Compensation of Non-Pecuniary Loss: An Economic Perspective

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§ 1 Introduction

In this contribution, written to honour Helmut Koziol, I will address the question whether non-pecuniary loss should be compensated under tort law and if so under which conditions. The reason I will address this topic is that I am well aware of the fact that Helmut Koziol has, in his many publications shown his concern with respect to an expanding liability. One of the instruments to limit liability may be a limitation of compensation for non-pecuniary loss, since many seem to fear that especially the increase of compensation for non-pecuniary losses may lead to uninsurability of liability.

To analyse the compensation for non-pecuniary loss I will use the economic analysis of law, being well aware that Helmut Koziol is on the one hand very interested in this methodology, but on the other hand conscientially critical. I will try to show that economic analysis might provide him with some arguments to keep liability for non-pecuniary loss within reasonable limits by pointing at the specific functions which tort law should have.

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Economic literature on the question whether non-pecuniary losses should be compensated is relatively scarce. There is, however, a lot of literature on the economic functions of tort law in general and on the issue of "punitive damages", but less on the question why tort law should compensate non-pecuniary losses. There is, however, a lot of (mainly North American) literature on the question how compensation should be awarded in case of the death of the victim. The issue of compensation for non-pecuniary loss has, however, been addressed by the German law and economics scholars Schäfer and Ott. The principal question why non-pecuniary loss should be compensated (or not) has been addressed from an economic perspective by Adams. It is not easy to find a "common core" in this literature since some authors stress the importance of the compensation of non-pecuniary loss from a preventive perspective, whereas others argue that compensation for non-pecuniary losses may lead to too many claims. To some extent the literature is also rather confusing. Take for instance a paper of von Randow, who comments on the just mentioned paper of Adams, arguing on the


6 Calabresi, G., Ideals, Beliefs, Attitudes and the Law, Private Law Perspectives on a Public Law Problem, 1985, 77.

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basis of some examples from contract law\textsuperscript{8}, whereas Adams paper in fact mainly
deals with liability under tort\textsuperscript{9}.

In this contribution I will address generally the issue whether, from an economic
point of view non-pecuniary loss should be compensated. The starting point will
be a simple situation whereby a victim and an injurer stand in a contractual
relationship to each other (§ 2). Next, the goals of tort law will be illuminated
from an economic perspective (§ 3) and the question will be asked how
compensation for non-pecuniary loss may fit into the goal of accident prevention
(§ 4) or loss spreading (§ 5). An example will be presented (§ 6), a few limitations
and normative consequences of the economic analysis (§ 7) and a few concluding
remarks (§ 8).

§ 2 Coase

An economic analysis will traditionally start with the famous theorem of Nobel
prize-winner Ronald Coase\textsuperscript{10}. Coase\textsuperscript{'} point of view is that when transaction costs
are zero an optimal allocation of resources will always follow, no matter what the
applicable legal rule is. This theorem also has its importance for the compensation
of non-pecuniary loss. When parties can negotiate freely \textit{ex ante} on the service
which will be delivered (this can be a service or a product), they can do so as well
as far as the amount of compensation is concerned if there would be no
performance. It is for instance possible for the contracting parties to agree that a
specific amount will be compensated for non-pecuniary loss in case of non-
performance. When the victim is a consumer, such an agreement can take place
implicitly via the price-mechanism. If a specific consumer wishes additional
protection in the form of a compensation for non-pecuniary loss, this can be
reflected in the price, which is charged by the producer or provider of the service.

A classic example constitutes the situation whereby a consumer asks someone to
develop a role of film with photos, which subjectively have a very high value for
the particular consumer. When the transaction costs are not too high (compared to
the value of the service) parties could agree that, if something would go wrong
during the development of the photos, the consumer will also receive
compensation for non-pecuniary loss. Such an agreement will obviously be
translated by the provider of the service in the price, which will be charged for the

\textsuperscript{8} Von Randow, Ph., "Kommiltau", in: Ott, C. and Schafer, H.B. (eds.), Allokationseffizienz in

\textsuperscript{9} See for an early contribution which addresses the compensation of non-pecuniary losses
Ogus, A., "Damages for lost amenities: for a foot, a feeling or a function?", Modern Law

development of the film. This shows that in principle in a contract situation parties can \textit{ex ante} agree whether non-pecuniary loss will be compensated or not, provided that the administrative costs make such an \textit{ex ante} agreement possible. The (implicit) agreement on that point can then be signalled via the price mechanism\textsuperscript{11}.

In general, there will, however, not be compensation for non-pecuniary loss in the contract case for the simple reason that the damage is too subjective and therefore too diverse. When all consumers of photo-development services would always be entitled on compensation for non-pecuniary loss, this would inevitably lead to a substantial increase of the price for the development of film. This price increase might be socially undesirable, since many consumers might not be willing to pay the increased price for an additional protection for which they have no demand. Hence, if the law would force all producers of those services to compensate non-pecuniary losses, this would lead to a negative redistribution since all consumers would have to pay a higher price for an additional protection which only benefits the few, being those who \textit{ex ante} expect a subjectively high non-pecuniary loss and are therefore willing to pay the higher price. Precisely this subjective and diverse character of the non-pecuniary loss in this example is the economic reason why non-pecuniary loss will in those cases in principle not be compensated. We learn from Helmut Koziol's handbook that this is apparently the general rule in Austrian tort law as well\textsuperscript{12}.

Obviously other agreements are always possible if the particular consumer expects \textit{ex ante} to have a potentially high non-pecuniary loss. In that case he can reach a separate agreement with the producer or provider of the service\textsuperscript{13}. Again, if case law would allow for compensation of non-pecuniary loss in those cases (which is the case in some countries), this would lead to a price increase for all consumers, whereas only the few who need this additional protection may benefit. A good example is the situation in case of interruption of the provision of electricity. Usually standard form contracts exclude compensation for non-pecuniary loss in those cases, which makes economic sense. If the electricity provider were forced to compensate the losses of e.g. those who posses 30 aquariums in their cellar and hence suffer a relatively large loss, this would lead to a price increase for all consumers, whereby only the aquariumlover in this example would benefit.

\textsuperscript{11} This point was also made by Faure in "Interdependencies between Tort law and insurance", Risk Decision and Policy, 1997, 193-210.
\textsuperscript{12} Koziol, H., Österreichisches Haftpflichtrecht, 355-356.
\textsuperscript{13} Von Randow, P.H., Lc., 1989, 219-222.
From an economic point of view it were better to avoid this negative redistribution by allowing the consumer either to agree on a specific higher amount of compensation with the producer of the service\textsuperscript{14} or to allow the consumer to conclude a first party-insurance, taking into account his personal demand for additional protection. This point, that full compensation in contractual relations \textsuperscript{18}, giving the diversity of the loss, usually inefficient, has been systematically developed by Rea\textsuperscript{15}.

§ 3 Goals of tort law

If we now leave the contract area and generally ask the question whether non-pecuniary losses should be compensated from an economic point of view in a tort case, first the economic principles of accident law have to be summarised briefly\textsuperscript{16}. This will allow us to address the question whether compensation for non-pecuniary losses may serve one of the economic goals of accident law\textsuperscript{17}.

In his well known book \textit{The Costs of Accidents}\textsuperscript{18} Guido Calabresi pointed at the fact that tort law should aim at a minimisation of the total sum of accident costs. Calabresi distinguishes between primary, secondary and tertiary accident costs. The primary accident costs refer to the expected loss and to the accident prevention costs. The secondary accident costs refer to the costs of loss spreading. Calabresi therefore points at the fact that the law should not only aim at an optimal reduction of primary accident costs, but also at an adequate loss spreading. This need to reduce the secondary accident costs explains the demand of insurance and the emergence of other mechanisms to spread risks and potential losses. One consequence of this need to minimise secondary accident costs is the wish to lay the financial consequences of risk as much as possible on the shoulders of those who have created the particular risk\textsuperscript{19}. Finally the law should also aim at a reduction of tertiary costs. These tertiary costs are mainly the administrative costs of the functioning of accident law. These are not only the costs borne by private parties (victim, injurer and insurer) in handling claims, but

\textsuperscript{14} If those negotiations are possible, giving the administrative cost involved.
\textsuperscript{16} The various goals of tort law have, from a legal perspective, also been elaborated in the famous handbook on Austrian tort law of Kozie, H., Österreichisches Haftpflichtrecht, Band I, Allgemeiner Teil, 3rd. ed., Vienna, Mainz Verlag, 1997, 8-13.
\textsuperscript{19} This is sometimes referred to as the need to have a correct allocation of accident costs.
also the costs of the legal system which has to be involved in the resolution of claims.

The basic idea in the economic analysis is that tort law gives incentives to parties in a potential accident setting towards prevention of accidents. Minimisation of primary accident costs is hence possible by forcing parties towards efficient prevention via the threat of a liability suit. In addition, the need to reduce secondary costs teaches that the losses should also be spread optimally and finally this minimisation of both primary and secondary costs should preferably take place at relatively low administrative (tertiary) costs. The question will now be addressed how compensation of non-pecuniary losses can contribute to a reduction of primary (prevention) accident costs or secondary (loss spreading) accident costs.

§ 4 Compensation of non-pecuniary loss and accident prevention

From the economic principles of tort law, as outlined above, it follows that an injurer should in principle be held to provide full compensation to his victim to give him optimal incentives for accident prevention. If we assume that the injurer makes a rational cost benefit analysis of the preventive measures he has to take to avoid the accident, we can equally assume that the injurer will relate the care he will take to avoid the accident to the amount of damages which he should compensate in case he is found liable. If, as a consequence, the injurer would not be held to compensate the full amount of the damage his activity created, he would have insufficient incentives towards optimal prevention. Precisely because it is important to hold the injurer to an optimal level of prevention, he should in principle be held to compensate the full loss of the victim, which should therefore in principle include the non-pecuniary loss. This idea, that liability rules have a preventive effect, is also predominantly present in Helmut Koziol’s work.

This straightforward economic analysis should, however, somewhat be refined, since a distinction should be drawn between so called unilateral and bilateral accidents. Unilateral are those accidents whereby only one party (in this case the injurer) can influence the accident risk. In case of a bilateral accident, also the victim exercises influence on the accident risk and can therefore prevent the

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20 This was also thought by Calabresi in Calabresi, G., “Some Thoughts on Risk Distribution and the Law of Torts”, Yale Law Journal, 1961, 499-553.
21 Adams, M., l.c., 1989, 213.
22 Adams, M., l.c., 1989, 214.
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accident by taking preventive measures as well. This distinction between unilateral and bilateral accidents is of importance for the question whether non-pecuniary losses should be fully compensated. In case of a unilateral accident, the analysis just presented remains unchanged. In that case the injurer should be held to compensate all, including the non-pecuniary, losses of the victim to provide him with optimal incentives towards preventive measures. These preventive measures will be related to the total loss of the accident. Compensation of non-pecuniary loss is, in this perspective, considered as an important instrument of prevention.

This picture, however, changes according to Adams, in case of a bilateral accident. Adams points at the fact that many preventive measures which a victim could take to avoid an accident cannot be observed\(^24\). Of course defences such as contributory or comparative negligence can force the victim partially to take preventive measures as well. There are, however, many precautionary measures, which a victim could take to avoid an accident, which cannot be incorporated in defences such as "contributory or comparative negligence". This is, according to Adams, the reason why legal systems should in general be reluctant with the compensation of non-pecuniary loss in case of bilateral accidents\(^25\). Not providing full compensation of non-pecuniary losses is therefore considered in the economic analysis as an element of risk reduction on the side of the victim\(^26\). Adams therefore argues that not compensating for non-pecuniary losses is in the interest of the victim, since it reduces ex ante the accident risk\(^27\).

The preliminary conclusion so far is therefore that from a preventive point of view economic analysis teaches that in case of a unilateral accident non-pecuniary losses should be compensated to provide the injurer incentives for prevention to the victim\(^28\); in case of bilateral accidents economic analysis holds that non-pecuniary losses should not be fully compensated to provide additional incentives for prevention to the victim.

\(^{24}\) Adams, M., I.c., 1989, 214.

\(^{25}\) This is, however, debated by Von Randow, Ph. (I.c., 1989, 219), who argues that defences such as contributory or comparative negligence are sufficient to provide adequate incentives for prevention to the victim.

\(^{26}\) See in the contractual context, Rea, S., I.c., 1982, 50-52.


\(^{28}\) Also the German Bundesgerichtshof argues that the duty to provide compensation in case of violation of personality rights serves primarily a preventive goal. This is striking because lawyers usually have difficulties in accepting the deterrent effect of liability rules (so Ott, C. and Schäfer, H.B., I.c., 1990, 564-565).
§ 5 Compensation of non-pecuniary losses and loss spreading

At first sight one could argue that from the angle of loss spreading there should be full compensation of the victim, so that also non-pecuniary losses should be compensated. Immaterial loss is not a pecuniary loss, but constitutes actual damage for the victim. One would, therefore, at first sight argue that these should in principle be compensated under a loss spreading perspective. If this were the case there would be a trade-off, at least in case of bilateral accidents, between the goals of reduction of primary accident costs and of reduction of secondary accident costs. From a preventive perspective one could argue that, in a bilateral accident setting, non-pecuniary losses should not be compensated to provide adequate incentives to the victim, whereas one could argue that this victim should be fully compensated, also for non-pecuniary losses, from a loss spreading perspective.

This is, however, a false problem. Adams has pointed out that non-pecuniary loss is indeed actual damage, but it does not create a demand for extra money. Obviously in some cases the non-pecuniary losses can somewhat be relieved with material help (think about paying a holiday to a victim as relief for suffering), but these constitute material losses which can therefore be compensated. The question, which arises from an economic point of view, is whether there is a need for compensation for the losses, which are indeed purely non-pecuniary. In this respect I refer to a loss which cannot be relieved or mitigated via additional material care. The main feature of these non-pecuniary losses is that they constitute a type of damage, which does not create an additional demand for money. The question, which therefore inevitably arises, is whether a financial compensation can remedy this non-pecuniary loss. Since these non-pecuniary losses do not _ex post_ create a demand for extra money, they also do not create _ex ante_ a demand for insurance. If a victim would therefore not have the tort system at its disposition to compensate the loss, he would _ex ante_ not have a demand for insurance against such a non-pecuniary loss. The reason why victims

31 Obviously in some cases there is a thin line between pecuniary and non-pecuniary losses, at least if one assumes that a non-pecuniary loss can be relieved by providing material help. See on the borderline between pecuniary and non-pecuniary loss also Koziol, H., Österreichisches Haftpflichtrecht, 74-87.
32 In that case it could be qualified as material loss.
33 Ogus in this respect rightly points at the fact that there is a distinction between “injury” and “loss”. A large injury does not necessarily constitute a large loss in financial term (Ogus, A.J., 1.c., 11).
take out first-party insurance coverage (such as e.g. legal aid insurance) is that the victim is *ex ante* willing to pay a premium to cover for the risk that there might *ex post* be a need for additional money as a consequence of the accident. Material damage generates a demand for additional money after the accident. This *ex post* demand can be met by the *ex ante* payment of a premium. However, the *ex ante* payment of premium always constitutes a loss of wealth. The insured will be willing to accept this loss of wealth today (the payment of the premium) if it provides extra certainty (money) after the risk materialises. Insurance therefore regulates a transfer of income between various members of a risk group. However, since non-pecuniary losses do *ex post* not create a demand for additional money, the victim has no willingness to pay a premium to cover for this non-pecuniary loss *ex ante*. The premium would indeed lead to a reduction of the victims' wealth today to cover for a loss, which does not bring about a demand for additional money. That is the reason why there is no first-party insurance available on the market for non-pecuniary losses. Potential victims apparently realise that if they would suffer non-pecuniary losses as a result of an accident, these cannot be remedied by the provision of additional money; therefore the potential victim has no demand for insurance against non-pecuniary losses. The potential victim would only insure against the risk that a non-pecuniary loss would bring about a demand for financial means to compensate for his suffering. But in that case the loss is again pecuniary and it does make sense to insure oneself against it. Therefore some victims may purchase *ex ante* first-party accident insurance, the proceeds of which can, after the risk has materialised, be used to remedy non-pecuniary losses as well. However, the insured does not take out insurance coverage in that particular case to cover non-pecuniary losses. There is indeed no first-party insurance coverage for non-pecuniary losses as such.

The question could also be asked whether non-pecuniary losses would at all be insurable in first-party coverage. The problem is indeed that non-pecuniary losses are, as was mentioned above, subjective and different for every individual. This makes therefore an *ex ante* differentiation of risk very difficult. Different persons will react differently on suffering. There is therefore also a serious moral hazard risk when the question has to be asked how the amount of compensation for non-pecuniary losses would have to be fixed after the risk has materialised. This can partially be remedied by a standardisation of the amounts, which would be paid out by the insurance-companies, but in that case the compensation would

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37 Obviously a potential injurer has a demand for the coverage of non-pecuniary losses in liability insurance.
38 Von Randow, Ph., I.c., 1989, 223-224.
not be adapted to the individual victim. There would therefore not be full compensation.

If a potential victim fears *ex ante* that he would suffer more than others from non-pecuniary loss as a consequence of an accident and if he believes that the suffering could partially be compensated through monetary compensation, such a potential victim could *ex ante* take out first-party insurance coverage. First-party insurance coverage is obviously much better able to differentiate according to the demand of the potential victims than third-party liability coverage.

A consequence of the fact that non-pecuniary losses in general do not create a demand for first-party insurance coverage is that from an economic point of view it can equally be argued that the loss spreading function of the tort system should not be used to compensate these losses. If the tort system would generally compensate non-pecuniary losses this would lead to a general increase of the price of all products and services for an additional protection for which most consumers would *ex ante* have no willingness to pay via first-party insurance. If the tort system would in this particular case be used for compensation of non-pecuniary losses the risk of a negative re-distribution would again arise. Indeed: the price would rise for all consumers of products and services, whereas only those who subjectively have large non-pecuniary losses benefit from this additional protection. Again: if specific individuals would *ex ante* have a demand for additional compensation (of non-pecuniary losses) after an accident, this demand can be met via a differentiated system of first-party insurance coverage. In that case these individuals could receive specific protection for which only they would pay. First-party insurance can therefore avoid the negative redistribution effect that would arise in case of a compensation of non-pecuniary losses via the tort system.

One therefore reaches the conclusion that in case of bilateral accidents there is no contradiction between the goals of accident prevention and loss spreading. Both perspectives teach that there is reason to be cautious with respect to the compensation of non-pecuniary losses. But again: in case of unilateral accidents there is a reason to compensate non-pecuniary losses. This reason is, however, the preventive function of accidents and not the loss spreading. From an economic point of view non-pecuniary losses do not create a need for loss spreading since there is no demand for additional money.

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40 For a similar conclusion see Adams, M., l.c., 1989, 215-216.
§ 6 Example

A classic example which is often advanced in the Law and Economics literature is the damage which occurs at the occasion of the death of a child. Both Shavell[41] and Adams[42] argue that this constitutes a typical example of an accident case where the damage is extremely tragic and painful and where the non-pecuniary loss of the parents involved can be spectacularly high, but where on the other hand there is ex ante no demand for insurance for this non-pecuniary loss. Parents would indeed ex ante never take life insurance to cover the non-pecuniary loss which they would suffer in case of the death of a child. Adams therefore argues that there would thus not be a willingness to pay a higher price for specific services or products with could ex post lead to extra money to cover this non-pecuniary loss[43]. From a loss spreading perspective there is hence no reason in this particular case to compensate the entire loss[44]. There would, however, be a good reason to compensate this loss, being the fact that the injurer should be given incentives for prevention. But, as was argued above, this depends upon the question whether it constitutes a unilateral or a bilateral accident case. Obviously many accidents with high amounts of bodily injury or the cases of a loss of a child, can often be qualified as unilateral. In those cases the non-pecuniary loss is often the total damage. Then again it becomes important to compensate this non-pecuniary loss, precisely because this will provide adequate incentives for prevention to the injurer.

§ 7 Limits and normative consequences

A. Limits

From the analysis presented above it follows that Law and Economics pleas in favour of limited compensation of non-pecuniary losses, since these may be considered as a kind of deductible on the side of the victim. However, these pleas in favour of a cautious attitude towards pair and suffering only applies in case of bilateral accidents. In case of a unilateral accident it remains important to provide

42 Adams, M., l.c., 1989, 216.
44 Ogus also points at the fact that when the victim has died, compensation can never be used to his benefit and hence amounts to a windfall to the dependants. He considers this as an anomaly (Ogus, A.I., l.c., 11-12).
the injurer with optimal incentives to prevent the accident, which will only be the case if he is forced to compensate the total loss.

If the immaterial loss would constitute the total damage one could also argue that the deductible (if that would take the form of non-compensation) would be far too high, more particularly in these cases of the loss of a child. Moreover, this deductible argument makes no sense in case of unilateral accidents. Precisely in these cases it remains important to confront the injurer with the total social costs caused by the activity. If the injurer would not be held to compensate non-pecuniary losses, there would be too little incentives for prevention.

In sum, although Law and Economics provide pleas in favour of caution with respect to the compensation of non-pecuniary losses in case of bilateral accidents, it equally argues in favour of a generous compensation of non-pecuniary losses in unilateral accidents, especially in cases where non-pecuniary losses constitute almost the total damage.

B. Consequences

From the above it follows that Law and Economics provides for a balanced judgement with respect to the necessity to compensate immaterial losses. In case of a bilateral accident it seems necessary to make a trade off, as far as the incentives for prevention are concerned, between on the one hand the desire to hold the injurer to full compensation to provide him with optimal incentives versus the need to limit the compensation due to the victim to control his incentives as well. In case of a bilateral accident the crucial question is therefore who’s activity has the most important influence on the risk and who’s activity should therefore primarily be controlled. If one assumes that it constitutes an activity where the injurer has the most important influence on the risk, then a generous compensation of non-pecuniary losses becomes important again, certainly if the non-pecuniary loss constitutes the most important part of the damage. If, on the other hand, it constitutes an activity where the victim also has an important contribution to the risk, then it would be important to be cautious with too generous amounts of non-pecuniary losses.

It remains important to stress that if full compensation is claimed, from a Law and Economics perspective this is only necessary to provide optimal incentives for prevention for the injurer and not to provide compensation to the victim, since the victim has ex ante no demand for insurance for non-pecuniary losses. If ex ante a specific victim would have a demand to have financial means which exceed the

45 Adams, M., l.c., 1989, 217.
material damage, then the particular potential victim can demand first-party accident insurance. This insurance can partially cover the non-pecuniary loss which specific potential victims would fear. But since this demand for this extra coverage will not be general, but specific for each individual potential victim, it seems better to meet this demand for specific extra compensation of certain potential victims via a nicely tailored first-party accident insurance instead of via liability law. Using liability law to respond to this ex ante desire for extra compensation of some potential victims does not seem an appropriate choice, since this may lead to a negative redistribution. In sum: compensation of non-pecuniary losses via tort law should, from an economic perspective, only be necessary to provide incentives for prevention, not to meet the loss spreading objective.

One may argue that this somewhat follows a tendency in some legal systems, particularly in the Netherlands, towards increased compensation for non-pecuniary losses, more particularly when there was intent on the side of the injurer. The fact that punitive elements are taken into account when the amount of compensation for non-pecuniary losses is established, is understandable from a preventive perspective.

Another consequence of this economic analysis could be the fact that the reason that some automatic compensation systems (such as social security) do not compensate non-pecuniary losses, may be seen as a deductible to control the moral hazard on the side of the victim.

§ 8 Concluding remarks

Economic analysis of non-pecuniary loss points at the trade off between the preventive function of tort law and the loss spreading perspective. Economic analysis stresses that compensation of non-pecuniary losses is especially important from a preventive perspective and less so from a loss spreading perspective. The fact that compensation of non-pecuniary losses seems, at least from an economic perspective, more important for prevention than for compensation seems also to follow some basic legal intuitions. Victims often claim compensation for their non-pecuniary loss as a form of recognition, almost

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47 See in that respect also Kerkmeester, H.O., i.c., 1998.
as punishment, but less so because the non-pecuniary loss would have created an extra demand for money (which is obviously the case with material damage as a result of an accident).

In addition it should be stressed that once it is accepted that compensation of non-pecuniary loss, for instance in case of unilateral accidents, is necessary, a large portion of economic literature addresses the question how this non-pecuniary loss should be estimated. I did not have the possibility to focus on the assessment of non-pecuniary losses with in the scope of this paper. The fact that the amount of non-pecuniary losses can often hardly be assessed is also advanced as a reason why many legal systems show themselves reluctant as far as the compensation of non-pecuniary losses is concerned.

As far as the compensation for non-pecuniary losses is concerned, there still are considerable differences between the various European legal systems. These differences between European legal systems have always been a major point of interest for Helmut Koziol, which he expresses inter alia in his work in the European centre for tort and insurance law. If the economic point of view, as sketched above would be correct, it is unclear why there would be those strong differences between the legal systems as far as the compensation of non-pecuniary losses is concerned. It is not always possible to provide a rational explanation for these differences, this requires more comparative Law and Economics research. It may be possible that some of these differences are related to the function of tort law compared to the compensatory function of social security. It is well-known that for instance in the United States there is traditionally a weaker system of social security, where it is argued that a strong tort law, accompanied with high amounts for pain and suffering and compensation in the form of "punitive damages" would be necessary to compensate for a weaker system of social security. But this would assume that compensation of non-pecuniary losses does have a compensatory function, which somewhat contradicts the economic analysis presented above. This shows that the theme of non-pecuniary losses still requires far more research, also from an economic perspective. In Europe one can for

49 See on this issue the papers of Ott and Schäfer quoted above and the papers by Fuchs, V. and Zeckhuser, R., l.c., 1987 as well as Kidner, R. and Richards, K., "Compensation to dependants of accident victims. The Economic Journal, 1974, 130-142.

50 Although Adams rightly argues that this difficulty is not a very convincing argument (Adams, M., l.c., 1989, 211).


instance notice in various legal systems a reduction of the compensation via the social security scheme, paralleled with a seemingly increase of the amounts awarded for pain and suffering. Although there is not necessarily a causal connection between the two, the parallel seems worth further investigation.

As far as the tendency in some European legal systems to increase the amounts for pain and suffering is concerned, economic analysis can provide an important lesson in the sense that it remains necessary, especially in case of bilateral accidents, to control the incentives of both the injurer and the victim. In that respect one can notice a tendency in some legal systems, for instance in the Netherlands, to do almost completely away with the contributory or comparative negligence defence on the side of the victim. This tendency can be explained by the wish of many lawyers to provide victim compensation at all costs. However, economic analysis warns that it may be dangerous to do away on the one hand with contributory and comparative negligence defences and on the other hand to increase the amounts for pain and suffering, also in case of bilateral accidents. Law and Economics would, if one wishes to apply its lessons at the normative level, predict to the contrary that if the victims behaviour is not controlled any longer via a contributory or comparative negligence defence, a reduction of the compensation for non-pecuniary losses remains important as a deductible on the side of the victim in case of bilateral accidents.

One advantage of the economic analysis of accident law is that it might contribute to the debate concerning the necessity to compensate non-pecuniary losses by pointing at the functions and goals of tort law. Nevertheless, Helmut Kozioł's traditional sceptic approach towards Law and Economics remains valid since Law and Economics is not able to answer all questions. Indeed, the economic argument concerning the preventive effect of non compensation of immaterial damage as a deductible relies heavily on the assumption that the victim's behaviour can be influenced through an exposure to the loss. Empirical evidence to back up this assumption is scarce. Moreover, more economic analysis is undoubtedly necessary, with respect to the possible compensatory function of non-pecuniary losses. This remains important since, from a legal perspective, compensation is the leading argument to compensate non-pecuniary losses. But also this

54 Obviously one could argue that an easier solution could be found in enlarging the traditional comparative and contributory negligence defences, which makes the tendency to increase the compensation for non-pecuniary losses less problematic.
55 See among other Lindenbergh, S.D., o.c., 1998, 50-60.
argument is not free of criticism. The traditional economic argument, advanced by among others Zeckhauser and Adams that non-pecuniary losses should not be used to compensate victims via tort law since victims have no ex ante demand for insurance has been severely attacked by Croley and Hanson.\textsuperscript{56} They argue that victims do have ex ante a demand for insurance for non-pecuniary losses, but that there are legal and economic barriers (mostly informational deficiencies) which explain that one can indeed observe that in practice coverage for non-pecuniary losses is not supplied via first-party insurance. Still the question remains whether this argument can be advanced in favour of a generalised compensation of all non-pecuniary losses via tort law or whether it is more an argument in favour of differentiated first-party insurances which should also explicitly cover non-pecuniary losses, which is already partially the case today (at least implicitly) in accident insurances. However, Croley and Hanson’s attack on the economic doctrine shows that also from a Law and Economic perspective the last word on the efficiency of the compensation for non-pecuniary losses has not been said yet. I hope that Helmut Koziol may find some inspiration in this economic expose for his own excellent work on the limits of tort law and I hope to be able to do some of the research which is still necessary in this field jointly with him in the near future.

\textbf{§ 9 List of references}


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