dei* xiv, 7) that *pain is used to express bodily suffering*. But sorrow is used more in reference to the soul. Therefore sorrow is not pain." The idea that sorrow can be virtuous is expressed with clarity by Thomas Aquinas I-II, Q. 39, Art. 2, when he argues that "… insofar as sorrow is good, it can be a virtuous good. For it has been said above that sorrow is a good inasmuch as it denotes perception and rejection of evil."
12. J.-M. Carbasse et B. Auzary-Schmaltz, "La douleur et sa réparation dans les registres du Parlement médiéval (XII^{e}-XIV^{e} siécles)" *in* B. Durand, J. Poirier et J.-P. Royer (dir.), *La douleur et le droit*, Presses universitaires de France, 1997, p. 435.

often obscures the fact that the medieval schools of thought show reciprocal influences and are interlinked in many ways. A further complication arises from a very strictly legalistic approach, which over-represents the importance of Roman law by almost completely ignoring the relevance and power exercised by Catholic Moral Theology during the Middle Ages[13]. The study of Salamantine scholarship is important not only from the perspective of the civil law tradition, but also from a common law perspective, since it exercised great influence in the shaping of modern European ideas of law and morality as it developed as an important place of a global network[14].

Amongst the theologians, it is said that the first to treat the issue of compensation for pain and suffering would have been the Scottish theologian Duns Scotus (c. 1266-1308)[15]. Alternatively it has also been argued that the notion of compensation for pain and suffering appeared with the Glossators in the context of the methods of assessment of damages regarding verbal insults and "real insults" (physical injuries) by requiring the claimant to use forms such as "I would have preferred to lose such amount of money than to experience this injury"[16]. Lastly, there is another trend of authors who, according to Otte, wrongly think that the compensatory award for pain and suffering was shaped first during the fifteenth or sixteenth century[17]. He argues that the idea of damages for pain and suffering as a form of compensation was already known during the high scholasticism (thirteenth and fourteenth centuries) and it is possible to see it for cases of injury to the body,[18] freedom,[19] honour,[20] and reputation[21].

13. The doctrine of restitution was not only contained in legal and scholarly books but also had a place in confessional manuals which is relevant because believers were required to confess at least once a year. Roman law and its restrictive view that the body of the freemen could not be estimated in money was not followed by a good part of the theologians, which meant that the wrongdoer was liable for *placatio lesi* even more importantly than for pecuniary losses, since it was necessary for salvation.

14. T. Duve, M. Lutz-Bachmann, C. Birr, A. Niederberger, *The School of Salamanca: A Digital Collection of Sources and a Dictionary of its Juridical-Political Language The Basic Objectives and Structure of a Research Project CITA 3*, p. 3.

15. He wrote that in case of mutilation the reparation had to respond not only to the material damage caused by the injury (inability to work, medical costs) for which he made reference to cannon law (Decrees of Gregory IX), but also to *placatio* and *consolatio* of the victim as the desolation following the mutilation would be perpetual. According to the theory of restitution of moral philosophers one should not receive more that the necessary to restore the *aequalitas* between the parties, yet pecuniary awards often exceeded the material losses of the victim.

16. R. Feenstra, "Réparation du dommage et prix de la douleur chez les auteurs du droit savant, du droit naturel et du droit romano-hollandais", *in* B. Durand, J. Poirier and J.-P. Royer (dir.), *op. cit.,* p. 412.

17. G. Otte, *Das Privatrecht bei Francisco de Vitoria*, Böhlau, 1964, p. 71.

18. F. de Vitoria, *Comentarios a la Secunda Secundae de Santo Tomas. T. III,* (Vicente Beltrán de Heredia ed, 1934) q. 62 a. 2. n 8. Vitoria expressly answers the question of whether restitution has to be made in cases of bodily injury. He answers positively by saying that

An additional observation that arises from the treatment that all the above-mentioned theologians give to the issue of compensation is that there is a more general development of the concept of money. The scholastic theologians also discussed a great deal the issue of usury. This is relevant because Aristotle's approach to usury considered a life of sustained by "money-making" as opposed to the purpose of a "good life", which also holds true for the beginnings of Christianity and its suspicion of money[22]. However, in the context of medieval scholastics great consideration was given to how money was being used[23]. For them, money was not only a measure useful to value things, but they also knew it was a social creation and were perceptive regarding the problems it presents with respect to justice.[24] This is certainly important regarding non-pecuniary losses, because it is possible that among other factors, this development of the concept of money and its functions in achieving justice ultimately allowed a departure from the more orthodox approach contained in the Digest, for example regarding the compensation of physical injuries.

In any case, the same is difficult to translate to emotional disturbances, as the medieval image of these was to attribute them to the presence of evil spirits or some sort of divine punishment for sins[25].

In the French context, from the eleventh century claimants would typically receive a *compositio* which was a transaction where the family of the victim renounced to exercise their right to vengeance, for a sufficient amount of money[26]. Around the fourteenth century it is possible to see that the creation of the *Ministère Public* representing the public interest, would determine the clear differentiation between *rétribution* and *réparation*[27]. However, the development

---

"*(…) non solum debet solvere expensas et sumptum cum medico et chirurgico, si fuit laesus, sed etiam infirmo debet fieri recompensatio, ita quod injuriae est facienda recomensatio."*

19. *Ibid.,* q. 62 a. 3 n 2.

20. *Ibid.,* q. 62 a. 2 n 29.

21. *Ibid.,* q. 62 a. 6 n 14. In this specific question, Vitoria argues that even though reputation is generally speaking more valuable than temporal things, it is not always the case. No doubt a true exposition of the dominant position in that time, he regards some men and women as lower in the social hierarchy, which makes him say that for them it is right to be compensated in money, because temporal things are more valuable than their reputation. He says (intercalating Spanish) that "*la fama de un aguador no es tanto ni vale tanto como mil ducados*" which leads him to the conclusion that it is proper to compensate it.

22. D. Alonso-Lasheras, *Luis de Molina's De Iustitia et Iure: Justice as Virtue in an Economic Context*, Brill, 2011, p. 210.

23. *Ibid.*

24. *Ibid.*

25. H. Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability*, – Hart Publishing, 2009, p. 13.

26. Y. Bongert, "Rétribution et Réparation Dans l'ancien Droit Français", *Études d'Histoire du Droit Médieval en souvenir de Josette Metman*, vol. 45, Éditions Universitaires de Dijon, 1988, p. 61.

27. *Ibid.*

of an autonomous concept of *réparation* was not enought to establish a general principle for compensation of bodily injury, since it dealt mainly with material losses[28]. Its compensation developed later, linked to the emergence of a general principle of compensation for fault, as exposed by Grotius, and Domat in France[29].

In Grotius' work *De Iure Belli ac Pacis* there is a passage in which he basically repeats the position of the Digest.

> "One who has maimed another will in like manner be liable for the expenses, and for the estimated value of the decrease in earning power of the one who has been maimed. But, as in the instance mentioned above, **the life, so here the scars, are not susceptible of valuation in the case of the freeman.** The same should be said for false imprisonment."[30] (emphasis mine)

Interestingly in its *Jurisprudence of Holland* he nuanced his previous position regarding personal injury stating that "Pain and bodily disfigurement, though properly speaking incapable of compensation, are assessed in a sum of money, if such is demanded"[31]. This shift in his views can be seen as influenced by the theologians from the School of Salamanca, and specially Domingo de Soto, because even though Soto is not expressly cited in this paragraph, he was cited dozens of times before in the same book and because it is clear that his position there is a departure from D.9, 3, 7[32].

In a strict sense, he followed Roman law by saying that pain and deformation cannot be repaired, but he makes a concession which is more according to his own times, and probably inspired by Soto. In both authors, this kind of compensation seems possible, however discouraged. This point is relevant since Grotius divides clearly the punitive sphere from the compensatory one in terms of the act itself and the effects of the act and also because it shows a more contemporary view as to the functions of money.

The influence of Grotius can also be clearly seen in the seventeenth century, especially in the works of Samuel Pufendorf who states that money is not really valuing a lost limb, but it's actually intended to make good the mutilation as far as possible[33]. But even though it is well known that natural law strongly influ-

---

28. S. Porchy-Simon, "Brève histoire du droit de la réparation du dommage corporel", *Gaz. Pal., Rec.* 2011, coll. p. 1291.
29. *Ibid.*
30. H. Grotius and S. Neff, *Hugo Grotius on the Law of War and Peace*, Cambridge University Press, 2012, B. II Ch. 17 N. 14.
31. H. Grotius, *The Jurisprudence of Holland*, vol. 1, Clarendon Press, 1926.
32. R. Feenstra, *op cit.*, p. 416.
33. S. Pufendorf, *De Jure Naturae et Gentium Libri Octo*, Clarendon Press, 1934. Book III, Chapter I Para 8, last part: "But it should be carefully noted, in connexion

enced later writers such as Blackstone in England[34], and Jean Domat in France, it is difficult to assess to what extent this was so regarding non-pecuniary losses. Nevertheless, it is clear that this discussion in the context of restitution were in the line of loosening the strict rule of Roman law.

However, even though Domat was strongly influenced by the ideas of Natural Law, he restricted his discussion on *dommages* and *intérets* only to pecuniary losses.[35] It has been argued that partly because of this, during the codification process, the original Natural Law idea of an overarching principle that included material and immaterial harm was forgotten[36]. The French Civil Code of 1804 code was eminently a code of property, and even though his first book has the title "Of persons", it really does not deal with more than nationality, civil status, marriage and filiation, with the term "personality" not appearing anywhere[37]. The question of non-pecuniary losses was also ignored, which left the development of *préjudice moral* to the courts, only becoming recognised as a head of losses in 1833[38].

As for the different heads of damages, they began to be distinguished from one another around the 1950s[39]. In 1956 the Court of Appeal of Paris ruled that compensation would be awarded for the moral loss and the unpleasantness (*désagrément*) experienced by the victim, along with the incapacity and the physical suffering which rapidly evolved into an autonomous head of losses called *préjudice d'agrément* intended to compensate the loss of life's worldly satisfactions as well as those of social or sportive order[40].

The alleged novelty of this sort of compensation can be seen in a series of well-known authors that during the early and mid-twentieth century bitterly regretted

---

with compensation for mutilation, that the limb itself is not appraised and valued, since it is a thing not to be measured in terms of money, but the loss that arises from the impaired or lost use of the limb, is made good, with consideration of different times, men and faculties. When the judge is taking cognizanse of these considerations, he must compare the different members, with an eye both to their uses and the pain involved in each". *Boecler, on Grotius, Bk. II, chap. I, para 6*'.

34. Blackstone was influenced by Grotius, Pufendorf and other Dutch and German authors. See: T. Scrutton, *The influence of the Roman law on the law of England: Being the Yorke prize essay of the University of Cambridge for the year 1884*, 1885, p. 143.

35. N. Jansen, "Trapped in Categories: On the History of Compensation for Immaterial Damages in European Contract Law" *in* V. Palmer (dir.), *The recovery of non-pecuniary loss in European contract law*, Cambridge University Press 2015, p. 37.

36. *Ibid.*

37. H. Beverley-Smith, A. Ohly et A. Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation*, Cambridge University Press, 2005, p. 147.

38. Cour de cassation, Chambres réunies, June 25, 1833. S. 1833, 1, 458, concl. proc. gén. Dupin.

39. J. Knetsch, "La désintégration du préjudice Moral", *Recueil Dalloz*, 2015, p. 443.

40. *Ibid.*

the acceptance of *dommage moral* as something completely new and by qualifying it as an "americanization of the human person"[41], a form of "commercialization of pain"[42], or as a "condemnable moral damage"[43].

In England, at the beginning of the nineteenth century the situation is not radically different. At the level of compensation for pain and suffering, the approach was still quite restrictive. Direct victims of train accidents frequently suffered from trauma after the incident, which could comprise pain, memory losses and other episodes of distress that would result in an inability to work[44]. Rail companies met these forms of distress with scepticism, which is in line with an already long history of stigmatisation of mental suffering, and which at that time was still regarded as self-indulgent, frivolous and as containing something intrinsically fraudulent which made these claims an example of the ills of litigation process in general[45].

This approach was expressed with clarity by Chief Baron Pollock in a case dealing with the compensation of the injuries as a consequence of a railway accident, where he argues that it is unmanly to make such claims[46]. Here again, the "unmanly" nature of claims for pain and suffering shows that it was still regarded as something reserved to women, which is by definition derogative, since they were viewed as the "weaker sex".

If there was reticence to accept this form of compensation regarding direct victims, it was also the case of indirect victims such as relatives of the claimant. This restrictive approach towards losses other than pecuniary can be seen in the case of *Blake v The Midland Railway Company*[47] which rules that:

> "… the jury, in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only."[48]

---

41. L. Josserand, "La personne humaine dans le commerce juridique", *D.H.*, 1932 1.
42. G. Ripert, "Le prix de la douleur", *D.* 1948, chron., p. 1.
43. P. Esmein, "La commercialisation du dommage moral", *D.* 1954, chron., p. 113.
44. M. Lobban, "Personal Injuries" *in* W. Cornish and others, *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law*, Oxford University Press, 2010, p. 992.
45. H. Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability*, Hart Publishing, 2009, p. 14.
46. (1854) 10 Exch 45, 26 Eng. L. & Eq. R. 438. "A jury most certainly have a right to give *compensation for bodily suffering* unintentionally inflicted, and I never fail to tell them so. But when I was at the bar, I never made a claim in respect of it, for I look on it not so much as a means of compensating the injured person as of damaging the opposite party. *In my personal judgment, it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share.*" (emphasis added)
47. [1852] 118 ER 35.
48. [1852] 118 ER 35 at [93].

There are many other cases which ground such restriction in suspicions of the authenticity of claims for pain and suffering. Such position is found in *Duckworth v Johnson*[49] where a father claimed damages after his fourteen-year-old son was killed of a fall in consequence of the defendant's negligence. In this case, again it was Pollock, C. B. who stated that:

> "(…) It appears to me that it was intended by the Act to give compensation for damage sustained, and not to enable persons to sue in respect of *some imaginary damage*, and so punish those who are guilty of negligence by making them pay costs."[50] (emphasis added)

These cases are interesting because even though compensation is not granted for mental distress which is seen as "imaginary", it clearly draws a line between pecuniary losses and "mental suffering" which shows an emergence of the contraposition of these two realms and a trend towards the consolidation of the *summa divisio* of all losses.

Contemporary developments of the theory of the mind and cognitive science. A legal perspective

As mentioned before, there are many authors that still subdivide pain in physical pain and psychological pain, as well as physical injury from psychiatric injury. Among other reasons, this might be the case of a persistent dualism Body/Mind in the legal field which has been overcome in philosophy. If we accept that consciousness is a feature of the brain, then it is necessarily also a part of the physical world. Searle points out that this problem originates because the whole mental/physical vocabulary is designed to make an absolute opposition between two allegedly different realms[51]. In a Cartesian sense, "mental" is defined as qualitative, subjective, first personal and consequently, immaterial[52]. By opposition, physical is defined as quantitative, objective, third personal and material[53]. It is possible to see that this is precisely the logic subjacent to the French distinction between moral and material losses and is fairly similar in English law. One possible explanation is that the philosophical background and the influence of the Cartesian way of thinking is still persistent in both of legal communities.

---

49. [1859] 4 H&N 653. 157 E.R. 997.
50. [1859] 4 H&N 653 at [657]. The passing of the mentioned Lord Campbell's Act is important since it allowed the relatives of persons killed in accidents to claim compensation, but the courts sustained it was only pecuniary one.
51. J. Searle, *Mind: A Brief Introduction*, Oxford University Press, 2005, p. 115.
52. *Ibid.*, p. 118.
53. *Ibid.*

The traditional approach to this kind of dualism has been characterized as follows:[54]

Mental	Physical
Subjective	Objective
Qualitative	Quantitative
Intentional	Nonintentional
Not spatially located & nonextended in space	Spatially located & spatially extended
Not explainable by physical processes	Causally explainable by microphysics
Incapable of acting causally on the physical	Acts causally and as a system is causally closed

As it can be seen, some of the troubles in the legal field come from the idea of immateriality which seems to be translated automatically to mental processes. This is not strictly true. While it is possible to say that some forms of economic losses are indeed immaterial, it can be regarded as obsolete from a scientific and philosophical perspective to keep talking of mental states as immaterial. They are certainly intangible but the whole classificatory notion of things one can or cannot touch may well be meaningless in terms of compensation. The problem is not the concept of immateriality itself, as it might be useful to explain some forms of economic losses, but the real problem seems to be when it is applied to mental processes which cannot be scientifically conceptualized as immaterial, and it is used more in a rhetorical sense to show the inaccuracy of their measurement. The vocabulary of the non-physical mind continues to be present and has been functional to the purpose of resisting to compensate emotional harm in some cases. This allows the conclusion that it has been erected as an obstacle which justify the claim that it cannot be quantified.

If we argue that feelings are protected in an indirect way consequential upon the infringement of other interests, for instance, they will be protected if there is an injury to physical integrity, then this could not be coherent with a non-dualist perspective of the Mind/Body problem. While logically coherent, it might be a case of dualism because it is not clear at all that physical integrity and feelings are two separate interests, because feelings would belong to the sphere of the physical anyway (not in a Cartesian logic for which the concepts have been used for centuries, but in a perhaps more contemporary perspective).

In English law, a mere scratch alone could potentially be actionable, but distress which does not amount to a recognized psychiatric illness is not, as a

54. Adapted from *Ibid.*, p. 116.

standalone[55]. This means that while an injury to feelings considered by itself is not considered sufficient to be actionable, where liability has been already established it will be considered in torts such as defamation[56].

Some distinctions between mental distress and psychiatric injury have to be made in England regarding intentional as contrasted to negligent infliction of emotional distress, the former cases falling under the *Wilkinson v Downton* tort[57] which preconditions are either physical injury or a recognised psychiatric injury[58]. This has to be contrasted with the recent development in *Rhodes v OPO*[59], where Lord Neuberger with whom Lord Wilson agreed, but with whom the majority did not, argued that in cases of intentional infliction of emotional distress it should be enough to establish significant distress[60]. The majority insisted on the requirement of physical injury or recognised psychiatric harm[61].

As seen before, this distinction between emotional distress and physical injuries, and the legal treatment given to them can be interpreted as a persistent dualism Body-Mind in the legal field which has been overcome in philosophy. If we argue that feelings are protected in an indirect way consequential upon the infringement of other interests, for instance, they will be protected if there is an injury to physical integrity, then this could not be coherent with a non-dualist

55. *Ibid.*, p. 116.
56. J. Edelman and others, *op. cit.,* para 5-013.
57. [1897] 2 QB 57.
58. In *Wainwright v Home Office* [2004] 2 AC 406, Lord Hoffmann did state that some people will constantly act with the intention of causing distress to others, yet that type of injury was probably not dealt appropriately by means of litigation. Later, in *Rhodes v OPO* [2015] UKSC 32 at [73] Lady Hale and Lord Toulson (with whom Lord Clarke and Lord Wilson agreed) ruled that "It is common ground that the consequence required for liability is physical harm or recognised psychiatric illness. In Wainwright v Home Office Lord Hoffmann discussed and left open (with expressions of caution) the question whether intentional causation of severe distress might be actionable, but no one in this case has suggested that it is." The *Wilkinson v Downton* tort was restated in the sense that after *Rhodes v OPO* it is sufficient that the defendant intended to cause severe distress which in fact results in recognisable illness (at [83]-[87]).
59. [2015] UKSC 32.
60. [2015] UKSC 32 at [119] "(…) there is plainly a powerful case for saying that, in relation to the instant tort, liability for distressing statements, where intent to cause distress is an essential ingredient, it should be enough for the claimant to establish that he suffered significant distress as a result of the defendant's statement. **It is not entirely easy to see why, if an intention to cause the claimant significant distress is an ingredient of the tort and is enough to establish the tort in principle, the claimant should have to establish that he suffered something more serious than significant distress before he can recover any compensation**." (emphasis mine)
61. [2015] UKSC 32 at [87] the majority rules that "a person who actually intends to cause another to suffer severe mental or emotional distress (which should not be understated) bears the risk of legal liability if the deliberately inflicted severe distress causes the other to suffer a **recognised psychiatric illness**." (emphasis mine).

perspective of the Mind-Body problem. While logically coherent, it might be a case of dualism because it is not clear at all that physical integrity and feelings are two separate interests, because feelings would belong to the sphere of the physical anyway (not in the traditional sense for which the concepts have been used for centuries, but from a perhaps more contemporary perspective).

Conclusions

Negative definitions of non-pecuniary losses in England, and *dommage moral* in France are at the heart of some of the asymmetries in the legal treatment given to economic and non-economic losses. While the first is considered to be material, the second category has been traditionally characterised by its allegedly immaterial quality. From a historical and comparative perspective, it is possible to see a common trend both in English and French law anchored in dualist view of the Body-Mind problem which conceives *dommage moral* or non-pecuniary losses as intrinsically immaterial. In this context, an underlying idea of weakness of the victim of some kinds of non-pecuniary losses has been shown to exist in diverse historical sources. Specifically, compensation of mental distress, has been object of a stigmatisation and comparatively recent recognition as a compensable head of losses when compared to what is perceived to belong to the "physical" or "bodily" realm of non-pecuniary losses. In the English legal system this means that there are still remnants of a differentiated treatment given to what is perceived to be a physical injury as opposed "mere" mental distress that does not amount to psychiatric injury.

As for the historical analysis of the emergence of the modern concept of non-pecuniary losses, even though the first mention of *préjudice moral* in French case law only appeared by 1833, its pedigree is much older. A trend of legal scholarship locates its origin in the Salamantine scholarship of the sixteenth century, from where it exercised great influence in the shaping of modern European ideas of the law. However, although authors such as Jean Domat were influenced to a very great extent by the ideas of Natural Law, the problematic of *dommages* and *intérêts* was confined only to pecuniary losses. Ultimately, this can be construed as one of the reasons why the later codification process ignored non-pecuniary losses as a component of those losses comprised in the general clause of liability for the damage caused.