Workers' compensation in Canada, and Colombia:
A comparative analysis of non-pecuniary damages

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1. Contents

2. Abstract

Workers face occupational risks leading to work-related accidents or illnesses, impacting both physical and psychological well-being. In Canada, a no-fault compensation scheme is utilized, providing benefits without litigation processes. While the Canadian system was designed to ensure broader coverage, it fails to adequately compensate non-pecuniary losses. In Colombia, the no-fault scheme within the Labour Risk System offers assistance through public and private insurers. However, seeking full compensation involves proving employer liability, termed the fault scheme, in court incurring costs and uncertainties. This thesis evaluates Canada's no-fault system, focusing on the Ontario model, and Colombia's dual system, focusing on non-pecuniary damages. It explores Colombia's potential transition to include them in the no-fault system, proposing benefits within the Labour Risk System for a more efficient workers' compensation framework.

3. Resumé

Les travailleurs sont confrontés à des risques professionnels qui se traduisent par des accidents ou des maladies liés au travail et qui ont un impact sur leur bien-être physique et psychologique. Au Canada, un système d'indemnisation sans égard à la faute est utilisé, fournissant des prestations sans procédure judiciaire. Bien que le système canadien ait été conçu pour assurer une couverture plus large, il ne parvient pas à indemniser de manière adéquate les pertes non pécuniaires. En Colombie, le système d'indemnisation sans faute du Labour Risk System offre une assistance par le biais d'assureurs publics et privés. Toutefois, pour obtenir une indemnisation complète, il faut prouver la responsabilité de l'employeur, appelée régime de faute, devant les tribunaux, ce qui entraîne des coûts et des incertitudes. Cette thèse évalue le système sans faute du Canada, en se concentrant sur le modèle de l'Ontario, et le double système de la Colombie, en se concentrant sur les dommages non pécuniaires. Elle explore la transition potentielle de la Colombie pour les inclure dans le système sans faute, en proposant des avantages au sein du système de risque du travail pour un cadre d'indemnisation des travailleurs plus efficace.

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5. Introduction

In the domain of workers' rights and compensation for work-related accidents and diseases, Canada and Colombia stand as distinctive examples, each offering unique approaches to addressing the needs of injured workers. As a labour lawyer, I have had the privilege of navigating the intricacies of these systems, particularly concerning claims for non-pecuniary damages. The differences in the legal frameworks and processes prevalent in these jurisdictions have underscored the complexities and challenges faced by injured workers seeking redress.

Concerning claims for non-pecuniary damages, I have been struck by the prolonged judicial processes and high costs of litigation prevalent in the Colombian legal system. These challenges, coupled with the emotional distress experienced by claimants present a troubling picture. This unwarranted delay not only highlights the system's challenges but also leads to the re-victimization of workers and their families, ultimately undermining the pursuit of justice. Motivated by this troubling scenario, I embarked on a quest to explore alternative solutions.

My research unveiled the longstanding popularity of workers' compensation models in Canada, with a particular focus on the province of Ontario,[1] where the historical trade-off ensures workers receive comprehensive compensation in exchange for relinquishing the right to sue their employers.[2] While economic losses, medical expenses, and rehabilitation are commonly addressed aspects within these systems[3], the realm of non-pecuniary damages, including pain, suffering, and the profound impact on one's quality of life, introduces a complex dimension to the debate.[4]

[1] The choice to concentrate on Ontario is justified by its historical prominence and the extensive popularity of its workers' compensation system within Canada. Recognized for its large and popular framework, Ontario's non-fault system provides a representative case study for a comprehensive examination of workers' compensation models.

[2] Paul C Weiler, *Reshaping Workers' Compensation for Ontario* (Ontario: Ministry of Labour, 1980) at 13.

[3] Barry Gerhart & Sara Rynes, *Compensation: Theory, evidence, and strategic implications* (Sage, 2003) at 82.

[4] Dianne Pothier, "Workers' Compensation: The Historical Compromise Revisted" (1982) 7:2 Dal LJ 309 at 11.

Motivated by the Canadian experience, the objective of this thesis is to conduct a detailed analysis of both the Canadian and Colombian compensation schemes for workers injured in work-related events, placing specific emphasis on the treatment of non-pecuniary damages. Within this scope, a potential transition for non-pecuniary damages from the current employer liability model to a no-fault system will be explored in the Colombian case. This transition involves the creation of benefits designed to compensate for intangible losses, aiming to enhance the overall efficacy and fairness of the compensation process.

Building upon the acknowledgment of workers' compensation's crucial significance, the focus now shifts to the choice of comparative jurisdictions: Canada and Colombia. This selection holds intrinsic value, with Ontario representing the common law tradition[5] through its non-fault workers' compensation system. In contrast, Colombia's coexistence of fault and non-fault systems exemplifies the complexities within a civil law framework.[6] This strategic comparative approach aims to delve into the main features of each system, with a specific emphasis on their handling of non-pecuniary damages.

As we embark on this comparative analysis, the overarching objective is to contribute meaningful insights to the ongoing discussion on workers' compensation. By evaluating the treatment of non-pecuniary damages in Canada and Colombia, we aim to shed light on potential pathways for reform, addressing the holistic needs of injured workers and their families. The exploration of these diverse systems will not only foster a deeper appreciation for the intricacies of workers' compensation but also lay the foundation for a more equitable and responsive framework tailored to the unique legal and cultural contexts of each jurisdiction.

When workers experience an accident or work-related illness, they are entitled to seek compensation. In tort law, the objective of compensation is to restore the injured party to their pre-accident condition, making them whole again.[7] However, concerning workers and work-related

[5] Weiler, *supra* note 2 at 79.

[6] Alfredo Puyana-Silva, *El sistema general de riesgos laborales en Colombia* (Bogota: Universidad Externado de Colombia, 2020) at 16.

[7] Daniel W Shuman, "The psychology of compensation in tort law" (1994) 43:1 U Kan Rev 39 at 45.

incidents, the area we are approaching is more delicate, it is related to social protection. Workers are subjects of special protection under both Canadian[8] and Colombian[9] laws. This distinction results in work accident compensation having unique characteristics. Beyond merely providing financial compensation for the worker's losses, the aim is to offer effective support for a swift return to work, if possible.[10] In cases where a prompt return is not possible, the goal shifts to providing comprehensive redress and support for the worker and their beneficiaries.

Drawing inspiration from the Canadian experience, where similar benefits have been successfully integrated into the compensation system, there arises a pressing need to address key concerns regarding accessing justice within Colombia's workers' compensation framework. The policy debate revolves around the maintenance of the solid historic trade-off between comprehensive compensation and the relinquishment of the right to sue employers. While the existing model in Colombia, exemplified by the coexistence of fault and non-fault systems, offers certain advantages, it also presents notable shortcomings, particularly concerning the treatment of non-pecuniary damages.

In this context, the proposal to incorporate non-pecuniary damage benefits into the Colombian General Labour Risks System (SGRL) represents a significant departure from traditional approaches. By offering an effective, rapid, and less expensive solution to claims for non-pecuniary damages resulting from work-related accidents and diseases, this initiative seeks to enhance accessibility, expedite dispute-resolution, reduce litigation costs, and alleviate judicial congestion. Moreover, by learning from the Canadian experience and adapting international best practices to suit Colombia's unique needs and circumstances, policymakers can built a path for a more equitable, efficient, and responsive worker compensation framework.

As we delve deeper into this policy debate, it becomes increasingly evident that meaningful reforms are essential to address the systemic challenges and ensure comprehensive access to justice for injured workers and their families. Through collaborative efforts and evidence-based

[8] See, *e.g., Employment Standards Act,* 2000 SO 2000, c 41.

[9] *Substantive Labour Code (Colombia)*.

[10] Weiler, *supra* note 2 at 25.

policymaking, Colombia can chart a course toward a more equitable and effective labor compensation framework that upholds the rights and dignity of all stakeholders involved.

In this thesis, we will first examine the Canadian workers' compensation system, specifically as established in the province of Ontario. Commencing with a historical background, we will highlight the key principles that have supported the system since its inception in 1913. Our exploration will then turn to a focused review of the non-economic loss benefits regulated in Ontario's Workers Safety and Insurance Act (1997)[11], emphasizing the historical catalysts behind this transformative change.

The discussion then shifts to Colombia's dual-model response to work-related accidents and illnesses, covering the General Labour Risk System[12] and the employer's fault model. The subsequent chapter proposes transitioning from the fault system to the non-fault system in Colombia, with respect to non-pecuniary damages. It advocates for the inclusion of non-pecuniary losses under the no-fault system, aiming for a more efficient solution while addressing challenges and promoting workplace safety.

The policy debate surrounding the incorporation of non-pecuniary damage benefits into Colombia's labour compensation framework signifies a paradigm shift towards a more equitable and efficient system. Taking inspiration from the Canadian experience and international best practices, this proposal seeks to address systemic shortcomings and promote fairness for all stakeholders involved.

[11] *Workplace Safety and Insurance Act*, SO 1997, c 16, Sched. A.

[12] Law 1562 of 2012 (Colombia).

6. Theoretical Framework

Within the complex subject of workers' compensation systems, a concrete theoretical framework acts as the intellectual foundation on which this research is constructed. This framework provides a conceptual lens through which we delve into the complexities of non-pecuniary damages and the broader dynamics of workers' compensation in Canada and Colombia.

6.1. Workers' compensation laws and employers' liability laws

The workers' compensation schemes work as labour risk insurance[13] offering financial and medical assistance to workers, or their beneficiaries affected by a work-related accident or illness.[14] Its purpose is to shift the financial burden of these injuries, utilizing insurance companies as the intermediary.[15]

They have emerged as a response to the inefficient and unsatisfactory employers' liability laws[16] that were plagued by high costs of litigation, uncertainty in the resolution of cases and the limited reparation of injured workers.[17] Some scholars trace its origins to Bertha von Krupp and the Prussian Chancellor Otto von Bismarck.[18] The first models of workers' compensation were implemented in Germany and Great Britain. The foundations of workers' compensation laws were a product of socio-political thought in the 19th century.[19]

Workers' compensation law differs fundamentally from tort liability concepts.[20] While tort liability

[13] Weiler, *supra* note 2 at 14.

[14] *Ibid* at 18.

[15] Paul Raymond Gurtler, "The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation" (1988) 9:2 Hamline J Pub L & Pol'y 285 at 285.

[16] Weiler, *supra* note 2 at 16.

[17] Gurtler, *supra* note 15 at 288.

[18] *Ibid*.

[19] Terence G Ison, "A Historical Perpective on Contemporary Challenges in Workers' Compensation" (1996) 34:4 Osgoode Hall LJ 807.

[20] Weiler, *supra* note 2 at 16.

relies mainly on fault, workers' compensation centres on establishing a connection between the employee and the injury. [21] Tort principles orbit around individual rights and rectifying personal wrongs, whereas workers' compensation is concentrated on collective social involvement and protection.[22]

The historical evolution of social welfare programs illustrates dynamic trends over time, and workers' compensation schemes have also changed over time.[23] The resilience of compensation acts, coupled with their adaptability to societal and technological changes, marks them as significant successes in the case law. While every legal system implementing these laws experiences reforms, the underlying principle remains consistent: a progressive society efficiently providing financial and medical benefits to injured workers.[24] However, it's essential to note that while these schemes cover various aspects, the complexities of ensuring adequate compensation and addressing the diverse needs of injured workers persist.

The Canadian no-fault system represents a historical trade-off wherein workers gain access to compensation without the burden of proving employer's liability for work-related injuries, in exchange for relinquishing their right to sue. As we explore this system further, it becomes evident that it has encountered numerous challenges that call into question the importance of preserving the right to sue. Despite these challenges, the Canadian model has consistently advocated the historical trade-off over time. Two notable cases that exemplify the complexities of this issue are

[21] Ison, *supra* note 19 at 812.

[22] Edward D Berkowitz & Monroe Berkowitz, "Challenges to workers' compensation: An historical analysis" (1985) 6:1 Work Compens Benefits Adequacy Equity Effic 158–179 at 178.

[23] Weiler, *supra* note 2 at 92.

[24] Gurtler, *supra* note 15 at 296.

those adjudicated by the Newfoundland Court of Appeal[25] and the Supreme Court[26] in a Quebec provincial case.[27]

In both cases, the courts grappled with the fundamental question of whether the historical trade-off embodied in the Canadian no-fault compensation system, which provides workers with assured benefits without the need to prove employer liability in exchange for abandoning their right to sue, remains valid and justifiable in contemporary legal and social contexts.

Given the efficiency and advantages of workers' compensation systems, this thesis argues that Colombia could shift towards a model that follows similar principles. Although concerns about potential undercompensation persist, as seen in the Canadian context,[28] workers' compensation systems provide an efficient and prompt response to injured workers and their families than solely depending on legal claims.[29] By embracing a workers' compensation framework, Colombia can guarantee that injured workers receive essential financial and medical aid while advancing social justice and collective welfare, especially regarding claims for non-pecuniary damages.

Analyzing Colombia's conditions compared to those of countries with established workers' compensation systems is essential. Although transferring legal concepts can pose challenges, workers' compensation frameworks generally provide a more effective response to injured workers than relying solely on legal claims. Adopting such a framework could improve support for injured workers and strengthen Colombia's social protection system.

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[25] *Reference re: Workers' Compensation Act,* 1983 (Nfld), ss 32, 34, 1987 CanLII 118 (NL CA), <canlii.ca/t/1nplb>.[*Reference re: Workers' Compensation Act*]

[26] *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc*., 1996 CanLII 208 (SCC), [1996] 2 SCR 345, <canlii.ca/t/1fr87>. [*Béliveau St-Jacques*]

[27] Ian B McKenna, "Workers' Compensation: The Historic Compromise Compromised" (2000) 38:2 Alta L Rev 578 at 579.

[28] Richard A Epstein, "The historical origins and economic structure of workers' compensation law" (1981) 16:4 Ga L Rev 775 at 778.

[29] Jean C. Love, "Actions for Nonphysical Harm: The Relationship between the Tort Systems and No-Fault Compensation (With an Emphasis on Workers' Compensation)" (1985) 73:3 Calif L Rev 857 at 858.

6.2. Work-related non-pecuniary damage

Arising from personal injury, the literature distinguishes between pecuniary and non-pecuniary damages[30]. Pecuniary damages refer to those with a clear economic value.[31] Non-pecuniary damages are those that cannot be measured in money, such as pain and suffering, moral damage, and loss of enjoyment of life, among others.[32] The compensation offered for the occurrence of non-pecuniary damages does not seek to place the person in the state prior to the accident or illness; on the contrary, its purpose is to alleviate and accompany the beneficiaries during the process of pain and suffering.[33]

This thesis aims to establish a comprehensive understanding of non-pecuniary damages under the Colombian Labour Risk System. While the classification of non-pecuniary damages can be extensive under tort law, our research aims to provide an integrated definition of it. Consequently, each time the term "non-pecuniary damages" is used, it encompasses eleven different categories. In some instances, specific types of non-pecuniary damages may be detailed as necessary. Following the categorization by Professor Berryman[34], the term includes the following: (1) Pain and suffering, (2) loss of amenities, (3) loss of expectation of life, (4) pure psychiatric losses, (5) physical inconvenience and discomfort, (6) mental and emotional distress, (7) loss of enjoyment including feelings of disappointment, (8) moral damages, (9) harms associated with assaults to dignity, (10) loss of reputation, (11) loss of life in relationship[35], this last one is in addition to the original list.

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[30] David Yates, "Damages for Non-Pecuniary Loss" (1973) 36:5 Mod Law Rev 535–541 at 535.

[31] Louis T. Visscher, *Tort Law and Economics* (Northampton: Edward Elgar, 2009) at 158.

[32] Luis D Torres & Aditya Jain, "Employer's civil liability for work-related accidents: A comparison of non-economic loss in Chile and England" (2017) 94:1 Saf Sci 197–207 at 198.

[33] Juan Carlos Henao, *El daño. Análisis comparativo de la responsabilidad extracontractual del Estado en Derecho colombiano y francés* (Bogota: Universidad Externado de Colombia, 2007) at 45.

[34] Jeff Berryman, "Non-Pecuniary Damages-In Search of a Purpose" (2021), SSRN online: <ssrn.com/abstract=4023466> at 3.

[35] This last category of non-pecuniary damages is usually included in the Colombian classification of these types of damages.

6.3. The lack of protection for non-pecuniary loss in Colombia

Colombia's Labour Risk System currently provides social benefits to workers affected by occupational accidents or work-related diseases. The benefits include welfare benefits such as medical treatment and rehabilitation, and economic benefits such as financial allowance for temporary incapacity, invalidity pension and others.[36] Judicial pronouncements assert that these benefits aim to support workers and their beneficiaries in managing the aftermath of the incident rather than serving as compensation for the incurred damage.[37] This thesis contends that a modification is necessary. Failing to acknowledge the compensatory nature of these benefits can result in a perplexing and inefficient system, ultimately leading to inadequate protection. This oversight might result in the recognition of dual benefits addressing the same harm, or the existing benefits may fall short of fully compensating for the harm caused.[38]

To prevent such complications and consider the true compensatory nature of the benefits within the labour risk system, this thesis proposes the inclusion of a specific benefit for non-pecuniary damages. This adjustment would not only provide support and companionship to the affected workers and their beneficiaries in their distress but also genuinely compensate for the harm suffered.

This thesis aims to include benefits for non-pecuniary damages under workers' compensation law in Colombia. Therefore, claims for non-pecuniary losses would transition from the fault scheme to the no-fault scheme. Recognizing the impact of work-related accidents or illnesses on individuals' lives beyond the economic realm, the thesis argues that compensating for non-pecuniary damages is crucial for a universal and just reparation. By integrating such compensation within the Colombian workers' compensation framework, the system can better provide a more compassionate and effective support structure. This expansion aligns with the evolving societal

[36] Puyana-Silva, *supra* note 6 at 62.

[37] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 24 July 2019, *Adriana Mendieta v Eternit Colombiana S.A.,* No. 77082, SL2845-2019 (Colombia).

[38] Henao, *supra* note 33 at 45.

understanding of the multifaceted nature of harm resulting from workplace incidents, aiming for a more equitable and inclusive compensation model.

7. Canada: Ontario's Workers Compensation System

In the province of Ontario, the workers' compensation system provides a swift redressal mechanism for those affected by work-related accidents.[39] This system encompasses a group of benefits designed to compensate the complex consequences of a workplace accident. For instance, the Workplace Safety and Insurance Act, 1997 (WSIA) contains loss of earnings benefits, non-economic loss benefits, health care provisions, and return-to-work support, among others.

An extraordinary feature of this system lies in its persistent commitment to comprehensive redress. The integration of compensation for mental stress injuries stemming from traumatic or chronic circumstances as well as benefits for non-economic losses[40] showcases the system's ongoing capacity to adapt for thorough full compensation. The systematic reassessment of the system has proven crucial for its sustained effectiveness.[41] This continuous adaptation has enabled Canada to uphold a longstanding tradition of the historical trade-off, allowing workers to access the no-fault compensation scheme in exchange for waiving their right to sue their employer.

This legal precedent underscores the resilience of the Canadian no-fault compensation system and its ability to withstand legal scrutiny while maintaining its core principles. By affirming the constitutionality of the Workers' Compensation Act and its no-fault compensation scheme, the Newfoundland Court of Appeal set a precedent that echoes across the country, reinforcing the foundation of workers' rights and social justice. This decision not only legitimizes the historical trade-off but also reaffirms its significance in providing efficient and assured benefits to injured workers and their dependents.

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[39] Weiler, *supra* note 2 at 133.

[40] Dirk Derstine & Shamash Nathu, "Workers' Compensation in Ontario: A Decade of Reform" (1990) 48:1 UT Fac L Rev 22 at 30.

[41] Robert Storey, "Social Assistance or a Worker's Right: Workmen's Compensation and the Struggle of Injured Workers in Ontario, 1970–1985" (2006) 78:1 Stud Polit Econ 67–91 at 93.

The Newfoundland Court of Appeal,[42] in its decision in a case where the plaintiffs challenged the constitutionality of the Workers' Compensation Act, affirmed the constitutionality of the Workers' Compensation Act and its no-fault compensation scheme. It recognized the Act as a superior social and equitable philosophy relative to the previous tort law system, concluding that it does not infringe on equality rights under the Charter of Rights.

The Court of Appeal examined whether eliminating the right to pursue legal action led to inequality under section 15(1) of the Charter. After analyzing the plaintiff's arguments and other case law under similar circumstances, it concluded that the primary disadvantage for injured workers and their families was the potential for reduced compensation compared to court proceedings. Nevertheless, the court deemed this limitation reasonable within the framework of upholding the integrity of the Newfoundland Act. It asserted that while the right to sue was substituted with the right to compensation, this transition was fair and just, without contravening section 15 of the Charter (Equality Rights). Furthermore, the court stressed that even if a compensation scheme is not perfect, as long as it maintains overall fairness and reasonableness, it will not be deemed unconstitutional under the Charter.This decision emphasized the importance of maintaining the historical trade-off as a means of providing efficient and assured benefits to injured workers and their dependents.

Simlarly, the Supreme Court, in a case from Quebec,[43] delved into similar issues within the context of the Quebec Charter of Human Rights and Freedoms. The court, in a case that involved harassment at work, examined whether the Charter's provisions allowing for compensation for unlawful interference with protected rights, coupled with the statutory exclusion of civil liability actions for work-related injuries under the province's no-fault compensation scheme, violated the Charter's guarantees. Ultimately, the court upheld the exclusion of civil liability actions, stressing the legislative intent behind the no-fault compensation scheme and its importance in providing comprehensive and efficient benefits to injured workers.

[42] *Reference re: Workers' Compensation Act*, *supra* note 25.

[43] *Béliveau St-Jacques*, *supra* note 26.

These cases highlight the ongoing tension between the principles of no-fault compensation and the right to sue for work-related injuries. While challenges have arisen questioning the necessity of maintaining the historical trade-off, both courts ultimately affirmed the validity of the no-fault compensation system, emphasizing its role in providing equitable and efficient redress for injured workers while balancing the interests of employers and the broader society.

Furthermore, the systematic reassessment of the workers' compensation system has led to the inclusion of different types of benefits such as non-economic benefits, marking a significant step towards comprehensive redress for injured workers. This ongoing revision demonstrates Canada's commitment to adaptability and responsiveness in addressing the evolving needs of its workforce. Despite the challenges inherent in fully compensating for non-economic losses, the inclusion of such benefits underscores the system's commitment to holistic support and reflects a broader understanding of the complexities of injury and recovery.

The inclusion of benefits for non-economic losses serves as a tangible outcome of this ongoing revision. As explored in detail later in this section, these benefits reflect a deliberate effort to safeguard dimensions of an individual's well-being beyond physical injury. While challenges may exist in fully compensating for non-economic losses through these benefits, they undeniably signify the evolving nature of the system.

This chapter discusses how the worker's compensation system in Canada, with special focus on the province of Ontario, addresses claims by injured workers in a work-related event. It pays particular attention to cases where non-economic loss benefits are granted. The chapter then discusses the options available to workers who want to seek compensation outside of the WSIA system for pain and suffering damages. Finally, it considers some important challenges of the current system.

7.1. The Workplace Safety and Insurance Act in Ontario

Canada's adoption of the worker's compensation system in 1913, marked a turning point in ensuring adequate support for employees injured in work-related accidents.[44] The key principle of the system is its no-fault nature, wherein the responsibility of proving employer fault is eliminated, allowing injured workers to receive compensation without litigation.[45] Referred to globally as a no-fault system[46], it relieves workers from the burden of proving employer fault in court while ensuring prompt and equitable compensation. [47]

Under the WSIA a work-related accident includes disablement arising out of and in the course of employment.[48] In that case, the worker is entitled to benefits under the insurance plan[49]. In determining whether a personal injury by accident occurred during employment, three key factors come into play: place, time, and activity[50]. For employees with a fixed workplace, injuries on-site are typically work-related, while those off-site usually are not. When a worker's role involves being away from the workplace for tasks assigned by the employer, injuries in relevant locations can count.

The "activity" factor centers on whether the injury happened while performing work duties or related tasks. Personal activities might still count if they are linked. Assessing this, factors like activity duration, nature, and deviation from regular work are considered. The nature of the job, work environment, and workplace norms also play a significant role.[51] The weight of these factors varies by case. Usually, the focus is on the worker's activity when the injury occurred, especially

[44] Weiler, *supra* note 2 at 13.

[45] Ison, *supra* note 19 at 808.

[46] *Ibid* at 809.

[47] Weiler, *supra* note 2 at 14.

[48] *Workplace Safety and Insurance Act*, SO 1997, c. 16, Sched. A. s 13(1)

[49] *Ibid.*

[50] "Accident in the Course of Employment | WSIB", online: <www.wsib.ca/en/operational-policy-manual/accident-course-employment>.

[51] *Ibid.*

for those with fixed work hours and places. [52] When an employee is hurt on the workplace premises during work hours, it is often seen as work-related. However, if the injury happened during personal activity, the link to work might be questioned. In other situations, where hours and place are not fixed, the worker's activity takes center stage, and a thorough review of circumstances decides if it's work-related.

The system, adopted in Canada on the recommendation of Sir William Meredith,[53] prioritizes prompt compensation for workers rather than punitive measures against employers. [54] It embodies a historic trade-off[55] where employees gave up the right to sue their employers in court and renounced the right to collect full damages for all losses they had received. In exchange, employees would receive protection against income losses related to personal injuries caused due to work accidents or illnesses, independently of fault.[56]. The system also allows access to health care benefits and medical and rehabilitation costs.

According to the Meredith Report, the system is based on five principles:[57]

1. No fault compensation. This means that in order to have access to compensation, the worker is exempted from the burden of proving fault in the occurrence of the work accident.
2. Collective liability. In which all employers contribute and are responsible for the payment of the economic compensation to which the worker is entitled.
3. Security of payment. Which ensures that all workers who demonstrate the requirements to access the payment are entitled to receive the benefits of the System.
4. Exclusive jurisdiction. The procedure for claiming workers' compensation benefits is assigned exclusively to an administrative entity independent of the judicial apparatus.

[52] WSIB, *supra* note 50.

[53] Weiler, *supra* note 2 at 14.

[54] Ison, *supra* note 19 at 819.

[55] Weiler, *supra* note 2 at 14.

[56] PH Winfield & JA Jolowicz, *Winfield and Jolowicz on Tort*, (United Kingdom: Sweet & Maxwell, 1979) at 168.

[57] David Scott, *The Workers Compensation Board of Manitoba: environment, structure, and process* (Masters Thesis, University of Manitoba, 1993) at 29.

5. Administration by independent boards. The System is administered by Boards, which are entities made up of representatives of workers and employers and, in any case, independent of the government.

Since its implementation in 1913, the workers' compensation system has been subject to numerous favourable comments but also criticisms[58], rendering it a dynamic and continually evolving model.

According to Ison, the system has significantly evolved since its origins. Initially, the system only granted economic benefits to workers from a prescribed list of industries.[59] It was profoundly male-oriented, where women were more eagerly recognized as widows than as workers.[60] However, financial benefits were not enough. Workers also needed medical care and health care to ensure their recovery. Because of these needs, in 1984 the workers' compensation system included medical care services within the insurance.[61] Prevention and rehabilitation started to be the key points of the system. These changes reflect the growing consensus that all workers have the right to safe and dignified working conditions.[62]

Regarding industrial diseases, there was a discussion related to their inclusion under the insurance. Unlike work-related accidents, industrial diseases are caused by prolonged exposure to a risk factor.[63] For example, respiratory diseases, ergonomic diseases, hearing loss, among others. In discussing implementing a workers' compensation scheme, some associations of employers argued

[58] Authors such as Katherine Lippel and JM Eakin have pointed that the system has many areas of improvement in order to offer fair compensation. Specifically, they identify cross cutting issues that shall be considered such as: "(1) non-adversarial access to adequate benefits and health care (2) in a way that ensures the protection of the dignity of claimants by pre venting stigma and ensuring balance, (3) appropriate use of scientific evidence in the determination of compensability, and (4) the application of appropriate measures for promoting return to work." Katherine Lippel, "Preserving workers' dignity in workers' compensation systems: an international perspective" (2012) 55:6 Am J Ind Med 519–536 at 2.

[59] Ison, *supra* note 19 at 810.

[60] *Ibid* at 811.

[61] *Workers' Compensation Amendment Act,* 1984 (No. 2), SO 1984 c 58.

[62] Gregory P Guyton, "A Brief History of Workers' Compensation" (1999) 19:106 Iowa Orthop J 106–110 at 107.

[63] Weiler, *supra* note 2 at 138.

that it should only apply to accidents. However, in his report, Sir Meredith proposed to equate industrial diseases to work-related accidents so that workers suffering from them could access the same benefits as if they had suffered a work-related accident.[64]

The initial version of the workers' compensation scheme aimed to address specific needs, specifically personal injuries resulting from work-related accidents. However, the definition was limited to physical harm.[65] The insurance only covered injuries that were visible, tangible, and directly resulted from a work-related accident or severe and prolonged exposure to risks that seriously affected workers' health. Regrettably, mental illnesses, psychological trauma caused by sudden exposure to traumatic events, or chronic stress and harassment at work, as well as occupational diseases resulting from continuous exposure to mild or moderate risk factors, were excluded from the system.[66] Even though the Meredith report acknowledged the importance of compensating for pain and suffering[67], it did not propose a way to include these aspects in the benefits claim. As a result, workers who experienced any of these damages as a consequence of an occupational accident were left, at the beginning, without compensation for their suffering.

7.2. Non-economic loss benefits

The no-fault system has conventionally been promoted as a framework providing extensive compensation for injuries arising from employment. Some proponents have asserted that this model has encompassed compensation pain and suffering since its beginning.[68] Nevertheless, preceding the amendments introduced by Bill 162, certain scholars underscored the shortcomings of the system.[69] They emphasized that despite the inclusion of these considerations in debates, the benefits available did not truly constitute sufficient compensation for non-economic losses.

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[64] Meredith Report at 16.

[65] Prue E Vines & Arno Akkermans, "An overview of some unexpected consequences of compensation law" (2020) Law Oxf Hart Publ SSRN online: < ssrn.com/abstract=3687412> at 3.

[66] Weiler, *supra* note 2 at 36.

[67] Meredith Report, *supra* note 64 at 17.

[68] Weiler, *supra* note 2 at 14.

[69] Derstine & Nathu, *supra* note 40 at 26.

In 1989, a decisive reform took place within Ontario's workers' compensation system. Bill 162 introduced a ground-breaking dual award system, encompassing compensation for both economic and non-economic losses.[70] This significant change also marked a shift towards prioritizing workers' rehabilitation. A momentous event in the history of the system, the Legislative Assembly of Ontario's records on June 15, 1989, captured Mr. McLean's statement, highlighting the significance and implications of this progressive reform.

> I welcome this opportunity to say a few words on the resolution from the member for Sudbury East (Miss Martel) calling on the Ontario government to withdraw Bill 162, An Act to amend the Workers' Compensation Act, and to begin the consultation process aimed at the progressive reform of the workers' compensation system in this province.
>
> The key points of Bill 162 include replacing the current so-called meat chart system with a new dual system which would compensate injured workers on the basis of projected income of future earnings or income and non-economic losses, such as the effect upon lifestyle associated with permanent injuries; a mandatory reinstatement policy for many employers under certain conditions, and an increase in the compensation ceiling which would see the maximum gross earnings on which benefits are calculated and assessments are determined increase from 140 per cent to 175 per cent of the average industrial wage for Ontario or $35,100 per annum to $44,000 per annum.
>
> Workers' rehabilitation policy would require the WCB to contact the injured workers within 45 days of their injuries and provide prompt rehabilitation counselling where necessary. Injured workers who have not returned to employment within six months of an injury would be entitled to a formal evaluation of their vocational rehabilitation needs.[71]

[70] *Ibid* at 30.

[71] "Hansard Transcript 1989-Jun-15 | Legislative Assembly of Ontario", (15 June 1989), online: <www.ola.org/en/legislative-business/house-documents/parliament-34/session-2/1989-06-15/hansard>.

This dual system includes in its second part benefits for non-economic losses. This acknowledgment highlights a key feature of the system: recognizing non-economic losses arising from work-related accidents and illnesses. Also, the 1989 reform expanded the coverage of the insurance system and included work-related mental injuries as events for which a worker would be entitled to the payment of economic compensation.

During the legislative discussion on this matter, they deliberated on the process for awarding non-economic loss benefits. It was decided that eligibility would be linked to a medical evaluation conducted by impartial professionals:

> The awarding of an amount for non-economic loss is fundamentally a medical rather than a legal or an administrative decision, and while the government has every confidence in the professionalism of medical practitioners in the employ of the WCB, others have a different view. Nevertheless, it is important that the assessment not only be an impartial professional analysis, but also be seen to be so. Therefore, the government has proposed an amendment to the bill which will enable the worker to select a physician from a roster of independent practitioners.[72]

The established, non-economic loss benefit[73] provides compensation to workers based on the degree of their permanent disability resulting from a work-related injury or disease.[74] This point in time is referred to as the maximum medical recovery date, as stated on the Workers Safety and Insurance Board (WSIB) website.[75]

The calculation of the benefit is decided by multiplying the whole person impairment percentage by a base dollar value. The base dollar amount is set out in the WSIA. To calculate a non-economic loss benefit, the WSIB uses the base amount for the year the worker reached maximum medical

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[72] *Ibid.*

[73] *Workplace Safety and Insurance Act, supra* note 48. s 26(1).

[74] Canada, Disability Credit, "WSIB Claims and Appeals: What You Need to Know", online: *Disability Credit Canada | Disability Tax Credit & CPP Disability Services* <disabilitycreditcanada.com/wsib-claims-and-appeals/>

[75] "Benefits for non-economic loss | WSIB", online: <www.wsib.ca/en/benefits-non-economic-loss>.

recovery following the evaluation criteria outlined in the American Medical Association Guides to the Evaluation of Permanent Impairment. [76] This base amount is then adjusted according to the worker's age at the time of their injury. [77] There is an age adjustment amount that is added for every year the worker was under the age of 45 at the time of the injury, or subtracted for every year the worker was over 45, up to a maximum of 20 years.[78] In simpler words, the benefit is calculated based on the overall extent of the worker's injury, multiplied by the whole-person impairment percentage. The higher the percentage, the greater the benefit amount. Additionally, there is a final adjustment based on the worker's age. According to Derstine & Nathu, the justification of this is "based on the theory that the younger worker has lost more and will have longer to live with the non-economic disruptions caused by the accident."[79]

Despite the fact that claims under tort law may offer higher compensation for non-economic losses compared to what the no fault system provides[80], in Ontario, as well as in other Canadian jurisdictions, there remains a steadfast preference for the traditional trade-off over pursuing legal actions against employers. When evaluating the merits of this model, workers' compensation stands out as a more effective, prompt, and reliable option.[81]

The inclination toward the historical trade-off reflects a complex interplay of legal, economic, and societal factors. Examining the advantages of the current system emphasizes workers' compensation as a practical choice. Its efficiency is evident in providing swift relief to injured workers without the prolonged legal battles associated with civil court proceedings. Additionally, the system offers a level of certainty regarding benefits, contrasting with the unpredictability of

[76] This is called the "whole person impairment" which determines the degree to which the worker's body is impaired due to work-related impairment. For instance, consider a severe injury to the lower back resulting in a 50% impairment of the lumbar region, this 50% impairment of the lumbar region would equate to a 30% impairment of the lower body. The 30% impairment of the lower body, in turn, represents a 15% impairment of the entire spine. Finally, the 15% spine impairment corresponds to a 10% impairment of the whole body.

[77] WSIB, *supra* note 75.

[78] Legislative Assembly of Ontario, *supra* note 71.

[79] Derstine & Nathu, *supra* note 40 at 30.

[80] Weiler, *supra* note 2 at 36.

[81] Ison, *supra* note 18 at 588.

court-ordered compensation. Workers' compensation provides a structured and predetermined framework for assessing and awarding benefits.

However, as societal attitudes and legal perspectives evolve, ongoing discussions persist regarding the efficacy of the traditional trade-off. Some advocate for a reassessment of this historical approach, acknowledging potential limitations it may impose on workers seeking comprehensive redress for non-economic losses. They argue that "access to the courts appears to have an important role in checking, in some measure, the under-compensation of workplace injuries by the application of excessively rigorous tests of causation and by the blanket denial of claims in respect of specific types of injury such as mental stress and burnout."[82]

For instance, one aspect that deserves careful examination concerning non-economic loss benefits is their calculation method. At present, these benefits rely on a medical assessment that identifies either a physical or mental injury in the worker. However, there are situations where the existence of pain and suffering, along with other non-economic losses, may not be visibly connected to a discernible physical or mental injury. Instead, these elements are intrinsic to the emotional weight associated with various losses, like the passing of a loved one or the distress of enduring an illness. The ensuing discussion will delve into the challenges posed by non-economic loss benefits and their implications.

7.3. Some critics in relation to non-economic loss benefits

The non-economic loss benefits are intended to address the psychological and emotional impact of work injuries. However, some concerns are important to analyze, especially regarding its adequacy. The calculation method, which places significant importance on the permanent impairment assessment, overlooks social and familial elements and excludes close relatives from compensation. Additionally, the benefit lacks a requirement for demonstrating how the injury affects lifestyle, relying solely on a percentage of permanent impairment, and neglecting internal damages like emotional pain. This approach fails to encompass the comprehensive impact on the

[82] *Ibid.*

worker's well-being. In essence, non-economic loss benefits do not truly compensate for intangible losses, providing limited compensation based solely on physical impairment. This oversees the multifaceted nature of non-economic losses, including mental anguish and emotional distress, not adequately addressed by the current evaluation process. A more holistic approach is needed to better address workers' overall well-being.

Given that a work-related impairment is classified as permanent only when it persists beyond the point of maximum medical recovery (MMR), a notable gap emerges in the coverage for cases where an impairment remains without having yet attained MMR. For instance, a worker who suffers a back injury that does not fully heal may continue to experience pain and limitations but may not be considered to have a permanent impairment until they reach MMR. This situation raises a significant concern, particularly in scenarios where individuals experience ongoing impairments that may have a substantial impact on their well-being and functional abilities, despite not having reached the established MMR milestone.[83] This can leave workers in a limbo, without access to the benefits they need to recover and get back to work.

In brief, the evolution of non-economic loss benefits in Ontario reflects a progressive response to the complex challenges faced by workers. The transformative 1989 reform, marked by Bill 162, introduced an innovative dual award system, encompassing both economic and non-economic losses. This pivotal shift not only prioritized workers' rehabilitation but also recognized the significance of addressing psychological and emotional impacts. Despite these advancements, concerns persist regarding the adequacy of compensation.[84] A holistic reassessment is essential to ensure that the compensation system effectively considers the broader impact on workers' well-being, bridging the gap for cases that may not fit neatly into existing frameworks.

The ongoing dialogue on these matters is crucial for refining and enhancing the support provided to workers in navigating the challenges of work-related injuries. Building on these advancements

[83] Robert I Correales, "Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce" (2003) 81:2 Denv UL Rev 347 at 361.

[84] Lippel, *supra* note 58 at 4.

within the system, our focus will now shift to the handling of work-related mental illness, which originally was equivalent to a non-pecuniary loss[85], as an additional inclusion that exemplifies the ongoing effort towards achieving genuinely comprehensive compensation.

7.4. Mental stress injuries under workers´ compensation

Concerning mental stress injuries, the original version of the workers´ compensation system did not offer coverage for such harm. Traditional workers' compensation systems were designed to address physical injuries and immediate tangible harm caused by work-related accidents or incidents.[86] As a result, mental stress injuries, such as anxiety, depression, and other psychological conditions that can arise from workplace factors, were often overlooked, or inadequately addressed. Over time, there was a growing recognition of the need to evolve the workers' compensation system to encompass the complexities of mental health challenges in the workplace.[87]

The distinction between work-related mental stress injuries and non-pecuniary losses is crucial, as they represent distinct concepts with differing implications. In cases of mental stress injuries, a diagnosed psychological condition by a medical professional can result in an inability to work. Conversely, non-pecuniary losses, such as pain and suffering stemming from workplace incidents, are intangible; they lack a medical diagnosis and may include emotional distress caused by the death of a loved one due to work-related circumstances, which cannot be easily quantified. Therefore, while mental stress injuries focus on identifiable mental health impairments impeding work (which is still challenging to assess), non-pecuniary losses encompass a broader spectrum of intangible harms, highlighting the disparity between the two concepts. Despite their differences, both factors are essential considerations in assessing and addressing the impact of work-related injuries on individuals, aiming to provide appropriate support and compensation.

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[85] Peter L Schnall et al, "The Relationship Between 'Job Strain,' Workplace Diastolic Blood Pressure, and Left Ventricular Mass Index: Results of a Case-Control Study" (1990) 263:14 JAMA 1929–1935 at 672.

[86] Weiler, *supra* note 2 at 52.

[87] Lippel, *supra* note 58 at 4.

In 1997 the Ontario legislature amended the Act. Bill 99 repealed the Workers' Compensation Act, made substantial changes, and replaced it with a new name, the Workplace Safety and Insurance Act (WSIA) [88]. In relation to benefits for mental stress injuries, section 13(5) of the Act established that a worker is entitled to benefits for mental stress that is "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment [...]". When discussing work-related mental stress injuries there are two scenarios: workers who experience stress gradually over time and who become mentally ill due to that uncontrolled exposure, and workers who face sudden and intense mental stress resulting from traumatic events that are reasonably foreseeable in their work.[89]

The first group fits workers who experience chronic mental stress, a build-up of stress over an extended period due to a high-pressure work environment, constant exposure to demanding tasks, or ongoing interpersonal conflicts. In such cases, the stress gradually accumulates and may lead to mental health issues.[90] In the second group of workers, there are workers with acute mental stress attributed to foreseeable traumatic events (not unexpected). In this group are individuals whose occupation exposes them to events that are known to carry a significant risk of causing sudden and intense mental distress, such as firefighters, paramedics or other emergency responders or jobs where violence is part of it, this refers to traumatic mental stress.[91] This exposure to traumatic events, although foreseeable, can generate mental stress reactions.

Despite the above, the 1997 reform only covered situations related to mental stress injuries arising out of traumatic events. When mental distress does not stem from a single sudden event but rather from ongoing work-related factors, the workers were not entitled to compensation under the

[88] Edward M Hyland, "The International Labour Organization and the Worker's Compensation Reform Act: Conflict Between International Responsibility for Human Rights and Divided Jurisdiction" (1998) 13:1 JL & Soc Pol'y 188 at 193.

[89] Mary Grace Herring, Lynn Martin & Vicki L Kristman, "Brief Report: Characteristics and Needs of Persons Admitted to an Inpatient Psychiatric Hospital With Workers' Compensation Coverage" (2021) 12:1 Fpsyt 1-9 at 2.

[90] Katherine Lippel & Anette Sikka, "Access to workers' compensation benefits and other legal protections for work-related mental health problems: a Canadian overview" (2010) 101:1 Can J Public Health S16–S22 at 16.

[91] *Ibid*.

section. The reason behind this is that their mental stress does not meet the criteria of a sudden and unexpected traumatic event. This regulation left out insurance for many years for workers who were exposed to mild or moderate but constant stress situations and who developed mental illnesses as a consequence of this exposure. In other words, workers who faced a hostile work environment or harassment at work for a prolonged period and as a result, began to suffer from mental illnesses were not covered under this model of the system.

In 2014, the situation took an extraordinary turn. In a 2014 case[92], the Workplace Safety and Insurance Appeals Tribunal of Ontario (WSIAT) held that when a worker suffers a mental stress injury caused by constant exposure to an occupational stressor, he or she is entitled to insurance benefits. In this case, the claimant, who worked as a nurse at a hospital, sought compensation for mental stress. The stress stemmed from being harassed by a doctor between 1990 and 2002, and even after the worker stopped working in June 2002. The worker appealed a decision of the Board that denied entitlement to compensation for mental stress.

When studying the case, the Panel found that under the pre-1997 Act, the worker would have had the right to receive compensation for mental stress since, before the reform, the legislation would allow access to the benefit of the insurance benefit in that kind of event. However, under the legislation in force at the time, the worker did not meet the requirements for mental stress entitlement. The worker raised a challenge to relevant stress provisions of the WSIA based on the Charter of Rights. In considering her arguments, the Panel held that subsections 13(4) and (5) of the WSIA and the related Traumatic Mental Stress (TMS) policy were substantively discriminatory and perpetuated the historical disadvantage experienced by the worker, it was unconstitutional[93]. Therefore, the provisions infringed on the worker's right to equality as guaranteed by the section and were not applied to solve the case.[94]

As some commentators on the decision have noted, the WSIA provisions were significantly more generous in providing entitlement to benefits for physical injuries than for mental injuries. This

[92] *Decision No. 2157/09,* 2014 ONWSIAT 938 (CanLII).

[93] *Ibid* at 309.

[94] *Ibid* at 310.

difference was inequitable, discriminatory, and therefore unconstitutional.[95] In its analysis, the Panel found that while there is epidemiological evidence demonstrating that there is an association between job strain and mental disorders, there is no 'gold standard' for determining work-relatedness for the vast majority of physical injury claims[96]. However, this association has been relevant for understanding that the numbers of compensated "mental stress" claims compared to job-strain attributable depression cases suggest that there is substantial under-recognition and under-compensation of job strain-attributable depression.

The case had important consequences. It significantly expanded the scope of entitlement of mental stress under WSIA. Even though the WSIAT is not bound by legal precedent[97], the WSIAT followed this precedent in deciding other similar cases. The case also had an impact on employers, especially those with stressful workplaces. It was an urgent call for employers with stressful workplaces to take additional steps to prevent work-related mental stress injuries. This includes identifying the risk factors for stress and taking action to control and prevent mental stress injuries.[98]

It also had an effect in the legislature, as only three years after the decision, in May 2017, the Ontario Government passed Bill 127 (named the Stronger, Healthier Ontario Act) [99]. The reform amended the WSIA, affirming that workers experiencing chronic or traumatic mental stress that arises out of and in the course of the employment are entitled to benefits under the insurance plan.

[95] Gabrielle McHugh, "The Importance of Organizational Climate in Healthy Workplaces: Considerations for Disability Management" (2020) 15:1 Int J Disabil Manag e5 1-10 at 2.

[96] *Decision No. 2157/09, supra* note 92 at 218.

[97] *Workplace Safety and Insurance Act, supra* note 48., s 119(1)

[98] "Hicks Morley | WSIAT Finds Limitations on Mental Stress Unconstitutional", (15 May 2014), online: <hicksmorley.com/2014/05/15/wsiat-finds-limitations-on-mental-stress-unconstitutional/>.

[99] "Stronger, Healthier Ontario Act (Budget Measures), 2017", online: <www.ola.org/en/legislative-business/bills/parliament-41/session-2/bill-127>.

Ontario's Workers' Compensation System has gradually increased its coverage, especially concerning work-related mental stress, categorized as a personal injury. Since 2017, the insurance not only acknowledges benefits to workers who have sustained physical injuries but also extends coverage to those affected by mental injuries resulting from chronic or traumatic mental stress.[100] This constant reshaping of the system, not only with respect to mental stress injuries but also with respect to non-economic losses, is clear evidence of Canada's insistence on maintaining the historic trade-off, despite the complexities involved. This insistence on maintaining and rethinking the benefits of the system in exchange for not having the right to sue has made the system robust despite criticism.

The addition of benefits that address non-economic losses, along with the extension of coverage for work-related mental stress injuries, highlights the ongoing evolution of the system. Although significant progress has been made, the current system does not adequately compensate workers for the pain and suffering caused by work-related accidents. The system fails to acknowledge the internal pain and emotional distress that can result from these accidents, even when they have physical or mental consequences. Additionally, the system does not provide compensation for situations where a worker's dignity is affected.[101] For instance, situations can arise wherein a worker faces unwarranted humiliation or a diminished sense of self-worth due to the circumstances surrounding the accident.

This gap in the system emphasizes the need for further refinement to ensure comprehensive support and recognition of the diverse ways in which work-related accidents can profoundly affect a worker's overall well-being. A comprehensive reassessment is needed to ensure that workers are not only compensated for observable losses but also for the intricate emotional toll exacted by such accidents.

[100] Alan Hall, "Occupational stress injuries in two Atlantic provinces: a policy analysis" (2018) 44:4 Can Pub Pol'y 384–399 at 389.

[101] Lippel, *supra* note 58 at 534.

7.5. Pain and suffering claims for work-related accidents.

Pain, suffering, loss of enjoyment of life among other non-pecuniary damages are losses that have no equivalent in financial terms, where money cannot provide real restitution.[102] For some scholars, pain and suffering damages are included under the term "non-pecuniary loss", which describes intangible losses that a person suffers as a result of an injury, such as pain, suffering, emotional distress, and loss of enjoyment of life.[103] They are damages that affect the dignity and autonomy of the person. The Black's Law Dictionary defines pain and suffering damages as the inability to lead a normal life due to mental and physical suffering.[104] According to the Legal Information Institute of Cornell Law School, pain and suffering refers to the compensable non-economic damages arising from physical discomfort and emotional distress.[105] It encompasses the feelings of pain, discomfort, emotional distress, inconvenience, and trauma accompanying an injury.

In Ontario, the term "general damages" is occasionally employed to denote pain and suffering. [106] In assessing damages under the Human Rights Code, the Divisional Court of Ontario, a division of the Superior Court of Ontario, which is not a workers' compensation tribunal, has taken into account a number of principles set out in ADGA Group Consultants Inc. v. Lane (2008), in which the court held:

> This court has recognized that there is no ceiling on awards of general damages under the Code. Furthermore, Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the Code by effectively creating a 'licence fee' to discriminate.

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[102] Peter A Ubel & George Loewenstein, "Pain and suffering awards: they shouldn't be (just) about pain and suffering" (2008) 37:S2 J Leg Stud S195–S216 at 207.

[103] Berryman, *supra* note 34 at 3.

[104] Henry Campbell & Josepg R. Nolan, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence*, (United Stated: West Publishung Company, 1991) sub verbo "pain and suffering".

[105] "Pain and suffering", online: LII Leg Inf Inst <www.law.cornell.edu/wex/pain_and_suffering>.

[106] Bruce Dunlop, "The High Price of Sympathy: Damages for Personal Injuries" (1967) 17:1 UTLJ 51–65 at 52.

> Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.[107]

7.6. Differences from other types of damages

Compensation for pain and suffering is different from compensation for physical harm or mental harm for several reasons. While compensation for physical and mental injuries focuses on the specific harm caused, compensation for pain and suffering recognizes the broader impact on the individual's overall well-being, including the non-quantifiable aspects of their suffering. [108]

In comparison with mental stress injuries, pain and suffering damages are different due to their nature and scope.[109] Unlike mental stress injuries, pain and suffering damages are distinct as they encompass a broader spectrum of physical, emotional, and psychological impacts stemming from various incidents. While mental stress injuries necessitate a formal diagnosis[110], pain and suffering can manifest without the requirement of a medical assessment. This differentiation is rooted in the fact that pain and suffering are intrinsic to human experiences, encapsulating a wide range of effects that extend beyond specific medical diagnoses.

Firstly, as to the source of compensation, benefits for a work-related mental stress injury are part of the workers' compensation, regulated in Ontario by WSIA while pain and suffering damages

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[107] *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC).

[108] Yates, *supra* note 30 at 535.

[109] Noelia Bueno-Gómez, "Conceptualizing suffering and pain" (2017) 12:1 Philos Ethics Humanit Med 7 at 3.

[110] It's important to remember that as per section 12(4) of the WSIA, benefits are allocated to a worker solely for chronic or traumatic mental stress that arises out of and in the course of the worker's employment. This stipulation implies that if the mental stress does not fall within the category of chronic or traumatic mental stress, compensation would not be provided.

must be claimed under the rules and principles of tort law.[111] It's crucial to note that if a worker is covered by the workers' compensation scheme, they are precluded from suing in court for additional non-pecuniary losses.[112] Interestingly, even in cases where individuals are excluded from no-fault insurance coverage, scholars have pointed out the challenges of seeking compensation through common law action in the courts, highlighting the complexity of strictly adhering to the historical compromise.[113] Secondly, claims for pain and suffering under tort law impose the burden of proof on the employer's liability. Thirdly, WSIA benefits are intended to compensate mainly the loss of wages suffered on the occasion of the work accident, whereas tort law allows for a broader assessment of the damages suffered.

While civil action under tort law to claim compensation for pain and suffering involves a much more thorough individual assessment than a worker may have under workers' compensation, this alternative has enormous disadvantages. Under Ontario's legislation, there are several limitations to the right to sue for workers injured or ill at work: (i) exclusivity of remedies:[114] by accepting workers' compensation benefits, workers forfeit their right to sue their employer for damages related to their workplace injuries; (ii) statutory bars:[115] claims for damages are explicitly barred by law if covered by workers' compensation; (iii) uncertainty of outcomes: legal or common law actions can involve significant time, expenses, and emotional toll without guaranteeing a favourable result.[116] These limitations significantly restrict the ability of injured workers to seek redress through the civil court system.

While not all claims for benefits under the WSIA are approved, the uncertainty involved is significantly less compared to litigation, where workers bear the burden of proving employer negligence and establishing a causal link between their injuries and the employer's actions. For

[111] Love, *supra* note 29 at 890.

[112] Vanessa Payne, "Can you sue your employer for workplace injuries and illnesses?", (16 June 2021), online: <goldblattpartners.com/unsolicited-blog/can-you-sue-your-employer-for-workplace-injuries-and-illnesses/>

[113] McKenna, *supra* note 27 at 587.

[114] *Workplace Safety and Insurance Act*, *supra* note 48. s.118(1)

[115] *Ibid*. s.26(2)

[116] McKenna, *supra* note 27 at 589.

example, for a person to receive benefits for a mental stress injury, under Ontario law, they must have a medical diagnosis that so determines, in contrast, any person, whether mentally healthy or not, can suffer pain and suffering as a result of a work-related accident. In other words, a medical diagnosis is irrelevant to a person's entitlement to compensation for pain and suffering damages.

The comparison between compensation for pain and suffering and compensation for mental stress injuries illuminates the distinctions in their nature, compensation mechanisms, and legal implications. While both types of damages encompass non-monetary losses, their assessment and recognition vary significantly. In this context, understanding the complexities inherent in determining compensation for pain and suffering sheds light on the multifaceted considerations involved in addressing non-pecuniary harm in legal contexts.

7.7. Compensation for pain and suffering

Determining the appropriate compensation for pain and suffering is a complex endeavour. Measuring an individual's pain or suffering lacks standardized metrics, as each circumstance is unique. Moreover, how one navigates, such situations varies from person to person, influenced by factors like cultural heritage, age, gender, ethnicity, and other distinctive attributes. [117]This is why compensation for pain and suffering is frequently granted as a single, lump-sum payment instead of multiple installments.[118] This approach is adopted due to the challenge in accurately assessing the precise monetary value that would satisfactorily address an individual's pain and suffering.

Although it is commonly accepted that these are non-pecuniary losses whose calculation is difficult, some reasons promote and justify their recognition. For example, they can serve as palliative for those injured, particularly if there was no financial loss as a result of the injury; they can allow the victim to obtain alternative pleasures to those they have lost, and they can provide compensation for any other non-quantifiable and unforeseeable losses suffered by the person. This kind of damage has the role of boosting the value of the overall award of damages.[119]

[117] Ubel & Loewenstein, *supra* note 102 at 212.

[118] Marcus L Plant, “Periodic Payment of Damages for Personal Injury” (1983) 44:5 La L Rev 1327-1340 at 1329.

[119] KM Stanton, *The Modern Law of Tort* (United Kingdom:Sweet & Maxwell, 1994) at 252.

The Supreme Court of Canada, in a series of three cases known as the trilogy on damages[120] has addressed the study of the issue around compensation for non-pecuniary loss. In Andrews v. Grand & Toy Alberta Ltd., the Court granted compensation to the plaintiff for the pain and suffering that these damages caused him. In this regard, the Court stated:

> […] Now he has a disability, deprived of many of life's pleasures and subjected to pain and disability. For this, he is entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care. […]
>
> However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. […][121]

In this case, the Court introduced a distinction between pecuniary and non-pecuniary damages in relation to the relevant criteria for determining the value of compensation. As far as pecuniary loss is concerned, the principle that should guide the calculation of compensation is the full compensation principle, which intends that all quantifiable damages be included in the compensation for pecuniary loss. On the other hand, considering non-pecuniary loss the

[120] The cases are: (i) Andrews v Grand & Toy Alberta Ltd, [1978] 2 SCR 229; (ii) "Arnold v. Teno - SCC Cases", online: <decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2589/index.do>; and (iii) Thornton v School Dist No 57 (Prince George) et al, [1978] 2 SCR 267.

[121] *Andrews v. Grand & Toy Alberta Ltd.*, *supra* note 120 at 261.

compensation should be fixed taking into account the "fair and reasonable" principle.[122] When the court refers to compensation for non-pecuniary loss as "fair and reasonable," it recognizes that there is no objective measure to fully quantify the extent of emotional suffering and intangible impact on the injured person's life. The court must consider various factors, such as the severity of the injury, the age of the individual, the loss of abilities, and the long-term consequences on their well-being. "Fair and reasonable" compensation in this context means acknowledging and providing appropriate compensation for the subjective and emotional toll that the injury has taken on the individual's life.

In this case, the court determined that $100,000[123] was an appropriate amount for non-pecuniary loss compensation claim. This figure include a 'cap' for non-pecuniary damages as a general rule, an amount that has been adjusted for inflation.[124] In reaching this conclusion, the court took into account different factors. The court noted that historically, damages for non-pecuniary losses, even for severe injuries like quadriplegia, were substantially below $100,000, so the court aimed to maintain a sense of uniformity and predictability in the assessment of these types of damages by ensuring that similar losses received relatively consistent awards across cases. In addition, the court emphasized the importance of providing monetary compensation for non-pecuniary damages that would make up for what has been lost in the best way possible, considering that some losses are impossible to be directly compensated. Another factor to be considered was the need to establish a rough upper parameter on non-pecuniary loss awards, so that similar cases could be guided by this figure.

The debate over the pain and suffering cap has not ended, with many personal injury lawyers contending it unjustly shortchanges victims. They argue that the cap's amount is insufficient to truly compensate for endured pain and suffering.

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[122] *Ibid.*

[123] The amount of the cap has been updated due to inflation. By 2023, in Ontario the cap is approximately $438,000 to $450,000 dollars, reduced by a deductible amount of $44,367 (the monetary threshold is $147,889). “Statistics | McKellar Structured Settlements Inc.”, online: <www.mckellar.com/statistics>.

[124] *Andrews v Grand & Toy Albetda Ltd*, *supra* note 120.

The Ontario Trial Lawyers Association (OTLA) lists three reasons for abolishing the cap[125]. Firstly, other damages like defamation lack caps, creating potential imbalances. Secondly, victims deal with extra insurance deductibles, compounding the impact of a cap. Thirdly, pain and suffering damages can be calculated more objectively. For instance, in the United States, juries are tasked with evaluating the monetary worth of pain and suffering on an hourly basis, projecting it over an individual's lifetime, or employing a multiple of economic damages. This strategy is applied because the impact on health, independence, and overall quality of life far outweighs that of economic losses.

In the employment field, pain and suffering compensation claims caused by the employer's negligence under the scope of civil actions have had different approaches. In Hunt v. Sutton Group Incentive Realty Inc.,[126] the Court assessed the plaintiff's general damages at $185,000. In this case, the worker suffered a serious injury that caused brain damage which affected several aspects of the worker's lifestyle forever. She lost her ability to remember recent events, and even simple tasks became challenging for her. Her social life had almost vanished, and it was highly improbable that she would ever form a lasting romantic relationship. While in this case, it was shown that the worker had been negligent in the occurrence of the accident, the employer had also been negligent, and the victim's fault did not exonerate the employer from liability, although the liability was reduced.

In Prinzo v. Baycrest Centre for Geriatric Care[127], the Court of Appeal for Ontario discussed the concept of intentional infliction of mental suffering in the context of employment law. In this case, the Court highlighted several cases where damages were awarded to workers who suffered emotional distress due to intentional harmful actions in the workplace. By confirming the existence of the tort of intentional infliction of mental suffering, the court acknowledges that emotional harm caused intentionally is a separate and actionable wrong. In other words, workers who have

[125] "3 Reasons the Pain and Suffering Cap Should Be Abolished", (4 January 2018), online: <www.injurylawyercanada.com/blog/3-reasons-the-pain-and-suffering-cap-should-be-abolished/>.

[126] *Hunt v Sutton Group Incentive Realty Inc*, 2001 CanLII 28027 (ONSC).

[127] *Prinzo v Baycrest Centre for Geriatric Care*, 2002 CanLII 45005 (ONCA).

experienced severe emotional distress at work to seek compensation beyond traditional remedies available for breach of contract or other legal claims.

In Boucher v. Wal-Mart Canada Corp[128] the court held that the tort of negligent infliction of mental suffering has three elements: (i) flagrant or outrageous defendant's conduct; (ii) the defendant's conduct was calculated to produce harm to the plaintiff; and (iii) the defendant's conduct caused the plaintiff to suffer a visible and provable illness. In this case, the employee alleged that she had been constructively dismissed due to constant humiliation, belittling and degrading treatment by her coworkers. She reported the situation to the company's management department. She also reported an incident where she was unfairly disciplined for refusing to alter the temperature log. However, her complaints were rejected because they were "unsubstantiated". A few days later, the worker was publicly humiliated in front of other employees, after which she resigned.

As a consequence of constant exposure to mistreatment and abuse by her co-workers in the workplace, the worker suffered from abdominal pain, constipation, bloating and weight loss, including reported episodes of vomiting blood. According to the plaintiff's medical opinion, these symptoms were related to work-related stress.

Verifying the facts and the consequences of the poor treatment of the worker's health, the trial court awarded the plaintiff a $100,000 award for intentional infliction of mental suffering. The court recognized the severity of the harm inflicted upon the plaintiff and the profund impact it had on her life. While the Ontario Court of Appeal subsequently reduced this amount, the initial award remains a significant benchmark in cases of workplace harassment and its resulting damages.

In a series of decisions from the Ontario Human Rights Tribunal, the tribunal has recognized compensation for harm to dignity, emotions and self-respect, where although not directly related to physical or mental harm, there is a non-pecuniary loss. In these cases, the Tribunal has found the following:

[128] *Boucher v Wal-Mart Canada Corp*, 2014 ONCA 419 (CanLII).

In the case of Simpson v. Commissionaires (Great Lakes), 2009 HRTO 1362[129], the applicant received $10,000 in compensation for harm to their dignity, emotions, and self-respect due to the respondent's failure to properly consider the applicant's need for disability-related accommodation. However, the applicant in Simpson continued to work for the respondent despite the discrimination.

In the case of Krieger v. Toronto Police Services Board, 2010 HRTO 1361[130], the Tribunal awarded $35,000 in compensation for injury to dignity, emotions, and self-respect. The respondent in this case failed to accommodate the applicant's post-traumatic stress disorder and terminated their employment, and the discrimination was worsened by a lengthy period of suspension from work.

In the case of Lopetegui v. 680247 Ontario, 2009 HRTO 1248[131], the Tribunal granted an award of $20,000 to the applicant. The reason for the compensation was that the applicant was unable to work due to injuries from a car accident. The applicant provided medical documentation to the respondent, indicating the temporary inability to work and requested modified duties. However, the respondent refused to provide modified work and subsequently terminated the applicant's employment, partly due to the applicant taking a leave of absence without permission.

In the commented cases, there is a common concept where the compensation looks for being "fair and reasonable". This concept of “fair and reasonable” compensation for non-pecuniary loss differs from "full compensation" for pecuniary loss due to the inherent nature of these types of damages.

Pecuniary losses are tangible and measurable economic damages, such as medical expenses, lost wages, and property damage. These losses can be directly quantified and calculated based on actual

[129] *Simpson v Commissionaires (Great Lakes)*, 2009 HRTO 1362 (CanLII).

[130] *Krieger v Toronto Police Services Board*, 2010 HRTO 1361 (CanLII).

[131] *Lopetegui v 680247 Ontario*, 2009 HRTO 1248 (CanLII).

expenses incurred by the injured party. In the case of pecuniary losses, the aim is to fully compensate the injured person for their monetary expenditures and economic losses, ensuring they are placed in the same financial position they would have been in had the injury not occurred. Therefore, "full compensation" for pecuniary loss means reimbursing the exact amount of financial losses suffered, without any shortfall.

On the other hand, non-pecuniary losses refer to intangible damages that are more subjective and difficult to precisely evaluate in monetary terms. These losses include pain and suffering, emotional distress, loss of enjoyment of life, and the impact on the individual's quality of life. Unlike pecuniary losses, non-pecuniary losses cannot be directly translated into a specific dollar amount, as they involve the personal and emotional aspects of the injury experience.

When the court refers to compensation for non-pecuniary loss as "fair and reasonable," it recognizes that there is no objective measure to fully quantify the extent of emotional suffering and intangible impact on the injured person's life. The court must consider various factors, such as the severity of the injury, the age of the individual, the loss of abilities, and the long-term consequences on their well-being. "Fair and reasonable" compensation in this context means acknowledging and providing appropriate compensation for the subjective and emotional toll that the injury has taken on the individual's life.

In summary, while "full compensation" is appropriate for pecuniary losses as it involves direct financial reimbursement, "fair and reasonable" compensation is more applicable for non-pecuniary losses, considering the subjective and intangible nature of these damages. The goal is to provide just and equitable compensation that acknowledges the emotional and personal impact of the injury while recognizing the limitations in precisely quantifying these losses in monetary terms.

7.8. Challenges in Ontario's Workers' Compensation System

In this chapter, we have argued that Ontario's workers' compensation system provides a swift solution for employees facing work-related accidents. The inclusion of non-economic loss benefits (NEL) and the acknowledgment of traumatic and chronic mental stress as work-related injuries signify significant progress, aiming to compensate for emotional harm resulting from work-related incidents or illnesses. Despite these positive steps, criticisms arise, particularly concerning the calculation and recipients of NEL benefits. Furthermore, it is important to note that employees covered by workers' compensation have no choice to pursue alternative avenues for seeking redress. Consequently, there existis room for redinement to mitigate reliance on tort law in claims and encourage greater reliance on the workers' compensation system.

Some scholars have also raised other critiques. One critique maintains the need to use a human rights approach to workers' compensation and insurance systems. Katherine Lippel for instance, argues in her article that analyzing the workers' compensation system from the worker's point of view would help overcome the system's shortcomings. She highlights three main issues in her article: 1) compensation as a non-adversarial system; 2) evidence-based decision-making; and 3) incentives for return to work.[132]

Similarly, Michael Lax and Federica Manetti claim in their article that even though the no-fault scheme is a non-adversarial system, many workers may face confrontation before receiving compensation, which, in their opinion, accentuates stigmas and contestations related to mental illness.[133] Additionally, in instances where workers intend to pursue specific types of non-pecuniary damages, as evidenced by court cases we examined, they may face obstacles preventing them . To ensure a truly comprehensive system, it becomes imperative to minimize the potential

[132] Katherine Lippel, "Preserving workers' dignity in workers' compensation systems: An international perspective" (2012) 55:6 Am J Ind Med 519–536, online: <onlinelibrary.wiley.com/doi/10.1002/ajim.22022> at 2.

[133] Michael B Lax & Federica A Manetti, "Access to Medical Care for Individuals with Workers' Compensation Claims" (2002) 11:4 New Solut 325–348 at 330.

for separate legal actions, often entailing prolonged litigation, when seeking compensation for non-physical and non-psychological losses.[134]

In another article, Katherine Lippel suggests that a fair compensation system should develop mechanisms to protect workers from discrimination and offer them psychological support. She also stresses that a fair workers' compensation system should include a return-to-work process because it is cost-effective and, at the same time, benefits the workers' rehabilitation process.[135]

The American Public Health Association (APHA), a professional organization of public health practitioners, has called for the expansion of workers' compensation coverage to include all work-related injuries and illnesses in the system, regardless of fault. The APHA argues that expanding coverage would protect workers' health and safety, reduce the financial burden on workers, and improve the workforce's overall health.[136]

Even the Workplace Safety and Insurance Board (WSIB), responsible for administering Ontario's compensation system, acknowledges the imperative for improvements, recognizing that challenges extend beyond compensation[137]. Addressing issues within the claim processes and coverage is vital for fostering a more inclusive and efficient system. The WSIB has identified key opportunities, including setting a sufficiency ratio and sustaining the rate-setting process, to ensure financial adequacy.

Furthermore, implementing a new rate framework, rationalizing coverage, modernizing claims and adjudication, and reforming the appeals process are essential steps toward a more streamlined and

[134] W Kip Viscusi & Michael J Moore, "Workers' Compensation: Wage Effects, Benefit Inadequacies, and the Value of Health Losses" (1987) 69:2 Rev Econ Stat 249–261 at 252.

[135] Katherine Lippel, "Workers describe the effect of the workers' compensation process on their health: A Québec study" (2007) 30:4–5 Int'l J.L.& Psychiatry 427–443 at 430.

[136] "The Critical Need to Reform Workers' Compensation", online: <www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/the-critical-need-to-reform-workers-compensation>.

[137] WSIB, (2019). *Operational Review Report. 2020.* Online: <www.ontario.ca/document/workplace-safety-and-insurance-board-operational-review-report>

responsive system. The Board's commitment to enhancing audits, strengthening the occupational health and safety ecosystem, and delivering effective prevention programs underscores the importance of a holistic approach. Improvements in governance, as outlined in the WSIB's initiatives, play a pivotal role in shaping a comprehensive and adaptive workers' compensation system for the evolving needs of the Ontario workforce.

Having examined the current system, the subsequent chapter will review the Colombian dual system for work-related injuries. The findings from this analysis will serve as a foundation for generating ideas for reform. In a subsequent chapter, we aim to propose a transition that advocates for the inclusion and treatment of non-pecuniary damages within the no-fault system.

8. Colombia: the dual model of no-fault and fault system

In the context of work-related accidents and occupational diseases, the Colombian legal system operates with a distinctive dual scheme. On one side, the General Labour Risks System (SGRL) provides social benefits to injured workers, under a similar scheme to the Canadian, and on the other side, the Substantive Labour Code (CST), establishes a civil liability system aiming to provide full compensation to the injured worker. The first scheme, named the tariffed reparation scheme, offers fixed economic and welfare benefits to the worker, regardless of the employer's fault.[138] The second scheme, the scheme of full compensation based on the employer's fault, aims to establish the employer's civil liability for the work accident and provide comprehensive compensation to the worker.[139] However, in this scheme, the worker must prove the employer's fault, the damage, and the causal connection between the employer's fault and the damages.

These models differ in the nature of their benefits, elements requiring a demonstration, processes to be followed, and the benefits they offer. The tariffed reparation scheme ensures not only

[138] Puyana-Silva, *supra* note 6 at 17.

[139] Diego Alejandro Sánchez-Acero, *Un Nuevo Concepto de Culpa Patronal* (Bogota :Universidad Externado de Colombia, 2015) at 37.

economic benefits but also medical assistance for worker rehabilitation.[140] In contrast, the employer's fault scheme primarily aims to secure monetary compensation for the worker or their beneficiaries. The tariffed compensation scheme is widely considered more efficient, timely, and straightforward compared to the employer's fault scheme.[141] Again, in this aspect it mirrors the Canadian system. This is because the tariffed reparation scheme operates on a standardized basis, providing swift and efficient support for injured workers, including economic and medical assistance.[142] In contrast, the employer's fault scheme involves a more complex evaluation process, affecting the speed and simplicity of compensation.

In Colombia, both compensation models have coexisted since 1993. The SGRL was created by Law 100 of 1993 and has been subject to regulations and modifications by Decree 1295 of 1994 and Law 1562 of 2012, among others. The employer's fault is much older, as it was created by Article 216 of the CST, in force since 1950.[143] The Labour Cassation Chamber of the Supreme Court of Justice has extensively examined both the tariff scheme and the employer's fault compensation regime approaches in various rulings. In one case, the Court established that the worker's entitlement to simultaneously receive benefits from both, without any offsetting deductions is legitimate.[144] In direct contrast to Canadian worker compensation schemes, under the Colombian dual model the worker can be a recipient of benefits and compensation from both schemes concurrently. The Court justifies this possibility by emphasizing that the benefits of each scheme stem from distinct causes, on one hand as social benefits, and on the other as compensation. For instance, a 2012 ruling by the Colombian Supreme Court of Justice articulated this perspective, stating that the legislation provides for two forms of compensation: tariffed reparation of risks and full reparation of damages. The former, administered by the Professional Risk Administrators,

[140] *Ibid* at 26.

[141] Puyana-Silva, *supra* note 6 at 18.

[142] Gerardo Arenas-Monsalve, *El Derecho Colombiano de la Seguridad Social* (Bogota: Legis, 2011) at 780.

[143] The CST was issued in 1950. It brought together several labour standards that had been enacted separately. It also included several of the internacional labour standards. In August 2023 the Colombian government presented a bill to amend the CST. However, the reform bill does not modify the employer's fault reparation scheme.

[144] Court of Justice Labour Section, 13 March 2012, *Amparo Jimenez de Riaño v Cementos Rio Claro S.A.*, No 39798 (Colombia).

offers benefits as per laws such as Law 100 of 1993 and Law 776 of 2002. On the other hand, the latter, governed by Article 216 of the CST, seeks to provide full compensation for damages caused by employer fault in work-related accidents. These two forms of compensation serve different purposes, with benefits from the Professional Risk Administrators aiming to protect affiliates or their successors as mandated by law, while full indemnity under Article 216 of the CST seeks to provide comprehensive compensation for damages resulting from employer negligence, inherent in the labour law system. [145]

The dual possibility of seeking compensation through two distinct avenues for the same incident, called by some scholars the "cumulative remedy theory",[146] results in unnecessary additional time and financial costs for both workers and employers. This situation introduces complexity and delays in resolving claims. Furthermore, the coexistence of these two reparation regimes may lead workers to perceive the compensation provided under the tariffed reparation scheme as incomplete. This is because the scheme does not encompass certain benefits that a worker could potentially claim, via a legal course of action. These additional benefits might include compensation for both material and immaterial damages resulting from the work-related accident. This possibility is totally denied in the Canadian model where the system is designed to avoid double compensation. Some scholars call this model the "alternative action theory".[147]

The challenges are even more pronounced when dealing with non-pecuniary losses, highlighting the inadequacy and lack of clarity of the current regulatory framework. The inherent complexity resulting from the dual nature of the existing systems further exacerbates the barriers to effective workers' compensation.[148] It is imperative to explore possible reforms to simplify and streamline procedures and, ultimately, to ensure fairer and faster resolution of issues related to occupational accidents and diseases.

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[145] *Ibid.*

[146] Love, *supra* note 29 at 860.

[147] *Ibid.*

[148] Tulio Alejandro Fajardo-Acuña, *Culpa Patronal. Criterios objetivos orientadores para la cuantificación del perjuicio moral* (Bogota: Editorial Ibañez, 2022) at 86.

This chapter delves into and elucidates the primary features of the two compensation schemes for accessing Colombian Workers' Compensation. It also examines the Colombian compensation scheme specifically addressing non-pecuniary damages arising from work-related accidents and occupational illnesses.

8.1. The General Labour Risk System (SGRL)

The General Labour Risk System (SGRL) in Colombia provides financial and medical coverage to all affiliated workers who suffer an injury or illness caused by or in connection with work.[149] The SGRL is an insurance that covers the contingencies of illness, disability and death resulting from an accident at work or a work-related illness. It is tariff-based because the benefits of this system and their values are previously defined by law. It is compulsory insurance for all employers in the country.[150]

This system follows the general principles of no-fault systems. Similar to the Canadian workers compensation system, the SGRL provides wage loss benefits, medical coverage and assistance in the reinstatement process to help workers return to work.[151] Another similarity with the Canadian model is that the SGRL has a special fund that receives contributions from all employers and guarantees payment of economic reparation and access to medical rehabilitation assistance.[152] As Professor Puyana-Silva points out, it is an insurance activity in which all employers are collectively responsible for the reparation of the damages produced as a consequence of occupational accidents.[153]

[149] Art. 3, Law 1562 of 2012 (Colombia).

[150] Puyana-Silva, *supra* note 6 at 20.

[151] Elías Alberto Bedoya-Marrugo, *Sistemas de Riesgos Laborales en América Latina y Otros Países*. (Cartagena: Universidad de Cartagena, 2016) at 57.

[152] Juan Carlos Cortés-González, *Régimen de los riesgos laborales y de la seguridad y salud en el trabajo: comentarios y actualización de la Ley de 1562 de 2012* (Bogota: Legis, 2015) at 50.

[153] Puyana-Silva, *supra* note 6 at 19.

One of its most relevant characteristics is that it is an objective regime, where benefits are granted regardless of the employer's fault,[154] like the Canadian model. In this context, workplace accidents and occupationally induced illnesses transform from elements of civil liability into a structured framework of assurance and social protection. This arrangement closely mirrors the principles found in general risk insurance schemes[155] wherein the employer assumes a role similar to a policyholder, and the Labour Risk Insurance Company (ARL) functions as the insurance provider and the worker is the beneficiary.

Despite all the similarities, there are relevant differences. A particular feature of the Colombian model that differentiates it from the Canadian model is the existence of occupational risk insurers (ARL). While in Ontario, the WSIB is the agency in charge of managing the workplace's safety and insurance system[156] in Colombia that role is spread among several insurance companies[157] under the surveillance and control and inspection of the Ministry of Labour.[158] The ARLs are private insurance companies (with the exception of one that is a public company with that operates as a private one), with a special regime that differentiates them from general insurance companies. Each insurance company has their own medical team who are in charged of providing medical assessment of workers. However, in case of discrepancies on the medical assessment, there are medical boards (Juntas de Calificación de Invalidez) who can review the medical assesments. In any case, the insurance companies are responsible of the payment of benefits to the workers and other beneficiaries.

The ARLs are in charge of paying not only economic benefits, but also welfare benefits of the SGRL. There are various ARLs in the country, and the employer, not the worker, is free to choose which one to join. The ARLs are obliged to provide economic and medical benefits.[159] They are

[154] Acero, *supra* note 136 at 27.

[155] Marco Alejandro Arenas-Prada, "'La subrogación en el sistema de riesgos laborales colombiano" (2017) 1:2 Páginas de Seguridad Social, online: <revistas.uexternado.edu.co/index.php/pagss/article/view/5067>." at 140.

[156] Weiler, *supra* note 2 at 19.

[157] Puyana-Silva, *supra* note 6 at 99.

[158] *Ibid* at 95.

[159] Arenas-Monsalve, *supra* note 142 at 45.

also obliged to accept the affiliation of all employers and their employees and to promote prevention, counselling and assessment of occupational risks.[160]

For the insurance to operate and release the employer from obligations stemming from the accident or work-related illness, specific criteria must be met: (i) the worker must have been previously affiliated with the system before the accident occurred, (ii) the employer must have complied with its obligation to pay the corresponding contributions, and (iii) the event impacting the worker's health must be classified as either an accident at work or a work-related illness.[161]

It is important to note that although workers are covered by the SRGL, employers remain obliged to fulfill specific duties of prevention and protection of workers' health and safety. Employers must actively implement necessary measures to prevent the occurrence of occupational accidents and diseases, underscoring the ongoing commitment to maintaining a secure and healthy working environment.[162]

8.1.1. Definition of accidents at work and occupational diseases

Law 1562 of 2012 provides a comprehensive definition of an accident at work, categorizing it as "any sudden event arising out of or in connection with work, and which results in injury to the worker's health, functional or psychiatric impairment, a disability, or death." The criteria for classifying an accident as work-related is similar to the Canadian definition, requiring that it occurs "arising out of" or "in the course of" work.

When an accident "arises out of" work, it signifies that the event happened during the execution of the worker's job duties or responsibilities.[163] For instance, a worker cutting raw materials in a factory may be deemed to have experienced a work-related accident if injured while using a machine. Conversely, an accident can occur "in the course of" work, where the event transpires

[160] Cortés-González, *supra* note 148 at 45.

[161] *Ibid* at 26.

[162] Art. 4 Decree 1443 of 2014 (Colombia).

[163] Arenas-Monsalve, *supra* note 142 at 763.

during the time and place of work but not necessarily in the direct performance of the worker's job duties or responsibilities. [164] For example, if a worker slips and falls in the cafeteria during a lunch break, the incident can still be considered work-related.

With regard to occupational diseases, Colombian law defines them as those contracted as a result of exposure to risk factors inherent to the work activity or the environment in which the worker has been forced to work.[165] In Colombia, the Ministry of Labour periodically issues a list of occupational diseases, which allows it to be constantly updated. Both, workers who have suffered from work-related accidents and those who have been diagnosed with occupational diseases are entitled to the benefits of the SGRL.

As labour dynamics and working environment conditions have evolved, so have the laws and regulations governing labour protection. Law 1562 of 2012 reflects this process of regulatory evolution by acknowledging that work-related accidents and occupational diseases are events that can occur in different scenarios. [166] Under the current legislation, it is recognized that occupational accidents can also occur outside the workplace and working hours, during the commute to work (provided that the employer provides the means of transport), during trade union activities, as well as during recreational, sporting or cultural activities on behalf of the employer.[167]

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[164] *Ibid* at 764.

[165] Art. 4, Law 1562 of 2012 (Colombia).

[166] *See* Law 57 of 1915 (Colombia), Law 32 of 1922 (Colombia), Law 133 of 1931 (Colombia), Decree 2350 of 1940, Law 6 of 1945 (Colombia), Law 90 of 1946 (Colombia), Substantive Code of Labour (Colombia), Decree 3170 of 1964 (Colombia), Decree 3135 of 1968 (Colombia), Decree 1848 of 1969 (Colombia), Law 100 of 1993 (Colombia), and Decree Law 1295 of 1994 (Colombia).

[167] The Constitutional Court decided as unconstitutional the definitions of accidents at work and occupational diseases in Decree Law 1295 of 1994, because this was a matter that should be regulated by a law and not by a decree. Between the ruling and 2012 there was a strong legal uncertainty, as there was no law regulating the definition of accidents at work and occupational diseases. In the absence of such a definition, the Ministry of Social Protection, in a 2007 concept, suggested the adoption of the definition established in Decision 584 of 2004 of the Andean Community of Nations while the vacuum was being filled. Rafael Rodríguez-Mesa, *Sistema General de Riesgos Laborales* (Barranquilla: Universidad del Norte, 2017) at 28.

This broadening of definitions not only recognizes the complexity of modern work environments, but also sets a more robust standard for worker protection. In addition, the inclusion of occupational diseases in the legislation is a crucial recognition that exposure to risk factors in the work environment can have adverse effects on long-term health.

8.1.2. Benefits

The system has two kinds of benefits: welfare benefits and economic benefits.

The health care benefits offered include[168] (i) medical, surgical, therapeutic and pharmaceutical care; (ii) the cost of relocation; (iii) hospitalization costs; (iv) drug supply; (v) ancillary diagnostic and treatment services; (vi) repair and replacement of prostheses and orthoses; (vii) dental service; and, (viii) physical and vocational rehabilitation.

The health care services will be provided through a Health Care Provider Entity (EPS) or a Health Services Provider Institution (IPS). In this way, the provision of ARL health care services is carried out through the EPS to which the workers are affiliated.[169] The coverage provided by the system depends on the degree to which the injured worker is affected by the accident at work or occupational disease. [170]

The economic benefits of the occupational risk system are recognized directly by the ARLs to the workers. These are established in Law 776 of 2002 and are as follows:

- Financial allowance for temporary incapacity (wage-loss benefits). The incapacity is temporary when the injury prevents the worker from performing his/her work capacity for a determined period. The value of the benefit is equivalent to 100% of the last salary of the injured worker, it is paid for a period of up to 180 days, extendable for another equal period (art. 3).

[168] Art. 5, Decree 1295 of 1994.

[169] Rodríguez-Mesa, *supra* note 166 at 100.

[170] *Ibid* at 22.

- Compensation for partial permanent impairment. The benefit consists of the payment of a lump sum that can vary between the equivalent of 2 and 24 times the salary of the injured worker (art. 7). This benefit is available to workers with a partial but definitive reduction in their capacity to work. This is a percentage set in the loss of working capacity medical report (PCL)[171] of between 5% and 49.99%.

- Invalidity pension. When the injured worker acquires a loss of working capacity of more than 50%, he/she is entitled to an invalidity pension, the payment of which varies between 60% and 75% of the last salary, depending on whether the PCL is lower or higher than 66% (art. 10).

- Survivors' pension. Equivalent to 100% of the last salary of the deceased worker. If the deceased is a pensioner, the value of the pension is 75% (Art. 12). The worker's heirs are entitled to this benefit under certain conditions.

- Funeral assistance. This benefit is granted to those who can prove that they have paid the burial expenses, for a single sum of money, equivalent to the last salary of the deceased worker, or to the last pension allowance of the deceased pensioner. The sum may vary between 5 and 10 legal monthly minimum wages in force (art. 16).

The economic benefits of the system vary according to whether the incapacity to work is temporary or permanent, or whether the loss of working capacity is partial or total, according to the doctor's diagnosis.[172] Depending on these elements, the injured worker or his or her beneficiaries may

[171] In a legal and medical context, the "dictamen de pérdida de capacidad laboral" or "PCL" refers to a formal assessment or report provided by a medical professional or expert, often required in legal proceedings related to workplace injuries or illnesses. This document outlines the degree to which an individual has suffered a loss of capacity to perform their work duties due to an injury or health condition. It plays a crucial role in determining compensation, benefits, or legal remedies for the affected individual.

[172] Puyana-Silva, *supra* note 6 at 67.

determine in advance the benefits they are entitled. The payment of the benefits established in the SGRL is financed through the payment of contributions made by employers to the ARLs for each affiliated worker. With these resources, the ARLs pay the benefits established in the system to the injured workers.[173] In order to receive the payment of benefits, workers must submit an application, which is similar to a claim like in Canada, to the corresponding ARL, which will study the application and, after verifying compliance with the legal requirements, will pay the corresponding benefits to the worker.[174]

The SGRL provides for social benefits to support the employee during the recovery process or the beneficiaries in the event of death.[175] The SGRL benefits are not primarily intended to compensate for the losses caused by the event but to serve as a welfare benefit while the beneficiary's situation is being resolved. This is a major difference from the Canadian model, where the nature of the benefits is compensatory.

For example, in situations of partial permanent disability, the benefit is calculated according to the percentage of loss of working capacity. Another illustrative case is the survivors' pension, which is designed to provide a periodic benefit for the survivors of a worker who dies as a result of an accident or occupational disease. Likewise, the funeral allowance is intended to cover the burial expenses of the deceased employee. These examples show that the system offers responses to various spheres of the worker and his or her family, without establishing an exhaustive list of reparable damages.[176] This flexibility is indicative of the possibility of expanding and extending the benefits of the system at the time of evaluation and review, which tends towards a comprehensive reparation.

In this context, it is crucial to acknowledge that while the system endeavors to alleviate the tangible repercussions of accidents or work-related illnesses, particularly in terms of material damage, it

[173] Arenas-Monsalve, *supra* note 142 at 732.

[174] *Ibid* at 781.

[175] *Ibid* at 784.

[176] Puyana-Silva, *supra* note 6 at 67.

possesses noteworthy limitations.[177] Notably, crucial facets such as the emotional, psychological, or social impacts stemming from a workplace incident often remain unaddressed by the current benefits structure. [178] Unlike the Canadian model, the SGRL in Colombia does not provide any benefits for non-economic losses incurred as a result of a work-related accident or illness.

This analysis is crucial to our research, emphasizing the urgent need to evaluate and enhance the system for a more thorough and fair treatment of the diverse harms in the workplace. The research strongly supports expanding SGRL benefits, proposing a comprehensive approach to address a wider range of damages for affected workers.

An illustrative example of situationns overlooked by the SGRL pertains to the absence of benefits for the restitution of non-pecuniary damages. Such instances reveal a gap within the existing system, impeding the complete and effective addressing of the needs of affected workers.

8.1.3. Non-pecuniary damage in the occupational risk system

As it has been described thought this study, non-pecuniary damages are those that affect aspects that are not directly linked to a person's economic assets with a significant in the inner realm. In Colombia, Generally, this type of damage includes moral damage, pain and suffering, physiological damage and damage to the enjoyment of relationship life.[179]

The Colombian labour risk system does not cover non-pecuniary damages caused by work-related accidents or occupational diseases.[180] Nor is there any economic or welfare benefit in the system that is intended to compensate for this type of damage, unlike the Canadian workers' compensation system, where there is a non-economy loss benefit analyzed above in this thesis. Although

[177] Fajardo-Acuña, *supra* note 148 at 86.

[178] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 3 October, *Federico Joaquin Collazos Chavez v Unilever Andina de Colombia Ltda.*, No SL4665-2018 (Colombia).

[179] María Cecilia M'Causland-Sánchez, *Tipología y reparación del daño inmaterial en Colombia: Comentarios críticos sobre la jurisprudencia reciente (*Bogota: Universidad Externado de Colombia, 2015) at 38.

[180] Fajardo-Acuña, *supra* note 148 at 12.

jurisprudence has recognized that these damages are compensable[181] benefits in these cases are not found within the SGRL but must be sought through judicial proceedings. Although the SGRL shares similarities with the workers' compensation scheme in Canada, it is essential to note that the Colombian system does not operate on a trade-off basis. Consequently, workers and beneficiaries who receive incomplete compensation, or who do not receive any compensation at all, are allowed to resort to civil actions to pursue full compensation.

One of the proposals of this study is to include non-pecuniary damages in the SGRL. While acknowledging the challenges faced by the Canadian no-fault system, as discussed in the previous chapter, it still presents a valuable opportunity in the pursuit of comprehensive redress. As Ison aptly stated:"Even if a system of compensation for disablement was being designed with malice, it would be hard to conceive of any system more inefficient than tort liability".[182]

Transitioning from this discussion, it becomes imperative to delve into the practical implications of integrating non-pecuniary damages into the SGRL framework. This transition highlights the potential advantages for both employees and their beneficiaries, as well as the potential impact on employers, ultimately setting the stage for a deeper exploration in the subsequent research.

Concerning non-pecuniary damages resulting from workplace accidents and occupational diseases, the legal precedent set by the Supreme Court of Justice establishes that once proven in litigation, these damages warrant compensation for the affected worker.[183] This is the employer's fault system which will be developed in the following paragraphs.

[181] Consejo de Estado [Council of State], 28 August 2014, F*elix Antonio Zapata González v Nación Ministerio de Defensa*, No 32988 (Colombia).

[182] Ison, *supra* note 19 at 580.

[183] Puyana-Silva, *supra* note 6 at 39.

8.2. Full reparation scheme based on the employer's liability.

Another avenue within the Colombian legal system for claiming compensation for damages caused by an accident at work is the full reparation scheme based on the employer's liability[184]. This is a fault-based liability system that aims to obtain full compensation for all the damages caused by a work-related accident or an occupational disease, including both, pecuniary and non-pecuniary losses.[185]

Professor Diego Sánchez-Acero indicates that the employer's fault compensation scheme established in Article 216 of the CST is a contractual civil liability scheme, as it arises from the employer's breach of its contractual obligations, mainly with respect to the employer's obligation of protection and safety towards its workers established in Article 56 of the CST.[186]

Unlike the tariff system for occupational risks, or simply the SGRL, which operates on the basis of strict liability allowing the worker to receive benefits regardless of the employer's fault, the employer's fault system operates under a subjective liability that requires, as an essential condition for obtaining full compensation, proof of the employer's liability.[187] This burden of proof must be borne by the worker in legal proceedings before the labour courts. This is an important difference concerning the SGRL where the claim for benefits is made through an administrative procedure before the ARL. The employer's fault system seeks to achieve full monetary compensation, which means that this system does not contain a list of benefits. The compensation granted to the worker will depend on the damages that they can prove in the litigation process.[188]

[184] Art. 216 *Substantive Labour Code (Colombia)*.

[185] Arenas-Monsalve, *supra* note 142 at 796.

[186] Sánchez-Acero, *supra* note 139 at 153.

[187] *Ibid.*

[188] Arenas-Monsalve, note 142 at 799.

8.2.1. Elements of liability

The legal precedent set by the Colombian Supreme Court of Justice establishes that to secure complete compensation for damages, the worker must demonstrate three key elements: i) damage (tort), ii) the employer's culpability, and iii) the causal link between damage and the employer's fault.[189] These elements are elucidated as follows:

- Damage (tort): is the civil wrong that causes harm to another's right consisting in the economic loss received, in the financial loss suffered by the victim, as well as in the moral suffering that distresses the victim.[190] In Colombia, the doctrine tends to differentiate damage (dommage) from harm (préjudice).[191] "Damage is the injury to the right to life or health of the worker, such as death, or psychological or physical injury, an organic injury, a functional or psychological disturbance or disability. Whereas harm corresponds to the negative consequences, of a pecuniary or non-pecuniary nature, which are generated for the victim as a consequence of the occurrence of the damage".[192] In that order of ideas, what is compensable under the Colombian legal system is the harm, not the damage.

- Employer's fault: is the lack of diligence or care or prudence that the employer should have used. This is the "slight fault that is predicated of one who, as a good father of a family, must use ordinary or medium diligence or care in the administration of his business".[193] Its analysis involves an examination of the employer's conduct in both its actions and omissions. Regardless of the intention with which the conduct was executed. As stated by Professor Diego Sánchez "the employer's fault in the occurrence of an industrial accident

[189] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 30 July 2014, *Eduardo Caraballo Baena v Electrificadora del Atlántico S.A. ESP*, No 42532, SL14420-2014 (Colombia).

[190] Fernando Hinestrosa, *Tratado de las obligaciones (*Bogota: Universidad Externado de Colombia, 2003) at 529.

[191] Henao, *supra* note 33 at 76.

[192] Sánchez-Acero, *supra* note 139 at 41.

[193] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 30 October 2012, *Carlos Arturo Cajar Rivera v Electrificadora del Meta SA ESP*, No 39631 (Colombia).

is his failure to comply with the obligations of protection and safety that he has, legally and contractually, towards his worker".[194]

- Causal link: This term refers to the connection between the employer's wrongful conduct and the harm suffered by the worker. It is essential to prove that the employer's negligent or careless conduct was the direct cause of the injury. This implies verifying both that the accident or occupational disease occurred arising out of or in connection with work, and that the proven fault of the employer was the actual cause of the injury, i.e. that the injury would not have occurred without this negligence." [195]

For the ordinary and full compensation established in Article 216 of the CST "it must be proven that the damage originated in a work-related activity was the consequence or effect of the employer's negligence or fault in the fulfilment of his duties, that is, to ensure the safety and protection of his workers (Article 26, numerals 1 and 2 of Decree 2127 of 1945)".[196] In other words, if the causal link is broken and the employer's conduct turns out not to be the immediate cause of the damage, the employer is released from any liability to pay compensation to the worker.

8.2.2. Exemption from employer's liability

The Supreme Court of Justice has traditionally admitted the following as grounds for exoneration of the employer's liability[197] : (i) force majeure or fortuitous event, i.e. the existence of an unforeseeable, irresistible event beyond the control of the parties and which is not part of the risk factors of the work activity; (ii) the act of a third party, i.e. when the negligent act comes from an agent external to the employer and that act was the exclusive cause of the damage and, (iii) the exclusive fault of the victim, which occurs when the damage has been caused by the victim's

[194] Sánchez-Acero, *supra* note 139 at 83.

[195] *Ibid* at 85.

[196] *Eduardo Caraballo Baena v Electrificadora del Atlántico S.A. E.S.P.*, *supra* note 189.

[197] Corte Suprema de Justicia Sala Civil [Supreme Court of Justice Civil Section], 17 November 2020, *Neida Esther Perilla Acevedo v Flota Cháchira Ltda*, SC4420-2020 No 00093-01(Colombia).

actions. Even if the worker establishes that they have suffered an injury, if during the process any of these situations is proven, the worker will not receive any compensation from the employer.[198]

It is important to note that for the events described above to fully relieve the employer from liability, they must be exclusive. That is to say that if in a specific case where there was force majeure or fortuitous event; or an act of a third party; or the fault of the victim, and in addition it can be demonstrated that the employer acted with fault, in that case the employer will be still liable for the damages caused to the worker as a consequence of the worked-related accident or occupational disease. [199]

The employer must also prove that it has fulfilled its general duty to protect and care for the worker, which goes beyond sporadic training and the mere delivery of some work elements. The Supreme Court of Justice has gone further in the development of this obligation, and based on the existence of rules on the promotion of health and safety at work by the employer (see Resolution 1010 of 1989, Decree 1443 of 2014 compiled in Decree 1072 of 2015) has established that the true fulfilment of the duty of protection and care of employers over workers is satisfied when the observance of three types of duties is verified: generic, specific and exceptional.[200]

(i) Generic duties: are linked to general prevention obligations, such as the duty to provide training and information on functions, risk factors and the implementation of protective measures. For example, ongoing training on the overview of factors and accident statistics so that workers are aware of the risks at work and the prevention measures available; (ii) specific duties: are established by law and regulate prevention obligations in specific tasks, as may be the case for example for work at heights or more recent work such as content controllers; (iii) exceptional duties: arise in situations where circumstances require special prevention measures, such as when work is carried out in high-risk areas or when an unusual but probable risk has been warned about.

[198] Arenas-Monsalve, supra note 142 at 806.

[199] Sánchez-Acero, *supra* note 139 at 85.

[200] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 4 November 2020, *Rafael Hernando Beltrán Ramos v Discristales S.A.*, No 61563, SL5154-2020 (Colombia).

8.2.3. Compensatory damages

As a civil liability scheme, it follows the rules of tort law. In the Colombian context, only compensatory harms are recognized, which correspond to the value of the compensation in proportion to the damage suffered. Unlike in Canada, Colombia does not accept punitive damages.

Compensation for damages should restore the person in proportion to the harm caused as if the harm had never occurred. Or if this is not possible, at least, place the worker or their beneficiaries in conditions as close as possible to those that existed before the harm.[201] Professor Henao explains that this rule is based on a general principle of law: "If the damage is compensated above the damage actually caused, there would be an enrichment without just cause in favour of the victim; if the damage is compensated below the damage actually caused, there is an impoverishment without just cause for the victim. Damage is thus the measure of compensation". [202]

When the Supreme Court of Justice has recognized the payment of full compensation in favour of workers under the employer's liability scheme, it has traditionally used the following typology in the compensation: material damages and immaterial or non-pecuniary damages.

Material damage

Material damages entail a decrease in the worker's financial assets. This loss of assets can occur in two scenarios: assets departing directly from the worker's wealth or, although they were intended to come in, they cannot come in due to work-related misfortune. To establish the legitimacy of these damages, the worker has the burden of proving the existence and quantity of their loss through litigation.[203] Article 1614 of the Colombian Civil Code categorizes material damages into emerging damages (damnum emergens) and loss of earnings (lucrum cessans).

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[201] *Corte Constitucional [Constitutional Court], 20 May December 1993, C-197-93 (Colombia).*

[202] Henao, *supra* note 33 at 45.

[203] Sánchez-Acero, *supra* note 139 at 43.

Emerging damage

Emerging damage is "the loss arising from the non-fulfilment or imperfect fulfilment of the obligation, or from the delay in its fulfilment".[204] This type of damage involves the loss of an economic asset that was in the victim's patrimony.[205] The Supreme Court of Justice has established that emerging damages include, in addition to the loss of patrimonial elements, the expenses that should have been incurred or that may arise in the future, as well as the increase of the liabilities due to the facts that generated the liability. A typical example of this kind of damage is the employee's right to reimbursement of reasonable expenses arising as a consequence of the damage such as medical and nursing expenses.[206]

Loss of earnings

Loss of earnings is "the gain or profit that ceases to accrue as a result of non-performance, imperfect performance, or delayed performance of the obligation".[207] Loss of earnings is the loss of an expected income that will no longer be forthcoming as a result of the harm, such as lost wages, fees, stipends, and other similar income.[208]

The Supreme Court of Justice distinguishes between two situations in which the right to loss of earnings can be generated: i) the consolidated loss of earnings is the amount not received from the time of termination of the employment contract until the date of the judgment[209] ; and ii) on the other hand, the future loss of earnings is the expected income that the worker would have continued

[204] Art. 1614 *note 180.*

[205] Arenas-Monsalve, supra note 142 at 800.

[206] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 24 August 2011, *Alvaro Gomez-Silva v Pride Colombia Services*, No 40135 (Colombia).

[207] Art. 1614. *note 180.*

[208] *Alvaro Gomez-Silva v Pride Colombia Services, supra* note 206.

[209] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 26 February 2020, *Cristina Cortes v Positiva Compania de Seguros S.A.*, No 67414 (Colombia).

to receive until the fulfilment of his life expectancy.[210] As with emerging damages, claims for loss of earnings require the worker to prove the damage before court. [211]

Non-pecuniary damage

In Colombia, immaterial damages have been understood as "damages that do not have an economic nature, in the sense that, by definition, they cannot be measured in money"[212] . Non-pecuniary damages, although they do not involve the impairment of a certain economic right, nevertheless produce an emotional injury or some damage to the feelings of the victim or third parties.[213]

In the Colombian legal framework, the Council of State (Consejo de Estado) stands out as the primary judicial entity that has extensively shaped this concept. According to its jurisprudence, the understanding has evolved to encompass:

> The typology of non-pecuniary damage can be systematised as follows: i) moral damage: ii) damage to health (physiological or biological damage): iii) any other property, right or legitimate constitutional interest, legally protected that is not included within the concept of "bodily harm or affectation to the psychophysical integrity" and that deserves an assessment and compensation through the traditional typologies such as damage to the life of relationship or serious alteration to the conditions of existence or through individual or autonomous recognition of the damage (e.g. the right to a good name, to honour or honour; the right to have a family, among others), provided that its realisation is accredited in the process and that it is necessary to be compensated, in accordance with the concept of the right to have a family, among others).e.g. the right to a good name, honour or reputation; the right to have a family, among others), as long as its concreteness is accredited in the

[210] Supreme Court of Justice Labour Section, 30 June 2005, Laureano Mora Carreño v Safe Colombia v S.A., No 22656 (Colombia).

[211] Sánchez-Acero, *supra* note 139 at 44.

[212] Henao, *supra* note 33 at 230.

[213] Arturo Valencia-Zea, *Derecho civil: De las obligaciones*, Derecho civil (Editorial Temis, 2004) at 181.

process and compensation is necessary, in accordance with the guidelines established at the time by this Corporation.[214]

In the context of non-pecuniary damages resulting from workplace accidents or occupational diseases, the Supreme Court of Justice has consistently included the following concepts in compensation for non-pecuniary damages: moral damages and damages to the quality of life in the relationship (loss of life's amenities).[215]

Moral damages

Moral damage is the sentimental and emotional affectation that is generated in the intimate sphere of the direct or indirect victim, as a consequence of the adverse situation produced by the work-related accident, especially in his state of mind, causing the victim feelings of anguish, sadness, grief, affliction, melancholy, desolation, etc.[216]

The Supreme Court of Justice recognizes specific situations where moral damages are presumed. For example, in cases of bodily injury, the moral damage of the injured person is presumed; in the case of the death of a worker, the moral damage to his or her children, spouse or permanent partner, parents and siblings is presumed. In other cases, sentimental pain and suffering must be proven.[217]

Damage to the life of the relationship (loss of amenities of life)

This loss refers to the impairment of the aptitude to enjoy the dimension of life in any of its social scenarios, which prevents some activities from being carried out or which require effort or generate

[214] *Felix Antonio Zapata González v Nación Ministerio de Defensa*, *supra* note 181.

[215] Sánchrez-Acero, *supra* note 139 at 49.

[216] *Ibid.*

[217] *Ibid* at 52.

discomfort and difficulties.[218] This type of damage corresponds to an affectation to the external sphere of the individual's behaviour, that is, in the situations of practical life or in the development that the affected person has in the personal, family or social environment. It becomes evident through obstacles, requirements, difficulties, deprivations, uncertainties, limitations or temporary or permanent of varying degrees. The affected individual must endure these changes, which, in any case, lack any monetary, productive, or economic significance.[219]

8.3. Challenges of the full reparation scheme based on the employer's liability.

Compared to the SGRL, the employer's fault scheme offers workers and beneficiaries the potential for higher compensation than the tariff scheme.[220] Yet, it falls short in essential areas such as rehabilitation, psychological support, and reintegration into the labour market. By placing a primary focus on financial restitution, this scheme neglects critical aspects, failing to address the core issues, including the promotion of a safe and healthy working environment as stipulated in the ILO's Convention 187 regarding Promotional Framework for Occupational Safety and Health.[221]

While the substantial potential litigation awards under the employer's fault regime may incentivize employers to act responsibly and adhere to their labour obligations, they alone are insufficient to encourage proactive measures aimed at preventing future workplace accidents and occupational diseases. This approach does not foster investment in occupational health and safety, and it neglects the crucial aspects of worker rehabilitation and return to work. In essence, the system's

[218] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 18 September 2019, *Argenida Emilia Porto Mateus v Sociedad Portuaria Rio Córdoba SA*, No 78718, SL4570-2019 (Colombia).

[219] Corte Suprema de Justicia Sala Civil [Supreme Court of Justice Civil Section], 7 March 2019, *Luz Marina Gómez Ramírez v Alejandro Quintero*, No 2009 00005 01, SC665-2019 (Colombia).

[220] Arenas-Monsalve, *supra* note 142 at 807.

[221] Even though the Colombian government has not ratified Convention 187, this ILO convention holds significant importance. Convention 187 is considered a fundamental convention. As a result, the country is still under an obligation to adhere to the international labor standard. Periodic reports must be submitted to the ILO's supervisory bodies, showcasing the measures taken to align internal legislation with the principles outlined in the convention.

purely economic perspective falls short of addressing the fundamental challenges associated with occupational risks.

The employer's fault system often confuses "indemnity" with "compensation," suggesting that if the employer is not deemed at fault, the worker is not entitled to compensation. This equation is flawed because even if the employer acted responsibly in a specific case, and the worker experienced a work-related injury or illness, it does not dismiss the existence of the damage. The crucial analysis should focus on determining if there was a personal injury and whether it resulted from work-related factors. If the injury is indeed work-related, compensation should be awarded, regardless of the employer's fault in the matter.

In addition, other aspects highlight the inefficiency of the employer's fault system in obtaining prompt and fair compensation for workers injured in work-related events. For example, the lengthy duration of the judicial process, which can take several years to be finally resolved, or the high costs involved, both financially and emotionally. Moreover, it should not be forgotten that the outcome of litigation is uncertain, which means that prolonged waiting and the payment of fees is no guarantee of a favourable outcome for the worker, who will always depend on the judge's decision.

The issue is significant because it affects a considerable number of individuals. Despite the fact that only 56.14% of Colombia's total employed population is affiliated with the SGRL[222] (highlighting another problem of limited access to the system), the number of affiliates nationwide has been on the rise. Official data from the Minitery of Health and Social Protection[223] shows that by the end of 2023, the SGRL had 12,120,419 affiliates reflecting a 3.4% increase compared to the previous year. During the same period, ARLs reported paying benefits for partial permanent disabilities and disability pensions to approximately 17,000 members (excluding wage loss benefits). Regarding the frequency of work-related accidents, there was an increase in 2023.

[222] "Labour Risks Indicators | Ministery of Health and Social Protection", online: <www.minsalud.gov.co/proteccionsocial/RiesgosLaborales/Paginas/indicadores.aspx>

[223] *Ibid.*

According to the Colombian Council of Safety (CCS), there were over 550,000 accidents, translating to 4.65 accidents per 100 workers, a slightly higher figure than in 2022 (4.62 accidents per 100 workers). However, there was a significant decrease in the number of illnesses diagnosed as occupational in origin in 2023, with around 11,700 reported cases compared to 32,000 in 2022.

On the other hand, by 2023, around 200,000 legal actions were initiated before labour judges with approximately 5% of the cases being related to employer's fault claims. These statistics paint a worrying picture, where despite the benefits of the SGRL there is still an important number of claims from individuals seeking for full compensation outside the no-fault system.

This criticism is a reality shared by all workers who decide to initiate a legal claim. In the case of workers with mental illnesses caused by or in connection with their work and workers who, for the same reasons, have suffered non-pecuniary damages such as moral damage or damage to their relationship life, the situation is even more serious. This is because exposure to such processes can exacerbate the negative consequences on the mental health and emotional well-being of injured workers. Being subjected to the uncertainties of litigation may not only increase feelings of anxiety and uncertainty but also be a catalyst for re-victimisation of workers.

Exposure to these negative aspects of the system would be significantly reduced if the worker could access full compensation for damages, including material and non-material damages, through the tariff-based compensation scheme or occupational risk system. As indicated above, the system allows more efficient access to injured workers, at a lower cost and with an objective criterion that does not depend on the employer's conduct but on the origin of the worker's injury.

The proposal aims to shift non-pecuniary claims from the employer's liability scheme to the no-fault SGRL, introducing specific benefits within the SGRL for comprehensive and fault-independent reparation. Focusing on non-material damages, the proposal outlines an assessment method and introduces the the policy debate for efficient access to system benefits. This approach, coupled with the existing preventive measures and monitoring tools in the Colombian Labour Risk System, ensures swift and comprehensive protection for workers in cases of work-related injuries.

9. Transition from employer's liability scheme to a no-fault scheme.

This chapter will present a detailed examination of the proposed transition from the employer's liability scheme to the no-fault SGRL, elucidating the key components and mechanisms involved in the integration of non-pecuniary claims. The focus will be on the specific benefits introduced within the SGRL to provide comprehensive reparation, irrespective of fault. Emphasis will be placed on the assessment method designed for non-material damages, addressing the intricacies of evaluating and compensating these losses.

9.1. Assessing non-pecuniary damages

As elucidated in this thesis, moral damages, pain and suffering, emotional distress, uncertainty, and other similar aspects are not subject to economic measurement under Colombian law. Compensation in this case, is not intended to restore the value of the injured property in money, but to alleviate the effects.[224] As Professor Henao points out:

> It is a question of granting a sum of money to a widow, to an injured person, so that they have an asset to help them mitigate their pain. The aim is not, therefore, that they are left materially unharmed, but that they have the money or another asset that allows them to make their grief more bearable and to suffer the emotional alteration produced in the best possible conditions and thus allow the damage to cease or lessen.[225]

Therefore, the proposed criteria outlined here do not aim to quantify the worker's pain and suffering in monetary terms but rather intend to establish a sum to accompany and alleviate the worker and their beneficiaries during their recovery process and provide financial support in recognition of their hardship and loss.

[224] Laura Anaya-Quintero, "Problematicas teórico-prácticas en las categorías del daño inmaterial reconocidas por la jurisprudencia colombiana" (2017) 18:1 Rev Digit Derecho Admin 371 at 374.

[225] Henao, *supra* note 33 at 231.

Initially, we will examine decisions from the Labour Chamber of the Supreme Court of Justice, specifically those where the employer was mandated to compensate non-pecuniary damages in favour of the claimants. This examination will commence with cases involving the demise of a worker due to work-related incidents or illnesses, followed by instances where the injured worker survived. Upon completion of this phase, we will identify the guiding criteria that will serve as benchmarks for formulating the non-pecuniary damages benefit within the no-fault system. Finally, the proposed criteria for calculating the benefit will be outlined, accompanied by examples to enhance comprehension.

This analysis draws on the framework presented by Tulio Alejandro Fajardo Acuña. Fajardo's guidelines provide a foundation for evaluating compensation for non-pecuniary damages. [226] While adopting the same criteria, this research posits that these guidelines should facilitate the creation of specific benefits for compensating non-pecuniary damages within the SGRL. Consequently, injured workers or their beneficiaries can access compensation for non-pecuniary damages concurrently with the existing benefits under the occupational risk system, without the obligation to establish the employer's fault.

a) Average award for non-pecuniary damages when the worker died between 2013 and 2023:

A review of relevant cases from 2013 to 2023 reveals the nuanced landscape of moral damages awards within the SGRL. In the cases under scrutiny, the Supreme Court of Justice meticulously examined the plaintiffs' assertions regarding non-pecuniary damages. In these instances, the unfortunate demise of the workers resulted from work-related accidents. The plaintiffs advanced their claims, contending their entitlement to compensation for moral damages arising from these losses. Following a thorough examination of the cases and substantiating the presence of employer negligence in the incidents, the Court acknowledged the obligation to remunerate the claimed damages. Nevertheless, it is notable that the awarded amounts exhibited a lack of uniformity.

[226] Fajardo-Acuña, *supra* note 148 at 85.

For instance, in cases such as Elma Sofia Parga v Alpha Seguridad Privada Limitada[227] and María Sánchez v Conaltura Construcción y Vivienda S.A.[228], the court awarded compensation for moral damages to spouses, children, and other dependents, for different amounts, even though in all cases share similarities in their facts. A work-related accident, where the worker unfortunately died, and where there was proof of the employer's liability. In these cases, there is a consistent application of the legal minimum monthly wage (smlmv) as the unit of measurement for assessing moral damages.[229]

In Esther Julia Riascos Angulo v Mayaguez S.A.[230], the court awarded moral damages to the spouse and four minor children, setting a precedent for subsequent cases in which similar familial dependencies were recognized. Similarly, in Maritza Fitata v Coop-Sol del Oriente[231], the court granted moral damages to the permanent partner and minor children, reaffirming the principle of compensating dependents for non-pecuniary losses.

However, amidst these precedents, notable discrepancies emerge. While the average compensation for non-pecuniary damages ranges from 46 smlmv for spouses or permanent partners to 70 smlmv for parents, some cases reached a maximum award of 100 smlmv per victim. For instance, in Rafael Hernando Beltran Ramos v Discristales S.A.,[232] the court awarded significant compensation to the mother, stepfather, and siblings of the deceased worker, reflecting a more generous

[227] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 18 October 2023, *Elma Sofia Parga v Alpha Seguridad Privada Limitada*, No 95153, SL2981-2023 (Colombia).

[228] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 14 April 2021, *María Sánchez v Conaltura Construcción y Vivienda SA*, No 70895, SL1900-2021 (Colombia).

[229] "Smlmv" stands for the minimum monthly wage in Colombia, which by 2024 is 1,300,000 COP, approximately 447 CAD in February 2024.

[230] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 5 November 2014, *Esther Julia Riascos Angulo v Mayagüez SA*, No 44540, SL16102-2014 (Colombia).

[231] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section]10 July 2013, *Maritza Fitata Sánchez v Coop-Sol del Oriente*, No 42561, SL440-2013 (Colombia).

[232] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 4 November 2020, *Rafael Hernando Beltrán Ramos v Discristales SA*, No 61563 SL5154-2020 (Colombia).

interpretation of moral damages. A similar situation occurred in Reinaldo Figueroa Gaviria v Constru Loft S.A.[233]

Intriguingly, only one case addressed damages concerning the "life of the relationship," indicating a potential area for further legal exploration. In Hernando Alarcón v Telemediciones S.A., the court not only compensated the permanent partner and minor daughter but also recognized the damage to the life of the relationship, highlighting the broader impact of workplace accidents on familial dynamics.

Moreover, the analysis reveals certain shortcomings in the current system. Despite the awarded compensations, no measures were prescribed to prevent future work accidents or occupational diseases. Similarly, psychological support for beneficiaries or guidance in the job procurement process was notably absent, raising questions about the comprehensiveness of the court decisions in addressing the holistic needs of affected parties.

In conclusion, the Court's recognition of the existence of non-pecuniary damages to the families of deceased workers is noteworthy. This recognition is what allows compensation to be awarded to the claimants. However, although the Court provides a mechanism for compensating non-pecuniary damages, there is still room for refinement and improvement to ensure equitable outcomes and comprehensive support for injured workers and their families. The lack of uniform criteria generates legal uncertainty and discourages the beneficiaries of compensation from raising their claims.

b) Average number of awards for moral damages when the worker suffered physical and/or psychological injuries between 2013 and 2023:

Similarly, in examining a series of cases spanning the same period, the Supreme Court of Justice undertook a meticulous examination of the plaintiffs' claims concerning non-pecuniary damages

[233] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 25 October 2017, *Reinaldo Figueroa Gaviria v Constru Loft SA*, No 64897 SL17473-2017 (Colombia).

resulting from physical and/or psychological injuries sustained by workers. These tragic incidents, rooted in work-related accidents, compelled the plaintiffs to assert their right to compensation for the profound losses incurred. Subsequently, after a thorough review of these cases and evidence of employer negligence in the accidents, the court acknowledged the imperative to remunerate the claimed damages. However, the awarded amounts exhibited considerable variance, reflecting the nuanced circumstances of each case.

Consider, for example, the case of Jhony Cardona Méndez v BI S.A.S.[234], where the court awarded moral damages to the worker for both the injury sustained (26.84% PCL) and the resultant damage to the life of the relationship. Similarly, in Gilberto León Moreno Cano v Eta Servicios S.A. E.S.P.,[235] compensation was extended not only to the injured worker but also to his family members, including his wife and children, further illustrating the intricate dynamics at play in such cases.

Meanwhile, in Lesly Lenes Peinado v Seatech International INC[236], a singular sum was awarded to the worker, emphasizing the diverse compensation patterns observed within these judgments. Furthermore, in Juan Gabriel Henao Mantilla v Electrificadora de Santander S.A. E.S.P.[237], a more nuanced approach was adopted, with compensation meticulously allocated to the worker and his family members based on the severity of the injuries and their respective relationships to the worker.

These cases serve as relevant examples of the complexities inherent in adjudicating claims for non-pecuniary damages within the context of workplace injuries. Despite these variations, certain

[234] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section], 31 August 2022, *Jhony Cardona Méndez v BI SAS*, No 83669, SL4223-2022 (Colombia).

[235] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section] 3 February 2021, *Gilberto León Moreno Cano v Eta Servicios SA ESP*, No 68960 SL440-2021 (Colombia).

[236] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section] 20 October 2021, *Lesly Lenes Peinado v Seatech International INC*, No 70072 SL5300-2021 (Colombia).

[237] Corte Suprema de Justicia Sala Laboral [Supreme Court of Justice Labour Section] 30 January 2019, *Juan Gabriel Henao Mantilla v Electrificadora de Santander SA ESP*, No 71585 SL261-2019 (Colombia).

trends emerge from the analysis. Notably, the average compensation for injured workers stood at 65 smlmv, while spouses or permanent partners received an average of 35 smlmv, and children received 25 smlmv on average. However, judgments recognizing convictions in favour of siblings were notably absent, underscoring potential disparities in the treatment of different familial relationships within these legal contexts.

Moreover, the review revealed recurring themes across the cases. Again, the unit of measurement for moral damages consistently aligned with the prevailing legal minimum monthly salary (smlmv), and the victims ranged from direct (the workers) to indirect (spouses, children, parents) beneficiaries. Notably, in four cases, compensation for damage to the life of the relationship was ordered, highlighting the broader ripple effects of these incidents on familial dynamics.

However, despite the compensation, no measures were prescribed to prevent future accidents or to provide support, such as psychological assistance or guidance in job procurement, highlighting potential gaps in the system's comprehensiveness. While the court grapples with these complex cases, there remains a pressing need for more consistent approaches to compensation and broader measures to address the multifaceted impacts of work-related injuries and illnesses on workers and their families.

Building upon the comprehensive analysis and insights gleaned from the aforementioned cases, the formulation of guiding criteria to underpin the construction of benefits for non-pecuniary damages within the occupational risk system emerges as a pivotal endeavor. These criteria are designed to navigate the complexities of compensating victims of work-related incidents, while also ensuring efficiency, fairness, and alignment with legal precedents and societal needs.

1. Benefit ceiling. A pivotal consideration in this formulation is the establishment of a benefit ceiling, set at 50 smlmv. This is the average amount recognized for all levels of indirect victims. It compensates all non-pecuniary damages caused by the work event to the worker and indirect victims. Although this is a lower ceiling than the maximum sentence judicially imposed (of 100 smlmv), this decrease is justified to the extent that in the proposed solution claimants will not have to incur the costs of lawyers' fees. Also, it is expected that after the

inclusion of these benefits in the SGRL, claims will be solved faster in comparison with the employer's fault system.

However, it is recommended that this cap be subject to periodic review, taking into account the views of the actors involved (workers' organizations, employers' organizations, insurers, government and expert advisors on occupational safety and health), as well as legal developments in other branches of law on non-material damage.

2. Beneficiaries. While the Supreme Court of Justice precedent lacks a clear criterion for selecting claimants or beneficiaries, the Council of State's unification judgment of 28 August 2014[238], which establishes consanguinity levels for assessing compensation for moral damages, will serve as the guiding reference in this matter. The judgments in question only grant benefits for level 0 (workers); levels 1 (spouse, permanent partner, children) and 2 (siblings) [239] , the proposed benefits will only be granted to persons in those levels. It should be noted that level 2 will not include grandparents or grandchildren as they are not included in the Supreme Court of Justice case law analyzed.

3. Distinction based on circumstances. The first when the worker dies, in which case benefits are provided for beneficiaries belonging to Level 1 and Level 2; and the second when the worker is injured, in which benefits are provided for beneficiaries of Level 0 (the injured worker), and additionally for beneficiaries belonging to Level 1 and Level 2.

4. Origin of the work-related event. The incident leading to the work-related accident or occupational disease, resulting in harm to the worker, must be unequivocally categorized as having originated in the occupational context. In other words, the event must have occurred arising out of or in connection with work.

[238] Council of State, 28 August 2014, *Ana Rita Alarcon v Municipio de Pereira*, No 26251 (Colombia).

[239] Level 3, consisting of great-grandparents, great-great-grandchildren, aunts, uncles and nephews; level 4, consisting of cousins, great-nephews, great-nieces, great-uncles; and level 5, consisting of affective relationships with third parties are excluded from compensation for non-pecuniary damage.

5. Exclusions. If the existence of the employment relationship is in dispute, or if the claimant is someone other than those listed in levels 1 and 2, compensation would not be granted under the SGRL. Instead, claimants shall initiate a civil action.

In synthesizing these guiding principles, the aim is to foster a robust and equitable framework that not only addresses the needs of injured workers and their families but also aligns with legal precedents, societal expectations, and pragmatic considerations within the occupational risk landscape.

9.2. Calculation of the benefit

The objective of establishing criteria for the assessment of the benefit for non-pecuniary damage and of including this benefit in SGRL is to combat the difficulties that currently exist in claiming compensation for non-pecuniary damages through the courts. The goal is to ensure that compensation for workers and other victims of work-related accidents and occupational diseases is prompt, truly comprehensive, fair, efficient, and free of litigation costs.

In this case, the objective is not to obtain an absolute restoration of the damage caused, as it is not possible to return the emotional or affective state of the person to its previous state. The purpose of this benefit is to accompany the affected person during the process of emotional suffering and internal grief. In the same manner as the non-economic loss benefits in Canada, this benefit is meant to recognize the permanent effects of workplace injury on a worker's life outside of work.[240] This compensation serves as more than a mere indemnity; rather, it is a form of assistance integrated into the SGRL, acknowledging, and addressing the emotional impact experienced by the affected party.

As we previously delved into in this thesis, the calculation for non-economic loss benefits is assigned depending on the severity of the injury and the impact it has on the individual's ability to

[240] "Non-Economic Loss Awards", online: <*Office of the Worker Adviser* <www.owa.gov.on.ca/en/workplace-insurance/benefits/non-economic-loss-awards/>.

function in daily life. The age of the injured individual at the time of the injury also plays a crucial role in this calculation process. Specifically, adjustments are made to the compensation amount based on whether the individual was younger or older than 45 years old at the time of the injury.

In order to calculate the amount of the benefit, the following elements are taken into account: i) ensuring fair compensation, ii) upholding principles of equity[241] , and iii) optimizing efficiency within the system. These factors are guided by the judicial precedent set by the Supreme Court of Justice, which has consistently ruled in favour of acknowledging compensation for non-pecuniary damages.

Although the demonstration of the employer's fault is no longer relevant to the access of compensation for the worker and/or the beneficiaries, this element is still relevant for possible claims that the ARL may initiate against the employer, in this cases it should be possible to increase the amount of contributions for negligent employers. Also, the Colombian Ministry of Labour may initiate administrative investigations and, in the event of finding non-compliance with the corresponding regulations, impose the penalties provided by law.[242] In consideration of the above, and considering the proposal for the assessment of moral damages set out by Fajardo Acuña, the benefits for non-pecuniary can be structured as follows:

9.3. Benefit in case of death of the worker.

To determine the benefit in the unfortunate event of a worker's demise, three key criteria are considered: i) the age of the deceased worker, ii) the presence of minor or children with disabilities, and iv) proof of cohabitation with the deceased worker. Each criterion contributes to a provisional value, which is then averaged to determine the final benefit. Age, presence of dependents, and cohabitation status influence the compensation amount, with younger workers and those with

[241] Fajardo Acuña, *supra* note 148 at 93.

[242] Art. 486 *Substantive Labour Code (Colombia)*.

dependents generally receiving higher benefits. This system aims to provide efficient and fair compensation for non-pecuniary losses incurred by the beneficiaries of deceased workers.

9.4. Benefit in case of injury to the worker.

Similarly, for injury benefits, four criteria are evaluated: i) severity of the worker's injuries, ii) the worker's age at the time of injury, iii) the presence of minors or children with disabilities, and iv) proof of cohabitation with the injured worker. These criteria follow a similar process of generating provisional values and averaging them to determine the final benefit. The severity of injuries, age, presence of dependents, and cohabitation status all impact the compensation amount, with more severe injuries and younger age generally resulting in higher benefits. The proposed system aims to streamline the compensation process and ensure swift delivery of benefits to injured workers and their dependents, contributing to a more equitable and just resolution of legal matters in social relations.

These non-pecuniary damage benefits do not preclude the worker or their beneficiaries from receiving other benefits outlined in the SGRL. The only exception is compensation for partial permanent disability, which should be replaced by this specific benefit. Unlike compensation for partial permanent disability, which does not address a particular injury, this non-pecuniary loss benefit considers not only the PCL but other broader factors for the calculation. Consequently, the provision of a benefit for non-pecuniary loss renders the compensation for partial permanent disability redundant and can be discontinued

The values obtained are reasonable and proportional, allowing swift compensation for the beneficiaries of the deceased worker who have suffered non-pecuniary damages due to his or her death. Although in some cases the judicial values may exceed those proposed, it is crucial to bear in mind that the inclusion of these benefits in the occupational risk system ensures faster delivery, a reduced burden of proof and the elimination of litigation costs. Overall, this proposal seeks a more efficient response to compensation for non-pecuniary damages. Prompt resolution of legal situations such as this contributes to a greater degree of fairness and justice in social relations.

9.5. What about cases where the employer was at fault?

To this point, we have explored the viability of incorporating non-pecuniary damage benefits into the compensation framework established by the SGRL. This proposal focuses on providing an effective, rapid, and inexpensive solution to claims for non-pecuniary damages caused by work-related accidents and diseases. It also prevents workers from resorting to litigation to obtain compensation for such damages, which reduces the costs of the claim and alleviates the congestion in the judicial system.

The proposed system transfers claims for non-pecuniary damages from a system of subjective liability to one of strict liability where the worker does not have the burden of proving the employer's fault. Nevertheless, it prompts an inquiry into whether, in this altered scenario, there are any repercussions when the employer is indeed negligent. While punitive damages are not awarded in Colombian tort law, there's a prevailing notion that a negligent employer should bear some form of consequence for their actions, particularly given that the primary obligation of the employer is to ensure the well-being and safety of the worker.

Article 486 of the CST establishes that the Ministry of Labour, as the labour inspection authority, has the power to carry out administrative investigations against employers who do not comply with labour regulations, with a special emphasis on non-compliance with occupational safety and health regulations. In case the Ministry of Labour notices a violation of those duties, it can impose fines of up to 5000 smlmv. This is regardless of a work accident or occupational disease. Nonetheless, the payment made by the employer in case of an administrative sanction is not addressed to the worker, but to other state entities in charge of administering these resources in different projects, especially in education.[243]

Now, despite the existence of such sanctions, it is possible that not all cases of occupational accidents are investigated and even if in some cases the employer has actually acted negligently, the Ministry of Labour does not investigate their conduct. This, coupled with a strict liability

[243] Art. 486 *Substantive Labour Code (Colombia)*.

scheme, could be an incentive for the employer to avoid investing resources in occupational safety and health schemes to avoid and prevent occupational accidents and diseases.

As Viviana Martelo-Angulo explains in her economic analysis of the occupational health and safety management system in Colombia, if the cost of possible litigation, due to employer's fault, or in this case the cost of paying contributions to the SGRL, is lower than the costs of investing in the prevention of occupational accidents, the employer might prefer to prepare for litigation (under the current system)[244] or pay an eventual increase in contributions (under the proposed scheme) rather than adopt preventive and protective measures for workers.

The effectiveness of the compensation framework in deterring employer negligence is crucial and should be carefully considered. Some systems assess deterrence by examining the frequency of claims made by an employer, while others adjust premiums based on risk proxies. It is important to determine how liability is assessed and how this aligns with the goal of deterrence rather than merely compensating workers. For instance, if the compensation system guarantees payment regardless of fault, the design must ensure that employers are still incentivized to invest in safety measures. This might involve adopting mechanisms similar to those used in other systems, where liability and premiums are adjusted based on the level of negligence.

For these reasons, and in order to avoid a perverse incentive for the employer to the detriment of the employee, it is proposed that, similarly to the Canadian model, if negligence is established and expenses have been allocated to the employer of the accident, a portion of the entirety of these expenses will be transferred from the accident employer's claims record to that of the negligent employer. In this regard the WSIB website established the following criteria:

[244] Viviana Martelo-Angulo, *Análisis Económico del Sistema de Gestion de Seguridad y Salud en el Trabajo en Colombia* (Bogota: Universidad Externado de Colombia, 2019) [unpublished] at 226.

Once the costs determined by the degree of negligence have been transferred to the negligent employer's claims experience, any future benefits on the claim are apportioned accordingly. For example, if the WSIB finds the negligent employer was

- 100% negligent, all future costs are directly allocated to the negligent employer
- less than 100% negligent, all future costs are allocated to both the accident employer and the negligent employer according to the degree of negligence."[245]

9.6. Policy concerns on access to justice

To this point, we have explored the viability of incorporating non-pecuniary damage benefits into the compensation framework established by the SGRL in Colombia. This proposal aims to provide an effective, rapid, and inexpensive solution to claims for non-pecuniary damages resulting from work-related accidents and diseases. Drawing inspiration from the Canadian experience, where similar benefits have been successfully integrated into the compensation system, we seek to address key concerns regarding accessing justice in Colombia's labour compensation framework. To make this possible the following aspects should be considered in the construction of new policies that guarantee comprehensive access to injured workers and their families:

i) Enhancing Accessibility

The inclusion of non-pecuniary damage benefits within the SGRL facilitates easier access to justice for injured workers and their beneficiaries. By streamlining the claims process and eliminating the need for costly and time-consuming litigation, the proposal ensures that individuals receive timely compensation without encountering barriers related to legal procedures or financial constraints. This approach promotes equity and inclusivity by extending support to all affected parties, regardless of their ability to navigate the legal system or afford legal representation.

[245] "Transfer of Costs | WSIB", online: <www.wsib.ca/en/operational-policy-manual/transfer-costs>.

ii) Expediting Resolution

One of the primary objectives of incorporating non-pecuniary damage benefits into the SGRL is to expedite the resolution of claims. Unlike traditional litigation, which can be protracted and uncertain, the proposed system offers a more efficient mechanism for addressing non-pecuniary damages. By establishing clear criteria for assessment and calculation of benefits, the SGRL ensures swift adjudication of claims, reducing the backlog of cases in the judicial system and providing timely relief to injured workers and their families.

iii) Reducing Litigation Costs

Litigation can impose significant financial burdens on both claimants and the legal system as a whole. By offering a no-fault compensation scheme for non-pecuniary damages, the SGRL minimizes the need for costly legal proceedings, thereby reducing the financial strain on individuals seeking redress for workplace injuries. This not only benefits injured workers and their families but also alleviates the burden on the courts, allowing resources to be allocated more efficiently to other areas of need within the justice system.

iv) Alleviating Judicial Congestion

The introduction of non-pecuniary damage benefits within the SGRL serves to alleviate congestion in the judicial system by diverting claims away from the courts and towards an administrative process. By resolving disputes outside of the courtroom, the proposal frees up valuable judicial resources and enables courts to focus on cases that require more extensive adjudication. This helps improve overall efficiency in the delivery of justice and enhances access to timely resolution for all parties involved.

v) Learning from Canadian Experience

Drawing upon the Canadian experience, where non-pecuniary damage benefits have been integrated, despite the challenges presented above, into the compensation system, Colombia can glean valuable insights into best practices and potential challenges. By studying the implementation and outcomes of similar initiatives in Canada, policymakers can refine and adapt the proposed framework to suit the unique needs and circumstances of Colombia's labor compensation landscape.

In conclusion, the incorporation of non-pecuniary damage benefits into the SGRL represents a significant step towards enhancing access to justice for injured workers and their families in Colombia. By offering a more efficient, cost-effective, and expedient mechanism for addressing non-pecuniary damages, the proposal aligns with international best practices and demonstrates a commitment to promoting fairness, equity, and efficiency within the country's labour compensation framework.

9.7. Advantages

This section delineates the principal advantages inherent in the proposed transition, building upon the earlier analyses presented in this thesis. Three key advantages are outlined. First, the inclusion of non-pecuniary damages in the SGRL would expedite and streamline the claims process for workers affected by work-related accidents or illnesses, offering a faster and more cost-effective resolution. Second, it would enhance social protection. Third, transitioning to a non-fault system for non-pecuniary damages claims would align Colombia with international standards.

9.7.1. A more efficient system in terms of time and cost-effective resolution

Incorporating non-pecuniary damages into the SGRL holds the primary advantage of streamlining the claims process for workers affected by work-related accidents or illnesses. Under the current system, non-pecuniary damages must be claimed through litigation which often results in prolonged and costly procedures, as well as uncertain results. Furthermore, the system is primarily

structured around economic considerations. Including non-pecuniary damages within the SGRL aligns the system with the holistic needs of injured workers and other beneficiaries, ensuring a more efficient and responsive process tailored to the complexities of their experiences.

Moreover, this inclusion facilitates a faster and more cost-effective resolution. Delays in the current claims process not only extend the suffering of injured workers but also contribute to elevated administrative costs. By integrating provisions for non-pecuniary damages into the SGRL, unnecessary litigation obstacles are minimized, benefiting injured workers with quicker relief while simultaneously reducing the high costs of litigation. This streamlined approach not only enhances the overall efficiency of the system but also underscores a commitment to a compassionate and user-friendly framework that prioritizes the well-being of workers and their families.

9.7.2. Promotion of social protection

The existing framework, primarily focused on economic compensation, overlooks the broader impact of work-related accidents or illnesses on the social and psychological well-being of the affected individuals. Including provisions for non-pecuniary damages within the SGRL acknowledges and addresses these intangible but crucial aspects of harm. By recognizing the emotional, psychological, and social consequences of workplace incidents, the SGRL would evolve into a more comprehensive and compassionate system that genuinely supports the holistic needs of injured workers and their families.

This enhanced social protection reflects a commitment to the overall well-being of the workforce emphasizing the importance of a comprehensive approach to occupational safety and health. Recognizing the multifaceted nature of harm, beyond the purely economic, signifies a progressive step towards fostering a work environment that prioritizes the dignity, mental health, and social integration of its workers.

9.7.3. Alignment with the Social Standards

Transitioning to a non-fault system for non-pecuniary damages claims represents a crucial step towards expanding and promoting social protection for workers. This strategic shift not only aligns with international standards but also embodies a progressive approach advocated by the Committee of Experts in the Application of Conventions and Recommendations (CEACR) of ILO International Labour Organization (ILO), which has emphasized discouraging legal action as the standard recourse for victims of accidents underscores the need for a more accessible and efficient mechanism to ensure that workers receive the benefits they deserve in the aftermath of work-related injuries.[246]

This approach places the obligation on the government to create a system that is responsive, efficient, and accessible to all workers, irrespective of their affiliation with the SGRL. Such a shift would embody a proactive stance, moving away from a model where legal action becomes a standard means of seeking redress for victims of accidents.

9.8. Disadvantages

As with any proposal, there are associated disadvantages in transitioning non-pecuniary damages from the employers' liability scheme to the no-fault scheme of the SGRL. This subsection highlights three specific drawbacks. First, there may be an increase in the number of claims. Second, concerns arise regarding the financial sustainability of the system. Third, employer and administrative costs. These disadvantages merit careful consideration in the pursuit of a balanced and effective workers' compensation framework.

[246] "Observation (CEACR) – adopted 2012, published 102nd ILC session (2013)" Workmen's Compensation (Agriculture) Convention, 1921 (No. 12)".

9.8.1. Increase in the number of claims.

The shift to a no-fault system for non-pecuniary damages claims in the SGRL is likely to result in a higher volume of claims due to the increased accessibility of the framework. While this surge in claims aligns with the goal of broadening access to benefits, the primary challenge lies in managing the increased caseload effectively. Ensuring that the system is equipped with adequate resources, staff training, and streamlined processes is crucial to handle the higher number of claims efficiently and maintain the quality of service for those requiring compensation.

9.8.2. Challenges in the financial sustainability of the benefits

The incorporation of a new benefit category into any workers' compensation system, particularly in the case of non-pecuniary damages, can strain the financial resources of the system.[247] This is something to consider in the Colombian case too. The potential increase in claims poses a financial challenge, requiring careful allocation of funds. To address this, policymakers should evaluate and incorporate a model where the proven negligence of the employer is a key factor to increase their constributions to the system, in a similar manner that it occurs in the Canadian workers' compensation scheme as explained above.

9.8.3. Administrative Challenges and Employer Costs

The inclusion of non-pecuniary damages in the SGRL brings administrative challenges, requiring adjustments and additional training. The potential surge in claims may impact efficiency, necessitating careful consideration. Transitioning to a no-fault system raises concerns about its impact on employer costs, influencing hiring practices and financial stability, especially for smaller businesses. This is something that has been carefully considered in the implementation of certain reforms in other workers' compensation systems.[248]

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[247] David Shulman & Alfred E Hofflander, "Cumulative Trauma in the Context of Workers' Compensation" (1980) 1:2 J Occup Behav 119–127.

[248] Richard A Posner, *Economic Analysis of Law* (Frederick MD: Aspen Publishing, 2014).

10. Conclusion

In examining the workers' compensation systems Canada, and Colombia, particularly their treatment of non-pecuniary damages, this thesis seeks to contribute valuable insights to the discourse on improving support for injured workers and other beneficiaries. The comparative analysis reveals important differences in each jurisdiction, and highlights the complexities and opportunities inherent in addressing non-pecuniary losses.

The Canadian system, with its no-fault framework, provides a robust foundation for compensating workers. The exploration of non-economic loss benefits, especially regarding mental stress injuries and pain and suffering claims, highlights both strengths and areas for enhancement. Recommendations include refining the mental stress regulations and proposing adjustments to the compensation model for a more comprehensive and equitable outcome.

The WSIA has undergone significant evolution over decades, shaped by societal changes and influenced by case law. This continuous adaptation reflects a commitment to addressing the evolving needs of the workforce. Despite commendable progress, challenges persist in upholding worker dignity and creating a less adversarial claims process. Ongoing efforts are essential to establish a supportive environment that recognizes the comprehensive needs of workers, encompassing both financial and emotional aspects.

In the context of a dynamic labour landscape driven by technological advancements, maintaining system agility is crucial. Adapting to these changes is vital for governance bodies to ensure the system's relevance and effectiveness. Staying abreast of technology and emerging labour market demands remains a challenge, underscoring the importance of a forward-looking approach to governance and policymaking. Achieving a balance between traditional foundations and contemporary needs is key to sustaining a responsive and comprehensive workers' compensation system.

In the Colombian case, there are also aspects to highlight and areas of improvement. Colombia's dual model presents unique challenges, particularly in compensating non-pecuniary damages.

While Colombia's workers' compensation system is relatively younger than its Canadian counterpart, it has made significant strides in advancing the protection of injured workers. The current benefits framework reflects a commitment to providing more than just economic redress; it includes crucial medical support. This integrated approach underscores the system's recognition of the multifaceted needs of injured workers, encompassing both financial and medical aspects. However, like any system, there are areas for improvement.

The proposal to transition to a no-fault system for these damages signals a transformative step towards a more comprehensive approach. Such a shift aims to ensure full compensation for injured workers and their beneficiaries, transcending the limitations of the current system. Additionally, it aligns with the global trend toward promoting social protection and reducing litigation in workers' compensation cases. Embracing this model reflects an evolution towards more inclusive and equitable standards, echoing the changing perspectives on workers' rights worldwide.

The advantages of transitioning to a non-fault system in Colombia's workers' compensation framework are considerable. Such a shift promises expedited claims processing, reducing judicial congestion, and ensuring alignment with international standards, thereby enhancing the country's global standing. However, concerns about potential increases in claims volume, financial strain on the system, and heightened costs for employers necessitate careful deliberation. Balancing the imperative to improve access to justice for injured workers with the need to maintain the system's stability underscores the importance of comprehensive stakeholder engagement and rigorous impact assessment. Furthermore, while the transition holds significant potential to modernize Colombia's workers' compensation regime and advance social justice goals, prudent planning and strategic implementation will be crucial in realizing these benefits.

In the middle of the exploration of workers' compensation systems lies a profound policy debate concerning access to justice for injured workers. This debate signifies a pivotal stage in the evolution of worker protection mechanisms, as it challenges traditional paradigms and seeks to balance the interests of various stakeholders. While the adoption of a no-fault system to expedite claims processing and reduce litigation costs, there are valid concerns regarding the potential strain on financial resources and employer responsibilities. Finding common ground in the midst of these

divergent perspectives requires exhaustive deliberation and evidence-based policymaking. Nonetheless, the policy debate underscores the imperative of advancing toward a more inclusive and equitable compensation framework that upholds the dignity and rights of all workers.

As we conclude this exploration of workers' compensation systems in Canada and Colombia, the door remains open to further inquiries and advancements. Future research may delve into extending the no-fault framework to other claim categories, such as material damages, to comprehensively address the diverse repercussions of work-related incidents. Additionally, a detailed examination of administrative aspects, including the establishment of a dedicated governing body in Colombia, could enhance the efficiency and responsiveness of the system. There is an expansive landscape for exploration, offering opportunities to refine and evolve these frameworks continually. By embracing ongoing dialogue and research, we can work towards creating even more robust and equitable systems that align with the evolving needs of the workforce and the principles of social protection.

This research has advocated for a balanced and informed evolution of workers' compensation systems. By learning from the strengths and challenges of both jurisdictions, policymakers can tailor enhancements that align with the evolving understanding of workers' rights and global standards. The proposed changes aim not only to provide financial and non-pecuniary support but also to foster safer workplaces, promote employer accountability, and contribute to a more equitable and compassionate compensation framework.

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