Non-pecuniary damages: financial incentive or symbol?

Comparing an economic and a sociological account of tort law*

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1 Introduction

Financial compensation of non-pecuniary losses has always been controversial.[1,2] Many object to equating the loss of life or serious personal injury with money. Although controversial, compensation of non-pecuniary losses has become prevalent in the tort systems of Western societies.[3] There are various factors which may explain this. These factors reflect competing social needs and conflicting understandings of what this compensation means and how it should be institutionalised in practice.

In this text I will focus on two major factors. First, tort law is increasingly applied as a tool for deterrence. This application is mainly based on the assumptions of law and economics, in which law is regarded as instrumental to the maximisation of social welfare. This requires the minimisation of the sum of accident losses and the costs of accident prevention (optimal deterrence). In this case, damages should induce actors to avert injury if, and only if, injury costs exceed precaution costs. It is crucial that those creating risks of injury bear all the costs they impose on other people. In principle this includes non-pecuniary damages, since suffering and grief reduce welfare.[4]

Alternatively, the rising prevalence of non-pecuniary damages can be seen as a reaction to completely different social needs. It also reflects the rising influence of the ideals of restorative justice, which is accompanied by a more prominent

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1 This text focuses on pain and suffering as a consequence of personal injury not on other cases of violation of personality (e.g. violation of privacy or injury to honour or reputation).

2 About non-pecuniary damages in the Netherlands: Lindenbergh 2008; Verheij 2002; Du Perron 2003.

3 Recently there has been a tendency in the US to restrict non-pecuniary damages, see: Croley & Hanson 1995, pp. 1788-1791; Dutch law has been more reluctant than other jurisdictions to compensate non-pecuniary compensations, see: Lindenbergh 2008, pp. 72-77.

4 Shavell 1987, pp. 133-134; Shavell defines non-pecuniary losses as: 'A *non-pecuniary loss* will be said to occur when there is a loss of (an) irreplaceable good. The amount of such loss will be taken to be the utility of the good to the individual. As the good cannot be replaced, the utility of the good is the reduction in social welfare due to loss of the good'.

role for the relation between the injurer and the victim.[5] Within this framework the injurer is doing justice to the victim by paying non-pecuniary damages. The compensation of damages has a symbolic dimension. This dimension is ignored in the rationale of law and economics, whereas sociologists of law do take it into account.

In this text, I will articulate the differences between an economic and a sociological perspective on non-pecuniary damages. Exposing the alternative perspectives on this issue help me to illuminate some methodological differences between both disciplines.[6] Further I will argue that the alternative underpinnings of both perspectives have serious implications for the way non-pecuniary damages are institutionalised in legal practice.

2 Law and economics

There are two major reasons to obey the law: one is adherence to social norms, the other the calculation of consequences if one breaks the law. Recently there is a tendency to increasingly rely on the latter, which reflects the rising influence of law and economics. Within tort law, damages are also increasingly seen as a financial incentive to promote deterrence.[7]

The recent increase in the influence of law and economics has given an enormous boost to empirical research in law. Because this perspective is able to compare and rank alternative legal systems and doctrines in terms of a common denominator (the maximisation of social welfare), it provokes a multitude of empirical questions. For example, it facilitates the comparison of contract, tort-law or environmental law as the most efficient instruments to improve environmental conditions.

There are several explanations for the popularity of law and economics. It offers a relatively simple deductive model of human behaviour, which is attractive for those who do not want to struggle with the more complex models of human behaviour adopted by the social and behavioural sciences. Moreover, this clear and simple model compares well with the abstract and structured models of

5 Restorative Justice generally involves bringing the victim of an injury and the offender together (including their family, and members of the community) in a supportive setting that allows the victim to express how he or she has been affected by the offender's acts and be involved in determining appropriate damages, and allows the offender to be held directly accountable to his or her victim. The hope of restorative justice proponents is that such proceedings ultimately produce greater satisfaction among all the parties involved than traditional judicial proceedings would, and that they will reduce the likelihood of future wrongdoing. See: Tomkins & Applequist 2008, pp. 257-273.

6 I focus here on a standard model of behaviour which is adopted by law and economics. This model can be found in nearly all introductions and study books on tort and law and economics and is underpinning the axioms which are empirically tested in most legal economic research on tort law. See e.g. Visscher, and Van Velthoven and Van Wijck in this volume.

7 White 2003, pp. 325-328.

human relations that legal scholars are used to working with. It also reflects the rising prominence of market relations. Further, it suggests a remedy for the integration of a heterogeneous society: cultural and normative differences are reduced to differences in individual preferences, or taste, which may be observed, aggregated and weighted in terms of welfare maximisation.

In an economic account it is the task of tort law to maximise social welfare by creating an optimal balance between the costs of preventing damages and the costs of those damages.[8] A rational actor would choose to implement safety measures which would prevent an accident, if these measures cost less than paying damages, and would choose to let an accident happen if the costs of safety measures exceed the costs of paying damages. Crucially, the actor has included all the costs of his activities into his calculations. Because law and economics understands damages as an individual's willingness to pay to be free from injury, these damages include non-pecuniary losses. As Posner stated: 'No one likes pain and suffering and most people would pay a good deal of money to be free of them. If they were not recoverable in damages the cost of negligence would be less to the tortfeasors and there would be more negligence, more accidents, more pain and suffering and hence higher social costs'.[9] You can expect potential victims (and their loved ones) to be willing to pay to avert grief, anxiety and frustration. In principle law and economics sets no limits to the injuries which have to be compensated.

Non-pecuniary damages also fit into the economic rationale because these damages may function as a remedy for not claiming. Since not every person who suffers losses claims compensation, injurers are taking fewer costs into account than their activities bring about. Compensation of non-pecuniary losses, together with punitive damages, can be used as supplementary damages which remedy slack claim activity.[10]

Although the basic principle of law and economics is that non-pecuniary damages should be allowed, there are some additional considerations which set limits on these damages. First, the evaluation of non-pecuniary damages brings about high administration costs (*transaction costs*). This evaluation implies complex and lengthy legal procedures. In the economic view, these transaction costs have a negative effect on welfare and should be minimised.[11]

A second argument against non-pecuniary damages is it may give victims too few incentives to reduce their vulnerability to accidents. This is an argument which only accounts for accidents that may be partly due to the behaviour of the victims

8 Important publications on law and economics and tort: Shavell 1987 and Calabresi 1970.

9 Posner 1987.

10 Van Boom 2008, pp. 253-276; Hartlief maintains that non-pecuniary damages and punitive damages may have the same function in this respect, although he is hesitant to accept that, see: Hartlief 2008.

11 Shavell 1987, pp. 132-134.

themselves (*bilateral accidents*).[12] They might be less willing to protect themselves against injuries when they anticipate not only a compensation of their pecuniary damages, but also a compensation for their pain and suffering.

A third argument against non-pecuniary damages is the subjective and indeterminate character of the costs of pain and suffering.[13] As a consequence, those considering pursuing risky activities are not able to anticipate the damages they have to pay for. Uncertainty will undermine the rational calculus of costs and have a negative effect on the maximisation of welfare.

The final argument against non-pecuniary losses from law and economics is formulated in *the optimal insurance* view.[14] In this view the willingness of victims to be compensated is derived from a market situation. Empirical evidence indicates that there are no separate markets in which people insure themselves against the risk of future pain and suffering. This proves that people are in fact unwilling to insure themselves against those losses.[15] Non-pecuniary damages are considered to be inefficient, since awarding these would give people something they themselves are not willing to pay for. This line of reasoning adds that even when some people would prefer to be insured against non-pecuniary damages, the legislator should abstain from introducing these damages. After all, people are free to insure themselves, and those opposing insurance should not be obliged to insure themselves against these damages.

There is a lot to say about the optimal insurance argument, and I will do that later, but let me make some qualifications here. First, the argument has some plausibility within tort domains where the burden of a more extensive liability of the injurer is ultimately borne by potential victims via loss spreading mechanisms. Only in this case can tort law operate on the basis of an insurance rationale. An example of this spreading mechanism exists within the domain of product liability, where ultimately the consumers have to pay for the non-pecuniary damages themselves, because manufacturers will shift these costs via increased prices of their products. However, the insurance argument is irrelevant in circumstances in which injurers are unable to pass back the costs to the (potential) victims. Consider the position of car drivers versus non-motorised traffic. When car drivers have to pay extra non-pecuniary damages for the more serious injuries they inflict

12 Adams 1989, pp. 210-217; Faure 2003, p. 90.

13 Kaplow & Shavell 1996, pp. 194; Faure 2003, pp. 87-95.

14 Schwartz 1988, pp. 353, 364-367, 408-411.

15 Authors maintaining that in the real world insurance market, individual consumers do not in fact 'demand' insurance for non-pecuniary losses, see: Schwartz 1988, pp. 362-367; and Cooter 1989, pp. 383-392; Empirical evidence that individual consumers do not in fact want to insure themselves against non-pecuniary losses: Danzon 1984, p. 517; Empirical evidence that there is more need for non-pecuniary damages in cases of minor injuries than in cases of major injuries, since minor injuries increase the marginal utility of income: Viscusi & Evans 1990, pp. 353-374; Evans & Viscusi 1991, pp. 94-104; For a critical evaluation of fore-mentioned studies see: Avraham 2005, pp. 941-979; Croley and Hanson demonstrate that the fact that there is no insurance for pain-and-suffering losses is not an indication of non-existent consumer demands but a consequence of various market impediments, see: Croley & Hanson 1995, pp. 1785-1791.

upon pedestrians or cyclists, they have to bear the costs of these damages themselves. These costs will be incorporated in their insurance premiums. The fact that this raises the costs of driving may be normatively relevant for pedestrians and cyclists, especially for those who have objections against motorised traffic. In other words, normative pluralism is not given a proper place in the optimal insurance perspective.[16] Moreover, the fact that potential victims do not insure themselves against pain and suffering is an incomplete argument against non-pecuniary damages since there is a crucial difference between insuring oneself against probable non-pecuniary losses and receiving compensation from those who can be regarded as the (potential) causes of these losses.[17]

Summarising, in principle law and economics endorses a broad concept of damage. As long as people are willing to pay for something not to happen, damage should be compensated, whether it is a damaged car, the loss of income, or pain and suffering. The aim of optimal deterrence, which contributes to the maximisation of welfare, requires that all these costs be borne by those parties which are able to prevent them most efficiently. However, legal economists have some additional arguments which restrict compensation of non-pecuniary damages. These arguments are based on the high transaction costs, the behaviour of victims, the indeterminacy of these damages, and the preferences of consumers on the insurance market (the optimal insurance argument). I have indicated that the optimal insurance argument can be easily disputed by other considerations.

Whether economists of law promote or reject non-pecuniary damages, the theoretical underpinnings of their perspectives have the same shortcomings. To show this I have to change perspective and look at non-pecuniary damages through a sociological lens.

3 Sociology and the symbolic dimension

Tort law combines two rationalities. On the one hand, it communicates normative standards of behaviour, such as duties of care which are embedded in daily behaviour and which may also lean on informal norms (the *symbolic dimension*). As such law, together with other normative rules, is part of a socialisation process which instils certain values into people. On the other hand, tort law may be seen as a set of financial incentives which promotes desirable behaviour (the *sanction dimension*). The latter perspective is adopted by law and economics. The obligation to pay damages has to give the injurers the proper incentive to balance the

16 On the contradictory demands of the aim of optimal insurance and deterrence, see: Shavell 1987, pp. 228-232; also: Faure 2003, pp. 85-103.

17 Radin 1993, p. 76; Radin criticises the optimal insurance argument. Her argument is that the main reason which precludes the purchase of insurance may be incommensurability. Even if it is empirically true that consumers do not insure themselves against their own pain and suffering, that does not imply that they do not want to receive money from the injurer, see: Radin 1993, p. 77; That there may be informal norms which are prohibiting consumers to insure themselves against pain and suffering, see: Sunstein 1994, p. 787; Croley & Hanson 1995, p. 1853.

costs of injuries against the costs of preventing those injuries. In the rationale of law and economics, tort law is made instrumental for accomplishing the maximisation of welfare. It is not seen as the aim of tort law to restore the moral balance between the litigants.

In a sociological perspective, the symbolic dimension of law is not neglected Durkheim, for example, saw the law as a reflection of solidarity.[18] Moreover, it is one of the major observations in current sociology of law that the effectiveness of law relies heavily on the support of informal norms.[19] This does not imply that financial incentives are completely ignored. But they are just seen as one of the various mechanisms which stimulate people to obey the law. It is distinctively sociological to regard the varying prominence of financial incentives versus normative standards of appropriate behaviour as a reflection of varying social contexts and social conditions.[20]

The classic model of law and economics is based on methodological individualism and the assumption that actors are rational and self-interested.[21] In this perspective, law and law enforcement function as the glue of society. In a sociological perspective, the enforcement of law has a less prominent role because the integration of society may be predominantly based on informal norms. People are not only influenced by expectations concerning the sanctions which follow undesirable behaviour, but also by internalised norms of cooperation.

In many contexts informal norms are far more important for the coordination of behaviour than law, especially when interacting parties have a continuing relationship. As demonstrated by Ellickson, for example. Based on an investigation of a variety of disputes arising from the damage created by escaped cattle in Shasta County, California, he observed to what extent the law affected ranchers' perception of liability for cattle trespass.[22] He concluded that the law almost plays no role in disputes about cattle that wander onto neighbouring ranches or residential plots, nor is it relevant in the ways in which neighbours distribute the damages. Their actions and expectations are governed by informal norms of neighbourliness. They keep an informal ledger of debits and credits. When cattle cause damage, the owners are expected to move the cattle quickly and to make good the damages. Small wrongs are simply entered into the rancher's mental ledger for repayment in kind at some later time. Those who have to deal with wandering

18 Durkheim 1964.

19 Moore 1973, pp. 717-746.

20 Satz 2010, p. 4.

21 Legal economists are increasingly aware of the unrealistic character of their model of human behaviour. A number of economists have shown interest in relaxing these presumptions, see for instance: Korobkin & Ulen 2000, pp. 1051-1144; Faure 2009; They are adopting more complex, and less deductive, models of human behaviour, which leads to much convergence between law and economics and sociology of law. It may be asked whether by relaxing it's assumptions this model of behaviour is not becoming as complex as that of the other behavioural and social sciences.

22 Ellickson 1991, pp. 15-104.

cattle on their property are obliged to take care of it, and inform the owner as quickly as possible. When fences need to be built or maintained, ranchers reach informal agreements which involve payment in kind.

Ellickson explains the marginal role of law in terms of the *relational distance* hypothesis: when people live in close-knit groups with many ties to one another, their relations will be mainly governed by informal norms. Law has a more prominent role between strangers. This hypothesis is confirmed by his findings that in Shasta County more formal processes are only invoked in the case of car or truck accidents. Ellickson attributes the use of law in these cases to the involvement of strangers.[23]

Ellickson claims that there is much more cooperation among individuals than one would expect based on the assumptions of law and economics: the assumption that individual behaviour is driven by self-interest, and that law is the only instrument to stimulate cooperative behaviour. He maintains that the incentives created by law enforcement are not a necessary instrument to stimulate cooperative behaviour. It may be based on informal norms. People sometimes act in selfless ways because they appreciate normative rules of decent behaviour or broader values.[24]

It is common knowledge amongst sociologists that close-knit groups engender cooperative behaviour. However, that does not imply that cooperative behaviour is absent in conditions where people are strangers to oneanother. Think of the habit of tipping waiters at roadside restaurants, after the service has been provided and there is nothing to be gained from such a transaction. Another illustration is the practice of returning lost articles to lost and found departments.[25]

It is a sociological assumption that it depends on the social context whether an action is based on self-interest or informal rules requiring cooperation. This is in essence an open empirical question. A discipline such as law and economics which simply presumes that a single-minded pursuit of self-interest is driving human behaviour is based on flawed empirical assumptions. Even the father of modern economics, Adam Smith, recognised the relevance of ethical principles and altruistic drives beside the pursuit of self-interest.[26]

Through a sociological lens human motivations are influenced by social practices and institutions. Rothstein gives an illustration of this when he, hinting at empirical research, maintains that the universal Swedish social insurance scheme creates a motivation structure which is based on the social norm of fairness, while the selective scheme which exists in the US undermines concern with the poor.[27] The main reason is that the Swedish well-to-do are also stakeholders in a scheme

23 Ellickson 1991, pp. 94-103.
24 Ellickson 1989, pp. 48-54.
25 Ellickson 1989, p. 50.
26 Smith 1976, p. 191; Amartya Sen refers to Adam Smith in: 2009, pp. 124-155.
27 Rothstein 1998, pp. 144-160.

which embraces the whole population, while the scheme in the US only supports those suffering most severely. This causes those supported by the scheme to be easily stigmatised as the less-adjusted minority who do not deserve support.

These observations indicate that motivational structures are not an inevitable given, but that institutions may be adjusted to promote desirable human motivations. One finds the same sociological awareness in the work of Habermas, who noticed that if welfare systems grow too large, they risk perverting incentive structures by making people dependent on arbitrary and impenetrable administrative bodies. In that case, they may undermine solidarity and promote a calculating mind-set.[28]

This sociological insight questions the adoption of an economic model of behaviour as a universal given. It has to be seen as contingent, and as the product of the recent increasing economisation of society, politics and law. In a sociological perspective individual behaviour, actor's motivations and preferences, are seen as endogenous, as entities which have to be explained.[29,30] Rothstein's example of various social insurance systems demonstrates, for instance, that preferences may be shaped by social context. This does not imply that we have to stick to some social determinism in which the behaviour of individuals is exclusively conceived as the product of social practices and social institutions. Given the insight in the relation between preferences and social institutions one may reflect how institutions have to be shaped to promote the most desirable motivations and preferences.

4 Non-pecuniary damages: financial incentive or symbol?

Whereas economists see law exclusively as a mechanism to distribute financial incentives, sociologists also see law as an expression of normative relations.[31] This has important implications for the view on non-pecuniary damages. For legal economists, non-pecuniary damages are merely a tool to maximise welfare. This consists in the first place of reaching the optimal deterrence level, but may also include, in line with the optimal insurance argument, the preference of victims, whether they want to be insured against non-pecuniary damages or not.

In a sociological perspective, there may also be moral claims at stake. Injurer and victim are brought together in a dispute because one claims that the other has harmed him in a way he had no right to do. Requiring payment is a way to both bring the wrongdoer to recognise that he has done wrong and has to compensate the victim, and to show the victim that his rights are taken seriously. It implies that some action is required to symbolise public respect for the existence of cer-

28 Habermas 1981, pp. 505-547.
29 That law and economics sees preferences as an exogenous factor, see e.g. Becker 1976.
30 Rothstein 1998, p. 130; Satz 2010, p. 4.
31 Analyses of both dimensions of law, see: Sunstein 1996, pp. 2031-2053; Scott 2000, pp. 1603-1647.

tain rights and public recognition of the wrongdoer's fault in disrespecting those rights.[32]

An economic account of tort law decomposes the relation between injurer and victim, and transforms them into agents for the maximisation of welfare, which is external to their personal conflict. What is at stake in the settlement of their conflict is not what they owe to each other, but how categories of injurers and victims may contribute to maximisation of welfare and optimal deterrence. Thus victims are regarded as the private enforcers of a risk reduction policy. With their claims they are contributing to the public aim of giving (potential) injurers the proper incentives to realise optimal deterrence.[33]

The damages the injurers have to compensate also serve the one-aim instrumentalism of a risk reduction policy. The assessment of damages and the amount to be compensated are determined by factors which have nothing to do with the personal relationship between victim and injurer. For example, as was indicated earlier, from an optimal risk reduction perspective, it may be rational to raise the compensation of each claiming victim, as a remedy for low level of claim activity of all victims in order to confront the injurer with the correct amount of costs. Together with punitive damages, non-pecuniary damages may be introduced to achieve this extra pricing. The use of non-monetary compensation and its height will fluctuate with claim activity and be determined by what deterrence requires, not by what the injurer and victim owe to each other.

An economic account of tort law not only decomposes the relation between both parties but also implies a commodification of human relations. The potential injurers have to select the optimal level of prevention by balancing the costs of injuries against the costs of preventing those injuries. Those considering risky activities are not expected to be more concerned with their victims than the calculations of the monetary value of their damages. In the words of Rick Abel: 'tortfeasors are allowed to create so much injury as they are willing to pay for'.[34] Compensation is seen as a licence to injure.[35]

The victim is assumed to be indifferent towards being harmed and receiving (sufficient) compensation, and not being harmed at all.[36] The question is: what should potential victims be willing to pay to avert the grief and suffering caused by an accident? The victim trades his injury and bodily integrity for an appropriate financial compensation. In this perspective, damages are treated like a transaction of a commodity the victim owns. The commodity form suggests that for every pain incurred there is some equivalent pleasure that will erase it – a pleasure that can be bought with money.

32 Radin, 1993, pp. 58-61.
33 Weinrib 1989, pp. 485-527.
34 Abel 1981, p. 204.
35 Coleman 2003, pp. 18-19.
36 Radin 1993, p. 61.

This reductionist line of reasoning can also be recognised in the optimal insurance argument. This argument also ignores the symbolic dimension. By transforming the victim's need to receive non-pecuniary damages in terms of whether he would prefer to be insured against those damages or not, it denies the normative relation between both parties. The optimal insurance argument assumes a victim not to perceive a difference between receiving compensation from its own insurance company and from someone who has not respected his rights. It is only the monetary value of the losses, including pain and suffering, which is considered to be relevant to the victim.

5 Commodification

In the perspective of law and economics, the normative conflict between injurer and victim is downplayed. The symbolic dimension is ignored by reducing the issue of non-pecuniary damages to a cost-benefit calculation. However, there are many economists who are willing to agree that their models are reductionist versions of reality, that their axioms are just founded on 'as if' assumptions, as if actors are rational self-interested maximisers of welfare. They regard their simple assumptions about human behaviour as a good device for empirical research. They admit that in reality compliance with the law (for instance, with standards of care) is not exclusively dependent on financial incentives and the calculus of costs and benefits. In their view financial incentives are just a supplementary mechanism to promote compliance.

However, it may be naïve to see this simple model of behaviour as just a harmless device for empirical research. First, this model may be a reflection of prevalent social practices and institutions, which are affected by expanding market relations. The legal-economic model of human action may be embodied in current tort practices in which the role of injurer and victim is often marginalised, and in which the issue of tort has just become a matter for specialists and of the sterile distribution of money between insurance companies.[37] Second, the framework of law and economics is not just an empirical device, but also functions as a normative political program to transform our legal institutions according to the scripts of economics.[38]

If the design of our institutions is based on the rationale of law and economics, this may change our morals and erode the normative basis of compliance with the law. Sandel illustrates this with a study on the acceptance of the construction of a nuclear waste site in a Swiss community.[39] The residents of a village were surveyed and asked whether they would vote in favour of a nuclear waste repository in their community, if parliament decided to build it there. A slim majority of

37 About the marginalisation of the role of the injurer and the victim in current practices:Stichting de Ombudsman 2002.
38 Sandel 2012, pp. 6-10; Frerichs 2011, p. 298.
39 Sandel 2012, pp. 112-114.

51 % said they would vote in favour. Afterwards the researchers added a supplementary question: supposing that living near the site would be compensated by an annual monetary payment. The support then declined (from 51 to 25 %), even when cash payments were as high as 8,700 dollars, and did not increase, as the economic rationale would have predicted. This study shows that normative and financial incentives cannot be regarded as additive. The prospect of financial compensation transformed a question of civic duties into a pecuniary one. The introduction of market norms crowded out the sense of civic obligation.

For many goods and services, the market may be a very efficient distribution mechanism. But there are some domains of life which have to be protected against the market, otherwise the non-market norms governing these domains will disappear.[40] There are some good things in life that cannot be quantified in terms of price. For example, if someone asks a neighbour to clear his pavement or to mow his lawn in return for twenty-five euros, the request will often be regarded as an insult, even if the neighbour would, in another context, prefer receiving twenty-five euros to not mowing the lawn.[41] A hired friend is not the same as a real one. And many are very reluctant to leave the distribution of kidneys to buying and selling on the market.[42]

Generally two negative effects are associated with the valuation of good things in terms of the pricing rationale of the market (*commodification*).[43] First, some of the good things in life are corrupted or degraded if turned into commodities. For instance, the concept of parenthood would be degraded if children were for sale on the market (the *corruption argument*). Second, assessing the value of goods in terms of what people are willing to pay for it, and distributing it by the process of buying and selling, may conflict with egalitarian values (the *fairness objection*). For some goods we feel they should not be exclusively available for those who are best able to afford them (organs, education, children, voting). For instance, should patients be able to jump the waiting list for medical care simply because they have the resources to pay extra?

The heart of the matter, when discussing non-pecuniary damages, is whether it is appropriate to see the risk of pain and suffering following death or injuries in terms of the market rationale. In affluent societies, this will primarily be an issue of corruption rather than of fairness. After all, the chance that poverty drives people into dangerous habits (e.g. because risky jobs are better paid) is relatively small. The issue of corruption remains. Should the pain and suffering of victims and close relatives only be seen in terms of what they are willing to pay to avert it, and should the obligation of (potential) injurers exclusively be defined by balancing these costs against the costs of prevention?

40 Sandel 2012, Satz 2010, pp. 189-207.
41 Sunstein 1996, pp. 2037, Sandel 2012, pp. 93-94.
42 Satz 2010, pp. 189-207.
43 Sandel 2012, pp. 110-112.

One may question whether the integration of society can only be based on the rationale of law and economics. I do not believe calculation offers a solid basis for the integration of society. The standard of due care and deterrence will become too dependent on permanent fluctuations of prices on the market. Moreover the rationale of the market is vulnerable to several adverse effects. What about the impact of the recent practice in the US to buy insurance on the lives of rank-and-file workers (*janitor insurance*)? It may give employers a financial stake in the demise of their employees, and create a perverse incentive to reduce workplace safety.[44]

When such an important institution as the legal system is restructured according to the presumptions of law and economics, just regarded as a bundle of financial incentives, it might promote calculative self-interested behaviour and undermine normative orientations which are in the end crucial for the effectiveness of law. Care for safety will be reduced, making place for the calculus of costs and benefits if the settlement of non-pecuniary damages is just an issue between insurance companies and a matter of exchanging money. Of course, this assertion has to be empirically tested. It provokes several questions. First, to what extent do calculative orientations undermine normative orientations? Further, to what extent does obedience to the law require a particular mix of normative and calculative orientations? Could it exclusively rely on one of these orientations or must it be seen as a multipurpose device which is intended to discourage preferences by fortifying norms prohibiting certain behaviour as well as by making that behaviour more costly?

There will certainly not be one universal answer for all kinds of legally prohibited behaviour; the answer will depend on the type of behaviour being regulated and the relevant social context. It seems plausible that in general society should engage in both pricing and preference-shaping activity to discourage bad behaviour.[45] A legal system which exclusively relies on calculative orientations does not appear to be a stable and robust system of integration.

6 The needs of victims

What are the needs of accident victims? There is some empirical evidence that indicates that victims of serious accidents (and their relatives) want money. But this evidence also shows that receiving money is subordinate to more symbolic needs. This was observed by Deborah Hensler in her study of the reactions of victims to the compensation programmes following the terrible events of 9/11.[46] It is not just money that victims are after. They also want to know why misfortune fell on them, that injurers accept responsibility and that the community acknowledges the seriousness of their losses. They see financial compensation as a confir-

44 Sandel 2012, pp. 132-135.
45 Dau-Schmidt 1997, p. 417.
46 Hensler 2003-2004, pp. 417-456.

mation of their dignity, as an apology of the injurer or as a sign of solidarity from the members of the community.

A Dutch study came to similar conclusions.[47] Close relatives of those killed or seriously injured were interviewed and asked how they perceive monetary compensation for the emotional harm they suffered as a result of the death or severe injury of their loved ones. Most of them indicated that they appreciate a (modest) financial compensation for non-pecuniary losses. The main determinant for the need for financial compensation appears to be the degree to which the consequences of the accident threaten financial security. Victims want to get their lives back on track and the guarantee of financial security is an indispensable precondition in this respect. They see such compensation as a positive gesture, conveying a symbolic message of recognition of loss and acknowledgment of responsibility. This observation does not confirm those theories which state that people consider life, health and loss as sacred values which cannot be compensated by money ('taboo trade-offs').[48] Nevertheless, from the perspective of the victim, money is instrumental to non-economic values such as recognition of their dignity.

The aforementioned studies indicate that this positive effect of money requires a setting in which the symbolic dimension is articulated: The money should be offered in a personal, respectful and considerate manner and be accompanied by an acknowledgement of what happened to the victim, an admission of fault, an apology, and an expression of empathy with the loss.

This attention for contextualised symbolic meaning is absent in a tort system that is based on the assumptions of law and economics. An articulation of the symbolic dimension demands procedures in which the injurer and the victim are directly involved, where there is ample room for truth finding, justification, acknowledgement and personal commitment. The tort system has to give a public stage for assigning responsibility and concern with the fate of the victims.[49] It does not allow for the non-pecuniary damages to be settled in a standard procedure in the back rooms of insurance companies, based on specialists calculating economic costs. Moreover, if one wants to do justice to the symbolic purpose of non-pecuniary damages, one has to accept that legal procedures should not merely be considered as a matter of transaction-costs which have to be minimised.

7 Conclusions

By regarding non-pecuniary damages solely as a set of financial incentives and as an instrument to maximise welfare, legal economists are stripping the compensation of pain and suffering of its normative underpinnings. Legal economists may

47 Hulst & Akkermans, 2011, pp. 245-262; Huver et al. 2007, Akkermans et al. 2008.
48 See e.g.: Fiske & Tetlock 1997, pp. 255-297.
49 See also: Hensler 2003-2004, p. 452.

maintain that their ambitions are modest and that they are just endorsing a simple model of human behaviour which has strong explanatory power. They may admit that their model does not cover all aspects of human behaviour, and does not deny the supplementary relevance of the normative dimension. However, this position overlooks the sociological axiom that models of human behaviour are socially embedded. The rising prominence of law and economics may be seen as an indication of a rising prominence of market relations within domains of life where they were traditionally banned, and as reflection of a social reality in which calculation is increasingly driving human behaviour. Moreover the economic model of man may be used as a prescriptive recommendation for legislation and adjudication. What is not an appropriate description yet, may become an appropriate description if these recommendations are implemented.

I have expressed my fears concerning the expansion of the rationale of law and economics within the domain of non-pecuniary damages by discussing the implications of a legal system which exclusively addresses calculating actors.[50] However, further empirical research is needed to find out to what extent the normative and symbolic underpinnings of law are really crowded out by market orientations. Empirical evidence concerning the needs of victims, and the fact that there is hardly any empirical evidence which indicates that the financial incentives produced by tort law have deterrent effects, suggest that human behaviour cannot (yet) be completely predicted by the axioms of law and economics.[51]

The rising prevalence of law and economics is not an inevitable process. Law is shaped by cultural and social factors, but law is also able to shape culture and society. In the same way as the choice for a selective or a universal system of social insurance may be seen as an attempt to affect values, the preferred structure of tort case settlement may be based on the conviction that commodification has to be minimised.[52] It is not an inevitable social fact that settlement of tort cases has to be handed over to insurance companies and experts who handle these cases behind closed doors. And settlement does not have to be reduced to an exchange of money in which the injurer and the victim merely have a subsidiary position.[53] They may be brought together in a setting where the restorative potential of tort compensation is used. A setting in which both parties have an opportunity to tell their story in a culturally meaningful context and in which there is ample room for accusations, justifications and apologies.

A decision to build the law on economic underpinnings is a normative decision. The implication of the insight that the design of our institutions shapes our preferences is that we need to reflect on the most desirable design of those institutions. Do we want to live in a society where tort law is seen as a set of financial

50 More about the deficits of a one-dimensional utilitarian perspective on tort law, see: Schwitters 2012.
51 See for example the articles from Van Velthoven and Van Wijck and Visscher in this volume.
52 Radin 1993, pp. 83-86.
53 That this practice is prevalent in the Netherlands, see: Stichting de Ombudsman 2002.

incentives, based on the rationale of a market for safety, or in a society where serious injuries are seen as personal dramas in which settlement requires and promotes the personal commitment of involved parties? These are questions that cannot be answered by examining preferences and aggregating them. Those normative issues cannot be transformed in terms of preferences, as if it is a matter of dealing with (subjective) tastes.

I follow Hirschmann when he distinguishes preferences and meta-preferences. Economics traditionally only deals with (first-order) preferences, which can be seen as tastes (apples vs. pears).[54,55] Taste is seen as exogenous, as something about which you do not argue. But human beings can also step back from their tastes and reflect on them, and see them as the reflection of prevalent institutions. A taste about which you can argue ceases to be a taste; it turns into a value or a meta-preference. So it may be considered a value to opt for a legal system which is seen as a bundle of financial incentives addressing self-interested actors instead of a legal system which leans on normative commitments. Whether we want this or not is not an issue which can be settled by aggregating (first-order) preferences. Instead it requires political and normative deliberation in which arguments are critically tested.

How an injury-case is settled is not just a matter of asking the injurer and the victim how much they would be willing to pay to avert the accident. It is also a matter of observing how people want to deal with each other when they are involved in an accident. Empiricism does not merely demand aggregation of individual preferences, but also the assessment of preferences and motivations in a social context in which reflection on desirable institutions is included. These issues require a reflective empiricism that is not available in law and economics. Sociology of law is better equipped to deal with these empirical and normative issues.

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54 Kaplow and Shavell have argued to see political values (e.g. fairness) as matters of taste or individual preferences, see: Kaplow & Shavell, 2002.Their proposal strikes me as objectionable, because it ignores the evaluative and argumentative character of political values.

55 Hirschman 1984, pp. 89-91.

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