THE RECOVERY OF NON-PECUNIARY DAMAGES IN EUROPE:

A COMPARATIVE ANALYSIS

by

Ulrich von Jeinsen* and Anna Konert**

SYNOPSIS

* Dr Ulrich von Jeinsen is a senior partner of the German Law Firm Göhmann (www.goehmann.de) and specialized in international tort cases, mainly in connection with aircraft disasters (www.germanlawair.com) and he is teaching law at Leibnitz University Hannover.

** Anna Konert is a Ph. D candidate in aviation law (air carrier liability) in Paris, France (Sorbonne University) and in Torun, Poland (Nicolai Copernici University). The authors thank Mr. Hans Ephraimson-Abt, the Spokesman of the "Air Crash Victims Families Association" for his great comments and his continuous support.

ABSTRACT

Whenever a person is killed in an accident, the issue of compensation recoverable by the surviving relatives will ensue; and that issue tends to be the more urgent the more spectacular the disaster is. It so happens that in the event of major air crashes occurring in Europe or involving a great number of European victims, US law firms will promptly appear on the scene to offer their advice – that is, assistance for the recovery of significant damages such as are common in the USA, but which are allegedly impossible to recover in Europe.

Are non-pecuniary damages recoverable? How they should be compensated? Can a claim for emotional distress be inherited? Can surviving relatives receive compensation for the emotional distress suffered by the decedent before passing away? These are all questions which are gaining increasing significance.

This article examines the possibility of recovering non-pecuniary damages in Europe and describes the relevant legal frameworks governing the subject in European countries (i.e., Roman law system, common law, socialist legal systems and others).

RÉSUMÉ

Chaque fois qu'une personne meurt dans un accident aérien, la question du dédommagement de ses proches se pose et ceci est encore plus important en cas d'accidents à grande échelle. Même lorsque ces tragédies surviennent en Europe et que les victimes sont majoritairement des ressortissants européens, certains avocats américains n'hésitent pas à se rendre sur les lieux de l'accident pour offrir des conseils juridiques aux victimes par ricochet dans le but d'intenter des actions visant des dommages et intérêts généreux pour les proches

de la victime. Ces dommages sont courants aux États-Unis mais prétendument indisponibles en Europe.

Est ce que les pertes non pécuniaires sont indemnisables ? Comment devraient être réparés de tels dommages? Une victime par ricochet peut-elle réclamer des dommages pour la souffrance morale subie par la victime directe avant son décès ? Toutes ces questions deviennent de plus en plus pertinentes.

Cet article étudie l'indemnisation des pertes non pécuniaires en Europe et décrit les dispositions juridiques gouvernant cette question dans des différents pays européens ainsi que dans les systèmes juridiques applicables en Europe (droit civil, Common Law, systèmes juridiques socialistes, et autres).

I. INTRODUCTION

After a tragedy has occurred, the material losses are relatively easy to quantify. However, pecuniary losses, such as the deceased's conscious pain and suffering prior to death (including the exact length and extent of their suffering) are generally unknown, open to speculation or at best described through experts opinion. The material value is almost impossible to determine – how much is a minute of pain and suffering worth?[1] Serious questions can also be raised whether the surviving family members, spouses, parents, siblings, dependents – and recently also "partners" - can legally and morally justify inheriting "money" for the undeterminable pre death sufferings of their loved ones. Further issues include addressing other non economic damages incurred by the survivors during the subsequent healing period, as well as to the surviving families. In particular, regard ought to be had to the emotional pressures such people are exposed to and suffer from during the lengthy process of damages determination, the investigation into the causes of the tragedies, judicial proceedings, intrusive media attention and many other events. Those damages can be enhanced when the injured and the surviving

[1] *In re Korean Airlines flight 007 crash of September 1, 1983*: jury awards and one bench award - for 8-12 minutes of assumed pre-death pain and suffering ranged:
Nothing (0) - *O'Campo v. Korean Airlines*, (see Oldham *et al* below)
$ 28,000 - Mahalek vacated (below)
$ 70,000 – *Zicherman v. Korean Airlines* 516 U.S. 217 (1996) vacated
$100,000 - *Oldham and Maikovich v. Korean Airlines* 127 F 3rd 43 - 326 U.S.App..D.C.375 decided Sept.23, 1997, (with O'Campo above)
$400,000 - Jones/Chambers (below
$1 Mio - Jones/Zarif – bench trial (below)
$1,350 Mio - Bowden/Bissel in 96 F3d 151 1997 A.M.C. 666, 45 Fed. R. Evid. Serv. 489 (6th Cir. State) affirmed Aug. 29, 1996 (with Jones/Chambers, Jones/Zarif above)
$2 Mio - *Estate of Alice Ephraimson-Abt v. Korean Airlines* cv 83-3890 (TCP) (E.D.N.Y.) (reduced to $365,000 and forfeited under the 1920 Death On The High Seas Act [DOHSA])
$50 Mio - Punitive damages were awarded by a jury in the United States in 108 plaintiffS MDL cases, but vacated on appeal in *Re Korean Airlines Disaster* F 2nd 1475 - 289 U.S. App. D.C. 391, 59 USLW 2681.

families become embroiled in lengthy judicial wrangling at the solicitation of mostly self appointed advisors to bring damages actions against third parties in far away venues – with the expectation of penalties otherwise not available, like punitive damages. When – as is often the case – those "hopeful" expectations dissolve into thin, air the suffering of deception and abandonment is further entrenched.[2]

Whenever a person is killed in an accident, the important issue to address immediately is the damage caused to their dependents. In tragedies of more than local dimensions – and in those which involve a substantial number of victims - the question of recoverable damages is widely discussed in the media. In any event, major tragedies generally unleash an intensely competitive wrangling among legal practitioners to represent the victims or their families in their damages proceedings. Potentially high fees are at stake, with the added incentive of media attention attracting future clients. The venue where damages actions are brought (or can be sustained), especially in wrongful death cases, is also important, particularly in cases where more than one party (possibly in several countries) may be liable for the tragedy that occurred.[3]

Before deciding in which venue to bring a damages action, one has to consider a myriad of factors, including where the tragedy occurred, who is the victim which is legally entitled to have his damages met, who are the responsible parties that have caused the incident and in which jurisdiction those parties are located. Furthermore, one must also evaluate what the appropriate and available legal remedies are in which jurisdiction the most favorable, reasonable and appropriate judicial environment the claim will be heard. An overriding guiding principle must be to allow a speedy yet fair resolution for the victims or their families to continue their lives.

Considering the considerable confusion that exists generally concerning what compensation is available under which jurisdiction and under what law, this article will attempt to shed some light to describe the legal environment in Europe for recovery of non-pecuniary damages.

II. DEFINITION

Pain and suffering, or non-economic equivalents are known in the

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[2] See especially, H. Ephraimson-Abt, "Air Crash Victims Families Association", (2004) Pan European Organization of Personal Injury Lawyers, Seminar, Innsbruck.

[3] See especially, *In re Pan American World Airways* [1992] QB 854; See also, *Air crash of Transworld Airlines Flight TWA 800 of July 17, 1996*; *Swissair Flight 111 crash of September 2 1998*; *Air France flight 4590 (Concorde) of July 25, 2000*.

jurisprudence of many countries. However, it is difficult to establish a consistent terminology in any of our often very diverse civil law code cultures.

For instance, different languages have different conceptions of pain and suffering such as: ***Schmerzensgeld*** in German, ***dommages morales, prejudice moral*** in French, ***mental injury, emotional distress, pain and suffering*** in English **,** ***paguba*** in Romanian, ***krzywda moralna*** in Polish, ***dano moral*** in Spanish, ***danno morale*** in Italian.

Romania has a special difficulty in determining how the peculiarly native words correspond to those of the major languages. Henry Smith[4] noticed that "paguba" means damage, but is thought to be restricted to "material injury." "The whole case for awarding compensation for moral damage is in danger of foundering on the very first rock - the definition: what means the word "moral"[5]. Moral prejudice is characterized as that kind of damage which cannot be expressed in pecuniary terms. Presently, in certain countries and international conventions non economic damages are only recoverable if they result from physical impairment.

Romanian jurisprudence interprets the definition of "moral damage" as a loss of social position, of credit, of liberty, of reputation, of affection and suffering or absence of pleasure whether physical or psychological.[6]

In Germany, non pecuniary (intangible) damages (Schmerzensgeld) can only be recovered if stipulated by law.[7] However, reasonable compensation can be claimed if the intangible damages are related to bodily injuries, the victim's health, or his freedom of sexual self-determination.[8]

The Polish and Roman law systems list a variety of definitions. They contrast ***krzywda moralna/prejudice moral/dano moral/danno morale*** with ***krzywda materialna/prejudice material/dano material/ danno materiale*** but do not insist in the application of these terms that material prejudice must lead to the attainment of a single material corporeal object, nor that moral prejudice is restricted to that which results in the attainment of immaterial, incorporeal, conceptual or sentimental objects.[9]

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[4] H. Smith, Book Reviews "Ráspunderea Civilá pentru Daunele Morale" (1980) 29:2-3 I.C.L.Q, at 535-536. [Smith].
[5] *Ibid*.
[6] *Ibid*.
[7] BGB s.253 para (1).
[8] BGB s.253 para (2).
[9] *Smith*, *supra* note 4.

The common law seems to circumvent some of these difficulties by concentrating upon the whole of the damage caused by a tortious act and permitting exemplary or punitive damages in appropriate cases,[10] taking guidance from case law.

III. HISTORY OF COMPENSATION FOR EMOTIONAL DISTRESS.

Mike France, in his article "How to Fix the Tort System",[11] writes that tort law plays a much smaller role in the regulation of corporate misconduct in Europe than in the United States, and that "payments for emotional distress are restricted" in Europe.[12]

There may be a need to unify, and in the process liberalize, the availability of emotional distress recoveries, either by international unifying law reform or through extended interpretation of existing individual State's code provisions.

Country[13]	Laws
ITALY	Article 2059 of Civil Code[14] allows the award of moral damage only in cases specifically provided by law. For a long time the interpretation was very narrow and referred only to criminal law.[15] Recently, Italian courts decided to liberalize the law. On 31 March 2003 the Supreme Court of Italy decided that moral damages for pain and suffering can be awarded for relatives of the deceased even in the absence of a crime. The evaluation of the moral damages would be "undertaken on the basis of all the relevant circumstances including the

[10] *Ibid*.

[11] M. France, "How to Fix the Tort System" (2005) *Business Week*, online: < http://www.businessweek.com/magazine/content/05_11/b3924601.htm>

[12] Anthony J. Sebok "Who Feels Their Pain? - The Challenge of Non economic Damages in Civil Litigation" (2006) 55 DePaul L. Rev. 379.

[13] Following a historical and analytical introduction to non economic damages in Roman law, common law and socialist countries, experts from these European countries can consider how their national systems would deal with the same practical problem, highlighting similarities and differences in a range of comprehensive issues.

[14] Art. 2059 Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge (Cod. Proc. Civ. 89; Cod. Pen. 185, 598).

[15] In Argentina, Section 1078 of the Argentine Civil Code, the sole code provision dealing with the question explicitly, grants moral damage (dano moral) only for some types of tortuous acts and only where the tort is criminal.

	closeness of the family relationship, the cohabitation with the primary victim, the size of the affected family, way of life, the age of the primary victim and the age of the relatives".[16]
ENGLAND	Before the case *Addis v Gramophone Co Ltd.*,[17] the damages for breach of contract could include compensation for non-pecuniary loss such as inconvenience.[18] This view changed after the decision of the House of Lords in *Addis v Gramophone* had been derived. This case is generally considered to have laid down the no-damages rule. Thus in *Bliss v South East Thames Regional,*[19] "The general rule laid down by the House of Lords in *Addis v Gramophone* is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach".[20] *Addis* decided that, in general, damages for non-pecuniary loss are not recoverable on contract and many authors have also subscribed to this view. The rule established in Addis was subject to certain exceptions. Notable among these is the class of cases which together may be referred to as the 'object of the contract' cases. For instance, there are cases in which the object of the contract was to provide a relaxing holiday,[21] a pleasure cruise, wedding photographs, entertainment at weddings or freedom from distress.[22]
GERMANY	The section 249 of the BGB (*Bürgerliches Gesetzbuch)* provides that the person liable for damages, either in tort or in contract, has to compensate the entire loss. There is an exception to the general rule of total reparation (*restitution in intergrum*).According to section 253 of the BGB the victim can claim monetary

[16] B. Markesinis et al, *Compensation for Personal Injury in English, German and Italian Law*, (Cambridge: Cambridge University Press, 2005).
[17] *Addis v Gramophone Co Ltd.* (1909) AC 488.
[18] *Hobbs* v *London and Southern & Western Rly Co* (1875) LR 10 QB 111*; Hamlin* v *Great Northern* (1856) 1 H & N 408.
[19] (1987) ICR 700 at 717-18.
[20] N. Enonchong "Breach of Contract and Damages for Mental Distress" (1996) 16 O.J.L.S 617[*Enonchong*].
[21] J*arvis v. Swan Tours Ltd* (I973) Q.B. 233; *Baltic Shipping Co v. Dillon* (1992-3) 176 CLR 344
[22] *Heywood v. Wellers* (I9761) QB 446. See also *Enonchong*, *supra* note 20.

	compensation only if the loss is of an economic nature. The person liable is not obliged to compensate any non-economic or non-material loss except in cases where the statute otherwise provides. It provides only non-material loss for bodily harm (the pretium doloris) and for a broken marriage promise. Ulrich Magnus, in his article[23] indicates the reasons for the German exclusion of non-economic loss. Firstly, he claims that "non-economic or non-material-harm has a strong if not exclusively subjective element and that it cannot easily be measured by reference to the market and market prices. Therefore it cannot be proved in an objective manner". The second reason is a historic reason. When the provision underwent the long drafting process from 1880 onwards the last and decisive draftsmen thought only of injuries to the reputation of the claimant in this connection and condemned a principle by which a kind of sale of reputation against money would be made possible. They said: "A man has little reputation to lose if he claims money for it".[24] Since the mid-1950s certain courts have begun to give the Code's provisions an expanded interpretation, especially determining the borderline between economic and non-economic loss.[25] The first step in this direction dealt with the right of privacy (allgemeines Persönlichkeitsrecht) acknowledged by the Federal Court in 1954.[26] If that right is invaded the courts now award pecuniary damages even if there is no economic loss. Another statutory exception to section 253 of the BGB is the recovery of damages for ruined holidays. In 1979, the German legislature introduced a statute regulating travel contracts. It is now incorporated into the Civil Code : "S.651 (2) If the trip is frustrated or materially damaged the traveler may demand reasonable monetary compensation also on account of loss of vacation time."

[23] U. Magnus "Damages for Non-Economic Loss: German Developments in a Comparative Perspective"(1990) 39 I.C.L.Q 677 [Magnus].

[24] *Report of the Commission of the Reichstag on the Draft of a Civil Code* (Germany, 1896) at 98.

[25] *Magnus*, *supra* note 23.

[26] BGHZ 13,334.

	The next developments referred to the lost use of some goods and loss of earning capacity.[27]
SWEDEN	In Sweden, pain and suffering are sometimes covered by tort liability and sometimes by "no-fault" insurance of different types which provides compensation on the same level as tort damages (with the aim of covering the economic loss in full and the non-economic loss to the extent that it corresponds with current principles). There exists a so-called "Swedish alternative", which refers to the types of voluntary insurance based on group policies. This no-fault insurance shall apply to: motor traffic damage insurance, "security insurance for work-related injuries" (Labor Market No-Fault Liability Insurance), "patient insurance" and "pharmaceutical insurance", industrial injuries, and product liability. For injuries which are covered neither by tort liability nor by any of the types of insurance that are voluntary and privately operated on the basis of group policies of various kinds, the injured person is left to suffer the corresponding loss himself.[28]

In the socialist countries, compensation awarded to injured persons for moral damages raised particular difficulties given that the ideology of the State was such that it supported the individual for life, thereby negating the need for these kinds of awards.[29] However, there has been a historical trend to "escape" from the prohibition of financial compensation for moral damages towards its full reinstatement. There has been a movement to lift those restrictions, by revision or the reform of their civil codes.

Country	Laws
CZECHOSLOVAKIA	In Czechoslovakia there existed a rule of "adequate satisfaction "regarding personal rights which did not exclude the possibility of compensation for "moral damage." Article 444 of the Civil Code of Czechoslovakia (1950) allowed financial compensation on a single

[27] *Magnus*, supra note 23 at 679-682.
[28] Jan Hellner, "Compensation for Personal Injury: The Swedish Alternative" (1986) 34 Am. J. Comp. L. 613.
[29] I. Albu & V. Ursa, *Civil Responsibility for Moral Damages* (Cluj-Napoca: Editura Dacia, 1979).

	occasion for pain suffered and for a worsened social situation.[30]
BULGARIA	In Bulgarian law, Directive No. 7 of 1959 mandated that each tribunal had to determine the evaluation of extra-patrimonial loss in conformity with the rules of equity, taking into account the character and actual effects of the injurious act, the extent of the damage, the gravity of the fault with all other circumstances inherent in the particular case.[31]
POLAND	Since socialist legal systems rejected damages for mental pain, Poland's solution was unique among Eastern European countries. "Arguments advanced in Poland against mental anguish recovery were characteristic of those that prevailed elsewhere: "Compensation for emotional suffering in the form of money" was an idea "born out of capitalist conditions and alien to socialist law",[32] and characteristic of "the bourgeois approach to the problem of protecting individual rights,"[33] According to the critics of traditional law, the concept could have rested "only on the foundations of a fetish for money," and indicates a decline in the moral qualities of its adherents, since "the evaluation of human suffering in monetary terms and compensation for it with money are contrary to fundamental moral values and human dignity."[34] While damages for mental suffering have been completely abolished in the rest of Eastern Europe, Poland achieved a compromise solution whereby such damages could be

[30] *Ibid.*

[31] *Ibid.*

[32] S. Szer, Kodeks Rodzinny [The Family Code], in Demokratyczny Przegląd Prawniczy (1950-53)

[33] A. Wolter, Prawo Cywilne-Częsc Ogólna [General part of The Civil Law] 153 (1955).

[34] J. Gorecki, "Industrial Accident Compensation in Eastern Europe: An Empirical Inquiry" (1971) 23 Stan. L. Rev. 276. See also M. Wawilowa, Zadośćuczynienie, *Damages for Mental Anguish in Polish Law*, (Poland: New Law 1020, 1954).

	awarded in the following cases. In the old Polish Liability Code (1933),[35] under Art. 157 § 3 a victim could demand (aside from recovery of pecuniary damage) compensation for moral damage in causes of action provided for by law. For instance, under Art. 165 § 1, in case of death, bodily injury, deprivation of freedom or outrage against of honor, a court could award to the victim (or to an institution indicated by victim) a certain amount of money as a compensation for pain and suffering and moral damage. Under the Polish Civil Code[36] which replaced the Liability Code in 1964 the general rule is that no damages can be recovered for emotional related injuries - there is no reparation of moral damages. The pecuniary compensation for moral damages can be awarded, as an exception, only in cases provided by law. Under art. 448, in case of intentional infringement of personal interest, a victim could demand the person who caused injury to contribute a certain amount of money to the Polish Red Cross. In 1996, the act amending the Polish Civil Code[37] changed art 448 and now, in case of infringement on personal interest (it doesn't have to be intentional), the court can either adjudicate pecuniary compensation for moral damages or on the victims instructions contribute the awarded amount of money for public purposes.
BELARUS	In Belarus, victims are now entitled to recover financial compensation for moral injury in accordance with the law under Article 60 of the Constitution of the Republic of Belarus. Civil Code (Chapter 58, Articles 152, 968) specifies the rules and the amount of compensation for moral injury. A court should

[35] Kodeks Zobowiązań 1933, Dz.U. nr 82 p. 598
[36] Dz.U. Nr 16, p.93
[37] Dz.U. Nr 114, p.542

	take into consideration the requirements of reasonableness and fairness, the character of the pain caused to the victim physical and moral suffering, as well as the degree of guilt of the inflictor of the injury in instances when the guilt is the ground to award compensation for injuries sustained. In 2005 the Constitutional Court of the Republic of Belarus delivered a decision "On taxation of compensation for moral injury".[38] The Constitutional Court pointed out that "the existing practice, where there are sums of compensation for moral injury which are subject to taxation, and there are other sums which are not subject thereto, is not fully grounded on the provisions of the Law "On income tax from natural persons", because the distinction in taxation of the sums of compensation for moral injury depending on circumstances which were the reasons of its compensation shall not follow directly from the norms of the Law in question" and "that the purpose of the compensation for moral injury is not a profit making one, but shall be the compensation for the moral and physical suffering caused ".[39]
UKRAINE	In the Ukraine, the Civil Code foresees compensation for moral damages suffered by the owner whose rights were violated (Article 386 of the Civil Code of Ukraine). Under Article 69 of the Environmental Protection Law, a party or parties causing injury to a third party or parties as a result of a violation of applicable environmental legislation must fully compensate the injured party for actual damages, lost profits and/or moral damages.
ESTONIA	There was also a significant modification in

[38] "*Decision of the Constitutional Court of the Republic of Belarus of 12 May 2005 No. D-185/2005 "On taxation of compensation for moral injury*" Announcement of Official Publication of the Constitutional Court - Bulletin of the Constitutional Court of the Republic of Belarus, No.2, 2005.

[39] "*Decision of the Constitutional Court of the Republic of Belarus of 12 May 2005 No. D-185/2005 "On taxation of compensation for moral injury" Ibid.*

	Estonian civil law. According to the new Civil Code (1996)[40] moral damage caused to a person shall be compensated for by the person that caused the damage. A person who causes damage shall be released from an obligation to compensate for moral damage if the person proves that the person is not at fault for causing the damage. The court decides on the basis of the circumstances in issue whether moral damage was caused thereby. In determining the amount of compensation, a court shall consider the extent and nature of moral damage caused and the degree of fault of the person who caused the damage. Under the Civil Code, a person can demand compensation for moral and proprietary damage caused by the defamation addressed in court proceedings unless the defamer proves the accuracy of the information.[41] A person has the right to demand termination of any violation of his or her private life and to demand compensation for moral and proprietary damage caused thereby.[42] Moreover, a person whose interests are damaged by use of his or her name may demand termination of the unauthorized use of the name and compensation for moral and proprietary damage caused to him or her thereby.[43] Estonian civil law also foresees that a person may also demand termination of the violation of his or her personal rights not specified in the Civil Code and compensation for moral and proprietary damage caused thereby.[44]

[40] Passed on 28 June 1994 (RT* I 1994, 53, 889), entered into force 1 September 1994, amended by the following Acts: 22.11.1994 (RT I 1994, 89, 1516) 1.09.1994; 15.02.1995 (RT I 1995, 26-28, 355) 1.09.1995; 4.05.1995 (RT I 1995, 49, 749) 3.06.1995; 9.11.1995 (RT I 1995, 87, 1540) 1.09.1996; 28.05.1996 (RT I 1996, 40, 773) 8.06.1996; 6.06.1996 (RT I 1996, 42, 811) 1.10.1996.

[41] § 23. It also applies if personal rights were violated before 1 September 1994.

[42] *Ibid*. § 24.

[43] *Ibid*. § 25.

[44] *Ibid*. § 26.

IV. EUROPEAN COMMUNITY (EC) LAW

The European Community has not progressed as yet towards unified regulations and legislation regarding recoveries for non economic damages.

Each EC country retains its own sovereign legal environment on the subject of non pecuniary damages. However, there are three major underlying legal cultures that govern European countries' laws: – Roman Law, Common Law and the law of the countries which were markedly influenced by the development of the law in Germany[45]– with significant differences in respect of their respective judicial precepts. This state of affairs resulted in either substantial differences or in significant overlap between legal systems. The introduction, early in the 19th century, of the "Code Napoleon" was one such example of overlap.[46] The Code Napoleon was based on the Roman "Corpus Juris Civilis of Justitian and preceded by the "Codex Maximilianeus Bavaricus Civilis (1756), the Prussian "Allgemeines Landesrecht of 1794 and the": West Galician Code (Austria) of 1797. The Code Napoleon continues to be the private law basis in Italy, the Netherlands, Belgium, Spain, Portugal and their (former) colonial possessions. It has been the basis of Romanian civil law since 1864. In Germany the Bürgerliche Gesetzbuch of 1900 replaced the Code Napoleon where it applied. Nevertheless, it still influences the laws in Switzerland.

The European Union intends to harmonize the disparate legal systems of its member states. To some extent – e.g. antitrust law, company law and transportation law – tentative steps have been realized. As regards aviation law, EU Regulation No. 2027/97 of 9 October 1997 on air carrier liability in the event of accidents[47] the EU Regulation implementing the

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[45] Until 1804 the German States were ruled under the umbrella of the Holy Roman Empire of the German Nations. In 1814 the 300 principalities and other entities were consolidated into 39 States that legislated issues of common interest under the guidance of the "German Bund", succeeded in 1866 (with the exclusion of Austria) by the "North Germany Bund". After the Franco-Prussian War a united Germany was proclaimed in 1871. See online: Wikipedia <http://wikipedia.org/wiki/germany>

[46] Code Civile des Français of March 21, 1804, the Code of Civil Procedures was adopted in 1806 and the "Commercial Code" was enacted in 1807.

[47] Replaced by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents with the Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91. They are the timely implementations first of the IATA Intercarrier Agreement of 31 October 1995 (IIA) with the "Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA) and the "Provisions Implementing the

IATA Intercarrier Agreement of 1996 established uniform rules in respect of the liability of European air carriers, which go far beyond the rules of the Warsaw Convention. The Regulation, in effect, reverses the high threshold of first proving the carriers "Willful Misconduct", with the introduction of strict liability (with the carrier retaining the right to prove its innocence in each country). However, like many other international conventions, this Regulation only relates to the issue of liability on the merits, i.e. the criteria and, e.g., burden of proof rules according to which an air carrier's liability has to be considered. The details of such liability, in particular in terms of amount, have remained untouched and are still within the sovereign scope of the member states' legislature. Unless this issue is addressed – and this is not likely to happen in the near future – there will be no Europe-wide legal provisions relating to such questions as whether the surviving relatives of a person who was killed in an air crash should have a title to recover damages for emotional suffering, nor can any determination of standards, based on European law, for the amount of such damages be expected.

It is important, therefore, to consider the current situation as exists in certain European States.

V. CAN A CLAIM FOR EMOTIONAL DISTRESS BE INHERITED?

Often, individuals involved in severe accidents are rescued from the scene of the disaster and taken alive to a hospital, but then succumb to their injuries. While surviving, albeit only temporarily, they realize the extent of their injuries, that people around them are similarly suffering and they may well fear their own impending passing. It is clear that, in such circumstances, the survivors of those individuals would be entitled to recover compensation for the physical and emotional suffering of their loved one prior to his death throughout all European legal systems. Whether each legal system would extend those causes of action to the surviving dependants *for their own pain and suffering* while standing by helplessly, seeing the victims' sufferings and not to be able to alleviate its pain or save its life is less clear.

IATA Intercarrier Agreement (IPA) and now of the *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999) , modernizing the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (Warsaw, 12 October 1929).

A. ROMAN LAW SYSTEM

1. FRANCE

In France, non-pecuniary losses suffered by the deceased can be claimed for by the beneficiaries, provided that they are a direct and immediate consequence of the tortious act. This remains the case even where the deceased had not previously brought legal proceedings. Such losses are limited to the loss or damage which the deceased sustained or incurred prior to death. There exist two separate claims for a victim's legal heirs:

a. ***action successorale des héritiers*** - an action continues for the benefit of victims estate by way of survival of the cause of action which accrued before the moment of death;
b. ***action personnelle des victimes par ricochet –*** victim's heirs do not claim damages on behalf of the estate of the deceased, but instead in respect of their own personal losses. These consist of compensation for the loss of society, comfort, care and protection of the deceased as well as the loss of any financial support they received from the deceased during his or her lifetime.[48]

2. ITALY

In Italy heirs of the victim can claim compensation for non-pecuniary losses (loss of amenity, pain and suffering, diminution of physical/mental integrity) between the event giving rise to the cause of action and the victim's death, under action "*azione iure successionis*" which is addressed on a case by case basis.

According to article 536 of Italian Civil Code, the following individuals can make a claim compensation for non-pecuniary losses: the surviving spouse; legitimate, natural, legitimated and adopted children; and, in the absence of any children, their lawful descendents.

3. SPAIN

In Spain, the non-pecuniary losses suffered by a victim between the accident and the death of the victim are also transferred to his heirs. This is in accordance with the theory of protection of the victims' families' rights,

[48] Michel Cannarsa, "Fatal Accidents and Secondary Victims Compensation in France" in Marco Bona *et al* .eds., *Fatal Accidents and Secondary Victims* (St Albans: XPL, 2005). [Bona].

recognized by the constitution.

4. PORTUGAL

In Portugal, non-pecuniary losses suffered by a victim, after his death, are added to the deceased's estate and passed together with the estate to the victim's heirs. Under the Portuguese Civil Code, the right to compensation for non-pecuniary losses suffered by a deceased passes as a whole to the spouse and the children or other descendants or, in their absence, to the parents or other persons in the ascendant line, the brothers and sisters of the deceased or nephews and nieces (Article 496 (2) Civil Code).[49]

B. COMMON LAW COUNTRIES

1. UNITED KINGDOM

In English law a claim for compensation for the pain, suffering and loss of amenity suffered by the deceased in the time between the negligent act and death is inheritable.
The claim can be made under:

a. The *Law Reform (Miscellaneous Provisions) Act 1934* – for claims brought on behalf of the Estate of the deceased
b. *The Fatal Accidents Act 1976* (as amended by section 3 of the *Administration of Justice Act 1982)* which provides a claim for losses suffered by dependants of the deceased.

There is no compensation for "loss of life" nor for "loss of expectation of life".[50]

2. SCOTLAND

Under the Damages (Scotland) Act of 1993 which amends the Damages (Scotland) Act of 1976, a deceased's relatives can make a claim for compensation for emotional distress on behalf of the deceased's estate even where the deceased had not previously brought proceedings. There is no compensation for "loss of life" but deceased's relatives can demand compensation for "loss of expectation of life" (the expectancy had been diminished as a consequence of the injuries).

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[49] Antonio da Costa Basto, "Fatal Accidents and Secondary Victims Compensation in Portugal" in *Bona*, *supra* note 48.
[50] Administration of Justice Act 1982 section 1(1)(a).

3. IRELAND

In Ireland "the common law principle of *actio personalis moritur cum persona* applie[s] in this jurisdiction to militate against permitting the estate of a deceased tort victim from recovering damages due to the deceased"[51].

C. SCANDINAVIA

In Scandinavia, the deceased's heirs cannot independently claim compensation for pain and suffering on behalf of the deceased in cases where the victim did not make a claim before his death, except in Denmark. In Norway, when the deceased had not previously brought proceedings, there is another possibility for heirs to make an independent claim, namely, when the claim has been approved by the person or the insurance company liable to pay compensation. In Sweden, before 2002, the right of the heirs to inherit moral damages only existed when the claim has been approved by the insurance company or adjudicated upon by a court prior to the death of the victim. The possibility for deceased's heirs to enter claims are as follow: in Denmark, under Law No. 463 of 7th June 2001 (Liability for Compensation Law), in Finland, under Chapter 5, sections2- 6 of the Tort Liability Act (412/1974) ("*Vahingonkorvauslaki Skadeståndslagen*") and in Sweden, under the Damages Act, *Skadeståndslagen (1972).*

In Finnish law, there is no distinction between 'instant' deaths or where the victim survives and death occurs some time later. The general rule in other European countries is that when death is immediate, there is no compensation for pain and suffering (because it is assumed that the victim did not suffer).

D. OTHER COUNTRIES

1. AUSTRIA

In Austria, under the statute and court decisions, a claim for compensation is inheritable. According to Art. 1325 ABGB, the injured person has a right to claim compensation for all pain and suffering. After the victim's death, this compensation can be brought by his heirs. The claim is recoverable for the time between the accident and the death of the victim. If an accident causes the immediate death of the victim, there is no claim for pain and suffering. There is no compensation for "loss of life".[52]

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[51] John E. Sweetman "Fatal Accidents And Secondary Victims Compensation In Ireland" in *Bona*, *supra* note 48.

[52] Ivo Greiter, "Fatal Accidents and Secondary Victims Compensation in Austria" in *Bona*,

2. ESTONIA

According to § 59 of the Estonian Civil Code (1996)[53] Civil rights and civil obligations may transfer from one person to another (legal succession) if these are not inseparably bound to the person by law or their nature. Pain and suffering are inseparably bound to the victim of an accident and rights which are inseparably bound to a person may transfer from the person to another as provided by law.

3. GERMANY

Since 1990, with the introduction of the contemporary "Bürgerliche Gesetzbuch", claims for compensation for physical and emotional suffering are inheritable. Such compensation is recoverable for the time between the incident and the victim's death and is payable to the victim's heirs. This change reflects the legislator's response to a growing public awareness in Germany of the need to legally intertwine guilt and atonement. The fundamental decision of the Federal Supreme Court dated July 6th 1955[54] sought to reinforce the notion that the payment of a monetary compensation serves not only to compensate any loss of property but also to provide satisfaction, i.e., to soothe negative feelings arising from the flagrant violation of a person's rights. According to the legislator – such satisfaction has priority over the questions whether or not it is morally objectionable to draw a financial benefit from a person's death.

In the assessment of such compensation, German court practice has been generous. For instance, the Federal Court of Justice in 1993 decided that if a person, as a consequence of an injury, is no longer susceptible to emotions this will not necessarily entail a reduction of the entitlement of such person to compensation for pain and suffering. Such a view, the court went on to argue, would reduce the amount of compensation to be assessed to only a symbolic value. Rather, the court stated that it is the immaterial damage sustained by such person as a result of a physical injury or an impairment of his or her health which has to be taken account of and which has to be compensated pursuant to Art. 847 of the German Civil Code by the payment of cash. In the court's view, such damage does not only consist

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supra note 48.

[53] Passed on 28 June 1994 (RT* I 1994, 53, 889), entered into force 1 September 1994, amended by the following Acts: 22.11.1994 (RT I 1994, 89, 1516) 1.09.1994; 15.02.1995 (RT I 1995, 26-28, 355) 1.09.1995; 4.05.1995 (RT I 1995, 49, 749) 3.06.1995; 9.11.1995 (RT I 1995, 87, 1540) 1.09.1996; 28.05.1996 (RT I 1996, 40, 773) 8.06.1996; 6.06.1996 (RT I 1996, 42, 811) 1.10.1996.

[54] BGHZ 18, 149 ff. (154 ff)

of physical and emotional suffering, i.e. negative sensations and emotional numbing as a consequence of the damage to the person's physical integrity or the impairment of his or her health. Rather, the damage to one's personality, the loss of one's quality as a person (as a result of a severe cerebral damage) constitutes on its merits an immaterial damage requiring compensation, irrespective of whether or not the individual affected is capable of realizing that they suffer from such impairment.

The question remains whether a victim's death, if it occurs shortly after the accident, will necessarily result in the reduction of such person's claim to compensation for pain and emotional suffering. It is intolerable to allow for this type of 'discount' in favor of the wrongdoer on the grounds that the victim did not have to suffer for a long time from his or her injuries.

If the idea embodied in the legislative changes of 1990 is to be taken seriously, the most extreme damage to one's personality, worse than any severe cerebral injury, namely the person's death, requires compensation in the form of a cash payment. It would, at least, appear quite intolerable if compensation payments were denied to the heirs of a person who died in an air crash caused by gross negligence on the grounds that the victim died rather than survived for some time, and did so only in a most severely disabled condition.

4. POLAND

As it is mentioned above, in Poland, the pecuniary compensation for moral damages can be awarded, as an exception, only in cases provided by law. In Polish Civil Code, there is only one such possibility. Under Art. 448, courts can adjudicate pecuniary compensation for moral damages in case of infringement of personal interest. According to Art. 445 § 3 this claim is inherited only if it was approved in written by the deceased or if he had previously brought proceedings.

5. RUSSIA

According to the Article 1112 of the Civil Code of the Russian Federation (1995),[55] the deceased's estate shall incorporate the items and other property owned by the deceased as of the date of the opening of the inheritance, in particular, rights *in rem* and liabilities. However, rights and liabilities inseparable from the personality of the deceased, in particular the

[55] With the Additions and Amendments of February 20, August 12, 1996, October 24, 1997, July 8, December 17, 1999, April 16, May 15, November 26, 2001, March 21, November 14, 26, 2002, January 10, March 26, November 11, December 23, 2003.

right to alimony, the right to damages for harm inflicted on the citizen's life or health, shall not be included in the succeeding estate. Personal incorporeal rights and other intangible wealth shall not be included in the estate. Therefore, the deceased's heirs cannot independently claim compensation for pain and suffering on behalf of the deceased.

VI. COMPENSATION FOR THE EMOTIONAL DISTRESS OF SURVIVING RELATIVES

The legal systems of various European countries differ greatly in respect of the issue whether a relative of a victim *generally*, i.e. without himself having sustained any injury (e.g. psychic disorders), has a claim to compensation for emotional suffering on the grounds of loss of companionship.

A. ROMAN LAW SYSTEM

All the countries adhering to the principles of Roman law have since long recognized, though on different conditions, a claim of surviving relatives to compensation for emotional distress.

For instance, **France, Belgium and Luxembourg,** on the basis of general claims in tort clauses (e.g. Art. 1382 Code Civil) recognize the right of surviving relatives to recover such compensation not only in the event of death but also in the event of serious injuries. The legitimacy of these claims is not questioned in these States, and eligibility for compensation is defined comparatively widely.

In **Spain**, consistent court practice is to award compensation for the emotional suffering of surviving relatives. Similarly, **Portuguese** law expressly provides for compensation for emotional suffering of surviving family members in the event of a relative's death. However, Art. 496 of the Codigo Civil restricts eligibility to the deceased victim's spouse (unless separated), children and their descendants.

Pursuant to Art. 2059 Codice Civile in conjunction with Art. 185 Codice Penale, **Italy**, too, recognizes the claim of surviving relatives to compensation for emotional suffering in the event of the victim's death.

In all these countries, liability is on condition that a direct personal and definite damage has been sustained – no less, no more. The 'persons' eligible to such compensation often, though, not, as stated above, in Portugal, extend beyond spouses and children to parents and, in some countries,

cohabiting partners.

B. COMMON LAW SYSTEM

In the Common Law countries, too, a claim for compensation for emotional suffering of relatives has been embodied in the law, although the conditions of eligibility are usually somewhat more restrictive and the legal consequences less far-reaching than in the countries adhering to Roman law. Nevertheless, all Common Law countries recognize the surviving relatives' claim to compensation for emotional suffering in the event of a relative's death.

In **Scotland**, for instance, this claim is based on Section 1 (4) (c) Damages (Scotland) Act 1976 as amended in 1993. Under **Irish** law, this claim is based on Section 49 of the Irish Civil Liability Act and Section 2 of the Civil Liability (Amendment) Act 1996. However in **England & Wales**, the relatives can claim compensation for emotional distress only in exceptional cases, namely for bereavement damages.

Bereavement damages are awarded as follows and are additional to any claim for dependency:

a. Deaths before 1 April 1991 - £3,500
b. Deaths after 1 April 1991 and before 1 April 2000 - £7,500
c. Deaths after 1 April 2002 - £10,000[56]

C. OTHER EUROPEAN STATES

1. AUSTRIA

For a long time the **Austrian** legal system differed most decidedly from the Roman law system in operating to deny any right to compensation for emotional suffering. This was so even in the event that close relatives had sustained severe emotional shock disorders. The Supreme Court (OHG) had long stated its position as being that the relatives were only indirectly damaged and that Art. 1327 and/or 1325 of the Austrian Civil Code (ABGB) did not allow for any other interpretation.

Meanwhile, within only a few years, the legal situation in Austria has undergone a complete change. Austrian courts now regularly adjudicate compensation for emotional suffering to surviving relatives.

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[56] Clive Garner et al, Fatal Accidents and Secondary Victims Compensation in England and Wales', in *Bona supra* note 48.

In 1994 and 1995, the Austrian Supreme Court for the first time decided that stress disorders sustained in connection with the death of a relative or close friend were susceptible of compensation.

However, the second and really crucial change was owed to a judgment passed by the Supreme Court on 16 May 2001.[57] Since then, the Austrian courts have consistently and expressly adjudicated compensations for emotional suffering to the surviving relatives of a deceased victim for the emotional impairment they have sustained, even in the absence of any particular injury to the relative's health in terms of Art. 1325 ACC.

We examine this court decision in greater detail because, on the one hand, the statement of the court's reasons for the decision help to understand the underlying change of philosophy from its former doctrine, deemed absolute, to its present approach, and on the other hand because the German and the Austrian legal systems are very similar. Hopes are that the German courts will soon adopt the approach of the Austrian courts.

The Austrian Supreme Court quotes supporters and opponents of the idea of compensation for emotional suffering sustained by relatives. Most particularly, the court points out that the Austrian literature recommends Art. 47 of the Swiss law of obligations 17 as a guide for the way to deal with this issue in Austria, too. The Supreme Court goes on to state that one of the arguments presented in the Austrian legal literature against compensation for emotional suffering of relatives was that the grief caused by this type of disaster was, fundamentally, part of the general risk of life which everybody had to bear. Pursuant to this, the exhaustive list of Art. 1327 ACC did not include any claim for compensation for the emotional suffering of surviving families. These arguments, highlighted within the Austrian literature, are also raised in the discussions in Germany against any claim on the part of surviving relatives to compensation for emotional suffering. In the final analysis, however, the Austrian Supreme Court decided against these arguments.

Drawing a comparison with the legal situation in other European countries, the Court concludes that under most of these legal systems compensation for emotional suffering is paid to the surviving relatives of a person who was killed – though the details of these provisions may differ. The Supreme Court points out that, under German law, compensation to surviving relatives for immaterial damages is denied, whereas France rejects this rule where adherence would be inconsistent with the "ordre

[57] OHG ZVR 2001/73.

public". Finally the court addresses the recommendation of the European Council dated 14 March 1975 calling for the harmonization of the legal terms used in respect of the law of damages in the event of physical injuries and death.

Explaining its opinion in detail, the Supreme Court stated that the existing legal situation, which does not provide for any compensation for the emotional damage sustained by close relatives when a family member is killed, has increasingly become untenable within Europe. The court continued by asserting that, frequently, it was problematic and at any rate extremely difficult medically to distinguish between grief with and without the quality of a true illness. Surviving parents, mourning the loss of their child, could hardly be expected to understand, in the court's view, that the law might consider their grief as falling short of the degree necessary to quality as an 'illness'. Accordingly, the law would refuse the parent's any redress and require them to accept the fact that, with their child's death, one of the general risks of their life had materialized.

Whereas minor injuries such as contusions and strains easily justify damage claims for pain and suffering, the court argued, any "merely" emotional suffering from the loss of a close relative, often more keenly felt than its physical counterpart, is legally deemed to be non-existent. The court continued that it seemed particularly strange that, certain conditions being met, the law expressly allows for emotional suffering in the event of a damaged physical object (Art. 1331 ACC) but not in the event that a beloved relative is killed. Nor can such absolute limitation have been the lawmaker's intention, the court concluded.
In brief, the arguments of the Supreme Court are:

1. It makes little sense to differentiate between grief that has the quality of a true illness and grief that has not. Anybody who has been informed that a justified claim to compensation for emotional suffering will depend on a concrete psychic disorder to have materialized on the part of the claimant may tend to develop or show somewhat less will power to cope with the saddening incident. This means that the law as currently in effect as well as the respective court practice positively favors relatives who know how to act out such disorders – an effect that is definitely not desired.
2. The reference to the general risk of life is bound to appear cynical to the surviving family members in mourning over their child's death. The civil law in effect embodies a conflict of values to the extent that any damage caused to a physical

object, even including the temporary loss of use of a vehicle, justifies a claim to compensation whereas the immaterial loss of a beloved person caused by the same damaging incident is deemed to be one of the general risks of life.

3. Another conflict of values is that even minor physical injuries easily justify damage claims for pain and suffering whereas such claims are not deemed justified in the event of man's severest suffering (other than, perhaps, his own physical injury), that is his grief over the loss of a child, partner or parent.
4. The refusal of compensation for the emotional suffering of relatives fails to appreciate the fact that the person so affected has lost a close companion for the remainder of his life and that elementary human bonds have been disrupted.
5. The Supreme Court, taking account of current attempts at harmonizing the law concerning liability on a European level, expressly substantiates its decision by invoking the doctrines of other legal system. In doing so the court has also taken the edge off the question as to which law on liability was applicable in cross-border damage cases.

In summary, the Austrian Supreme Court – contrary to long-standing court practice – has effectively recognized the claim of family members to compensation for emotional suffering. The Supreme Court was right to do so. This approach allows close relatives to claim, in their own right, compensation for emotional suffering irrespective of any concrete impairment of their physical/long-standing emotional health.

2. ESTONIA

Under subsection 134 (3) of the Estonian Law of Obligations Act [LOA][58] in the case of an obligation to compensate for damage arising from death or a serious bodily injury, the persons close to the deceased (or 'aggrieved' person) may claim compensation for non-patrimonial damage if payment of such compensation is justified by exceptional circumstances. The circle of persons close to the deceased or aggrieved person include: the patient's spouse, parents, children, sisters and brothers, as well as other persons close to the patient, if this arises from the patient's living arrangements. It may also include the aggrieved person's unmarried partner, but not his or her employer or friends, who are not in such close

[58] State Gazette I 2001, 81, 487; 2002, 53, 33; online: <https://www.riigiteataja.ee/ert/ert.jsp>

relationship with the aggrieved person. The court has the discretion to identify the level of closeness and nature of a relationship in the case of each dispute.[59] Victims' relatives' compensation for non-patrimonial consequential damage is justified if the tortfeasor did forsee or should have forseen the possibility that the offence could result in significant physical and emotional pain and suffering, such as serious physical suffering or a permanent trauma. Moreover, compensation for non-patrimonial consequential damage may be considered justified if the damage was actually aimed at a person close to the aggrieved person.[60]

3. GERMANY

To-date, applicable law in Germany does not provide for this type of compensation. The view held by the courts and expressed in the respective expert literature on the subject may best be put in a nutshell by repeating what the then federal minister of justice replied to a group of lawyers. Calling for the introduction of a law on the subject of compensation for emotional suffering of relatives, the minister responded that it was questionable whether it was desirable, from the point of view of legal and political ethics, to commercialize mourning and suffering connected with the death or injury of family members.

In such cases, the German courts will not adjudicate any compensation for emotional distress to family members unless they are suffering from the loss of companionship in a way that attains the quality of an independent illness.

This view is strongly opposed by some lawyers who consider it to be outdated,[61] particularly in comparison with other European countries. However, the courts continue to adhere to the existing doctrine. That said, there have been recent signs of an evolving trend. In 2006, the Federal Court of Justice heard a case involving a father and a mother and their son who were standing by a pool, unable to help, witnessing their little boy as he was pulled into the unprotected suction pipe of the water circulation pump and drowned. Surprisingly, the supreme German court – contrary to its consistent practice as described above – affirmed the judgment of the lower instance. The lower court had adjudicated to the surviving family a

[59] Margus Kingisepp,"'Scope of Claim for Consequential Damage in Delict Law', (2003) I Juridica International 203; online: <http://www.juridica.ee/international_en.php?document=en/international/2003/1/65320.SUM.php>.

[60] Ibid.

[61] Dr Ulrich von Jeinsen, (2008) Zeitchrift fur Schadensrecht (Journal of Injury Law),61.

compensation for emotional suffering in the amount of 20,000 € each, without the family having to prove that they were now suffering from psychic disorders themselves in consequence of their child's or brother's death.

Hopes are that this trend will continue. If it does not, the legal consequences in Europe of such tragic occurrences will continue to be different depending on the surviving relatives' nationality, and there is no justification for such differences. In light of the development in the recent past of the legal systems of our European neighboring countries, Germany's legal system is now practically the last of any state to deny the concept of compensation for emotional suffering of relatives. There is no future in continuing the historical division between the courts which feel competent to adjudicate upon purely emotional damages and those that do not..

4. GREECE

Greek law draws on Art. 932 (3) Civil Code and the term "family" as defined therein. By tradition, this term includes all relatives who had close emotional ties to the victim. Greek law makes no distinction as to whether or not the relatives cohabited with the deceased. The decisive criterion is that the victim's death impaired them emotionally.

5. POLAND

In Poland, such a possibility existed *de lege ferenda* under Polish Obligation Code (1933),[62] as previously mentioned. Under Art. 157 § 3 a victim could demand, in addition to the recovery of pecuniary damages, compensation for moral damage in cases provided for by law. For instance, under Art. 165 § 1, in case of death, bodily injury, deprivation of freedom or outrage against of honor, the court could award to a victim or to an institution indicated by the victim, a certain amount of money as a compensation for pain and suffering and moral damage.

In 1951, the Polish Supreme Court held that compensation for pain and suffering and moral damage from art. 165 § 1 is contradictory to "principles of conduct in community".[63]

Under art 446 § 3 of Polish Civil Code (1964)[64], the victims relatives

[62] Kodeks Zobowiązań 1933, Dz.U. nr 82 p. 598 (Code of Commitments 1933, Journal of Laws No. 82 item 598).

[63] In polish, "zasady współżycia społecznego". ('principles of social coexistence').

[64] Dz.U. Nr 16, p.93 (Journal of Laws No. 16 item 93).

can claim compensation when, as a result of the victim's death, their economic situation had considerably changed. This compensation has a pecuniary character. Under this article a possibility of claiming compensation for pain and suffering is excluded. In 2006, seeking better protection for the victims of accidents, the Polish Ombudsman made a motion to the Polish Ministry of Justice to change the art 446 § 3. His suggestion referred to a possibility of claiming compensation for pain and suffering of deceased relatives in "special circumstances" and taking into account the "consideration of equity".[65] He pointed out that if such possibility existed in case of infringement of personal interest, the more it should exist in case of death of a close person. On April 11, 2008 the Parliament passed an Act which amended art. 446 § 3 adding § 4 which states: "The Court shall award a compensation for emotional distress of the closest victims' relatives". This Act has not yet been signed by President.

6. RUSSIA

Under Art. 151 of the Civil Code of the Russian Federation (1995)[66] if moral damage is inflicted on a citizen (physical and moral suffering) by actions violating his personal non-property rights or violating his non-material values, the court can require the person responsible to provide monetary compensation. In defining the amount of compensation of moral damage the court shall take into account the degree of the responsible person's guilt and other significant circumstances. The Russian Civil Code does not mention whether the victim's relatives can claim compensation for moral damages.[67]

7. SWEDEN

Often quoted in the past as a state that refused to embody a claim to compensation for the emotional suffering of relatives in its legal system, Sweden enacted a law 1 January 2002 in support of such claims.

The first step was the practice of the courts to recognize such claims in the presence of very gross negligence. Eventually the lawmaker, responding to the general trend, passed a law which acknowledged the

[65] In Polish, "względy słuszności". ('equitably; justifiably; with legitimate reason').

[66] With the Additions and Amendments of February 20, August 12, 1996, October 24, 1997, July 8, December 17, 1999, April 16, May 15, November 26, 2001, March 21, November 14, 26, 2002, January 10, March 26, November 11, December 23, 2003.

[67] See especially Olga A. Papkova, "Reparation of moral damages and judicial discretion in Russian civil legislation", (1998) 24:3-4 Review of Central and East European Law 269; Andrei Cherstobitov, "Problems of Consumer Protection in Russia" (2001) I Juridica International 53-57.

justification of such claims irrespective of the type and degree of negligence involved.

A judgment of the Swedish Supreme Court, on 17 October 2000, provides background to this change in the law. Here, the Court stated that it is in the nature of things that anybody who was very close to a victim is likely to suffer emotionally much more than he would if the person had died a 'natural' death. Accordingly, the court was prepared to presume that such surviving relatives sustain emotional damage.

The effect of this judgment, and the resulting legislation, is to recognize that such individuals may claim compensation on account of their emotional distress without having to furnish independent proof of any stress disorders they may be suffering from and which may require medical attention.

8. SWITZERLAND

Art. 47 of the Swiss law of obligations expressly provides for the claim of families to compensation for emotional suffering in the event of a relative's death. Art. 47 reads:

> If a person is killed or injured, the judge after appreciating the particular circumstances of the case can adjudicate to the injured victim or to the deceased victim's family members a reasonable amount of monetary compensation as satisfaction.

VII. OUTLOOK

As has been shown above, the legal situation in respect of the issue of compensation for the emotional suffering of relatives continues to go through the process of considerable changes in Europe in recent years. Austria and Sweden have left Germany behind as one of the last countries to refuse the embodiment of any claim to such compensation in their legal systems. The Netherlands are soon going to embody, or may judicially already have done so, a claim to compensation for the emotional suffering of relatives. Taking account of a decision by the *Hoge Raad* dated 22 February 2002,[68] there is academic consensus that the Netherlands, too, are

[68] *Hoge Raad (The Netherlands), Judgment of 22 February 2002 - on Compensation for Psychiatric Injury and Emotional Distress Suffered by Close Relatives,* (2003) 11:3 European Review of Private Law 412.

likely to soon drop out of the group of those countries which, like the Federal Republic of Germany, object to the introduction of a legal claim to compensation for the emotional distress of surviving relatives.

Considering all the circumstances, it seems strange that this trend in the court practice of other European countries has not yet been sufficiently taken account of in Germany. However, once the issue has been harmonized on a European level, it will be impossible for Germany to disregard the concept of compensation for the emotional suffering of close relatives. In this respect, German law on compensatory damages will have to be adjusted in line with the latest developments.

Any Europe-wide regulation on extra-contractual damages is bound to include a claim by relatives to recover compensation for emotional suffering. Court decisions in Austria and Sweden have eased the way in this respect; accordingly, these countries are already well-prepared to implement such new regulation in their respective legal systems. Any country that denies the justification of any such claim, out of concert with the other European states, will find it more and more difficult to substantiate its view. Ultimately, the crucial argument, as in the case of the Austrian court decision, is the comparison with the legal provisions in effect in other countries.

Against a background of German refusal to amend its national laws and its Court's to, on the whole, apply those laws restrictively, it would be worth considering whether, in a concrete case, recourse should not be taken to the European Court of Human Rights pursuant to Art. 34, in conjunction with Art. 35 paragraph 1 ECHR. The arguments could be as follows;

> In other European countries, the adjudication of compensation to family members for their emotional suffering is based on the idea that the loss of a close relative impairs – and possibly destroys – the family of which the victim who lost his life and the claimant were members. This is in accordance with Art. 8 ECHR, the effect of which goes beyond the protection guaranteed by Art. 6 of the German Constitution. Hence the German courts' denial of any claim to compensation for the emotional suffering of relatives is inconsistent with the legal situation in other European countries and, what is more, such denial infringes Art. 8 ECHR. This is even more pressing given that, under Art. 8 paragraph 2 ECHR, there shall be no interference by a public authority with the exercise of the rights protected under Art. 8 paragraph 1 ECHR unless (see below) such interference is provided by law. However, there is no such positive

interference provided under German civil law. Nowhere does the German Civil Code [BGB] state that the relatives of a person who was killed does not have any justified claim to damages for the loss of companionship with the victim. But, pursuant to Art. 8 paragraph 2 ECHR it would only be on condition that such a provision did in fact exist that German nationals could be treated differently (less favorably) than the nationals of other European countries. Accordingly, there is no need to scrutinize the question whether interference by a public authority as stated in Art. 8 para. 2 ECHR is allowable on the grounds of the "justifications" stated therein.

VIII. SUMMARY

The recovery of non economic damages is one of the most discussed and controversial legal issues in Europe today, raising complex questions which affect the law of torts and contracts.

Is there a common core of principles, policies and rules governing liability for non economic damages in Europe?

Unfortunately a uniform European Community legislation regarding the recovery of non economic/moral damages in aviation accidents does not currently exist. However, the above considerations lead us to conclude that in principle non pecuniary damages are recoverable in every European system. The individual Member States provide – in varying degrees – legal provisions under which such damages can be awarded and such claim can be inherited The European legal environment is not much different from that prevalent in the United States where moral damages recovery is also often largely dependent upon differing State law.

For victims and/or their dependents not having their domicile in the United States, claiming damages in that country becomes even more complicated because they would have their rights and the quantum of their claims adjudicated according to the laws of the country of their primary residence.