

The new scale for compensation of road traffic accident victims in Spain (“Baremo”) and the significant increase on damages

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*On the 23<sup>rd</sup> September 2015 the long-awaited Law reform 35/2015, of 22<sup>nd</sup> September, for the system for the evaluation of damages caused to victims in traffic accidents was finally published. Long-awaited because after more than 20 years since the entry into force in 1995 of the “System for the Evaluation of Damages caused to Persons in Traffic Accidents” (hereinafter “Baremo”) published in the Annex of the Law on Legal Liability and Insurance for the Use of Motor Vehicles, approved by the Royal Decree 8/2004, of 29<sup>th</sup> October, the need for a reform of a system that proved to be outmoded, not responding to factual situations of a society that has developed into a completely different family structure, was notorious.*

Certainly, the reforms at European level have also influenced this new law that will come into force on the 1<sup>st</sup> January 2016 and will only apply to road traffic accidents occurring after that date. Despite the transposition of EU directives, with direct impact on the field of liability and compensation for victims of traffic accidents in Spain, it was urgent to introduce a reform in our system that would reduce the disparities between the compensatory amounts received by victims of road traffic accidents in Spain and those received in other European countries.

This way, the **principle of full compensation of the damage (*restitutio in integrum*)**, a concept that was already used by the ancient Romans and inspires our system, which aims to place the victim in an as near as possible situation to the one prior to the accident, becomes more important with this reform and undoubtedly represents a tangible improvement of the current system, seeking fair compensation for the victims and their families.

The main innovation in terms of structure is the inclusion of a new Title IV to the Law on Civil Liability and Insurance in the Use of Motor Vehicles, approved by Royal Decree 8/2004, of 29<sup>th</sup> October, which consists of 112 articles divided into two chapters. It is therefore a new system and not just a quantitative increase of compensation, setting with accuracy in Chapter 1 the general criteria and including clear definitions of concepts intensively discussed during the 20 years of application of the old “Baremo”. Chapter 2 establishes new guidelines for the assessment of personal injury.

The quantitative impact in the levels of compensation will be the most important change but not the only one, since the reform also introduces new injured parties and new compensatory concepts, in addition to the amendment of Article 1 and Article 7 and the inclusion an Article 14 relating to the procedure of mediation in cases of disagreement.

The new “Baremo” establishes in its 507 pages many more novelties than the ones we will refer to in this article, but certainly, Articles 1, 7 and 14 are of such importance that we must refer to them expressly.

The reform introduced by Article 1 is based on 5 key points. One of the most important concerns **minors and those who are physically or mentally incapable**, as from the 1<sup>st</sup> January 2016, the exclusive or concurrent fault of victims under this category (for example in cases in which a minor steps into a road looking for his ball) will not apply and damages will not therefore be reduced as a consequence. Besides, the recovery action against the parents and guardians is excluded, as long as they had not intentionally contributed to cause the accident.

At the same time, those who do not comply with the **required safety measures**, such as wearing a helmet or a seatbelt, will be regarded to have contributed to the causation of the injury, which may result in a reduction in the entitled compensation. This reduction, however, will never exceed 25%, being this another important novelty.

Article 7 plays a vital role in order reduce litigation levels and most of all, promote swift out-of-court settlements, forcing insurers to make a **reasoned offer** or give a response indicating the reasons that prevent them from making an offer of compensation, either because liability is not established or because they have not been able to assess the damage with the medical evidence available, facing administrative sanctions if not complying with this. The out-of-court claim presented by the victim to the insurance company of the vehicle responsible for causing the accident is also a previous requirement before filing court proceedings.

In case of disagreement of the injured victim with the offer of compensation made by the insurer, the parties, by mutual agreement and at the expense of the insurer, may request expert reports, including the those from the Institute of Legal Medicine, which will enable the insurer to make a new offer of settlement within a month.

Article 14, meanwhile, entitles the victims to use a **mediation** procedure in case of disagreement with the insurer. This procedure has a great advantage over court proceedings, as it is a relatively quick procedure with a length that may not exceed 3 months. It is an optional path that the injured may take within two months after receiving the offer of compensation or reasoned response.

The new system is divided in three **different sections**: (i) compensation for death, (ii) compensation for lifetime effects and (iii) compensation for temporary injuries. Each of these categories includes three types of harm: (i) basic personal harm, (ii) particular personal harm and (iii) financial loss.

Regarding the **basic personal harm**, major changes are introduced with respect to bereavement damages, including five categories of beneficiaries (the widowed spouse, parents, children, siblings and those who had a close relationship with the victim), being particularly innovative the inclusion of “close friends”, that is, those people that do not have the condition of beneficiary according to the four categories, if they had lived with the deceased for at least five years before the death and were specially close to the victim.

Regarding the widowed spouse, new family models are considered, identifying the harm suffered by the spouse to that suffered by a common-law partner, registered in a public record or document or those who had lived with the deceased for at least one year immediately before the death of for a shorter period if they had a child together.

Equally important is the value that is given to the years of marriage or cohabitation with the partner, establishing a fix amount for up to 15 years of cohabitation and an increase for any additional year or fraction, varying in terms of age of the victim.

In case of compensation for lifetime effects, physical, intellectual, organic or sensorial disabilities and aesthetic damage, the basic personal harm relies on the gravity and intensity in accordance to a medical scale, which is also included in the new law.

The new law establishes methods for the calculation of the compensation in those cases in which the victim had previous pathologies that have been aggravated by the accident and also for the lifetime effects sustained in the same accident and affecting common functions, due to the significant aggravation of each of them.

The **particular personal harm** compensates the particular circumstances of the victim. In cases of death the following are considered: (a) physical, intellectual or sensorial disability of the injured party, (b) cohabitation of the injured with the deceased, (c) sole injured victim of its category, (d) sole injured victim of the family, (e) death of the single parent, (f) death of both parents in the same accident, (g) death of the only child, (h) death of pregnant victim with loss of the foetus and (i) exceptional injury.

Special importance should be given to the “exceptional injury”, as it is closely related to the full

compensation of the damage to which we referred above and that allows, with previous justification, to include damages in the claim that are not referred to in the law but cause a harm to the victim, with a maximum limit of 25% of increase with respect to the compensation for basic personal harm.

In what concerns compensation for lifetime effects, the particular personal harm is recognised by the existence of complementary moral damages when a single lifetime effect reaches, at least, 60 points and 80 points in case of concurrent lifetime effects, or in a loss of quality of life due to the effects suffered by the victim or by the relatives of those who have suffered a major injury.

Regarding compensation for temporary injuries, the special consideration given to surgery is interesting. Until now, the number of days that the victim remained hospitalized, had been compensated in the same amount as those days in which the injured underwent one or more surgeries. The new “Baremo” takes into account not only the number of surgeries, but also the characteristics of the surgery, the complexity of the same and the type of anaesthesia.

Last but not least, the new law introduces an important reform in compensation for **financial loss**, including in this category both financial damage, which is the expenses that the victim or his/her family had to incur as a result of the accident, and loss of earnings, which is the loss of monetary income by the victim, or his/her family in case of death, as a result of the accident.

For the calculation of **lost profits**, on the one hand, the net income of the victim is taken into account and, on the other hand, a coefficient which is set individually for each injured and that includes variables such as the length of recovery time, the risk of death according to the degree of disability (in case of suffering lifetime effects) or public pensions to which the injured may be entitled in case of permanent partial disability or total disability.

A fix compensation of 400 €, without justification, is established as a novelty in cases of death for each of the claimants for the expenses caused by the death such as trips, support, accommodation and other analogous costs.

It is also established that the duration of the proven **economic dependence** of parents, grandparents and those who suffer a disability is lifelong. Regarding the accredited economic dependence of children, grandchildren or siblings, it is considered to exist until they are 30 years old and always for a period of at least three years. In cases in which by the date of the death the injured was older than 30 but economically dependent, it is considered that the

duration of the dependency has been three years, just as in the case of close relatives.

In case of victims that are exclusively dedicated to household, the minimum wage will be considered, with an increase of 10% in cases in which there is additionally an injured minor, someone with disability or a prejudiced party over 67 years who lived together with the victim. For victims that have been unemployed during any of the three years preceding the accident, the unemployment benefit will be taken into account for the calculation of the net income. If the victim had not perceived any unemployment benefit, an annual minimum wage will be counted as income.

Cases of compensation for lifetime effects, compensation for the foreseeable future costs of health care and care, which is currently limited to cases of major catastrophic injuries, deserve special mention.

From the 1<sup>st</sup> January 2016, **care** may also be compensated in those cases in which such assistance is required because the personal autonomy of the victim has been affected. The new regulation includes the necessary hours of care according to the effects suffered.

There shall be no compensation for care if the victim is permanently kept in a special centre or/and the insurance company assumes the health care costs. It is also possible that the insurer provides these health care services at the victim's home for lifetime.

**Prosthetics and orthotics** are reimbursed, as well as home or outpatient **rehabilitation**, assistive products for personal autonomy, **home adaptation** and the financial loss caused by the increase of costs of **mobility**.

The new "Baremo" foresees the possibility that the fixed compensation may be reviewed in cases in which there appears a substantial change of the circumstances that determined the amount of the compensation.

The rules for compensation of those injured that are pending to enter the labour market in case of absolute permanent disability are also new. The starting date for calculation of the compensation is from the age of 30, counting as forgone income the minimum annual wage and the average wage for total disability and 50% of that amount for cases of permanent disability, considering in that case the impossibility of carrying out a large number and variety of work activities. This amount may be increased to 20% if the victim had a higher level of training.

Exceptionally, **psychological treatment** to the family of the deceased or major injured may be paid by the insurer of the vehicle that caused the damage.

The new system of assessment of damages therefore implies huge and transcendental changes aimed to a **full reparation of the damage** caused by increasing the amount of compensation, the inclusion of new injured parties and the special attention to vulnerable situations in which victims who are dependant or disable may find themselves when the breadwinner of the family dies as well as victims who suffer specially serious injuries as a result of the accident, including the possibility of replacing the compensation by a total or partial lifetime rent, specially in cases of minors or those lacking capacity.

For all the reasons above, we can only conclude that this reform implies a clear improvement of the current system and provides fairer compensation to those more seriously injured as well as clarifies the rules applicable to other less serious injuries.

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