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Employer's Civil Liability for Work-Related Accidents: A Comparison of Non-Economic Loss in Chile and England

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Abstract

Employers' civil liability for work injuries and subsequent compensation for non-economic losses represent challenges for many countries. Several countries in Latin America and Europe still do not apply non-economic damage standards, and even when they do, the task of assessing damages is often left to a judges' discretion. However, in other countries, common and civil law have shown non-standard ways about how these losses should be assessed and understood. This paper therefore, aims to compare England and Chile in terms of employers' civil liability and subsequent non-economic damages compensation after work-related accidents. It focuses on the current progress made by both countries in terms of non-economic loss definition and assessment. This is a qualitative study. Research data consisted on a review of case law within the last five years in both countries. Additional, contextual data was gathered by looking at published documents examining the current English context and four interviews were carried out to further understand the Chilean context. Data was analyzed using framework analysis and the Nvivo software. From a comparative perspective, findings show that England has made important progress in terms of types of employer's liability, understanding of non-economic loss, and standards of assessment. Although several advances have been made in Chile over the last few years, a number of challenges still remain.

Keywords: tort law, civil law, employer's liability, worker's compensation, work-related accidents, safety.

Introduction

Injury in the workplace is a significant problem around the world. Globally an estimated of 2.34 million die from work-related accidents and occupational diseases resulting in an economic cost of 1.8 to 6.0% of GDP (Dorman, 2012; ILO, 2011; Takala et al, 2014). The legal response to such injuries can take a number of forms ranging from social security benefits to civil actions (ILO, 2014). For many employees who have suffered a work accident or occupational disease, the simplest option is to claim social security benefits in the form of pensions, disability benefits and medical treatment. These benefits are part of the social protection system and, as such, they are activated by the sole occurrence of the work injury and frequently expressed in the form of financial support.

However, social security benefits are limited in scope and inevitably not as high as any compensation awarded by a civil action for employers' liability. As such, an injured worker is entitled to pursue compensation on civil grounds for the losses which have not been covered by the social security system. Damages in tort are therefore the most commonly sought remedy in the form of monetary compensation. Compensation for employer's civil liability will be awarded by a judge in a civil proceeding only if it can be proven that the employer has a duty to the injured employee, if he/she has failed to implement this duty, and if this failure causes the work injury (Lewis & Morris, 2012).

From a comparative perspective, the same mechanisms are applicable to the law of tort grounded on English common law as well as to the law of obligations based on the Roman civil tradition. As a general rule, when liability is found and causation established, awards for damages are aimed at compensating a victim's economic and non-economic losses after the accident. Economic losses are related to the person's wealth such as loss of earning and medical expenses, so it is possible to calculate a fairly straightforward monetary value. However, estimating non-economic losses is more complex as they do not involve loss of monetary wealth or expense and cannot be assessed by reference to a market value (Lindenbergh & van Kippersluis, 2009).

In this respect, employers' civil liability for non-economic losses is a controversial area and represent a challenge for many countries. Common and civil law in this area have shown competing organizing and informing principles and non-standard ways about how non-economic losses should be assessed and understood (Karapanou & Visscher, 2010). Many countries still do not recognize or apply such principles, and even when they do, the task of assessing damages is abandoned, more or less entirely, and left to the exercise of discretion on the part of judges (Diez, 2003a, 2005b; Friedler, 1986; Rogers, 2001a).

However, how employers' liability is established and what is compensated as non-economic losses highlights several differences in common and civil jurisdictions. In this respect, the English Law of Torts has made important progress on the understanding of non-economic losses in personal injury cases. This progress has been grounded on several public consultations (Law Commission, 1994, 1995, 1999), the development of guidelines for damages (Judicial College, 2013), European comparative law studies (Rogers, 2001b), and an important amount of literature about employers' liability in tort. Non-economic losses are then contained in the concept of non-pecuniary loss and awarded as general damages for pain and suffering and loss of amenities. In consequence, the assessment of non-pecuniary losses has become fairly standardized.

On the other hand, many challenges still remain in Latin American civil law jurisdictions (Diez, 2005b). This is particularly the case of Chile where many of the problems raised have not yet been resolved. Non-economic losses are comprised in the category of extra-patrimonial losses and awarded as *daño moral* (translated as moral damage). As such, although Chilean courts have recognized the applicability of civil mechanism after occupational accidents and diseases, the understanding and assessment of such losses are still limited (Diez, 1997). How non-economic losses are defined and how this understanding impacts on their assessment by the courts is still far from disentangled.

The aim of this paper is therefore to compare Chile with England in terms of employers' civil liability regarding non-economic loss in cases related to occupational accidents. Despite the fundamental differences between civil and common law systems (Dainow, 1966), this paper focuses on identifying mutual aspects in both countries. It seeks to examine the current progress made in terms of non-economic loss, its definition and assessment, and thus considers the advances made by England to identify elements that may be of help to overcome the challenges identified by Chilean scholars (Sánchez, 2015).

This paper does not aim to compare common and civil law systems as such. Instead, it focuses on two specific areas, employers' civil liability and non-economic loss relating to work injuries, from a comparative perspective. Additionally, the issue of what type of specific work injury or combination of injuries constitutes damage for the purposes of tort law will not be pursued here. Rather, it will be assumed that the work injury-giving rise to non-economic loss is compensable, and the issue explored will be how both countries understand and assess non-economic losses in any given case. By doing so, this paper attempts to find elements that can be of help for further development by Latin American researchers working in this area. Furthermore, it seeks to bring the attention of health and safety scholars and professionals to an issue that has been largely seen as purely legal, but that calls for a multidisciplinary approach and that can help to improve current safety measures at work.

This paper is divided in four main sections. The first section describes the analytical approach on which this paper is based on. As the main research data is case law in both countries, it explains the search process. Throughout the paper, examples of relevant case law are cited to support findings and to help further consultation. The second section explains the fundamental differences between England and Chile in terms of social security systems and employer's liability on civil grounds. By focusing on the latter, it identifies areas and types of employers' duty and its breach. The third section explains the types of remedies an injured worker can claim by a civil action for employer's liability. It puts its attention on the understanding of non-economic losses in both countries. The last section deals with the assessment of non-economic losses. It particularly addresses issues regarding the use of evidence and the award of compensation.

Analytical Approach

This is a qualitative study. For this research, case law within the last 5 years in both countries was reviewed. In addition to the literature review and in order to understand the current situation in both countries, a number of public consultations in England, a published interview with an expert English lawyer, and four ad-hoc semi structured interviews with lawyers in Chile were also examined.

Contextual Data

Two different sources of contextual information was considered for each country. Considering the significant amount of documents explaining the British non-pecuniary system, this paper takes as contextual data three public consultation developed by the Law Commission in 1995 and 1999 about non-pecuniary loss in personal injury cases (Law Commission, 1995, 1999) and personal injury compensation (Law Commission, 1994). Additionally, it considered the guidelines for damages assessment in personal injury cases developed by the Judicial College (2013). Finally, it includes the insights from a European review written by Rogers (2001b) who included an interview with an English expert.

On the other hand, considering the limited number of official documents regarding moral damage in Chile, four expert lawyers in employer's civil liability and moral damage were interviewed. Lawyers came from a major law firm, an employment tribunal, an insurance company, and a large multinational company. Interview questions were based on Rogers (2001b). In this respect, questions were aimed at identifying current progress, understanding, levels of standardization, the use of evidence, and challenges for the legal practice.

Research Data

A search of case law within the last 5 years (24th October 2010 to 24th October 2015) was carried out for both countries to identify non-economic loss in work injury cases. English case law was gathered using the Westlaw UK database. The search included the following terms identified in the literature review: "pain and suffering" (228 results), pain AND suffering (1229), "loss of amenity" (264 results), "loss of faculty" (5 results), "general damages" (765 results), "non-pecuniary loss" (94 results), "non-pecuniary damage" (247 results). In order to narrow the search, only cases dealing with health and safety at work resolved at courts in England and Wales were included. Accidents with fatal consequences were not included. By so doing, the preliminary total numbers of cases which fulfilled the criteria were 19. A further reading of the cases reduced the number to 17.

Chilean case law was gathered using the Microjuris Chile database. The search was implemented within the employment section using *daño moral* (moral damage) as keyword. No additional terms were considered as no different heading is included when a claim for compensation is brought into court. The preliminary total number of cases was 343. Each case was analyzed to identify cases about non-fatal work-related accidents and diseases. By doing this, the preliminary total numbers of cases which fulfil the criteria were 158. A further reading of the cases reduced the number to 127.

It is important to note the reasons for the exclusion of fatal accidents regarding the goals of this paper and who makes the claim. This paper is focused mainly on employers' liability within the contractual employer-employee relationship. In case of death, the claim is made by indirect victims such as the victim's family who does not have a contractual relation with the employer, so, and particularly in Chile, employment courts do not have jurisdiction; instead, the claim is solved in common civil courts calling non-contractual regulations (Corral, 2010; Dominguez-Aguila, 2004). Similarly, in England

special regulations such as the Fatal Accidents Act 1976, and specific actuarial tables (Government Actuary's Department, 2011) can apply.

Data Management

Research data was analyzed using framework analysis (Richie & Spencer, 1994; Spencer, Ritchie, & O'Connor, 2003; Srivastava & Thomson, 2009). Coding of the data was accomplished in a series of iterative phases. An initial list of themes was developed using the conceptual insights. This list was used during the familiarization process in order to facilitate the first approach to the data. After this process, initial themes were refined allowing identifying emerging themes and issues. During the coding process, the thematic framework was again reviewed in order to add and reconstruct themes as new insights emerged. The final framework was composed by 11 themes gathered around two categories: overall case content (general claim, employer's liability, work injury, general evidence, and court decision), and non-economic losses (specific claim, main heading, court understanding, court criteria, specific evidence, and court decision). Nvivo 10 was used to facilitate the data management.

Findings

Worker's Compensation and Employer's Civil Liability in Perspective

The response to work-related accidents can take a number of forms (ILO, 2014). Two schemes have been particularly studied in the context of work injuries, the non-fault and the fault schemes (Diez, 2005a; Lewis, 2012; Lewis & Morris, 2012; Parsons, 1999). The non-fault scheme refers to social security benefits, while the fault scheme is based on civil actions. Although Chile and England have different legal and social protection systems, both schemes are present. Therefore, an employee injured at work is, in both countries, able to claim no-fault social security benefit and also damages from the employer if liability in tort can be established.

The fault scheme goes beyond traditional social protection measures regarding employment regulation to also reach civil grounds. As such, the fault scheme is actionable only by a civil action for damages claiming employer's negligence. When employer's negligence is found and causation established, awards for damages are aimed at compensating a victim's economic and non-economic losses (Lewis & Morris, 2012). This compensation is compatible and accumulative with the benefits included in the non-fault scheme. However, the compensation is sought from different funds and they involve very different procedures, personnel and adjudication as summarized in Figure 1. This will be briefly explained in the next two sections.

[Figure 1]

No-fault scheme: Social security benefits

For many victims of work accidents and occupational diseases, the non-fault system provides a minimum compensation for injury. In England and Chile, this scheme requires only proof of a work-related accident irrespective of how it takes place in order to activate the benefits. Generally, an

accident which happens while at work is accepted as having happened as a result of it, unless there is some evidence that this is not so. However, both countries have several differences in terms of who compensates, the benefits included, and how the system is funded.

In Chile, the Work Accident and Occupational Diseases Act no. 16744 of 1968 created the obligatory social insurance to protect employees who have suffered a work accident or occupational disease. The insurance is obligatory for employers, fully funded by them (contributory), and managed by a reduced number of authorized organizations called *mutualidades*. To access the social insurance benefits, it is necessary that the injury (accident or disease) is caused by or in the course of work including travelling to/from work injuries and results in disability (at least 15%) or death. If a worker suffers from a work accident or a listed occupational disease, he/she is legally entitled to the benefits contained within the obligatory social insurance. These benefits include full medical treatment and economic compensation in the form of pensions until the worker is fully recovered or until the symptoms are present, even after the employment relation is terminated. These benefits are claimed by the victim from the authorized organizations which are mainly private and non-for-profit.

In England the social security system works differently. The non-fault scheme is comprised in the Industrial Injuries Scheme which is part of the welfare state and, as such, the benefits are claimed by the victim from the Department for Work and Pensions. The legal basis of the scheme is contained in the Social Security Act 1998, the Social Security Contributions and Benefits Act 1992, The Social Security (General Benefit) Regulations 1982, and the Social Security Administration Act 1992. The Industrial Injuries Scheme provides non-contributory and no-fault benefits for illness or disability because of an accident or prescribed disease caused by work. To claim benefits, the injury needs to arise out of and in the course of employment (excluding travelling to/from work), results in a personal injury (as defined by the Law Reform (Personal Injuries) Act 1948), and produce at least 14% of disablement (i.e. loss of an index finger). As medical treatment is guaranteed by the public health system, the Industrial Injuries Scheme Benefits (IISB) are only monetary including attendance allowance, severe disablement allowance, reduced earnings allowance, and retirement allowance.

Fault scheme: Employers' civil liability

The non-fault scheme is limited in terms of compensation, as economic losses such as loss of earning and non-economic losses such as pain and suffering are not compensable. A claimant who seeks compensation for these losses needs to do it in the fault scheme by bringing a civil action before court. The employer will be legally liable only if it can be proved that he/she was at fault which means that he/she failed to protect their employees against a reasonably foreseeable hazard (Kobayashi & Middlemiss, 2008).

However, before a claim can reach court, insurance companies in both countries play an important role. English employers are required by legislation to be insured according to the Employers' Liability (Compulsory Insurance) Act 1969. The Act requires almost every employer carrying on a business in Great Britain to insure, and maintain insurance, under one or more approved policies with an authorized insurer or insurers against liability for bodily injury or disease sustained by his/her employees (Hood, 2005). This has a considerable effect upon the administration of the tort system

(Lewis, 2012; Lewis & Morris, 2012). Even though only in 2014/2015 employers' liability registers a total of 103,401 tort claims due to personal injury (Department for Work & Pensions, 2015), the cases which reach court were reduced. In practice, insurers decide whether a case merits the very exceptional treatment of being taken to a court hearing (Pearson, 1978).

On the other hand, in Chile the figure is different. As no obligatory insurance for civil liability is in place, most claims for employers' liability are solved in court. Employers can be insured in a voluntary basis as insurers offer special coverage for civil liability (*seguro patronal*). However, as highlighted by the interviewees, this is not a widespread practice among companies, particularly small and medium companies, considering that this voluntary insurance can be expensive. Furthermore, it is difficult to know the extent and scope of the system considering that no public and dedicated statistical records exist.

If a case reaches the court, the liability of employers to employees for work-related accidents and occupational diseases lies within the law of torts in England (Lewis & Morris, 2012). Tort claims for work injury are dealt with by the usual courts administering civil justice as well as employment courts. In England, no specialized tribunals or procedures are involved (Lewis, 2012). Employment and Civil courts decide about tort claims after a work-related accident or occupational disease. However, a civil action cannot be brought into court more than three years after the date on which the cause of action accrued or (if later) the date of knowledge of the person injured (Limitation Act 1980, ss. 11-14).

In Chile, the civil action is granted by the Act no. 16744 (art. 69) (for a historical analysis see Diez, 2008a and 2009). The Act states that when an accident or disease occurs due to fault or *dolo* (intentional tort) of the employer or a third part, the victim and anyone to whom the event causes an injury can claim not only social insurance benefits but also those incorporated in the Civil Code including moral damages. As a general rule, claims cannot be sought after 5 years since the date of the accident (Act no 16744, art 79) and the jurisdiction of common civil courts or specialized employment courts depends on who the claimant is and how the claim is made. If the claim is made by the direct victim (the employee), employment courts have jurisdiction. On the other hand, if the claim is made by indirect victims such as the victim's family, for example in cases of death of the victim, civil courts have jurisdiction (Corral, 2010; Diez, 2003b).

When the civil law is considered, liability may arise from various mechanisms. An English employer can be liable for the breach of duty by an employee who was acting in the course of employment (vicarious liability), for the breach of a primary duty owed directly by the employer to the injured employee (breach of common law duty of care), and for the breach of a primary duty placed on the employer by a formal statute (breach of statutory duty) (Giliker, 2014; Lewis, 2012). The common law duty of care and the breach of statutory duty are the main mechanisms used by claimants to recover damages after work injuries. However, since October 2013, breach of statutory duty is no longer actionable in civil proceedings unless individual regulations provide this possibility (Enterprise and Regulatory Reform Act 2013, Order 2013/2227). Despite this, claims can include both mechanisms to increase their chances of success. As such, breach of statutory duty can be claim by calling, for example, the Workplace (Health, Safety and Welfare) Regulations 1992 (*Burrows v Northumbrian Waters Ltd*, 2014), the Manual Handling Operations Regulations 1992, and the Personal Protective

Equipment at Work Regulations 1992 (*Narey v Iceland Foods Ltd*, 2015). If the breach is not proven, the victim can still go ahead with the employer's common duty of care.

As a consequence, employees rely mainly on the employer's common duty of care to make a complaint in tort (Craig, 1996). In case law this duty asks employers to provide a safe workplace, a safe system of work, and adequate equipment (*East Anglia University v Spalding*, 2011; *Narey v Iceland Foods Ltd*, 2015). If an employer fails, negligence may be committed where there is a failure to take reasonable care for the safety of workers (Morgan, 1975). What is reasonable can be established by looking at whether there was a foreseeable risk, and whether the impact was plain enough for the employer to do something about it (*Daniel v Secretary of State for the Department of Health*, 2014).

Chilean employers can be found liable mainly if they breach their duty of care or duty of safety (Diez, 2005). This is actionable under the employer's contractual obligation of taking all the measures to protect the life and health of their employees. This duty is included in the Labor Code of 2002 (art. 184) and it excludes to/for work accidents (*Sanchez v Comercializadora S.A.*, 2012). Even if the breach of a statutory duty can be claimed by calling dispositions comprised in specific regulations (i.e. Workplace Environmental and Sanitary Conditions Regulation no. 594 of 1999 and Occupational Risk Management Regulation no. 40 of 1969), the judge always considers the duty of care to enact a sentence (*Acosta v Inmobiliaria Construcciones Ltda*, 2011). Alike England in Chile, this duty is related with, for instance, work facilitates (*Martinez v Comunidad Edificio Terrazas de San Damian*, 2015), hazards control, vigilance, and communication (*Abbot v Recex Ltda y otra*, 2011; *Ortiz v Curtidos Bas S.A.*, 2014; *Rojas v Plastiservi Ltda*, 2014); and suitable equipment, protection elements, and training (*Ferrer v Antofagasta Railway Company PLC*, 2011; *Sepulveda v Aluminios Torroja Ltda*, 2014; *Valladares v Constructora e Inmobiliaria Alejandro Alberto Guttierrez Alcaino EIRL*, 2014).

Additionally, Chilean employers who hire a contractor are also jointly and severally liable regarding their duty of care. In this respect, the main company, which is the owner of the premises, is jointly liable to take all the measures of health and safety in order to protect the contractor's employees (Labor Code of 2002, art 183(E); Act no. 16744, art 66(bis); Regulation no. 594, art 3; Subcontracting and Outsourcing Act no. 20123 of 2006, art 183 (AB)). If a breach in the duty of care is found and jointly and several liability applies, the main company as well as the contractor are held liable for the losses of the injured worker (*Godoy v Rentas Equipos Besalco Ltda*, 2012; *Kassara v Sociedad Ingenieria AVA Montajes Ltda y otra*, 2011; *Morales v Anglo American Sur S.A.*, 2011; *Salas v Echeverria Izquierdo Ingenieria y Construccion S.A.*, 2013; *Sepulveda v Sanchez y otro*, 2015; *Zavala v Empresas Instalaciones Secar Ltda*, 2014). This liability has been confirmed by the Supreme Court through jurisprudence unification resource (*Ramirez v Mena*, 2013) considering that some appeal courts had limited the main company's liability to only labor and social security obligations (*Elgueta v Servicios Industriales y Forestales Larrain Ltda y otra*, 2010).

In England joint and several liability works differently and in very specific cases (Miller, 2009; Robinson & Gruber, 2006). Particularly, the Compensation Act 2006 (ss. 3) establishes joint and several liability in cases where a person has contracted mesothelioma as a result of being negligently exposed to asbestos. However, this liability does not work in the same way than in Chile. Instead, it enables a claimant to recover damages from any one of the employers whose tortious conduct has materially

increased the risk of developing the disease in a certain period of time (*Jones and others v Secretary of State for Energy and Climate Change and Coal Products Ltd*, 2012). This recognizes that a worker's exposure to asbestos can occur during his/her employment with more than one employer (Stapleton, 2012).

In both countries, judges can reduce or even discharge a defendant's liability in terms of compensation by assessing also the claimant's contributory liability. This implies that, at least to some extent, the accident is caused by the claimant's negligence. This is a typical argument made by employers in Chile. For example, employers have largely argued that the injured worker was doing an activity outside the scope of his/her job (*Rojas v Plasticservi Ltda*, 2014), that the worker acted imprudently (*Fritz v Constructora Armas Ltda*, 2014; *Leon v Hormigones Transex Ltda*, 2012), that the worker was in a different place than the one required by his/her job (*Martinez v Comunidad Edificio Terrazas de San Damian*, 2015). This is similar in England where employers can argue that, for instance, the worker failed to follow signposting (*Wall v London Eastern*, 2014), or to wear protective equipment and tools (*East Anglia University v Spalding*, 2011). However, it is on the judge's discretion whether to or not consider these allegations.

Losses after Work Accidents and Diseases

If employer's civil liability and its breach are confirmed, the case turns into causation. The question is therefore whether the breach of duty caused the work injury. If so, the injured worker can receive compensation for damages. Compensation can be obtained for both the economic and non-economic losses resulting from the injury.

Economic losses

The aim of compensatory damages is to restore the victim to the position he or she would have been in if the event had not happened. This is fairly straightforward when the event causes only economic losses since they are concerned with a person's wealth and can be valued by reviewing the market. For example, personal injury after an occupational accident is usually associated with monetary loss such as loss of earnings and medical expenses.

In English civil proceedings, economic losses in cases of personal injury are awarded as specific damages. The heading implies that these damages can be easily classified considering past or future losses due to the wrongful event. Special damages can therefore include, for instance, loss of earnings, travelling expenses, care and medication/prescription charges (*Shore v Airbus Operations Ltd*, 2014); and medical equipment and psychological/occupational therapies costs (*De Oliveira v Ealing Primary Care Trust*, 2014). Specific damages can also include losses related to the performance of the claimant on the labor market and the cost of personal equipment she/he would not need if the accident had not occurred. In this respect, it is also possible to receive an award for items such as handicap on the labor market and the cost of automatic cars (*Robinson v North Bristol NHS Trust*, 2013). Similarly, a claimant can be awarded for damages for lost years. Loss of years is awarded for loss of earning but considering the years his/her life has been shortened by the defendant's tort (*Ball v Secretary of State for Energy and Climate Change*, 2012).

Although similar to England, in Chile this classification is limited within employment case law. The Civil Code guarantees the possibility to claim for economic losses regarding *lucro cesante* (loss of earnings) and *daño emergente* (expenses) (Civil Code of 2000, art 1556). Particularly, the accreditation of loss of earnings can be difficult. As such, they are not awarded on the basis of speculation regarding employment certainty and life span (*Rojas v Plastiservi Ltda*, 2014; *Sepulveda v Aluminios Torroja Ltda*, 2014), neither are they under the sole presence of a physical injury (*Palma v Siena Constructora S.A.*, 2014). Consequently, although claims focus mainly on the loss of earnings, expenses are not frequently included by injured workers, and courts sentences tend to be restrictive and dismiss these losses unless certain facts are present in the claim such as age, salary and disability percentage (*Leiva v Constructora del Pozo Ltda*, 2011; *Mateluna v Sociedad Comercial Inmobiliaria Automotriz Vespucio San Ramon Ltda*, 2011). As a consequence, injured workers rely mainly on non-economic losses in order to succeed in terms of compensation.

Non-economic losses

Unlike economic losses, non-economic losses are far more complex to estimate, as they cannot be measured in money. In comparative European Law, non-economic loss is defined as a, “loss which is not damage to a person’s assets or wealth or income and which is therefore incapable of being quantified in any objective financial manner by reference to a market” (Rogers, 2001a, p. 246). Compensation on a restitutionary basis is therefore impossible, since the court cannot command the defendant to restore the victim's lost member or mental state. However, the consideration of these losses implies that certain issues are compensable even though they do not involve loss of monetary wealth (Lindenbergh & van Kippersluis, 2009).

In comparative law, non-economic loss does not have a universal terminology. Non-economic losses can be found by names such as non-patrimonial loss, *dommage moral*, *daño moral*, *schmerzensgeld*, *danno alla salute*, non-pecuniary loss, pain and suffering, loss of amenity, and so on (Benedek, 1998; Diez, 2005b; Handford, 1978; Rogers, 2001a; Sugarman, 2015). Similarly, such losses attract varied descriptions including physical injury, prescribed psychiatric illness, injury to feelings, inconvenience, loss of self-confidence, loss of esteem, mental distress, mental suffering, upset and even worry (Halson, 2003). The understanding of non-economic loss is also different in England and Chile.

Non-pecuniary loss in England

In English law non-economic loss is referred as non-pecuniary loss and compensated as general damages. Although no comprehensive judicial definition exists (Rogers, 2001b), non-pecuniary loss is well established in English civil proceedings for personal injury. In this regard, courts have assessed and awarded non-pecuniary losses since around the 1960s (Law Commission, 1995). In line with the European understanding, the jurisprudence has largely understood non-pecuniary losses as those losses which are not susceptible of measurement in money (*Wright v. British Railways Board*, 1983 in Sprague, 1997). Despite this limitation, non-pecuniary loss has become fairly standardized in

terms what is included within this category leading to the emergence of subheadings and standards for assessment.

Main subheadings of non-pecuniary losses are pain and suffering and loss of amenities. The Law Commission (1995) understands pain as “the physical hurt or discomfort attributable to the injury itself or consequent upon it” and suffering as “the mental or emotional distress which the claimant may feel as a consequence of the injury: anxiety, worry, fear, torment, embarrassment and the like” (1995, p. 12). They also explain that due to its subjective characteristics, the victim needs to be aware of it to have the chance of being compensated. On the other hand, loss of amenities is a claim for the loss of enjoyment of life experience after the injury. Loss of amenity includes those injuries that can “deprive plaintiffs of the capacity to do the things which before the accident were able to enjoy, and to prevent full participation in the normal activities of life” (Law Commission, 1995). Unlike pain and suffering, loss of amenity is considered an objective loss in the sense that the loss exists without the need of awareness by the person who is suffering it (Law Commission, 1999).

Judges usually do not distinguish between the elements in pain and suffering and tend to include loss of amenities when deciding on a compensation claim. In this regard, sentences awarding general damages include pain, suffering and loss of amenity as one main heading (i.e. *Cunningham v Sainsburys Plc*, 2015; *Shore v Airbus Operations Ltd*, 2014). However, damages can be awarded for general damages alone without subheadings, but generally identifying elements of pain as suffering and loss of amenities among the reasons (*Robinson v North Bristol NHS Trust*, 2013). Similarly, pain and suffering can alone be awarded as general damages, but sentences usually include elements of loss of amenity. For instance, in *Parr v Wirral University Teaching Hospital NHS Foundation Trust* (2014) the judge awarded general damages for pain and suffering accepting that “these problems have deprived the victim of a fulfilling career which she very much enjoyed” (ss.80a).

Similarly, courts have also used additional subheadings to increase the amount of compensation. For example, in *De Oliveria Malvacini v Ealing Primary Care Trust* (2014), the judge awarded damages for loss of congenial employment. The sentence explained that the victim was prevented from continuing enjoying her job due to the injury she suffered, referring to the issue that there is no prospect of the victim “returning to her very much loved job” (ss.96).

Furthermore, non-pecuniary damages are awarded for physical and psychiatric injury. As physical injuries are frequently the natural result of a work accident or a prolonged exposition to hazard in the case of occupational disease, they are the main reason by which victims seek compensation. On the contrary, cases of psychiatric injury are reduced in amount due to the difficulties to establish causation by the claimant and, in turns, to succeed in court (Enonchong, 1996). Additionally, any psychiatric injury brought into court needs to be officially recognized through a diagnosis by a psychiatrist (Halson, 2003). For instance work-related stress itself does not give rise to liability, but exposure to factors leading to work-related stress which may cause personal injury in the form of a psychiatric illness or condition which may be recoverable in terms of damage (Craig, 2002; Jill & Morrison, 2001; Jones, 2008). For example, in a case regarding occupational stress and subsequent mental disease (*Daniel v Secretary of State for the Department of Health*, 2014), the judge dismissed the claim considering that the employer was not able to foresee the psychiatric injury so no duty of care

arose. In this regard, the employee had a mental precondition which was not communicated to the employer.

Non-pecuniary loss in Chile

In Chile, non-pecuniary loss is referred as extra-patrimonial loss and compensated as moral damage. The employment legislation has largely acknowledged the possibility of claiming moral damage (Sierra & Nasser, 2012). However, the compensation for moral damage was largely dismissed within contractual relations by Chilean civil courts. It was largely accepted that if the obligations included in an agreement were not fulfilled, the affected part could claim only pure economic damages. This common trend changed in 1994 when the Supreme Court awarded moral damages within contract relations (Dominguez-Aguila & Dominguez-Benavente, 1994). This was the first sentence which acknowledged the possibility of moral damages due to breach of contract.

As in England, there is no definition for moral damage within the enacted legislation. The legal doctrine has understood moral damage as any injury to the victim's non-material belongings which are irreplaceable for a monetary value and, in turn, cannot be measured by this resource (Diez, 1997). Jurisprudence includes in this definition any suffering, psychological disorder, spiritual illness or breach to the rights inherent to the individual and produced by the wrongdoing (*Alvarez v Fundicion Vulco Ltda*, 2011). These definitions summarize the fundamental elements included in this category. However, it does not give a clear understanding of what kind of losses are included. Jurisprudence has generally avoided to use a clear differentiation of subcategories of moral damage (Barrientos, 2008; Corral, 2005).

Therefore, subheadings for moral damage are not included in sentences. However, moral damage awards include mainly elements of pain and suffering. It has been accepted pain and suffering as a valid effect of physical injuries (*Aedo v Nazar Logistica Ltda*, 2014; *Escobar v Proyectos Matrices y Maestranza Ltda*, 2011). Courts have clarified that if a physical injury produces only body pain, this pain would not be considered as moral damage (Barrientos, 2008). On the contrary, a body injury would be compensated only if it also produces psychological pain such as distress and fear (*Matinez v Comunidad Edificio Terrazas de San Damian*, 2014), anxiety and depression (*Rojas v Plastiservi Ltda*, 2014), reduced sense of worthiness (*Ortiz v Curtidos Bas S.A.*, 2014), sorrow (*Zavala v Empresas Instalaciones Secar Ltda*, 2014) feelings of incompetence (*Munoz v Inmobiliarua Fortaleza S.A.*, 2014), sadness and spiritual suffering (*Salas v Cia. de Tejidos Primatex, S.A.*, 2012).

Moral damage can be awarded for physical and psychiatric injury. Injuries to the body are then reduced to a sub category of moral damage related with pain and suffering. Under this context, the possibility of seeking compensation also for the loss of amenities is limited as both refer to different losses (Corral, 2005). However, recent sentences are starting to acknowledge elements of loss of amenities and even aesthetic loss. For example, in *Palma v Siena Constructora S.A.* (2014) the judge awarded moral damages because the injured worker will not be able to practice the sport he enjoyed referring implicitly to loss of amenities. Also in *Aedo v Nazar Logística Ltda.* (2014) the Supreme Court explicitly awarded moral damages for both element, loss of amenities and aesthetic loss. Particularly, loss of amenities is being included by the claimant's lawyer in several cases (*Brañas v Jumbo Administradora S.A.*, 2011; *Hugo v Fibro Sonoco S.A.*, 2014; *Muñoz v Inmobiliaria Fortaleza S.A.*, 2014;

Ortiz v Curtidos Bas S.A., 2014; *Palma v Siena Constructora S.A.*, 2014; *Zavala v Empresa Instalaciones Secar Ltda*, 2014). However, its understanding is fairly general by referring to the things that a person with certain age and physical condition cannot enjoy anymore due to the impact of an injury following an accident.

The same principles are applicable to psychiatric injuries. Although moral damage is mainly related with physical injuries, prescribed mental disease can also be compensated (*Salas Reyes v Banco Estado y otro*, 2014). This is valid only if the mental disease is prescribed as occupational by the organizations managing the social insurance. However and alike England, the number of cases seeking compensation for psychiatric injuries in Chile is almost none.

Assessing Non-Economic Losses

In order to obtain an overall appreciation of what non-economic loss consists of in both countries, it is important to recognize the great difficulty involved in assessing these losses. The problem of the assessment has long been a matter of interest for legal scholars writing in this area and even more so for the courts (Acoli, 1949; Benedek, 1998; Comande, 2006; Litvinoff, 1977; Navarro Espigares & Martín Segura, 2008; Sebok, 2006). Judges are faced with the task of assigning a sum of money to the loss experienced by victims of work-related accidents and occupational diseases.

Several jurisprudential approaches have been identified in comparative law. Benedek (1998) identifies three approaches: conceptual, personal, and functional. Under the conceptual approach, courts consider that the victim's non-economic loss is a valuable personal asset such as the capacity and faculties for enjoying life or being free of pain. Each asset is perceived as having an objective value which is recoverable in case of loss. On the other hand, the personal approach is the primary mode of evaluation for the loss of expectation of life. Compensation is given for the unhappiness experienced, for the distress suffered due to the early shortening of life, or for the amount of happiness relinquished by the victim during the lost years. Finally, in the functional approach compensation is provided based on the use it can provide. The functional approach endeavors to determine how money can be used to compensate the plaintiff for his/her lost amenities rather than what he/she has lost.

The conceptual approach has been the method of choice in the assessment of non-pecuniary damages in England. After a public consultation and comparison to the Canadian functional approach, the Law Commission (1999) recommended that English law should not move from this approach which is known as "diminution of value" (p. 5). This approach recognized that the loss itself cannot be restituted; however, the award tries to reflect a fair and reasonable compensation regarding what the claimant has lost more than how the money will be used.

Similarly, the examination of cases in this study indicates that, this approach seems to be the main method in Chile. Although there is no official declaration or public consultation on the matter, the loss is treated as a valuable asset and, as such, the award is decided regarding the loss suffered by the victim and his/her physical detriment (*Ortiz v Curtidos Bas S.A.*, 2014). The amount of the compensation aims at being as fair and reasonable as possible. The award therefore cannot be a source of profit for the claimant; instead, judges attempt to award a value which tries to satisfy the loss caused by wrongdoing (*Alvarez v Fundicion Vulco Ltda*, 2011).

Despite the similarities, the application of the approach is fairly different in both countries in terms of the standard of evidence, burden of proof and the method used to calculate the award. They will be discussed in the following sections

Determining what constitutes as evidence and burden of proof

Establishing the existence, extent and cause of non-economic loss can give rise to considerable evidential difficulty. The traditional form of proving causation by English claimants is by establishing that, but for the breach of duty, the work injury would not have occurred. This is known as the “but for” test (*Jones and others v Secretary of State for Energy and Climate Change and Coal Products Ltd*, 2012 ss. 6.2). A claimant will only succeed in establishing liability if he/she can prove on the balance of probabilities that the defendant’s conduct caused or materially contributed to his/her work injury (Miller, 2014). For the judge, this requires a carefully evaluation of the evidence presented in order to understand the nature and extent of the damage that flows from the accident.

So, if a case reaches court and is determined by a civil judge, the burden of proof is on the claimant. If the claimant is not able to prove the causal link between his/her injury and the breach of duty, or even he/she was able to establish causation, the lack of evidence presented could lead to the case being dismissed. For example, in *Cunningham v Sainsburys PLC* (2015) the claimant failed to prove that the consequences of the injury were related to the accident she suffered. Even if the accident happened at work, the judge concluded that the claimant’s condition was related to a previous disease and not to the employer’s negligence. Similarly, in *Heavey v TMD Friction Ltd* (2012) the claimant did not provide enough evidence to establish a causal relation between his hearing loss and the employer’s negligence. As such, judges have also supported their decisions on causation by using medical records, published research findings and epidemiological studies (*Aldred v Cortaulds Northern Textiles Ltd*, 2012).

If the causal relation is established, the claimed losses need to be accredited. This is not easy in terms of non-pecuniary loss. The accreditation and consequent consideration by the judge is aided by the division of these losses as subjective, for pain and suffering, and objective, for loss of amenities. It is therefore common practice of judges to consider expert witnesses’ opinion to assess, for example, the level of pain and the psychological effects on the victim (*Wall v London Eastern*, 2014). Similarly, by reconstructing the victim’s life before and after the injury, the judge is able to evaluate the objective physical and social limitations the injury has caused. This is achieved by looking at the accepted level of pain and suffering, the documented effects of a specific injury, and the testimony of witnesses and of the own victim (*Parr v Wirral University Teaching Hospital NHS Foundation Trust*, 2014).

Unlike England, in Chile the burden of proof is upon the defendant. Courts have largely accepted that if the work accident occurred, the employer’s negligence is presumed (*Aedo v Nazar Logistica Ltda*, 2014; *Escobar v Proyectos Matrices y Maestranza Ltda*, 2011; *Salgado v Preserva Ltda y otros*, 2010). The employer needs to justify his/her behavior and to prove that the accident or disease is not for his/her fault (*Alvarez v Fundicion Vulco Ltda*, 2011). As the obligation of taking care is on the side of employers, they need to bring into court evidence to prove that all the necessary safety measures have been implemented (*Carrasco v Exportadora Camarico S.A.*, 2011; *Diaz v Cortez*, 2012).

Although the claimant still needs to clarify the circumstances in which the accident took place and the employer's negligence, the standard of proof requested is low or inexistent. Judges have commonly established a difference between economic and non-economic loss in terms of evidence. While patrimonial or economic losses need to be fully accredited by the claimant, extra-patrimonial loss or moral damage do not (*Escobar v Proyectos Matrices y Maestranza Ltda*, 2011; *Pinto v Artículos Deportivos Gacitua y Cia Ltda*, 2011). Reduced to subjective pain and suffering, courts have acknowledged that it is difficult to demonstrate this loss by the victim (Femenías, 2011). Consequently, if the event causes a personal injury, courts assume that the victim is entitled to receive compensation for moral damage (*Acosta v Inmobiliaria Construcciones Ltda*, 2011; *Riquelme v Easy Administradora Norte S.A.*, 2012).

Nonetheless, recent sentences have recognized that non-economic losses have to be accredited by the claimant (Hunter, 2013). Moral damages are, under this perspective, proven by the claimant as any other loss. With this purpose, courts have considered medical reports, , and/or expert opinion as a mean of evidence (*Guerrero v Dosal Hermanos y Cia Ltda y otra*, 2013; *Munoz v Inmobiliaria Fortaleza S.A.*, 2014; *Sepulveda v Aluminios Torroja Ltda*, 2014; *Zavala v Empresas Instalaciones Secar Ltda*, 2014;). In *Valladares v Constructora e Inmobiliaria Alejandro Alberto Gutierrez Alcaino EIRL* (2014) the judge dismissed a claim for moral damage compensation because the claimant did not provide enough evidence to prove its existence. The worker stated that he suffers from post-traumatic stress disorder because of the accident; however, no medical prescription was issued and no records of psychological or psychiatric treatment existed.

Despite this case, this is not the common practice within Chilean courts. Generally, when evidence is considered to assess moral damages, its value goes mainly to a reduction in the amount of compensation awarded if there is a lack of it. However, the existence or not of moral damage and its quantum depends fully on the judge's discretion and it may be established by just looking at the testimonial evidence (*Hormazabal v Sociedad Agrícola Los Tilos Ltda*, 2014; *Hugo v Fibro Sonoco S.A.*, 2014; *Maureira v Perfiles Laminados Solari Ltda*, 2012;) or by considering judge's assumptions as a mean of evidence (*Gonzalez v Polincay Export Ltda*, 2012).

The quantum of award

The level of awards has become fairly standardized in England. Damages in employers' liability cases are assessed in the same way as for any other type of personal injury case and with reference to awards in previous cases. Although a fixed level of damages may not be suitable considering the particularities of each case, this comparative approach allows judges to, first, estimate a general level of award and, then, calculate an amount which is as adapted as possible regarding the case under consideration (Law Commission, 1995). The whole process rests on ease of calculation, consistency across cases, and predictability facilitating settlements and maintaining easy insurability (Comande, 2006).

Since 1992, this task is facilitated by the periodic publication of guidelines (Judicial College, 2013). This document is not specific for work-related accidents, but for personal injury in general. A scale or tariff is organized by reference to types of injuries and based on comparative values which are

attributed to different injuries according to its seriousness (i.e. severe, moderate, and minor) in terms of severity, duration and multiplicity (Law Commission, 1995). The tariff is constructed by working down from the award for the worst case (quadriplegia), currently about £333,000 (Law Commission, 1999; Rogers, 2001b).

The courts then look to the victim's own pain, suffering and disablement in order to reach a precise sum of compensation within the range consigned in the Judicial College's guidelines. The final level of award considers elements such as the duration and level (pain) of the symptoms, if the symptoms can be controlled, the extent and effect of the medical exams and treatment, type of disease, domestic circumstances, previous state of health, and current level of the claimant's activity (*Ball v Secretary State of Energy and Climate Change*, 2012); claimant's age, habits (such as smoking in a Silicosis claim) (*Mills v JP Barnes Sons Ltda*, 2013); and the level of the condition (*Daniel v Secretary of State for the Department of Health*, 2014).

Compared to this fairly standard and transparent method, the Chilean situation is still fairly underdeveloped. Judges do not have any standard criteria neither do they have tools to value these losses. This limitation has been acknowledged by judges when valuing the amount of the award (*Munoz v I. Municipalidad de Lota*, 2011; *Avila v Servicios Generales Colina Ltda*, 2012). Additionally, the limited understanding of what moral damage is also affect court decisions. Damages are awarded as a total sum so they frequently do not identify the amount of money which goes to patrimonial and extra-patrimonial losses (Domínguez-Hidalgo, 1998), and even if they do, the total amount is awarded in one general heading for moral damage.

The assessment of moral damage is fully given to the discretionary criteria of judges. Regarding this, some criteria have been acknowledged by courts for award assessment. They have frequently considered elements such as the gravity of the event which caused the injury, the right or interest injured; the resulted social, moral and psychological consequences; the intention (negligent or malicious), the duration and persistence in time, the victim's behavior, the victim's personal conditions, and the parties' economic capacities (*Álvarez v Fundación Vulco Ltda*, 2011; Diez, 1997). This latter is particularly controversial. On the one hand, defendants have used this argument to seek a reduction on the amount of the compensation (*Zavala v Empresa Instalaciones Secar Ltda*, 2014). On the other hand, if the judge considers it, it is not clear if the final award really aims at compensating what the victim has lost.

Without the support of guidelines, the amount awarded is variable between cases showing a scarce standardization. This is exacerbated by the lack of types of injuries and compensation maximum. For example, for a 90% disability caused by a work accident the judge in *Muñoz v I. Municipalidad de Lota* (2011) and *Cisternas v Constructora Jorge Gutierrez e Hijo* (2014) awarded 60,000,000 Chilean pesos (around £58,000), while for the same level of disability another judge awarded 100,000,000 Chilean pesos (around £95,000) (*Mateluna v Sociedad Comercial Inmobiliaria Automotriz Vespucio San Ramon Ltda*, 2011).

Discussion and Conclusions

Employers' civil liability for non-economic loss in work-related accidents is a challenging area for many countries. From a comparative perspective, England and Chile show several similarities regarding the mechanisms through which an injured worker can obtain compensation. In this regard, both countries acknowledge that a victim of a work-related accident is entitled not only to receive social security benefits, but also to claim past, present, and future economic and non-economic losses. However, the form in which both countries have managed both systems and the progress made is fairly different. On the one hand, England has made important progress in terms of types of employer's liability, understanding of non-pecuniary loss, and awards assessment. Chile, on the other hand, is still facing several challenges in terms of definitions of moral damage and assessment. Although several progresses have been made in the last few years by legal scholars, many still remain.

Compared to English case law, the Chilean understanding of non-economic losses is partial. Although the scope of moral damage includes not only pain and suffering but also loss of amenities and even aesthetic loss, courts do not use subheading for damages compensation so it is not possible to know precisely what is being compensated. Frequently, judges refer to moral damage using a long list of unexplained terms with no definition in medical or psychiatric literature to refer mainly to pain and suffering. Similarly, it is clear that moral damage is the consequence of the work injury the victim has suffered; however, its assessment and the resulting compensation may imply that pain and suffering is the origin of the loss (Barrientos, 2008).

In this regard, there is a need of a clear classification of what moral damage comprises in terms of compensation. In England, efforts for clarification have considered elements beyond pain and suffering as subheadings for damages. In Chile, on the other hand, the reduction of moral damage to pain and suffering has represented a limitation for several reasons. On the one hand, as it is today, this category is too ambiguous, it can be used to make a number of unjustified claims under the idea that any discomfort or sorrow can be a moral damage. On the other hand, pain and suffering is a biased category considering that it depends on variables such as the age and mental condition of the victim making impossible for some people to suffer a moral damage (Dominguez-Aguila, 2004).

This limited understanding of moral damages has a direct impact on the low standard of proof requested, if any. In terms of evidence and beyond the discussion of the burden of proof, although moral damages are being accredited by the claimant, the standard of proof is low. Legal scholars have largely argued that the legitimacy of moral damage can and should be demonstrated by presenting documents, expert opinion, and witness testimony, among others (Barros, 2006; Femenías, 2011). Currently, Chilean courts request documentary evidence in the form of authorized medical reports to accredit the existence of personal injuries and the level of disability. The testimony of witnesses and of the own victim is also used to determine the consequences of the injury in the claimant life, or the extent of his/her moral damage. However, the use of research findings, epidemiological studies, and expert opinion is still limited.

Similarly, moral damage represents an area of strong uncertainty in terms of levels of awards not only for judges but also for lawyers and insurance companies. As there is no minimum and maximum level of awards for moral damage, legal professionals working in employer's civil liability deal with cases

that could mean a company closure or an unfair victim compensation depending on the judge who dictates sentence. As a way of reducing this uncertainty, the current non-official practice among judges is to consider the percentage of disability determined by the authorized social insurance organizations and assign an amount per each point of disability. Although this is not an agreed and standard practice, it is gaining ground among judges and lawyers in this area.

Likewise, due to the uncertainty that a claim for moral damage represent, the cost of voluntary employers' civil liability insurances is prohibitive for most companies. In England, this has been solved by the enactment of an obligatory insurance for a minimum of £5 million coverage. Despite the gaps in the system (for a detailed analysis see Parsons, 1999 and Hood, 2005), the role of the insurer is key to solve claims, compensate, and reduce the cost of civil court proceedings. In Chile, the lack of standards for awards has made moral damages a high risk issue in terms of voluntary insurance increasing its cost. Although no specific statistic exist, the insurance is likely to be more widespread among large companies than in small and medium enterprises.

In this respect, there is a strong need for the development of guidelines to support the judges' decision-making, the job of lawyers, and insurance companies. Recently, a guideline for moral damage in death cases has been developed (Corte Suprema & Universidad de Concepcion, 2013), and there is also an ongoing project to design guidelines for moral damage in work injury cases. However, standardization requires, at the least, a better understanding of what moral damage is and what is covered in the award. This challenge still remains, and it will not be solved by the sole development of tariffs.

Limitations and Avenues for Further Research

Beyond the difficulties and limitations that comparing two countries with different legal system have, a number of limitations and avenues for further research can be identify in this study. On the one hand, the differential number of case law between countries made difficult to compare claims for similar work injuries. Due to the obligatory employers' insurance in England, case law is reduced for work injury claims. Although in Chile similar but voluntary insurances exist, their use is not generalized. Future research may then include data from other available sources such as cases solved by insurance companies and additional case law databases.

On the other than, future research could explore non-economic loss at different stages of the employment relation. This study focused only on employers' liability in work related accidents; however, an employer could be found liable and, therefore, a person could suffer non-economic losses at different stages of the employment relation (Gamonal, 2012). Future research could focus on, for example, a pre-contract, while-contract, and/or post-contract stage. For example, in a pre-contractual stage, a candidate for a work can be discriminated against during the selection process or his/her human rights can be violated by asking intimate information. A similar situation can happen post-contract when, for instance, a worker is unfairly dismissed. Finally, during the period of the contract the employer could not only breach his/her common/statutory duty of care but also make an abusive use of his position.

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