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### Damage to Reputation: A Comparative Analysis of Pecuniary Compensation for Non-Pecuniary Harm

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# Damage to Reputation: A Comparative Analysis of Pecuniary Compensation for Non-Pecuniary Harm

BY FRANK S. GIAOUI\*

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\* Copyright © 2023 by Frank S. Giaoui, J.S.D., Columbia Law School; PhD, Sorbonne Law School; Adjunct Professor, Lorraine University School of Law and Economics; MBA graduate and former Adjunct Professor of Finance, Essec Business School; Founder of *Optimal*lex, Corp. The author would especially like to thank the Chair of his advisory committee, Professor Avery Katz, and his advisors, Professors Eric Talley and Alejandro Guarro, who actively contributed to his research at Columbia Law School. The author also thanks Professors Jonathan Askin, Laurent Aynès, Aditi Bagchi, Mark Barenberg, George Bermann, Patrick Bolton, Anu Bradford, Richard Brooks, David Capitant, Suzanne Carval, Robert Cottrol, Albert Choi, Joan Divol, Philippe Dupichot, Bénédicte Fauvarque-Cosson, Joel Feuer, Martin Gelter, Ronald Gilson, Victor Goldberg, Jeffrey Gordon, Anne Guégan, Georges Haddad, Stephen Halpert, Geneviève Helleringer, Sophie Hocquet-Berg, Patrice Jourdain, Jeremy Kessler, Caroline Kleiner, Alan Koh, Russell Korobkin, Yves-Marie Laithier, François-Xavier Lucas, Stefano Manacorda, Daniel Markovits, Thomas Merrill, Joshua Mitts, Sophie Robin-Olivier, Christina Ramberg, Alex Raskolnikov, Joel Reidenberg, Paul Rogers, David Rosenbloom, Darren Rosenblum, Gregory Rosston, Jeffrey Fagan, Carol Sanger, Robert Scott, Ruth Sefton-Green, David Schizer, Steve Thel, Ran Tryggvadottir, Christina Tvarno, Liliane Vana, Pascal de Vareilles-Sommières and Timothy Webster for their generous advice. The extends his thanks to the participants in the Law & Economics Workshop of October 9, 2017, in the Remedies lecture of December 7, 2017, in the Associates Forum of February 14, 2018 and March 6, 2019 at Columbia Law School, the participants in the ASCL YCC Conferences of April 21, 2018, May 11, 2019, and October 8, 2022 respectively at Case Western Reserve University School of Law, McGill University School of Law, and Northeastern School of Law, the participants in the Law & Economics Seminar of March 21, 2019 at Sydney University School of Law, the participants in the Law Incubator & Policy Clinic Seminar of April 3, 2019 and October 2, 2019 at Brooklyn Law School, the participants in McGill Graduate Law Conference of May 9, 2019, and the participants in the Causal Inferences Workshop of August 12-16, 2019 at Duke University School of Law for their constructive comments. Many legal practitioners had the kindness and patience to participate in the field interviews: Forrest Alogna, Laurent Aynès, Claude Bendel, Cyril Bonan, Emmanuel Brochier, Matthieu de Boisseson, Pascal Chadenet, François Château, Adam Emmerich, David Katz, Alain Maillot, Olivia Maginley,

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### ABSTRACT

*Compensatory damages for non-pecuniary harms have traditionally only been granted to individuals. When they started to be granted for legal entities in Continental Civil Contract Law, courts would typically rule on symbolic quantum. U.S. Law has only relatively recently followed this path, and until today, compensatory damages for non-pecuniary harm remain very discrete in contract law. This results in highly unpredictable outcomes and quantum; often undercompensating the actual harm and sometimes overcompensating it.*

*The case law sample analyzed shows a converging trend toward the recognition of non-pecuniary harms to legal entities in the U.S.A. and France, results which are consistent with those of my previous comparative study on breaches of preliminary agreements in the same jurisprudences.<sup>1</sup> I first demonstrate a clear negative correlation between the quantum of the plaintiff's claim and the likelihood of a plaintiff outcome. Second, I establish that the methodology, or evidentiary level of sophistication used by the claimant in support of their claim, has a concrete positive impact on the outcome. Third, I explain why claimants operating in mature industries seem to have better chances to be granted damages than those operating in riskier businesses. However, contrary to my previous general findings, smaller or medium law firms obtain better win rates and recovery rates than larger law firms.<sup>2</sup>*

*Based on the results of an empirical analysis, this article formulates simple and practical suggestions for parties seeking to improve their chances of success in recouping damages to reputation and goodwill. It also shows how implementing more quantitative valuation methods developed in other fields of research are likely to reduce the uncertainty of the recovery of damages and assist the judiciary power in reaching a fair and equitable assessment of the amount of damages decisions (to the benefit of all the constituencies).*

*Once validated on a larger and more widely shared sample, those results may not only benefit the academic debate on whether damages for non-pecuniary losses should be granted to legal entities, — but also address how to properly assess the appropriate monetary compensation to be awarded. In addition, the results also depict how courts and judges may use those methods to assist their future rulings, while parties and lawyers may use them in deciding whether to settle or litigate.*

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1. Frank Giaoui, Towards Legally Reviewable Damage Awards, 1 CORP. & BUS. L. J. 1, 34-41 (2020). [hereinafter Giaoui Damage Awards].

2. See, e.g., Cour de cassation [Cass.] ch. Réuns, June 15, 2015, Sirey 1833.I.458, note Palmer V. (Fr.)

*Continuous empirical research on certain types of damages in a commercial setting combined with the use of AI – particularly natural language processing and machine learning techniques – have the potential to lead to compensatory schedules with high predictive power.*

## I. INTRODUCTION

Until the 19<sup>th</sup> century, French courts hesitated to recognize non-pecuniary harm, resulting in a substantial list of poorly compensated harms for individuals.<sup>3</sup> The same results were even more prevalent in common law jurisdictions, such as the U.K. and the United States, particularly in matters regarding contract law.<sup>4</sup> And while the recent trend has been for courts to award damages for non-pecuniary harms resulting from breaches of contract, their traditional evaluation methods have arguably reached their conceptual and practical limits.

Beginning with bodily injury, other types of non-pecuniary harm suffered by individuals have slowly started to be recognized by courts, including damages for a breach of contract depriving a consumer of some form of enjoyment. Presently, American law recognizes in few cases that non-pecuniary interests may be an integral part of a promised service, including where the physical integrity of the obligee is not at issue.<sup>5</sup> French law, on the other hand, broadly (perhaps too broadly) recognizes the existence of non-pecuniary interests, including in contract law.<sup>6</sup> However, it generally provides only symbolic compensation except where the harm is physical.<sup>7</sup> Beneath the overlapping lack of a significant doctrine where these damages can be recognized, there is a main common thread between these two jurisdictions. Even once the existence of non-pecuniary harm has been recognized, there remains the problem of evaluating them objectively. Where the non-pecuniary damages may be caused by disappointment from a breach of contract, no court, even in the United States, has developed calculation methods.<sup>8</sup> Specific rules of calculation have been constantly patched to compensate for non-pecuniary harm and the definition of “assets” has been similarly expanded haphazardly.<sup>9</sup>

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3. See, e.g., Cour de cassation [Cass.] ch. Réuns, June 15, 2015, Sirey 1833.I.458, note Palmer V. (Fr.) The French awakening in the nineteenth century. VERNON VALENTINE PALMER, *THE RECOVERY OF NON-PECUNIARY LOSS IN EUROPEAN CONTRACT LAW* 58-76 (Vernon Valentine Palmer ed. 2015).

4. Ewan McKendrick & Katherine Worthington, *Damages for Non-Pecuniary Loss*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 287 (Nili Cohen & Ewan McKendrick ed., 2005).

5. *Id.*

6. French law regards the body as sacred and therefore grants particularly generous compensation for body injury. See Eve Matringe, *Une marchandisation assumée par le biais de l'indemnisation du préjudice corporel, exemple du droit suisse: L'obligation de minimiser son dommage. Le corps humain entre sacralisation et marchandisation [Commodification assumed through compensation for bodily injury, example of Swiss law: The obligation to minimize one's damage. The human body between sacralization and commodification]*, (2009) (Fr.) <https://hal.archives-ouvertes.fr/hal-00442064v3/document>.

7. *Id.*

8. Molly L. Csaki, *Compensation for Nonpecuniary Loss: Revising Louisiana Civil Code Article 1998 to Reflect Litvinoff's Damage-Based Approach*, 75 LA. L. REV. 1275, (2015).

9. *Id.*

The French civil law system has had a head start of about two decades to figure out these shortcomings, so this particular weakness remains salient in the United States, where the constitutional right to a jury<sup>10</sup> of one's peers, largely relying on their own knowledge and experience, opens the door to unpredictable and perhaps even unreasonable verdicts.<sup>11</sup> Juries composed of lay persons have a particularly acute need for a framework to assist them in determining the amount of damages, and amounts awarded generally rely on the court's evaluation, with very little, if any, reasoning given.<sup>12</sup> In the case of travel, for example, jury instructions direct juries that the amount awarded for emotional distress must take into account the amount paid by the obligee as a way of measuring how valuable the service was to him.<sup>13</sup>

For the same technical and philosophical reasons and limitations in valuation methods, the same non-pecuniary harm was not granted to any legal entity until recently under civil law<sup>14</sup> and even more recently under common law.<sup>15</sup>

As it has become clear from my other studies<sup>16</sup> that global jurisdictions tend to converge — eventually — I believe that the timing and circumstances are ripe for a comparative study to determine the trajectory of U.S. law in this field by looking outside towards French and International law.

In this article, I first review legal scholarship and search the case law to determine whether the concept of non-pecuniary harm for legal entities exists. As we will see, this is a difficult concept to establish — even more so than for individuals — and has frequently remained tied to economic harm.<sup>17</sup> After reporting on the obstacles to the recognition of non-pecuniary harm in Part 1 and the essential developments for individuals in Part 2, I will turn to situations in which the injured party is a legal entity in Part 3. In Part 4, I will illustrate my argument using examples of damage to brand image, reputation, and goodwill in the U.S. and French courts. Finally, I will turn to the results of my empirical study in Part 5. As reported in my previous article, I find converging trends between French and American laws and

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10. U.S. CONST. art. III, § 9.

11. Jury determinations are reviewable on appeal, but this is far from an efficient solution for all parties involved.

12. The following amounts have been awarded in U.S. courts, without explanation: *Simon v. Solomon*, 431 N.E.2d 556, 568 (Mass. 1982). (\$35,000 for substandard housing that resulted in the tenant seeking psychiatric treatment for depression); *Kishmarton v. William Bailey Construction Inc.*, 785, 788 N.E.2d 785 (Ohio 2001). (\$19,000 for the loss of the use of a villa).

13. *Harris v. Waikane Corp.*, 484 F.Supp. 372 (D. Haw. 1980).

14. See, e.g., Cour de cassation [Cass.] [Supreme Court for Judicial Matters] com., May 15, 2012, JCP E. 2012, 1510, Bull. July 2012, 360, note Barbieri (Fr.).

15. See, e.g., *Am. Cent. Corp. v. Stevens Van Lines*, 303 N.W.2d 234, 237 (Mich. Ct. App. 1981).

16. Giaoui Damage Awards, *supra* note 1, at 1-57.

17. We must therefore distinguish between non-pecuniary harm in the strict sense of the term, which do not require any calculation of economic consequences, from non-pecuniary harm that may be indirectly converted into monetary value.



similar driving factors influencing the outcome of cases in this field. In other words, while mainstream theories predicate the determination of damages upon questions of fact, it is becoming more obvious that they are also a question of law.

## II. THEORETICAL OBSTACLES TO THE RECOGNITION OF NON-PECUNIARY HARM

### A. *Current Theories for Compensation of Non-Pecuniary Harm Under Common Law*

As is well known, common law, unlike civil law, generally favors monetary damages over specific performance — or at least this was the case until recently.<sup>18</sup> A study of cases over time by Ewan McKendrick and Katherine Worthington shows that English courts have, with increasing frequency, awarded damages for “moral distress”<sup>19</sup> suffered as the result of a breach of contract.<sup>20</sup>

The authors of this study identified two principal groups of cases based on the type of moral distress that was found: (1) moral distress resulting from the loss of positive interest, in other words, the failure to obtain an expected non-pecuniary benefit expected to be the purpose of the contract (such as a celebration, pleasure, rest, tranquility of spirit, etc.); and (2) non-pecuniary harm that results directly from the breach of the contract but is not the purpose of the contract (physical discomfort, psychological suffering, etc.).<sup>21</sup>

Currently, however, recognition of this moral distress is limited to the former tort cases in which the defendant explicitly promised a non-economic benefit to the plaintiff, or the plaintiff explicitly expected personal added value from the performance of the contract. As a practical matter, this primarily consists of cases in which the plaintiff is a consumer or employee, but never cases in which the plaintiff is a business.<sup>22</sup>

On the other side of the pond — and close to twenty years before McKendrick and Worthington — Charlotte Goldberg, in her article on emotional distress damages in contract law, distinguished three categories of contracts in which the

18. McKendrick & Worthington *supra* note 4 at 287.

19. Or emotional distress, in American law.

20. McKendrick & Worthington *supra* note 4 at 288.

21. *Id.* at 301, 308.

22. For example, in consumer law, a British decision rendered on appeal by Judge Bingham in *Watts and Another v. Morrow* establishes clearly that the non-pecuniary harm suffered by a real estate purchaser is recoverable separately from the economic harm, even if and including where there exists no simple method of calculating that harm.; McKendrick & Worthington, *supra* note 4 at 290. The case holds that where a buyer hires an expert appraiser, he does so obtain assurance and peace of mind that that the house will not cause him discomfort, stress, or other worries. *Watts and Another v. Morrow* was cited by several later causes awarding damages for non-pecuniary harm. *Id.*

personal implications justified awarding such damages:<sup>23</sup> (1) Those relating to an emotional event (death, disability, divorce, or family move); (2) Those relating to an emotional object (an object with sentimental or esthetic value, such as pets, family heirlooms, or home construction); and (3) Those relating to emotional interests (the creation of happiness or security, such as contracts for planning a reception, travel, or a vacation).<sup>24</sup>

For Goldberg, whether emotional distress damages should be awarded depends on whether the contract's personal aspects predominate over its commercial aspects.<sup>25</sup> Thus, a contract is commercial if the parties enter into it for financial gain. Only in the other cases, in which at least one of the parties entered into the contract to obtain personal satisfaction, should damages be awarded for emotional distress.

In 1986 when Goldberg's article appeared, very few courts had awarded damages for emotional distress falling within the second and third categories that she defined.<sup>26</sup> Even today, the bulk of the case law also holds that non-pecuniary damages may not be awarded for a mere financial interest<sup>27</sup> (or where the non-pecuniary harm was not foreseeable by the obligor<sup>28</sup>). Holdings to the contrary are sufficiently rare that we need not discuss them here.<sup>29</sup>

Accordingly, the Restatement (Second) of Contracts adopts a restrictive view, providing in Section 353 that "[r]ecovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a *particularly likely result*."<sup>30</sup>

Nonetheless, a movement has recently emerged to recognize these harms more fully and it would seem that the United States has begun to permit breach of contract damages for non-pecuniary losses, through broader readings of Section 353.<sup>31</sup>

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23. Charlotte K. Goldberg, *Emotional Distress Damages and Breach of Contract: A New Approach*, 20 U.C. DAVIS L. REV. 57, 60 (1986); See, e.g., *Allen v. Jones*, 163 Cal. Rptr. 445, 452 (Cal. Ct. App. 1980); *Windeler v. Scheers Jewelers*, 88 Cal. Rptr. 39, 44 (Cal. Ct. App. 1970).

24. *Id.*

25. *Francis v. Lee Enters. Inc.*, 971 P.2d 707, 713 (Haw. 1999) (holding that the nature of a contract determines whether emotional distress damages may be awarded).

26. *Id.*

27. See *Am. Cent.*, 303 N.W.2d at 237; *Kewin*, 295 N.W.2d at 55; *Fogleman v. Peruvian Assocs.*, 622 P.2d 63, 65 (Ariz. Ct. App. 1980).

28. *Roberson v. Dale*, 464 F.Supp. 680, 683 (M.D.N.C. 1979); *Stanback v. Stanback*, 254 S.E.2d 611, 619 (N.C. 1979); *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949).

29. *Simon v. Solomon*, 431 N.E.2d 556, 561 (Mass. 1982); *Godfrey v. Steinpress*, 180 Cal. Rptr. 95, 109 (Cal. Ct. App. 1982).

30. *Kishmarton*, 754 N.E.2d at 788 (Emphasis added). (as way of illustration, the Restatement presents "A contracts to construct a house for B. A knows when the contract is made that B is in delicate health and that proper completion of the work is of great importance to him. Because of delays and departures from specifications, B suffers nervousness and emotional distress. In an action by B against A for breach of contract, the element of emotional disturbance will not be included as loss for which damages may be awarded").

31. *Id.* at 788 ("We are confident that allowing emotional distress damages in breach-of-contract actions involving vendees and builder-vendors will not open the floodgates"); See also *B*

*B. In France, a Long List of Poorly Compensated Non-Pecuniary Harms*

Looking at civil law, other than with respect to the loss of opportunity, French law appears to be among the most generous in the world in indemnifying for non-pecuniary damages.<sup>32</sup>

The flexibility and broad drafting of former Article 1382 of the French Civil Code<sup>33</sup> led to the increasing quantification of these damages. At first glance, of course, indemnification for these damages, which are frequently tied to the physical results of accidents, would seem to be primarily a question of tort law. According to Xavier Pradel, “the same applies, by extension, to contract law.”<sup>34</sup> This extension is not solely a creature of French law. However, what seems to be specific to French law is the range of damages recognized. Other than *pretium doloris*<sup>35</sup>—the price of pain and suffering — and disfigurement, damages for loss of enjoyment have increased in both frequency and amount more than any other types of damages in French case law.<sup>36</sup> Philippe Gilliéron has noted that the Cour de cassation [the French Supreme Court] has, in succession, ordered compensation for the loss of the pleasures of gardening, walking, traveling, hunting, driving, reading, etc., not to mention damages for sexual loss (which was at first included in loss of enjoyment and then became its own autonomous category), injury to a minor, and even the loss of senses such as taste or smell.<sup>37</sup>

Philippe Le Tourneau criticizes the idea of listing the supposedly different types of injuries, as they are merely “differently viewed aspects of a single reality, which is a decrease in a person’s well-being . . . If we compensate them separately, we will be compensating the same injury multiple times.”<sup>38</sup> Le Tourneau therefore prefers to reduce the risks incurred by parties, who are generally risk averse. This distinction must be viewed in the context of the initial difference between French culture on the one hand, and English and American culture on the other. The first, strongly influenced by the Catholic Church and incorporated by the Napoleonic Code into an agriculturally oriented framework favoring the security of the parties,

*M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979); *Salka v. Dean Homes of Beverly Hills, Inc.*, 22 Cal. Rptr. 2d 902 (Cal. Ct. App. 1993).

32. GENEVIÈVE VINEY, PATRICE JOURDAIN & SUZANNE CARVAL, *LES CONDITIONS DE LA RESPONSABILITÉ [THE CONDITIONS FOR LIABILITY]* (4<sup>th</sup> ed. 2013).

33. CODE CIVIL [C. CIV.] [CIVIL CODE] art.1382 (Fr.).

34. XAVIER PRADEL, *LE PRÉJUDICE DANS LE DROIT CIVIL DE LA RESPONSABILITÉ [DAMAGES IN CIVIL LIABILITY LAW]* 115 (L.G.D.J. 2004) (2001).

35. Damages scales exist, although they have no binding legal force. See PHILIPPE LE TOURNEAU, *DROIT DE LA RESPONSABILITÉ ET DES CONTRATS [THE LAW OF LIABILITY]* n.1555 (7<sup>th</sup> ed. 2008).

36. *Id.*

37. PHILIPPE GILLIÉRON, *LES DOMMAGES-INTERETS CONTRACTUELS*, 560 (Centre du droit de l’entreprise de l’Université de Lausanne (CEDIDAC) 2011).

38. LE TOURNEAU, *supra* note 35 at 1555.

contrasts with the second, a mercantile Protestant culture, which is more open to risk. The philosophies — and, therefore, the solutions — reflect these cultural differences.

### III. NON-PECUNIARY HARM TO INDIVIDUALS

#### A. *Methods of Evaluating Non-Pecuniary Harm*

One of the most frequently used arguments against broader recognition of non-pecuniary harm is the difficulty of quantifying this type of harm. As non-pecuniary harms cannot be quantified, or can be quantified only with difficulty, it is particularly difficult to estimate and calculate them. For example, Geneviève Viney and Patrice Jourdain, quoting Gabriel Roujou de Boubée, note that “it is impossible to convert non-pecuniary harm directly into monetary units, as moral values can have their equivalent only in kind.”<sup>39</sup>

This argument is not unique to French law. Speaking for the New York Court of Appeals, Judge Sol Wachtler noted in *McDougald v. Garber* that “[t]ranslating human suffering into dollars and cents involves no mathematical formula [but] rests . . . on a legal fiction.”<sup>40</sup> Similarly, in England, Alfred Marshall described pleasure and suffering as fundamentally subjective and unquantifiable concepts.<sup>41</sup> In France, Philippe Le Tourneau notes that an award of damages as compensation for a non-pecuniary loss leads to the practical objection that it is difficult to evaluate the harm monetarily; however, this objection is not fatal.<sup>42</sup>

This difficulty of evaluating and quantifying damages raises two issues. First, because the indemnification is imprecise, it may fail to deter socially unacceptable behavior, missing the law’s goal of efficient deterrence of unwanted future behaviors. Respect for the rule of law is therefore not encouraged. Second, the imperfection of the calculation prevents the full compensation that would enable victims to manage their new situations. Courts ultimately seem to be reluctant to give an award that fails to clearly identify the wrong that was done.

Even supporters of a novel economic analysis of law recognize the limits of their model. Richard Posner, for example, wrote “[d]amages awards for pain and suffering, even when apparently generous, may well undercompensate victims crippled by accidents . . . . The problem is most acute in a death case.”<sup>43</sup> The futility of attempting to estimate non-pecuniary harm is confirmed by classical economists,

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39. GENEVIEVE VINEY & PATRICE JOURDAIN, *LES EFFETS DE LA RESPONSABILITE [THE EFFECTS OF LIABILITY]* (4th ed. 2017).

40. *McDougald v. Garber*, 536 N.E.2d 372, 376 (N.Y. 1989).

41. PATRICK S. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 604 (5th ed. 1995).

42. LE TOURNEAU, *supra* note 35 at 1555.

43. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 229 (9th ed. 2014).

who believe that since there cannot be a market for non-material items, economics is incapable of quantifying them.<sup>44</sup>

However, this argument does not mean that these values do not in fact exist. The court in *McDougald*, cited above, addressed the victim's comatose condition after a failed surgery, stating, "We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace."<sup>45</sup> The goal of returning the victim to the position in which he found himself prior to the harm would therefore appear to apply only to economic harm. A non-pecuniary harm may be indemnified, but it would be impossible to return the victim to his pre-harm position — certainly no award could by itself wake the patient in *McDougald* from her coma.

To award damages for non-pecuniary harms is an attempt to compensate for life experiences that our society views as negative, and, at bottom, as experiences that should not be undergone. The law thus arrives at an artificial reduction of risk, protecting individuals—at least partially—from life's vagaries. To say that a non-pecuniary harm is difficult to measure in monetary terms does not mean that the harm is non-existent or that we must give up any attempt to measure it. In fact, I will even go so far as to say that all so-called "non-pecuniary" damages may well have an "economic" nature.

Overlooking the oxymoron, this assertion is justified if we take the trouble, along with Philippe Gilliéron, to rethink the notion of property in the light of the consumerist society in which we live, a society in which subjective harms are broadly recognized and must be indemnified by courts using the discretionary power they have.<sup>46</sup> Further, Gilliéron explains the heart of the difficulty is deciding how to calculate these new economic values, and assigning a number to a non-pecuniary harm is not an exact science. Thus, the best we can do is to assist the judge's power by attempting to sketch out guidelines and to make proposals.<sup>47</sup>

### *B. The Need to Expand the Traditional Scope of Economic Damages*

As cultures change and move toward a global standard, we must challenge the strict economic vision of damages to more honestly reflect non-financial assets that are valued by modern society: time, space, calm, well-being, reputation, integrity, and the mere enjoyment of one's assets. A recent example of these shifting views

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44. Donald Harris et al., *Contract Remedies and the Consumer Surplus*, 95 L. Q. REV. 581, 601 (1979). Donald Harris, Anthony Ogus, and Jennifer Philips summarize their position succinctly: "[E]conomics . . . can offer little guidance on the methods by which a third party, such as a court, could assess in money the value of a lost consumer surplus," namely the value that the consumer assigns to the good of which he has been deprived.

45. *McDougald*, 536 N.E.2d at 374-75.

46. GILLÉRON, *supra* note 37, at 554.

47. *Id.* at 555.

can be found in the Volkswagen emissions scandal of 2015.<sup>48</sup> While 40 years ago little uproar would have resulted from the revelation that an auto manufacturer's emission measurement were intentionally less than accurate, presently, such news managed to plunge Volkswagen's stock price by 50% in the span of a week, which has yet to fully recover as of this writing.<sup>49</sup> This is a reflection of the depth of the damage the company's reputation suffered.

Our usual conception of "assets" is insufficient for a consumer society in which non-property-based values have taken on an increasingly important role. It is clear that these non-financial assets cover inherently subjective concepts that must be made objective, legally and economically. Conscious of the unjustifiable restrictions imposed by the traditional notion of "assets," the courts have slowly warmed to the idea of effective damages for non-pecuniary harms resulting from breach of contract, by recognizing that certain goods and services have an "enjoyment value" independent of their market value — in Volkswagen's case, environmentally friendly cars and the entailing brand images and goodwill these once created.<sup>50</sup> American courts and, to a lesser extent, French courts understand the importance of these values in our society. They have progressively expanded the scope of recoverable damages, therefore extending the notion of an asset to include the subjective value that the wronged party attaches to certain goods and services.<sup>51</sup>

These are changes welcomed by legal professionals, who have unanimously wished that the literature, if not the law itself, would go further and offer courts a more precise definition of non-economic interests through which more inclusive boundaries around the scope of compensation could be drawn.<sup>52</sup> At the very least, the introduction of indicators to make the measurement of damages more objective would be welcomed as the foundation for preparing a general framework for courts to use in measuring damages.

After all, claiming to "fully compensate" for the harm to the consumer while refusing to recognize the utility that the good or service represented to him would be as absurd as claiming to "fully compensate" for the harm to a business, or to an

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48. Admittedly not a breach of contract case, yet nonetheless a very useful illustration of the value of intangible assets.; Scott Evans, *Volkswagen Emissions Scandal - Everything We Know*, MOTORTREND (Sept. 22, 2015), <https://www.motortrend.com/news/1509-volkswagen-emissions-scandal-everything-we-know/>.

49. *Id.*

50. *Id.*

51. Harris et al., *supra* note 44, at 587.

52. *Id.* at 585-88.; Consumer law in the United States is narrower and less complete than European consumer law, and the courts have sometimes filled in the gaps left by legislators. For example, American courts hearing cases on defective construction have adopted the notion that only by taking non-pecuniary factors into account can they ensure adequate compensation for the loss actually suffered. They have recognized that the specifications given by a project owner for constructing his own house reflect an essential aesthetic value for that owner. If the contractor deviates from them, he must repair the construction, even where the costs may be disproportionate to the loss of the good or service itself.

individual acting in a business capacity, while refusing to recognize the complete value of their lost profits. Lost enjoyment is to the consumer what lost profits are to the professional. There is no justification for indemnifying the second and refusing to indemnify the first, unless we deny the ever-increasing importance of leisure and pleasure in our daily lives, which far exceeds their importance at the time the French Civil Code was enacted.

#### IV. NON-PECUNIARY DAMAGES AWARDED TO LEGAL ENTITIES

##### *A. The Idea of Legal Entities Suffering “Non-Pecuniary Losses”*

As we have seen, French case law was slow to relax its position on non-pecuniary damages. But what were legal scholars saying? How can a legal entity suffer moral harm? Legal entities have no bodily integrity; they experience no pain or emotion. So how can they be harmed other than monetarily? In other words, the question is whether we can attribute emotions to a non-human entity.

A review of case law and scholarly literature in this area shows that the idea of legal entities suffering “non-pecuniary losses” is gaining acceptance bit by bit. Notably, most national judicial systems limit the concept of non-pecuniary loss to individuals — though results have been contradictory at the international level.<sup>53</sup> This is likely why there is relatively little case law in this area. But it is also possible that most companies having suffered this type of loss choose to either not assert it or to re-characterize it as an economic loss (in which case, they would then have to demonstrate the economic impact of the loss and estimate its quantum, as we will see below).

To the extent that the rights attaching to personhood are not exclusive to human beings, it is clear that we must look to these subjective rights, and in particular to personal rights, in order to decide how to sanction damage to the goodwill, reputation, or brand image of a legal entity. This was the line of inquiry pursued by Philippe Stoffel-Munck, who wrote that “for a legal entity, non-

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53. International arbitral tribunals have hesitated to embrace the idea of legal entities suffering “non-pecuniary losses.” In 1996, an arbitral tribunal in Milan, sitting in equity and applying the UNIDROIT Principles, denied a claim for damages for non-pecuniary losses asserted by a U.S. company against an Italian company. The tribunal held that a legal entity could not assert such a claim. Case No. 1795 of 1996, 24 (a) Y.B. Comm. Arb. 196, 205-06 (Chamber of Nat’l & Int’l Arb. of Milan). Ten years later, an arbitral tribunal in Mexico, also applying the UNIDROIT Principles, distinguished clearly between the economic loss that results from damage to reputation and the non-economic loss that is the damage to reputation itself. It concluded in that case that the plaintiff had not proven either the existence or the quantum of that loss. *Arbitrary Award of November 30, 2006, (Centro de Arbitraje de Mexico)* (citing Ewan McKendrick, *Damages, in COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* 980, 985-86 (Stefan Vogenauer ed., 2015)) [hereinafter *Arbitrary Award*].

pecuniary harm means harm to its image or reputation.”<sup>54</sup> Similarly, Marc Isgour supported the notion that legal entities have the same rights as individuals to defend their property, and can, like individuals, seek compensation for all their losses and any harm to their esteem or reputation can constitute a non-pecuniary loss.<sup>55</sup>

Perhaps we should go even further and include harm to other intangible assets, such as workplace environment, employee motivation, and corporate governance, in our definition of non-pecuniary loss. According to Dominique Ledouble, legal scholars are essentially unanimous in their opinion that moral harm (i.e. non-pecuniary) suffered by a “legal person will rarely be pure, and that we will often be faced with a situation combining strictly moral elements and others which are rather material but difficult to assess, ‘the simple ersatz of an economic loss whose materiality would be difficult to grasp.’”<sup>56</sup> The porous boundary between pecuniary and non-pecuniary losses suffered by legal entities is to their advantage, at least when it comes to measurement. At this point, it starts to become clear that while it was originally controversial in France, the general viewpoint of compensating non-pecuniary harm to legal entities gradually gained acceptance among scholars. Likewise, a legal entity’s right to seek compensation for non-pecuniary harm has also been recognized on several occasions by the European Court of Human Rights.<sup>57</sup> A relevant example is a case in which a company sought compensation from the Portuguese government for violating its right to a speedy trial.<sup>58</sup> Acknowledging that legal entities have such a right is the right result. There is no reason to limit the rule of law solely to individuals, especially since complex societies frequently make use of legal entities. Excluding them from the right to a

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54. PHILIPPE STOFFEL-MUNCK, *Le Préjudice Moral des Personnes Morales*, in LIBRE DROIT, MÉLANGES EN L’HONNEUR DE PHILIPPE LE TOURNEAU 959-72 (2008).

55. Marc Isgour, *L’atteinte à l’image de marque des personnes morales*, 3 AUTEURS ET MEDIA, 2007, at 214. *The author cites to* 2 HENRI MAZEAUD, LEON MAZEAUD & ANDRE TUNC, *TRAITE THEORIQUE ET PRACTIQUE DE LA RESPONSABILITE CIVILE DELICTUELLE ET CONTRACTUELLE* n. 1874-4 & 1878-18 (1960); JEAN VAN RYN, 1 *PRINCIPLES DE DEROIT COMMERCIAL* 256 (1954).

56. Dominique Ledouble, *L’évaluation du préjudice moral: va t-on sortir du ‘doigt mouillé’?*, LEDOUBLE: PUBL’NS (Feb. 8, 2013), <https://www.ledouble.fr/publications/levaluation-du-prejudice-moral-va-t-on-sortir-du-doigt-mouille/>.

57. *Comingersoll SA v. Portugal*, 2000-IV Eur. Ct. H.R. 355 (2000); *Centrum Stavebního Inženýrství, A.S. c. République Tchèque*, App. No. 65189/01, (Dec. 21, 2004), <https://hudoc.echr.coe.int/eng?i=001-67739>; *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A. Ş. c. Turquie* (No. 1), App. Nos. 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, (Mar. 30, 2006), <http://hudoc.echr.coe.int/eng?i=001-72957>.

58. *Id.* at 365, indicating that “[t]he Court cannot deny, in view of its own case law and in light of this practice, that a commercial company may suffer an intangible harm deserving of monetary compensation” and that “since the principal form of compensation that the Court can grant is pecuniary in nature, the effectiveness of the right guaranteed by Article 6 of the Convention can be enforced only if pecuniary damages may be awarded for non-pecuniary harms, including to a commercial company.”



fair trial would result indirectly in denying that right to the individuals behind them.<sup>59</sup>

However, damages for non-pecuniary harm can be awarded only for the direct consequences of the harm and not for the economic consequences, for several reasons that consider the nature of the legal entity. For a non-profit organization, harm simply consists of damage to the cause that it promotes. For a commercial company, it would seem at first glance harder to prove true non-pecuniary harm. In reality, however, harm to a company's reputation for honesty (to take but one example) constitutes a clear non-pecuniary loss, foreseeable and thus compensable, even though it is often unmeasurable, and the damages may be limited to a symbolic euro. Compensation is thus molded to fit the characteristics of legal entities, a process that is grounded in fact, not law. It is the same process as that used when the internet arrived on the scene, as the general law was adapted—with a few exceptions—to the factual situation.

### *B. Non-Pecuniary Harm and the Calculation of Economic Consequences*

In France, Philippe Gilliéron proposes a few limited guidelines for evaluating the non-pecuniary harm of disappointment caused by a breach of contract that has an easily recognizable—and therefore foreseeable—psychological component. Gilliéron notes that his proposals are not an exact science, and they do not claim to provide a precise method of calculation to substitute for the court's discretionary power.<sup>60</sup> However, they would rein in that discretionary power by encouraging courts to take into account criteria designed to make the process less than completely arbitrary.<sup>61</sup>

In other words, courts would quantify and properly compensate for the positive interest (the enjoyment that constitutes the consumer's lost opportunity, as introduced by German "commercialization theory") to which the consumer has a right, in addition to the negative interest (the loss of the expenses incurred in vain in order to obtain the services, as developed in the theory of frustration). Thus, there are two ways to calculate.

The first approach would be to use the insurance premium that the consumer would have agreed to pay for coverage had he known that the contract might not be performed. However, this approach is difficult to put into practice. A second, more practical approach, would then be to look to quantifiable asset values, as does German commercialization theory. With respect to this second approach, we must make a distinction based on the type of service of which the consumer has been

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59. This issue is doubly controversial in the field of human rights, given that only individuals—according to some—are entitled to the protection given by human rights treaties.

60. GILLÉRON, *supra* note 37, at 560.

61. *Id.*

deprived: First, if the contract relates to the provision of real or personal property, enjoyment may be defined as the rental value of a comparable asset for the length of time during which the obligee has been deprived of the asset. On the other hand, if the contract is for services, it is difficult to refer to rental value, since by definition there is no pecuniary equivalent (as there is no market) and the service includes a psychological component intended to increase the consumer's sense of well-being. (We will look at the example of a vacation below.) The *per diem* rule described below will give us the first part of the solution to this problem.

Although this article covers contract law and does not directly address bodily injury, the latter *per diem* rule of calculation can serve as a model for the monetary evaluation of other types of non-pecuniary harm. This rule provides for a daily monetary evaluation of the activities of which the injured party has been deprived, and then determines a lump sum amount by multiplying the result by the number of days in her remaining life expectancy. According to Douglas Laycock, this method, which was first developed by insurance companies, was taken up by legal advisers and used by plaintiffs to provide American juries with a methodological framework.<sup>62</sup> Eventually it became accepted by the courts in half of the states.<sup>63</sup> The use of a clear method makes the judicial process more predictable and transparent, a clear benefit in jury trials, and one which courts are not oblivious to.<sup>64</sup>

At this stage, we must also distinguish based on the professional status of the counterparty. If the obligee is an independent contractor, we must deduce that he valued his vacation, whatever the cost, at an amount greater than or equal to the income that he would have earned if he had worked. But if the obligee is an employee, we cannot be certain that he values his vacation at an amount greater than or equal to his salary, because he receives this salary even when he is on vacation.

However, in the case of an obligee who is an employee, we may still consider two similar methods: The first would be to assume that the employee values his vacation at an amount greater than or equal to his salary, so as to avoid discriminating between individuals by their status; however, this method is not necessarily realistic. The second method would be to add all the expenditures that the employee would have incurred during his vacation (perhaps as the average of his expenditures during previous vacations) and the services of which he was deprived (at a minimum, for example, the cost of a pool membership for a family deprived of a beach vacation during the summer break).

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62. DOUGLAS LAYCOCK AND RICHARD L. HASEN, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS*, insert 693 (5<sup>th</sup> ed. 2018).

63. *Id.*

64. One example is *Debus v. Grand Union Stores*, a 1993 Vermont case holding that there is nothing inherently improper or prejudicial about *per diem* arguments if they are made under the ordinary supervision and control of the trial court.; *Debus v. Grand Union Stores*, 621 A.2d 1288 (Vt. 1993).

Neither of these methods are mandatory, which gives courts the flexibility to opt for whichever methodology is best suited for a particular situation. Foreseeability is only partial, since the parties cannot predict which method will be chosen. Nevertheless, they will know that courts may choose between these two methods depending on the facts of the case, which somewhat improves the foreseeability of the outcome.

### *C. Translating Non-Pecuniary Harm into Monetary Value*<sup>65</sup>

As we have seen, non-pecuniary harm can be suffered by all legal entities, whether for-profit or non-profit, provided that they engage in economic activity. Compensation thus should not be limited to a symbolic euro or dollar for reasons of ultimate justice and of guaranteeing access to a fair trial. As a result, it is important to find an objective way to calculate damages. This approach would have the added benefit of providing greater legal certainty.

Econometric analysis tools now make it possible to quantify, to a high level of accuracy, harms that do not necessarily result (at least directly) in a loss of profits.<sup>66</sup> Harms that have economic effects may always be compensated as economic losses. The distinction is a narrow one, and possibly an artificial one from the standpoint of the legal entity. However, it is not an obstacle to full compensation for the “non-pecuniary harm” suffered.

The approach would depend on the size of the business. The first case is that of non-professional associations, companies formed for professional practices (*sociétés d'exercice libéral*, or “SEL”), and very small businesses (“VSB”), for which the stakes are often limited, and information is often non-public or even non-existent. This case is closer to that of individuals. In this case we might, on our first approach, use the appraisal techniques and damages scales used in the case law relating to individuals and discussed in the previous Part.

For larger foundations and companies, however, the stakes justify using more abundant publicly available information or even developing specific techniques of analysis. For Maurice Nussenbaum, any assessment of the loss resulting from harm to brand image must be based on the effects of that harm on traditional economic indicators: lost sales, lowered prices, the costs of additional publicity to repair the damage, impairment of investments, impairment of goodwill, etc.<sup>67</sup>

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65. Since the purpose of this exercise is to convert a non-pecuniary harm into monetary damages, we might instead use the term “indirect pecuniary harm,” or, in the parlance of American common law, consequential damages.

66. See below, Section V, subsections A “Harm to Brand Image,” and C “Reputation and Compensation under U.S. Case Law.”

67. Maurice Nussenbaum, *Évaluation du préjudice de marque – Le cas particulier de l’atteinte à l’image de marque*, JCP 1993, éd. E, I, 303 at 569.

Non-economic indicators (such as environmental, social, and governance, or “ESG”) are now regularly published by large companies in many countries,<sup>68</sup> and these indicators are an integral part of these companies’ intangible assets and corporate image. These indicators may include, for example, customer satisfaction, attractiveness to students, the “Great Place to Work” classification,<sup>69</sup> inclusion in a socially responsible investment (“SRI”) portfolio, etc. The deterioration of these indicators following a breach of contract—such as a supplier’s failure to comply with its environmental commitments—will thus become the measuring stick for non-pecuniary harm after being converted into an economic loss by an appointed expert. For example, lower customer satisfaction may cause a company to resort to sales, resulting in lower prices; declining attractiveness to students or a lower “Great Place to Work” rating may force a company to increase salaries; the removal of a public company from an SRI index or portfolio may decrease its stock price or increase its financing cost.

The table below summarizes the foregoing developments concerning intangible harm resulting from a breach of contract to evaluate the plaintiff’s positive interest and calculate the compensation due. Among consumer contracts, we can see the use of rental value of comparable items as a standard. The same metric partially applies to business contracts among professionals alongside lost profits. Although, large corporations also consider the probability of a positive impact on the obligee. However, and more importantly, we can see the inclusion of the value of goodwill or brand image as part of the positive interest.

French advertising executive Rémi-Pierre Heude defines the value of brand image in paradoxical language.<sup>70</sup> He describes brand image as an intangible item that is not included on the company’s balance sheet.<sup>71</sup> It is unquantifiable, and yet it is probably the most valuable asset that a company has. If econometric research had not made such enormous progress over the last few decades, we probably would have abandoned any thought of quantifying the value of a brand image or harm to it. But it has, and I will now turn to that subject.

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68. In France, these indicators may be found in Code de commerce [C. com.], art. L225-100-1 (Fr.), which codifies Loi 2010-788 du 12 juillet 2010 portant engagement national pour l’environnement (1), JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 13, 2010 Article 225-II [hereinafter *Grenelle II*].

69. I discuss the Great Place to Work Institute in FRANK S. GIAOUI, INDEMNISATION DU PREJUDICE ECONOMIQUE: RUPTURES CONTRACTUELLES EN COMMON LAW AMERICAINE, DROIT CIVIL FRANÇAIS ET DROIT COMMERCIAL INTERNATIONAL 270, 406-07, 434 (2019).

70. REMI-PIERRE HUEDE, L’IMAGE DE MARQUE XVI (2E éd. rev. et corr. 1989).

71. *Id.*

Type of Contract	Type of Plaintiff	Standard Provision of Goods or Services	Personal Services
Consumer	Employee consumer	Use Rental value of comparable item	Well-being Expenses that would have been incurred during vacation + asset value of the services lost
	Self-employed consumer	Use Rental value of comparable item	Well-being Amount greater than or equal to the income that would have been earned if the consumer had worked
Professional or Business	Professional or VSB	Lost profits Same as consumer	Goodwill Same as for consumer
	Large business	Lost profits Probability of positive impact for the obligee of the event that was Prevented by the obligor's breach	Goodwill Analysis of value Conjoint analysis Market value (Stock market multiples, Comparable transactions)

Table 1: Summary of developments regarding non-pecuniary harm

## V. HARM TO BRAND IMAGE, REPUTATION, AND GOODWILL

### A. Harm to Brand Image

As mentioned earlier, our usual conception of “assets” is insufficient for a consumer society in which non-property-based values have taken on an increasingly important role. It is clear that these non-financial assets cover inherently subjective concepts that must be made objective legally and economically. As exemplified by the 50% drop in Volkswagen’s share price after its 2015 emissions scandal, chief among these non-financial assets are a company’s brand image and goodwill.<sup>72</sup>

The attempt to quantify harm to brand image likely requires calculating the objective value of the brand, which constitutes a significant portion of the

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72. Scott Evans, *Volkswagen Emissions Scandal - Everything We Know*, MOTORTREND (Sept. 22, 2015), <https://www.motortrend.com/news/1509-volkswagen-emissions-scandal-everything-we-know/>.

company's intangible assets. Yet, the legal concept of a brand image does not exist as such under any American or French statute. Nevertheless, if we look closer, we find the notion in abundant case law,<sup>73</sup> where harms to a company's brand image are expressly recognized by courts,<sup>74</sup> and generally originate from the infringement of an intellectual property right (the brand or another distinctive sign), an act of unfair competition (parasitic sales practices, denigration, etc.), or misconduct arising from a criminal violation (such as defamation).<sup>75</sup>

In trying to quantify such harm, I will look at two scenarios in turn. First is one where though it can be proven that the harm to brand image has caused decreased sales of a product, the challenge of how to measure lost profits remains. Consequently, the crux of the issue lies where it is impossible to prove that a decline in sales directly results from the harm to the company's brand image. The damage occurs, but traditional compensation is unascertainable because we do not know how to determine its quantum. In such a case, legal protections for the parties may not be satisfactorily guaranteed.

To address this problem, the French Cour de cassation deduces the existence of the harm from the misconduct itself.<sup>76</sup> Legal entities thus have the benefit of a presumption that reverses the burden of proof with respect to the causal link. The Cour de cassation often drafts its opinions in this manner: "When denigration has occurred, generating a commercial disturbance, there is necessarily a loss."<sup>77</sup> Another variant of the same idea reads as follows: "The harm is deduced merely from the fact that the denigration has occurred, without any need to prove actual loss of customers or a decrease in revenue."<sup>78</sup> At present, this line of reasoning seems to be limited to tort cases. In contractual disputes, French courts do not appear ready

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73. Isgour, *supra* note 55, at 214. Isgour discusses several French and Belgian cases in the introduction of his article, e.g., Deutsche Bank's 15-million-euro indemnity claim against Think/BBDO.

74. *Id.* at 215. Moreover, certain legal provisions, such as Article 10.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms establishing limits to free expression, make reference more or less explicitly, to a right to 'brand image,' 'reputation,' or honor, and to consideration of persons or enterprises. Freedom of expression, the paramount value in democratic countries, may thus be limited in order to protect the reputations of legal entities.

75. *Id.* at 214.; *See also, e.g.,* Eric Barendt, *Balancing Freedom and Privacy: The Jurisprudence of the Strasbourg Court*, 1 J. MEDIA L. 49 (2009) (analyzing the decisions of the European Court of Human Rights that balanced privacy rights and the rights to life and reputation with the freedom of expression).

76. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] com., Feb. 9, 1993, No. 469 (Fr.); Cour de cassation [Cass.] [Supreme Court for Judicial Matters] com., Feb. 27, 1996, No. 732 (Fr.).

77. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] com., Jun. 14, 2000, Bull. civ. IV, RJDA 12/00 No. 1184 (Fr.).

78. Cour d'appel [CA] [Regional Court of Appeal] Paris, Apr. 3, 1995, RJDA 110/1995, No. 1185 (Fr.).

to import the concept.<sup>79</sup> The very principle of compensation for these harms is not yet fully established under French contract law. Moreover, traditionally, the trial courts have had full discretion to measure the amount of a loss.<sup>80</sup> Therefore, it is easier for a legal entity to obtain compensatory damages for torts, at the cost of a lack of territorial harmonization and legal foreseeability.

### *B. How Should We Determine the Value of a Brand?*

Economically, a brand is an intangible asset that, like all assets, requires one-time investments at key phases of its life cycle (creation, renewal, modernization) as well as ongoing maintenance investments in the form of institutional communications. In return, the brand provides its owner or user with an expectation of future financial flows from revenues or from royalties on a license.

Over the last three decades, the fairly technical subject of determining the values of a brand has garnered increasingly satisfactory answers in economic theory, thanks to applied statistical analysis methods in marketing and finance.<sup>81</sup> Since the early 20th century, analysis techniques have been in existence that enable us to calculate precisely the objective cost of each manufactured product. However, until the 1980s, we were in the dark when it came to the value of a brand.<sup>82</sup> Since then, applied research has advanced, and today, as a methodological matter, we are well equipped to determine the value of a brand.<sup>83</sup>

Quantitative marketing techniques, including conjoint analyses, now permits us to measure the price premium that a consumer (or a representative sample of consumers) is willing to pay for a branded product as compared with an equivalent generic (or lower branded) product, and thereby to estimate the value of the brand. Parties thus have a relatively foreseeable estimate of damages. Schematically, if the reverse engineering analysis shows a cost of 100 for a Ford and a cost of 120 for an equivalent BMW (+20%), and if the conjoint analysis measures the values attributed by consumers for the two models at 133 and 200, respectively (+50%), then it can

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79. In French contract law, damages are compensated only if they are a consequence of a breach and proving decrease of revenue is directly related to contract breach challenging. This explains why French courts are hesitant to import the concept into contract law.

80. Cour de cassation [Cass.] [supreme court for judicial matters] com., Jun. 21, 1994, Bull. civ. IV, RJDA 12/94, No. 1404 (Fr.).

81. These methods include the following models in particular: "Brand Asset Valuator," from Young & Rubicam, with its FRED valuation rubrics (for Familiarity, Relevance, Esteem, and Differentiation); the "Megabrand System" from Sofres, the model developed by Landor Associates; Brand Finance calculates the values of 500 brands using the Royalty Relief approach in its Brand directory; Millward Brown - Kantar use a mixed financial and marketing methodology to calculate the value derived solely by the brand in Millward Brown US 100 and Millward Brown Global 100, Interbrand combines Financial Analysis, Role of Brand and Brand Strength to rank the brands as detailed in Interbrand Best global brands methodology.

82. *Id.*

83. *Id.*

be estimated that the BMW brand has a relative value of 30% (50 minus 20) greater than the Ford brand, all other things being equal.<sup>84</sup>

Experts in financial analysis have solutions that consider brand value where brands belong to listed companies or to companies who have engaged in transactions. In such cases, valuation multiples can be compared among companies in the same industry using several key indicators, including revenue, net income, and growth.<sup>85</sup> If there is sufficient available information and it is correctly analyzed, trends can be extrapolated. As a result, any difference in valuation as compared with those trends will be a good approximation of the value of the company's intangible assets, and thus of its brand.

For example, a hypothetical dispute in dermatological and cosmetic services in the United States, where the standard valuation multiples are 3 times revenue or 12 times net income, based on all transactions identified between 2007 and 2014. If a company like Clorox acquired another company like Burt's Bees for a price equal to 5 times its revenue and 20 times its net income, using the above methods, Clorox may value Burt's Bees' goodwill between 2 (5 minus 3) times its revenue and 8 (20 minus 12) times its net income. If at about the same time, Johnson & Johnson acquired Biafine for 3 times its revenue, this would indicate that the acquirer considered the target to have the standard brand value for its sector,<sup>86</sup> not leaving disgruntled shareholders of the latter company much ground upon which to dispute the appraisal.

Another well-known example provides a useful illustration of this argument. In 1988, Nestlé acquired the English group Rowntree Mackintosh for GBP 2.55 billion, even though its market capitalization was just GBP 1.43 billion.<sup>87</sup> The purpose of the transaction was to acquire the Kit Kat, After Eight, Polo, and Quality Street Brands.<sup>88</sup> These brands had extraordinary development potential due to their capacity for international expansion and introduction into new markets.

That potential had a market value of GBP 1.12 billion (2.55 minus 1.43), which the buyer did not hesitate to pay. However, that potential existed neither on the company's books nor in its net income, which made it difficult to assess. Nevertheless, it must be taken into account in valuing the image of the brands, which in turn support the goodwill of the company.

Some American judges may likely be better equipped to understand and apply the above reasoning — as they have a generalist undergraduate education in a variety of fields (which may even include economics), as compared with France, where

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84. This illustration is based on a realistic but fictional example.

85. The next step, i.e., how to quantify such loss in terms of dollars and cents, poses a different type of challenge.

86. This illustration is based on real examples with which the author is familiar.

87. Cotton Timberlake, *Rowntree Agrees to \$4.5 Billion Buyout From Nestle*, AP NEWS, (June 23, 1988). <https://www.apnews.com/article/6c2a8ce608b96e25c00116cf3d74bf93>.

88. *Id.*



judges have almost exclusively studied only the law. But nonetheless, whether in France or in the United States, it will be necessary to hire outside experts. This will create a barrier to access to justice, since smaller companies will likely have a harder time obtaining such services, marking the first of several limits to these methods.

Similarly, one can argue that these methods do not apply, or at least do not apply well, to small companies whose brands are not established — even when this is a criterion for determining the brand does not have much value in the first place. Additionally, they often give relative values between brands in the same industry. It can therefore be difficult to apply them in a monopolistic sector.<sup>89</sup> Likewise, the concept of harm is not one equivalent to a snapshot at a given time. Consequently, to estimate the harm — and at the same time to draw a presumption of causality — we must conceptually use these techniques twice: once before the harmful event, and once after. It would then be necessary calculate the difference between the two measurements. This is known as an “event study.”<sup>90</sup> Adding further complications, these procedures are difficult to implement (and even more difficult to implement twice) and may not be economically justifiable other than for the cases with the largest potential damages.

Nonetheless, as many limitations as these methods may have, the reality is they can and have yielded results within the legal profession, as they are already in use in securities fraud cases, and will likely continue to see adoption in other newly developed areas like the present one.<sup>91</sup>

### *C. Reputation and Compensation under U.S. Case Law*

Distinguishing between a loss of profits, on the one hand, and harm to goodwill or reputation, on the other (even though, as an economic matter, the first is merely the result of the two others) permits us to treat them differently for accounting, tax, and especially legal purposes. American case law sometimes distinguishes between the two; in such cases, it may consider them separate compensable injuries. It will often calculate damages as the consequences of a breach of warranty commitments, which may chill the resale of the goods, sometimes independently of the quality of the goods or services delivered.

The value of reputation as an asset is determined by the future cash flows that it will produce. From an economic and financial perspective, the value of a reputation may therefore be defined as the present value of the cash flow that it will generate in the future, and the injury to reputation may be defined as the decrease in

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89. Though on the other hand, the concept of non-pecuniary damages may not have much meaning in that type of sector.

90. *Event Study*, THE WORLD BANK, [https://dimewiki.worldbank.org/Event\\_Study](https://dimewiki.worldbank.org/Event_Study) (last visited Jan. 14, 2022).

91. Alon Brav and J. B. Heaton, *Event Studies in Securities Litigation: Low Power, Confounding Effects, and Bias*, 93 WASH. U. L. REV. 583 (2015).

that present value of future profits. However, the American common law system does not always conflate lost profits with lost asset value, and therefore may sometimes grant two separate sets of damages.

Most harms to reputation are considered by the courts to give rise to indirect (or consequential) damages rather than to direct (or general) damages.<sup>92</sup> While American common law requires the same standard of proof of the existence of either direct or consequential damages, it imposes a higher standard of proof as to the quantum of consequential damages than to the quantum of direct damages. At the same time, damage to goodwill or reputation is sometimes considered to be included in the direct (general) damages; they are then rejected as an independent claim, as are the related damages.

Of course, there are numerous cases in which compensation has been denied for loss of reputation in addition to damages for lost profits. In fact, awarding both kinds of damages are rare, since damage to reputation cannot, in theory, be indemnified as a separate claim, distinct from the lost profits that result from a breach of contract.<sup>93</sup> We generally see cases where the plaintiff has difficulty proving the difference between the two, or offers no evidence of damage to reputation. In a 2005 case in U.S. federal court, the lower court awarded damages both for loss of goodwill and for future lost profits based on a breach of warranty.<sup>94</sup> The decision was reversed on appeal, because “the evidence supporting an award of goodwill damages to which [the plaintiff] directs our attention is the very same evidence used to support an award of damages for future lost profits” and because the plaintiff “does not... point to any evidence in the record separate and apart from its evidence of future lost profits.”<sup>95</sup> In a 2010 New York case concerning a dental practice, an award of damages both for the loss of goodwill and for lost profits was found to constitute double counting; “[t]he practices lost value because [the defendant] set up a rival practice resulting in lost profits.”<sup>96</sup> In a more recent matter, a court reversed a jury award for loss of goodwill after key employees departed a company to create a competing business.<sup>97</sup> The court noted that the company was sold several months after the employees’ departure, and the plaintiff failed to demonstrate that the alleged loss of goodwill caused by the employees’ departure resulted in a reduction of sale price.<sup>98</sup>

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92. I.e., a breach of a confidentiality agreement that exposed sensitive company data to the public v. a breach of a supply agreement that results in the aggrieved company failing to meet the public’s expectations.

93. *Metalworking Lubricants Co. v. U.S. Fire Ins. Co.*, 460 F. Supp. 2d 897 (S.D. Ind. 2006); *Belle City Amusements, Inc. v. Doorway Promotions, Inc.*, 936 N.E.2d 243 (Ind. Ct. App. 2010).

94. *Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*, 401 F.3d 901, 913-914 (8th Cir. 2005).

95. *Id.*

96. *Dental Health Assocs. v. Zangeneh*, 34 A.D.3d 622, 625 (2006).

97. *21st Century Sys., Inc. v. Perot Sys. Gov’t Servs., Inc.*, 726 S.E.2d 236 (2012).

98. *Id.* at 242-43.

However, in rare cases, the recovery of damages for loss of goodwill may be considered separately from damages for lost profits. This is the case, for example, where the plaintiff suffers a breach of obligations under warranty; most courts have long maintained that damages for breach of warranty may be recovered if they include damage to the company's goodwill or reputation.<sup>99</sup> In 1994, a federal court held that "New York law permits a breach-of-warranty claimant to recover for loss of goodwill, which is sometimes referred to as loss of future profits, or loss of customers, or damage to reputation."<sup>100</sup>

More recent decisions also awarded damages for loss of reputation, apart from breach of warranty. In a 2013 N.Y. decision, a substantial portion of the purchase price for a veterinary practice was expressly attributable to reputation.<sup>101</sup> The seller breached the asset purchase agreement by conduct leading to his arrest and conviction on sex crime charges.<sup>102</sup> The resulting lost profits and loss of goodwill were held to be foreseeable harms at the time the agreement was entered into, and they were both compensated.<sup>103</sup> Sometimes the recovery of damages for loss of reputation substantially exceeds the recovery of damages for lost profits. If we believe (as economic theory tells us<sup>104</sup>) that the value of an asset is merely a reflection of the present value of the future cash flows generated by that asset, then such damages may seem excessive. If, on the other hand, we believe that goodwill is not only the present value of future cash flows but also constitutes an additional, "intangible" asset based on the brand, intellectual capital, personal skills, or strategic position (as marketing theory tell us<sup>105</sup>) then the damages may be considered reasonable. In an Iowa decision, a court of appeal affirmed<sup>106</sup> a jury's verdict to deny awarding damages for lost profits, while awarding damages for a loss of reputation.<sup>107</sup> In deciding to do so, the court of appeals presumed that a reputation does not depend on profitability.

Thus, U.S. courts have shown themselves to be proactive in playing a dialectical role between the letter of the law and the society's perception of its interests, namely the protection of the reputation of a natural person or a legal entity.

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99. *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749 (10th Cir. 1975); *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5th Cir. 1971); *Lucker Mfg. v. Milwaukee Steel Foundry*, 777 F. Supp. 413 (E.D. Pa. 1991), appeal dismissed, 983 F.2d 1051 (3d Cir. 1992); *Delano Growers' Co-op. Winery v. Supreme Wine Co.*, 473 N.E.2d 1066 (1985).

100. *Toltec Fabrics, Inc. v. August Inc.*, 29 F.3d 778, 780 (2d Cir. 1994).

101. *Fitzpatrick v. Animal Care Hosp.*, PLLC, 104 A.D.3d 1078, 1082 (2013).

102. *Id.* at 1080.

103. *Id.* at 1083.

104. Aswath Damodaran, *Valuation Approaches and Metrics: A Survey of the Theory and Evidence*, FOUNDS. & TRENDS IN FIN. 693 (2007).

105. *Id.* at 55-56.

106. Note that in France, the appeals courts have greater flexibility, as they are permitted to review both the findings of fact and the findings of law.

107. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 618 (Iowa 1991).

This protection is more important than ever, since the internet makes it possible to rapidly disseminate information that can destroy a person's reputation.

#### *D. Reputation and Compensation under French Law*

Though the claim itself was recognized earlier in France, the methods for quantifying damages arguably lagged behind the U.S. for a while. According to an empirical study conducted by commercial court judge Michel Toporkoff, the solution that has been applied by the French courts largely consists of implicitly using a “smell test” to determine an amount that seems sufficient to deter the defendant from doing the same thing again.<sup>108</sup>

Unsurprisingly, this smell test is done without much explanation. For example, a court found that it has the necessary information to calculate the compensation due for the harm incurred but made no reference to any factual items whatsoever.<sup>109</sup> Admittedly, this solution does have the benefit of preventing the symbolic or nominal awards that would be ordered otherwise, but still, these cannot replace the important function of compensating for an injury. The symbolic dimension is merely derisory and does not necessarily make the victim feel that justice has been done.<sup>110</sup>

*Mogul v. Griltex* is a perfect example of a case in which the claimant asserts a non-pecuniary loss and the court awards damages without the slightest reference to any quantitative methods.<sup>111</sup> In that case, a foreign subcontractor had incorrectly carried out the work it was hired for and completing it in a manner that was not compliant with French standards. The contractor sued the subcontractor, claiming harm to its image and reputation, and sought damages in the amount of €15,000. The court of appeals held that the reputation of the plaintiff's company had been harmed – as its reputation could be damaged by the poor quality of the work – and simply ordered damages in the amount of €12,000.

But this is not to say French courts are fully against quantitative analyses. *SAS Les Variétés v. SARL Beauvais Cinéma Communication* perfectly illustrates the

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108. MICHEL TOPORKOFF, DRIOT DE LA CONCURRENCE DÉLOYALE (Gualino ed., 2010).

109. Michel Toporkoff, Colloquium on the Legal Protection of Reputation as Organized by the Observatory of Reputation at the Commercial Court of Paris, *Problématique de la réparation des atteintes à la réputation (d'une entreprise et/ou de ses produits) du point de vue du juge chargé de cette réparation* [The Problem of Compensation for Harm to Reputation (of a Business and/or its Products) from the Point of View of the Court Charged with Calculating It], (Jan. 28, 2004), [hereinafter Legal Protection of Reputation].

110. On occasion, following the French tradition of awarding specific performance, the court adds to their decision by enjoining the defendant from continuing to engage in the harmful act, subject to heavy penalties. This is undeniably one of the most effective measures against businesses. This said, French courts sometimes do use experts. The expert report, at least in theory, entrusts an expert in the field with estimating the loss and calculating the damages, which should limit the risk of errors and, to a certain extent, the differences in outcome in different parts of the country. But as we have seen, much then depends on the experts selected.

111. Cour d'appel [CA] [Court of Appeals] Douai, 2e Ch., Nov. 21, 2007, 06/01863 (Fr.).

application of quantitative approaches.<sup>112</sup> In that case, an independent movie theater owner and a movie theater operator entered into a management lease agreement for the construction of a multiplex movie theater.<sup>113</sup> The owner proposed a merger or an acquisition of its movie theater. The operator refused both and did not agree to the early termination of its lease of the movie theater. As a result, the value of the business decreased. The plaintiff company sought damages in the amount of €1,244,000 for the loss in value of its business.

The plaintiff's expert used four methods to evaluate the loss of goodwill: (i) the net income from fees (excluding tax); (ii) an estimate of future cash flows; (iii) the capitalization of lease management fees (which is less relevant); and (iv) the measurement of taxable weekly receipts, a way of valuing the business as a percentage of annual revenue or a multiple of average weekly taxable receipts. The average of the first, second, and fourth methods resulted in an average valuation of €1,244,000. However, the valuation had to be reduced by approximately 40% to take into account the likelihood that a competing multiplex movie theater would also have opened, thus reducing the value of the plaintiff's business. These factors contributed to a final valuation of €730,000. The court approved the methodology used to calculate those damages, though on appeal the reviewing court revalued the amount.

## VI. METHODOLOGY OF AN ATTEMPT AT A DAMAGES SCALE BASED ON AN EMPIRICAL STUDY

### A. *The Need for a More Objective Damages Calculation Methodology*

When confronted with the difficulty of objectively assessing damage to the brand image of a legal entity, the case law most frequently resorts to an equity-based valuation.<sup>114</sup> According to Marc Isgour, "Recourse to this type of assessment often also results from a lack of knowledge of this type of intangible asset and a lack of rigor on the part of claimants in the calculation and precise assessment of their damage."<sup>115</sup>

While there is no miracle solution for calculating losses in reputation or goodwill, there are several economic and non-economic approaches that can be used to make the process more objective. One method would include the completion of two steps. The first step would require specifying as a legal matter exactly what is being harmed by following the uniform definition of brand image: A mental

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112. Cour d'appel [CA] [Court of Appeals] Douai, 2e Ch., Apr. 18, 2013, 11/02321 (Fr.).

113. *Id.* at 3.

114. With respect to the amounts granted by the case law, *See, e.g.*, Gaz. Pal. 1999, Somm. 728, Paris, 15e Ch., Oct. 22, 1999 (Fr.); Cour d'appel [CA] [Court of Appeals], Orléans, July 2, 2004, (Fr.).

115. Isgour, *supra* note 55, at 232.

representation of the brand's referent product, obtained by memorization of the brand. The product-brand Image is both more than product image and more than brand image.<sup>116</sup>

The second step would require the application of one of two quantitative approaches just reviewed above: (1) the asset approach, consisting of past investments: the defendant has partially destroyed the value of the investments it had made; or (2) the cash flow approach, whereby harming the company's reputation, the defendant decreased plaintiff's future revenues, profits, and cash flows.<sup>117</sup>

Another method better than current practice would consist of taking periodic surveys of customers and measuring changes in goodwill. According to proponent of this method Michel Toporkoff, scholars who have mentioned it consider it useful and valid. However, it is not often used, in particular for reasons of cost.<sup>118</sup> Therefore, in order to make the process simpler, some scholars and practitioners have proposed doing only *ex-post* surveys.<sup>119</sup> A representative sample of customers would be surveyed and asked if and how they experienced damages to the plaintiff company's goodwill or reputation. Here, customers are assumed to be more objective and independent than the experts who are paid by the parties. As stated above, these methods rely on quantitative marketing techniques that are relatively expensive. As a result, only the wealthiest parties can use them, while companies with more limited financial resources will not be able to obtain such reports. In the absence of public funding, we are left with a real problem of access to the law and justice.

An alternative solution better than current practice, and much less expensive in the long term (and thus potentially more broadly usable) than the methods cited above, would consist of a case law study identifying as precisely as possible the universe of cases that can serve as precedent and constructing a scale equivalent to the schedule of bodily injuries. The amount of research is considerable but would be an investment worth making. Although it would not have binding legal value, such a scale could be used as an unofficial guide for courts and could reduce the

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116. M. Bodrie, *L'atteinte indirecte à la marque* [Indirect Harm to Brands], *PRODIMARQUES* 10 (July 1994).

117. Indeed, this distinction reflects different measures of compensation, that is, compensation for "negative interest" (relying on the "asset approach") as opposed to compensation for the "positive interest" ("cash flow approach").

118. Michel Toporkoff, *Le rôle des associations professionnelles dans la défense des intérêts de leurs membres contre le dénigrement collectif* [The Role of Professional Organizations in the Defense of their Members' Interests against Collective Defamation], *LES PETITES AFFICHES*, 1992.

119. See, e.g., Mack J. Morgan, *Surveying the Damage*, 68 *OKLA. BAR J.* (1997), in which the *ex-post* survey method is used in a convincing manner by both the plaintiff and the defendant (first citing *Harold Stores Inc. v. Dillard Dep't Stores*, 82 F.3d 1533 (1996); and then citing *Florifax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 933 P.2d 982 (1997).

uncertainty and arbitrary nature of the judicial process.<sup>120</sup> Moreover, the parties could use it to settle their disputes after the fact, or they could agree on a lump-sum indemnification before the fact (liquidated damages). I discuss this solution in greater detail below.<sup>121</sup> However, the research costs borne by some parties will unavoidably limit their access to the courts. These facts motivate us to develop referenced indemnification scales beyond liquidated damages.

Ironically, the many available methods become an obstacle to the establishment of a single method, despite a clear need for legal foreseeability and hedging the risk that courts will act arbitrarily. Thus, we may say, along with Philippe Gilliéron, that no method of rigorous calculation seems capable on its own, of quantifying the value of an intangible harm. However, there are criteria enabling us to limit the court's discretionary power to avoid completely arbitrary results.<sup>122</sup> Armed with the qualitative analysis that has emerged from the case law and scholarship, I will next address the empirical quantitative analysis that I performed based on the most relevant characteristics of the cases. As done in my previous article,<sup>123</sup> I will describe the results of my sampling of U.S. and French case law to propose areas for future research that may make it possible to develop damages scales.

### B. Early Hypothesis

Based on my literature review, I expected to find a rise in awards for harm to goodwill over time, even if just a subtle trend. Though there is a noted evolution in legal thought, the literature above suggests loss of goodwill is not common in contractual matters, likely due to the difficulty of satisfactorily proving such harm. It would not be surprising if harm to reputation is not generously compensated, which probably explains both why this claim often appears to be made along with other claims, and why it was difficult to find recent decisions.

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120. See Lexis 360®, *Contentieux De L'Indemnisation – Evaluations Des Indemnités [Damages Litigation – The Valuation of Damages]* <https://www.lexisnexis.com/terms/lngp/fr/lexis360/cgu/cgu-ciel.asp> (last visited Sept. 5, 2022).

121. See Part 6, “Methodology of an Attempt at a Damages Scale Based on an Empirical Study,” *infra*.

122. GILLÉRIEN, *supra* note 37, at 560. It is fair to note, non-pecuniary harm is most frequently asserted in a case where the victim is an individual in a national court or a State in an international arbitration. In such cases the plaintiff frequently seeks and sometimes is granted other forms of compensation that do not require any method of calculation. These may include symbolic damages (of one euro) or the publication by the defendant of an “acknowledgement of fault, an expression of regret, official excuses, or any other appropriate statement,” as explained by Bernd Ehle & Martin Dawidowicz, *Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation*, in JORGE A. HUERTA-GOLDMAN, ANTOINE ROMANETTI, & FRANZ X. STIRNIMANN, *WTO LITIGATION, INVESTMENT ARBITRATION, AND COMMERCIAL ARBITRATION* 293, 297 (Kluwer L. Int'l ed., 2013) (e-book).

123. Giaoui, *supra* note 1, at 34-41.

*C. Sample Description*

I conducted empirical research on cases in which the plaintiff has suffered a loss of goodwill. In order to extract relevant cases from the available databases, I used several combinations of the following keywords (in both English and French), among others, in legal databases<sup>124</sup>: “harm to reputation”; “harm to goodwill”; “harm to image”; “loss of customers”; “lost profits”; “infringement”; “commercial reputation”; “business identity”; “brand image”; and “loss of customer confidence.”

My initial US database included approximately 150 cases covering cases between 2002 and 2015, with roughly 20% of them compensating loss of goodwill. After randomly selecting about one in five to respect the distribution of the results in terms of chronology and other descriptive criteria, out of a sample of 30, I was left with 28 cases concerning a loss of goodwill: six in which damages were awarded, and 22 in which they were not. Even though the sample contained cases decided as early as the late 80s, out of 28 decisions, the earliest that damages were awarded was in 2002, seemingly supporting the presumption that this claim is relatively recent in the United States, and that, moreover, it remains difficult to prove and still more difficult to calculate the amount. Nonetheless, as the figure below will show, the granting of damages for harm to goodwill seems to be becoming more frequent – and the amounts higher – over time.

On the French side, of the one hundred and fifty first cases extracted, I also randomly selected one in five. I thus obtained a first sample of 30 relevant decisions where in eight of these (27%), damages were awarded, and in the other 22, there were no damages awarded. Next, I extracted 30 decisions (some of which overlapped with the previous extraction) from 1996 through 2015, 29 with a quantified claim and 29 with a quantified grant;<sup>125</sup> I deliberately selected mostly cases in which damages were awarded in order to analyze their quantum, calculation methods and the court’s reasoning. However, I kept a few cases in which damages were not awarded in order to evaluate the reasons for damages awards. In 24 of the 30 cases (77%), the court awarded damages to the plaintiff.

Regarding both jurisdictions, I must note first that very few cases discuss loss of goodwill in detail. In thousands of cases, plaintiffs sought damages for harm to reputation (often among other claims), but courts found for the claimant in very few of these cases, and damages were awarded in a small amount those cases. In some cases, the court found there was a breach of contract and there was harm to reputation but was unable to quantify the plaintiff’s loss. Interestingly, most of the time the plaintiff did not offer a satisfactory method for proving the existence of the harm or

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124. Primarily Westlaw and Lexis Nexis for the US, Dalloz, Lexis Nexis and Lamyline for France.

125. However, they are not exactly the same 29: there was one case that had a quantified claim without a quantified grant, and vice versa.



its amount.<sup>126</sup> Logically, in such cases, the plaintiff should not expect to be awarded damages. However, sometimes the courts will award damages for harm to reputation without a detailed methodology, resulting in a very round number, one that may even appear to have been essentially selected at random (such as €1 million).

#### *D. Methodological Challenges*

Arguably, the most serious methodological challenge for this research is its comparative side; as the legal systems analyzed are different, any result can only point in the right direction, without warranting a clear conclusion.

Moreover, as very detailed rulings are needed to be able to extract useful data and trends (especially the quantum of both claims and grants), it should be noted that finding relevant and representative cases is a great challenge. Although as part of my doctoral research I've gathered 905 cases dated between 1989 and 2016, I was only able to manually code data from about 200 of them that were fully documented in the database. This overall lack of documentation could be indicative of the legal community's limited interest in quantitative analysis, a challenge possibly presents equally in the United States and France. To my knowledge, this research represents an early attempt amongst comparative lawyers to systematically measure contractual damages. Nonetheless, over time I may be able to overcome this difficulty in sample size limitation as more advances are made in the development of analytical technologies and the availability of information on public and private legal databases increases.

#### *E. Outcomes Analysis*

I used two main metrics to quantify the outcomes in the cases sampled, a win rate and a recovery rate. The win rate refers to the probability for a claimant to be granted any amount of compensatory damages by the court. In cases where the claimant wins, I generate a recovery rate, which represents the proportion of their claim quantum that is granted by the court.

I then performed several successive analyses with these metrics: First I focused on the general trends of the outcomes, over time and by types of damages, across the two jurisdictions. Then, I considered the different criteria that could influence the outcomes.

##### 1. General Trends of the Outcomes

###### a. Impact of the Methodologies Used by the Parties

Given that each situation concerns harms to goodwill, reputation, or image, which are principally intangible assets, I hoped to find evidence using qualitative

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126. Though it is worth keeping in mind that correlation does not imply causation.

indicators such as customer satisfaction, employee satisfaction, attractiveness to recruits (such as the “Great Place to Work” index), and, more generally, ESG (environmental, social, and governance indicators). This was not the case. Is there simply a delay in the use of these relatively recent indicators? It remains likely that they will be used in the future to improve expert witness reports.

### b. Principal Reasons for Granting Compensatory Damages

The cases presented in my database sometimes indicate the reasons for why the court decided to award damages. I analyzed these factors where they are clearly stated or may be clearly identified in the court’s decision.

In the US, the principal reasons for awarding damages (primarily consequential damages) in loss of goodwill cases are breach of contract (3 out of 6 cases), bad faith or immoral conduct (2 out of 6 contract cases), and negligence (1 out of 6 cases). Thus, immoral conduct or bad faith on the part of the defendant plays a role in loss of goodwill cases. This is not surprising as a matter of common sense, but it is surprising from the standpoint of contract law, where the court is supposed to award complete compensation based on the harm suffered as a result of a breach of contract. No moral or punitive damages are supposed to be ordered. Nevertheless, my empirical analysis suggests that moral considerations are indeed factored in.<sup>127</sup>

Across the pond, unsurprisingly, the principal reason for which the French courts award damages is a finding that the services provided were inferior to the defendant’s contractual undertakings (this accounts for three of every four cases), which amounts to a breach of contract by the subcontractor. However, in a quarter of the cases, the court bases its decision on the defendant’s bad faith. Ultimately, these reasons are similar to those seen in cases relating to the termination of negotiations,<sup>128</sup> making me suspect that some “compensatory” damages are in fact hidden punitive damages.

### c. Recovery Rate is Large, but the Total Value Remains Low.

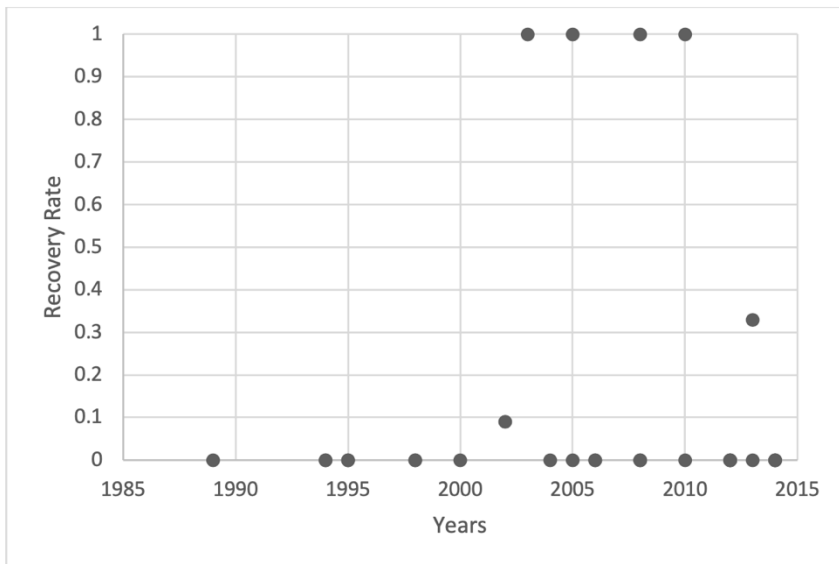
The proportion of US litigated cases in which damages were awarded rose from 0% during the 1989-2001 period to 30% during the 2002-2014 period. The average claim went from \$293,000 to \$1,461,000, and average awards went from zero to \$155,000. If we exclude one extreme case of \$182 million (our 2U11 reference), the average claim for damages for harm to reputation in the U.S. is close to a modest \$809,000, with a median of \$124,000. Most cases do not meet the standard of proof or foreseeability necessary for granting compensation: 12 out of 18 quantified cases (66%) awarded no damages, such that total average damages

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127. While culpability or bad faith on the defendant’s part sometimes led judges to flip the burden of proof on damages, I couldn’t find evidence of such within my sample.

128. Giaoui, *supra* Note 69, at 281-384.

were less than \$41,000, or 5% of the average claim. The New York courts are particularly demanding in terms of evidentiary requirements. Virginia, on the other hand, is more lenient. Looking at the six cases awarding damages for harm to reputation, the amount awarded varies from \$13,000 to \$500,000, with an average of \$124,000. That represents a very high average recovery rate of 74%. Four appeals courts out of six awarded 100% of the claims. This means, in turn, that if the standard of proof has been met, the claimant may obtain the full damages sought.



*Figure:1* Evolution of the US recovery rate over time for loss of goodwill

In France, where the decisions awarded damages, the average recovery rate was 34%. This relatively high average contradicts the conventional wisdom that the French courts are extremely wary of awarding damages for harms to reputation. In fact, the average is slightly higher than that for cases concerning terminations of negotiations. Of course, because of the relatively small number of cases in which damages were awarded, it is logical that those cases in which damages were actually awarded would be those in which it was worthwhile to develop solid methodology proving most of the damages. As a result, these cases would likely have a relatively high recovery rate. A few cases show exceptionally high rates, where the parties were merely asking the Court of Appeal to affirm the decision of the trial court. All of these factors taken together explain the higher recovery rate.

The evolution of the French recovery rate overtime is also interesting. Predictably, the rate climbs over time, and it is only around 2008 that cases with higher than average (34%)

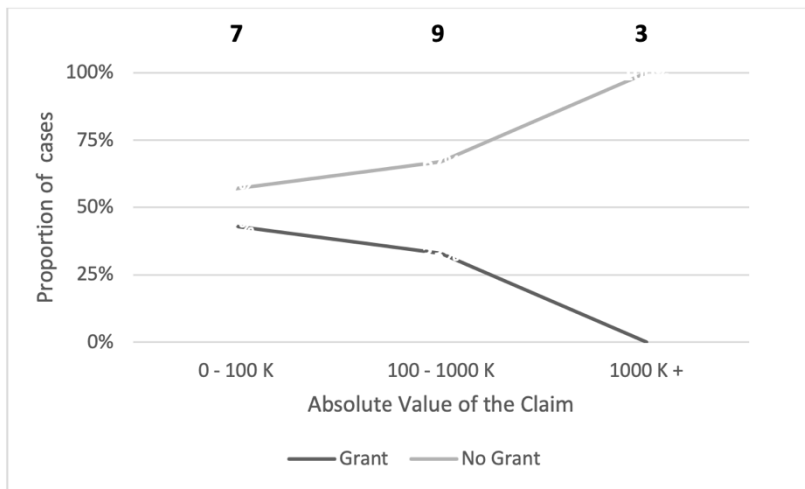
rates start to become more frequent. Moreover, when we divide the cases into groups of similar size (11 cases, 10 cases, and 9 cases) over three successive periods, the average recovery rate increases steadily from 30% for 1996-2007, to 33% for 2008-2011, to more than 40% for 2012- 2015, confirming the recent acceleration of the increase.<sup>129</sup>

## 2. Criteria Influencing the Outcome Across Jurisdictions

### a. The Absolute Value of the Claim

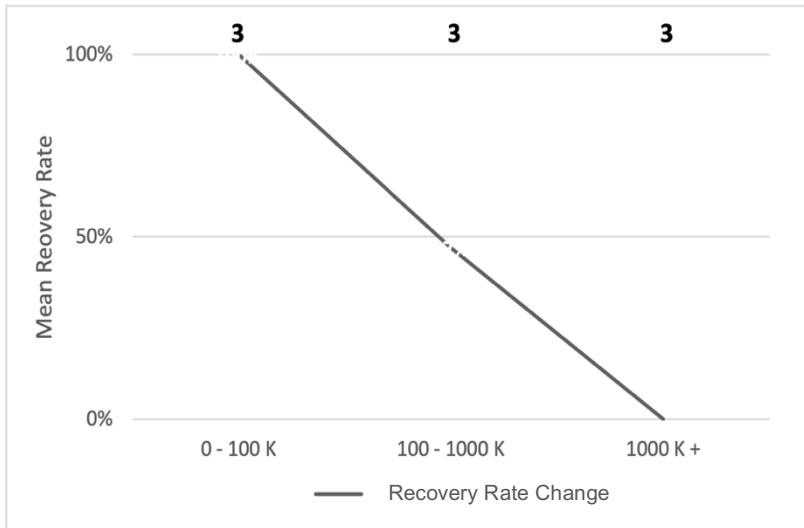
The quantum value of claim is defined as the amount of money the defendant declares as their damages.

Data shows an increase in the absolute value of the claim has a negative effect on the court's decision to award damages (win rate) and on the amount of those damages (recovery rate). The win rate decreases from 43% to 33%, and then drops to 0%, while the quantum of damages rises from the \$0-\$100,000 range to the \$100,000-\$1,000,000 range, and finally to the over \$1,000,000 range. In addition, of all cases granting damages, the average recovery rate also decreases from 100% to 47% and then to 0%, respectively.<sup>130</sup>



129. *Id.*

130. *Id.* Again, a conclusion similarly found in previous study on “agreements to agree.”



*Figure:2* Change in win rate (Graph 1) and recovery rate (Graph 2) depending on the claim quantum

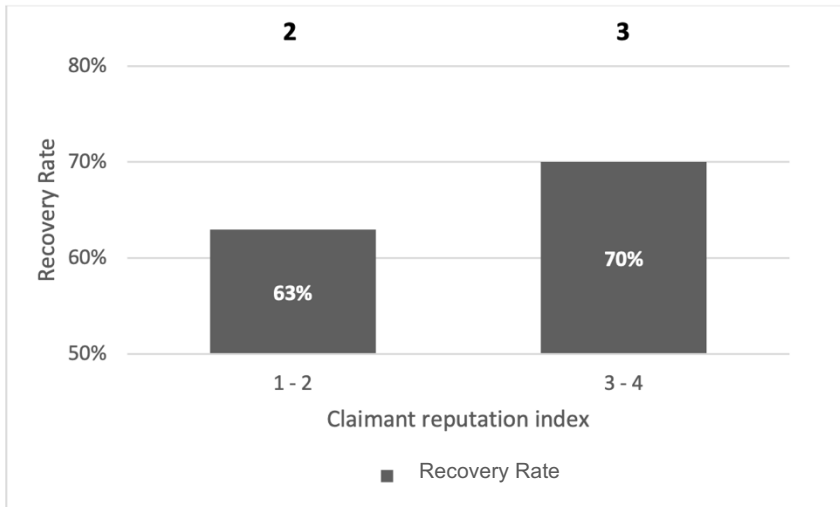
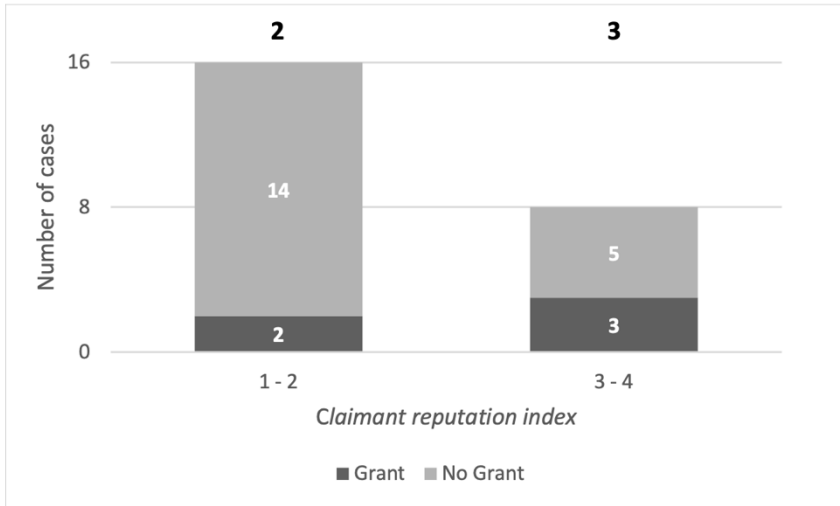
The increase in the absolute value of the claim has a negative effect on the court's decision to award damages (graph 1 on top) and on the amount of those damages (graph 2 on bottom). Everything else being equal, it is possible court skepticism increases as claims increase. Likewise, it is also possible that very high claims are more likely to be regarded as unreasonable by the defendant or may in fact be the result of overestimation by the plaintiff.

**b. The Greater the Importance of Reputation in the Claimant's Industry, the Greater the Likelihood that the Claimant will be Granted Damages.**

I also used an indicator measuring the importance of the plaintiff's reputation in each case. I designed the indicator to measure the degree to which the plaintiff's reputation was a key factor for success in its business sector. The indicator enabled me to assign a rank to each case (ranging from 1, for low importance, to 4, for high importance). I built this composite index encompassing among others: average advertising expenditures, brand awareness and word of mouth, referrals as sources of business, search engine results, news coverage, publicized actions of the company, etc. In both jurisdictions, I noted a striking correlation between the importance of the plaintiff's reputation and the court's decision, and, in particular, the recovery rate.

For the U.S., the claimant obtained damages in two out of 16 cases (12.5%) where reputation was not an important factor (ratings 1 and 2), and in three out of eight cases (40%) where reputation was an important factor (ratings 3

and 4). However, the recovery rates were similar between the two groups, at 63% and 70%, respectively.



*Figure:3* Distribution of US cases and average recovery rate (in cases awarding damages) depending on the importance of reputation for the claimant

For France, when reputation had high or very high importance (a rank of 3 or 4) for the plaintiff, the court awarded damages in 9 out of 12 cases, with an average recovery rate of 44%. However, when reputation was of low or very low importance (a rank of 1 or 2) for the plaintiff, the court granted damages in 13 of

18 cases, with an average recovery rate of 27%.

Moreover, I compared the amounts of damages in French cases between the lower court and the appeals court.<sup>131</sup> I found such data for 19 of the 30 decisions (not all cases discuss harm to reputation both in the lower court and on appeal). Fourteen of the 19 cases ultimately awarded damages on appeal<sup>132</sup> (in accordance with the 30-case sample), of which five reversed decisions refusing to award damages, two increased the amount of damages, and two reduced it, with the last five simply affirming the lower court's decision. Among the 14 cases awarding damages on appeal, I found that the quantum of damages had been reduced on appeal twice and increased on appeal twice; in five cases, the lower court had not awarded damages at all, and the appeal court reversed.

The distribution of those cases over time speaks volumes. I separated the cases into two periods (1990 to 2004 and 2005-2015) and noticed a distinct change in the attitude of the courts. Prior to 2005, the Court of Appeal granted very few claims concerning damages (only three cases: one affirming a decision not to award damages, one reversing a decision not to award damages, and one increasing the amount of damages). More recently, the courts ruled in a less uniform manner, but never reversed a decision to award damages, which reinforces my prior finding that damages are awarded by the lower courts only when the claim includes good supporting documentation. This evolution in the decisions shows the courts' increased understanding of harms to reputation, image, and goodwill.

### c. The Use of a More Sophisticated Methodology Increases the Claimant's Chances of Success.

As disputing parties must prove or argue the exact quantum of real damages, one would expect that a greater sophistication of the methodology used for this calculation would yield better results. I therefore devised a sophistication index to test the link between this index and the recovery rate. I observed the evolution of average win rate and recovery rate ratios as a function of the sophistication of the methodology used by the claimant. I gave each level of methodology an index between 1 (very unsophisticated) and 4 (highly sophisticated).<sup>133</sup>

With respect to the reasoning of claimants—and of courts and judges—I found quite inconsistent and simplistic methodologies for calculating the

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131. Data for the U.S. was sparser. As mentioned above, contrary to practice in the United States, French courts of appeal are permitted to review both the law and the facts of the lower court's judgment. As a result, the outcome on appeal is more complicated than merely upholding or reversing a decision.

132. Upon *de novo* review.

133. (1) The claimant requests an overall amount without any details or justification. (2) The claimant allocates the claim among several types of damages or explains that it has taken different factors into account but does not specify how these factors influenced the claim. (3) The claimant takes these factors into account and explains how they affect the different heads of the claim, using simple calculation methods. (4) The claimant takes these factors into account and explains how they affect the different heads of the claim, using varied and/or sophisticated calculation methods.

quantum of damages. However, when claimants use more sophisticated methods, they significantly increase their success rates. For the U.S., in no cases did the claimant receive damages where the methodology was not explained in detail (rankings 1-2); on the other hand, claimants received an award in four out of eleven cases (35%) in which the methodology was detailed and/or sophisticated (rankings 3-4). Considering only those cases in which damages were awarded, the average recovery rates were 0% and 61%, respectively. In France, consistent with the intuition, I observed a clear positive impact from the sophistication of the claim to the average win rate, and even more so to the recovery rate. Claims of sophistication 3 and 4 have an average recovery rate of 71%, whereas those of sophistication 1 and 2 caps at an average recovery rate of 22%.

#### d. Larger and International Law Firms Have Relatively Lower Rates of Success For These Claims.

I also became interested in uncovering any link between the final result, especially in terms of the recovery rate, and the size of the law firms representing the claimant in court. If such a link exists, and if it is positive, it is plausible to infer either that judges are more prone to award higher damages to clients defended by large firms, or those firms are simply more sophisticated and can therefore better substantiate their clients' claims.

Unfortunately, this analysis was not conducted in France for breach of agreements to negotiate cases due to the extreme variation of the quantum value of claim across my different categories and which could have biased my results. Similarly, I did not conduct an analysis evaluating the results of each specific firm at this stage because of the relatively small sample.

Law firm size was measured by the number of attorneys working at the law firm. It is scaled from 1 (Very Small) to 4 (Very Large).<sup>134</sup>

In my sample, using a larger law firm had a negative effect on the claimant's success. Of twelve claimants hiring the smallest firms (categories 1 and 2), four (33%) obtained damages. On the other hand, of seven claimants hiring larger or more international firms (categories 3-5), only one (14%) obtained damages.

Claimants who hired law firms of a similar size to those hired by the defendants had an average recovery rate of 100%, whereas claimants who used much larger and more international firms had an average recovery rate of only 62%.

However, unsurprisingly, the large firms have the advantage when it comes to the quantum of damages sought, since large firms tend to choose larger cases, for obvious economic reasons. The very large or large firms (category 3 or 4) represent claims that, on average, are 10 times larger than the claims represented by small firms in categories 1 and 2: \$657,000 and \$64,000, respectively. One interpretation is that while certain smaller firms may specialize

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134. Very Small includes local law offices with less than 5 lawyers; Small covers national law office with less than 100 lawyers; Large, major national law firm with over 100 lawyers; and Very Large, major international law firm with over 300 lawyers.



and find a profitable economic model with moderate claim amounts, the larger firms with higher overhead and much broader commercial opportunities may not have developed or wished to develop this practice area.

It is important to note, the average value of these claims represent only a small fraction of the average value of the claims analyzed in the other situations: 100 times smaller than cases concerning the termination of negotiations and 10 times smaller than “new business rule” cases.<sup>135</sup>

#### e. Claims for Consequential Damages are Much Larger and Simultaneously Compensated Worse than for General Damages.

Again, most harms to reputation are considered by the courts to give rise to indirect (or consequential) damages rather than to direct (general) damages. While American common law requires the same standard of proof of the existence of either general or consequential damages, it imposes a higher standard of proof as to the quantum of consequential damages than to the quantum of direct damages.

The loss of goodwill cases had very interesting results. The cases included different types of compensatory damages: general damages, consequential damages (which is frequently the case for loss of goodwill), reliance damages, and restitution damages. Plaintiffs almost universally seek general expectation damages. Of those, 10 cases also sought reliance damages, four also sought consequential damages, and four sought all three types of damages. Restitution damages were sought only in one case in the sample. The quantum of damages awarded was similar for the three types of damages. However, no decision granted all three types of compensatory damages, and two decisions only granted compensation for reliance damages. The quantum of damages was analyzed for each type of claim, in current dollars:

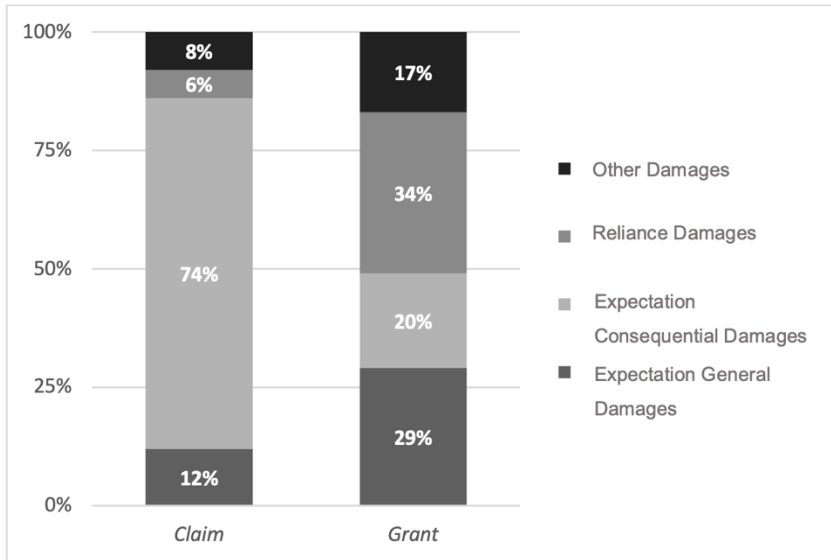
- (1) Reliance damages were claimed in an average amount of \$186,000 and a median value of \$47,000;
- (2) Direct damages were claimed in an average amount of \$238,000 and a median value of \$50,000;
- (3) Consequential damages were claimed in an average amount of \$809,000 and a median value of \$124,000.

However, the analysis of the quantum of damages gives us an entirely different perspective. While consequential damages, direct damages, and reliance damages represented, respectively, 74%, 12%, and 8% of the total amount of claims, the allocation of the total amount of compensation was much more balanced, at 29% for consequential damages, 20% for direct damages, and 34% for reliance damages). This confirms both common sense and my previous observation that once a defendant has been found liable, damages for losses incurred in reliance to the contract are almost always granted. It is easy for claimants to provide the court with proof of their investments, but it is more difficult to prove, and thus to obtain, general damages, and it is yet more difficult for consequential damages, including the loss of goodwill.

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135. For a discussion of these cases, see Giaoui, *supra* note 69, at 49.

Figure:4 Types of damages in claim quantum and grant quantum



Consequential damages represent the large majority (74%) of the damages sought, but only 20% of the compensation awarded.

## VII. EMPIRICAL CONCLUSIONS – GENERALIZATION FROM THE HYPOTHESIS

The above hypotheses constitute a first step in a broader analysis of the behavior of courts. Nevertheless, this empirical study highlighted yet another converging trend between the American and French jurisprudences. The recognition of non-pecuniary harms to legal entities, alongside the quantification of these harms, is consistently becoming more prevalent in both jurisdictions.

The case law sample shows results consistent with my previous general analysis.<sup>136</sup> First, in the U.S. and France, there is a clear negative correlation between the quantum of the plaintiff's claim and the outcome: the gap between claim and defense widens when the claim increases, so a court decision logically reflects this wider gap. Second, it is clear that the sophistication of the methodology used by the claimant in support of their claim has a concrete positive impact on the outcome. Third, claimants operating in mature industries seem to have better chances to be granted damages than those operating in riskier businesses. However, on the contrary of my previous general findings,<sup>137</sup> smaller or medium law firms obtain higher win and recovery rates than larger law firms.

The increased recognition of claims for harm to reputation in both

136. Giaoui, *supra* note 69, at 34-41.

137. *Id.* at 38.

jurisdictions is consistent enough across the board to be worth studying in much closer detail. Nonetheless, the project remains inherently comparative: in order to go further, we must identify the litany of factors that have the greatest effect on the decisions of judges and arbitrators, and in particular their decisions to award or not award damages. Finally, a larger sample of cases would be necessary to confirm some of my hypotheses or at least increase the robustness of these findings.<sup>138</sup>

## VIII. CONCLUSION

The relatively recent assessment of damages to the reputation of legal entities faces judicial uncertainty and technical complexity, the former being particularly high when objective data is missing. Even when that data exists, current financial and statistical methodologies are too technically complex and costly for most cases, leading to inefficient bargaining, unnecessary litigations, and/or unpredictable judicial decisions. Hence, there is a marked need for alternative methods that are both objective and simpler than current quantitative methods.

Taking inspiration from the field of torts — where claims for damages to an individual's reputation originate — I decided that one of those methods would be to develop damages schedules for certain types of economic losses as they exist for personal injury. After building a comprehensive database, I studied the relations between key variables prominent in literature and judicial outcomes.

The resulting sample demonstrated that U.S. and French case law have been converging in the recognition of non-pecuniary losses for legal entities rapidly over the last 25 years, likely leading to further commonalities in their respective statutes and legislation. If legal theory in this area continues this convergent development, damages guidelines and schedules for the recovery of non-economic losses may consequently be built based on prior awards of damages for breach of contract. The introduction of such objective schedules could benefit academic researchers, parties redacting contracts, and attorneys in their pre-litigation discussions or arguments before the court.

With these findings in mind, I reiterate practical recommendations to parties who wish to improve their likelihood of success and the quantum recovered in damages for lost profits. As claims for consequential damages are much larger and simultaneously much less well compensated than general damages, I am led to make two principal recommendations for parties seeking to improve their chances of obtaining damages for harm to reputation or goodwill:

- Go further than the traditional standards of proof in order to demonstrate the existence and, most importantly, the quantum of general expectation damages and, even more so, the quantum of consequential damages. This is clearly a higher standard than for reliance damages.
- Draft agreements in such a way that in the event of a breach, it will be clear to the parties (and the courts that in addition to lost profits,

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138. *Id.* at 35.

there is foreseeable harm to reputation. This can be achieved, for instance, by including a liquidated damages clause.

At this point, additional empirical analysis should be performed in more depth to achieve statistically representative samples and more width in order to explain the judicial behaviors observed. Once validated on a larger sample and more widely shared, those results may benefit not only the academic debate, but also courts and judges as tools to assist their rulings. Finally, the parties and their attorneys can use those results *ex-ante* when drafting their contracts to minimize the risk of dispute. They can also be used *ex-post* when a dispute emerges to settle or optimize their outcome in case of litigation.

Eventually, the use of damages schedules combined with artificial intelligence technology (such as natural language processing, machine learning, and deep learning) would give rise to predictive systems. Such systems would make it possible to assess — in advance, instantaneously, and with a high degree of accuracy — both the probability of obtaining (or being ordered to pay) damages and the quantum of those damages. The development of predictive technologies could prove useful for all participants in and users of judicial systems. Furthermore, if they were broadly adopted, these AI technologies based on schedules would trigger a virtuous cycle: assisting judges in making their discretionary decisions, providing data to improve the models, giving more incentive for judges (and all stakeholders) to use them, and so on. Their use would drastically increase judicial fairness and reduce uncertainty. It would make predictions more reliable, streamline unnecessary litigations, and eventually generate value for society far beyond what can be imagined today.