

Chapter 5

Methods of Ascertainment of Personal Damage in Portugal

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Abstract The chapter illustrates the historical, judicial, and juridical framework of personal injury assessment and compensation in Portugal, describing the expert's qualification and competences and detailing the ascertainment methodology and criteria of evaluation utilized for identifying, describing, and estimating any personal injury, its temporary and permanent consequences, and the causal value/link between the event and the injury and between the injury and the impairment/disability.

5.1 Historical, Judicial, and Juridical Overview

Despite the Resolution (75) 7 of the Council of Europe—Committee of Ministers, concerning the assessment and compensation for damages suffered in cases of personal injury and death—the features of personal injury compensation within the European Community are still diverse. The different modalities for the assessment and compensation result from social and legislative diversities and reflect the profound philosophy of societies.

Several attempts to harmonize personal injury and damage assessment have been performed in the past. For example, in 1998, the “European Confederation of Specialised in the Assessment and Compensation of Physical Injury” (CEREDOC), which brings together the national associations of legal doctors working in judicial and insurance fields of several European countries (Belgium, France, Italy, Spain, and Portugal), has made a valuable effort for defining the damages to be assessed and the evaluation methodology, harmonizing the qualification of medical experts and creating a guide for the evaluation of permanent impairment.

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However, despite the abovementioned and other similar initiatives aimed at establishing an international harmonization, there are still numerous differences regarding the ascertainment methodology, the barémés for the evaluation, the terminology, and the training of forensic specialists in the evaluation of personal injury/damage at an international level.

Under the Portuguese juridical system, civil responsibility takes place when the injured individual files a lawsuit claiming patrimonial and/or non-patrimonial damages derived from a tort committed by another individual. The aim of civil law is to reestablish, as precisely as possible, the equilibrium destroyed by the injury and return the victim, at expenses of the person responsible of the tort, to the state that she/he would have been had if the event causing the injury did not occur.

In Portugal, full compensation shall be awarded for all injuries and losses to legitimate interests suffered by the victim (i.e., both material and nonmaterial losses). The assessment is traditionally based on objective considerations (medical expenses, loss of income, occupational disability, permanent total or partial incapacity) and subjective considerations (pain, aesthetic detriment and loss of amenity). Ultimately, the judge must decide what sum is adequate (exercising his discretion).

5.2 Description of Medicolegal Expert's Qualifications

In Portugal, there are two kinds of medical experts expected to ascertain and evaluate personal injury/damage suffered by an individual: (1) specialists in forensic medicine and (2) private experts with a specific demonstrable competence on personal injury assessment.

These experts (1 and 2) have to prove that they received a solid medical and legal preparation and a domain of medicolegal expertise.

However, following the Portuguese law, anyone with a degree in medicine (MD) is allowed to assess personal injury/damage and to testify in court as an expert.

In Portugal, forensic medicine services are concentrated in a single National Institute of Legal Medicine (INML), with headquarters in Coimbra, three delegations (in Lisbon, Coimbra and Porto) and a network of 31 medicolegal offices spread around the country. These are located in central hospitals and are answerable to one of the INML delegations, in accordance with geographic area.

5.3 Ascertainment Methodology

The medical forensic expert who will examine cases of personal injury/damage has access to all of the clinical data included in the civil process and may also request further information deemed relevant to the case. In the case of expert investigations

ordered by the court, experts from the INML have direct access to all relevant clinical information, which they may request directly from hospitals, private doctors, clinical departments of insurance companies, or any other institution involved in the situation under examination. These bodies are then obliged to send a copy of the requested documents to the INML within 15 working days under penalty of legal sanctions.

It should also be pointed out that the forensic medical experts from the INML have, by law, total autonomy to order any complementary tests deemed scientifically justifiable for an accurate understanding of the situation, without having to seek prior approval from the court.

The parties involved and the court may of course also request further clarification from the INML concerning the investigation being conducted or may seek the answers to concrete questions about any aspect of the medicolegal investigation (about the methods used, complementary tests, scientific interpretation, conclusions, etc.) or even about merely scientific aspects.

During the course of the investigation and subsequent preparation of the report, the medical expert must consider all prior clinical information (clinical history, hospital records, etc.), as well as opinions and testimonies issued by private experts, and should interview and examine the patient and undertake any complementary diagnostic tests deemed necessary.

5.3.1 Collection of Circumstantial and Clinical Data

The first operation, which the expert must carry out, is the collection of clinical and documentary data, retrieving all medical and healthcare information believed to be useful for a diagnostic framework, for later identification of the pathological features, injuries and damages.

The documents of prime importance to be collected and examined are as follows: authorization for admission, anamnesis and physical examination, patient's journal, medical orders sheet, consent documents, emergency room assistance sheet or emergency room report, inter-consultation sheet, reports of complementary examinations, presurgery examination sheet, anaesthesia report, operating room report, postsurgery evolution sheet, pathological anatomy report, nursing journal, graph of vital signs and clinical discharge report.

It is of utmost importance to collect also any circumstantial documents useful for the reconstruction of the event/accident which caused the injury and, in particular, the mechanism which caused the injury.

5.3.2 *Medical Case History*

The expert must recon a detailed medical history, including familial anamnesis, physiological anamnesis (with a description of the particular/specific daily recreational activities) and work-related, remote and recent anamnesis.

Special attention must be paid in recording the exact circumstances of the event/accident, all the complaints attributed by the victim to the sequelae resulting from the trauma (i.e. familial, daily activities, recreational activities, social activities, work-related activities, etc.). Particularly in posttraumatic cases, the expert must be able to understand the full impact of the trauma upon the injured party, considering the type and characteristics of the trauma, the victim's reaction in the peri- and posttraumatic periods, the injuries and impairments resulting from the trauma, the perception that the damaged person has of the event and its consequences. This latter perception is related not only to the resulting personal injury but also to the justice system and to personal factors, such as previous experience of other traumatic situations, former health status, consumption habits, cultural and religious characteristics, the victim's responsibility and his or her resilience and motivation for rehabilitation. The expert must collect information also on the economic, family, social and cultural contexts where the victim lives because all these factors may influence the impairments and disabilities causally related to the traumatic event.

5.3.3 *Systematic Clinical and Medicolegal Visit*

This part involves a careful systematic collection of objective clinical data including internal medicine, neurological and clinic-objective tests aiming at specific problems.

In view of the possibility that the patient being examined may simulate non-existent injuries or accentuate the severity of injuries already present, proper medicolegal semeiotics must be applied in all clinic-objective examinations.

An exhaustive local examination of the injured region of the body must be performed, with an analytic study of simple movements and a global study of complex gestures.

5.3.4 *Additional Investigations*

If after the examination of medical and healthcare documentation and clinical objective signs, the available anatomo-functional data are not sufficient for a diagnostic picture, the possibility of further diagnostic tests, non-invasive and/or invasive, must be evaluated.

5.4 Evaluation Criteria

The first step for the medicolegal expert is to verify if, after the injury, the victim has gained the maximal medical improvement or, in other words, if the lesion is stabilized/consolidated.

It is possible that the victim, after receiving proper treatment, has been cured, that is, experienced a full anatomical, functional and/or psychosensorial recovery (i.e. the victim is not affected by any permanent impairment or damage).

It is also possible, more often, that after an evolution of the injury/disorder, the victim is still affected by a sequela with a permanent impairment, which does not require any other medical treatment unless those aimed at preventing a further deterioration of the *sequelae*.

Using all circumstantial evidence and the data collected at medical anamnesis, the expert must reconstruct the event/accident that could have caused the injury, focusing on the followings.

- Circumstances and mechanism of the trauma/injury.
- Symptoms in the immediate period after the event/injury.
- Symptoms in the interval between the event/injury and the ascertainment.
- Treatment(s) and/or medication(s) administered in the interval between the event/injury and the ascertainment.
- Outcomes of treatments already performed.

Basing on the circumstantial and clinical data previously collected, the medicolegal expert must then reconstruct the *pre-existing psychic and somatic state* of the victim prior to the event/injury.

5.4.1 Personal Injury Identification

The expert identifies the physiopathological features of the injury/disorder reconstructing the initial, intermediate and final stages of the disorder/disease. This reconstruction must be based on scientific references, following a proper source hierarchy.

- Guidelines.
- Consensus documents.
- Evidence-based publications.
- National literature.

In Portugal, the expert must classify the disorder using the *International Classification of Functioning, Disability and Health* (ICF).

This classification, created by the World Health Organization (WHO), provides a unifying framework for classifying the health components of functioning and disability.

The ICF classification complements WHO's International Classification of Diseases (ICD), which contains information on diagnosis and health condition, without details on the functional status.

The ICF is structured around body functions and structure, activities related to tasks and actions by an individual and involvement in a specific life situation.

After depicting the initial, intermediate and final status of the injury/disorder from a clinical point of view, the expert must identify the medicolegal equivalents, in terms of temporary/permanent impairment, and their repercussion on professional and social/leisure activities.

5.4.2 Temporary Impairment

The temporary impairment represents the detriment to good health caused by the injury/disorder in its initial and intermediate phases. It manifests first and foremost as a perturbation of the normal existence, being accompanied by physiopathological disturbances and subjective suffering.

In Portugal, the medicolegal expert, in order to describe and evaluate the temporary impairment, takes into account the followings.

- The characteristics of the traumatic injuries.
- The nature and severity of the lesions.
- The location, extent, depth and number of lesions.
- The treatment methods.
 - Type and number of treatments.
 - Number and nature of surgical interventions.
 - Time spent in continuous extension.
- The evolution of the injuries.
 - Incidents of immobilization and evolutionary.
 - Number and length of hospital admissions.
 - Number and nature of the exams.

In order to assess the *quantum doloris*, which is a particular noneconomic temporary damage, in Portugal, the medicolegal expert uses a “scale” divided into 7 subcategories: from very slight pain (1/7) to light (2/7), moderate (3/7), average (4/7), considerable (5/7), important (6/7) and very important (7/7) pain.

5.4.3 Permanent Impairment

The permanent impairment starts when the injury has stabilized and the maximal medical improvement has been achieved.

The expert must furnish a detailed and motivated description of the permanent functional deficit, the permanent repercussion upon the generic and specific professional activity and upon the leisure and social activities, the aesthetic damage and the eventual impairment of the sexual function.

In order to assess the damage in the most global and personalized manner and promote integral reparation, the expert should consider the person as a whole, rather than as the sum of his or her body parts, including capacities/functions and life situations/participation and activities.

These three levels may be the body and biological aspects (1) with their morphological, anatomical, histological, physiological and genetic particularities; (2) the functions and capacities; and (3) the life situations and activities. Regarding this latter point, in particular, the expert should carefully evaluate the repercussions on the work capacity and the leisure/social activities, explaining the followings.

- The eventual impossibility of performance of a particular profession.
- The difficulties of performance in a particular profession.
- The compatibility of a potential professional reclassification with the existing sequelae.
- The impossibility of performance of any work.

The medicolegal report should describe the injuries, impairments, disabilities and losses in a way that is clear, rigorous, objective, detailed, systematic and comprehensible to non-medical practitioners, even though medical terminology should always be respected. Sources of information and references should be provided.

5.4.4 Causal Value/Link Between Event, Injury and Impairment

The causal value/link and the relationship of an actual causal link must be evaluated by means of a “criterion of scientific probability”, such as universal law, statistical law or criterion of rational credibility.

In Portugal, the medicolegal expert uses the criteria by Muller and Cordonnier (1925), focusing on the followings.

- The adequate nature of the event to produce the observed injuries/sequelae.
- The adequate nature of injuries/sequelae to the concerned aetiology.
- The exclusion of pre-existing damage.
- The adequacy between the region affected by the trauma and the seat of the lesion.
- The time adequacy.
- The anatomo-clinical chaining.
- The exclusion of causes strange to trauma.

In the medicolegal report, the expert must clarify whether the causal link between the trauma and the injury/impairment is certain or hypothetical, direct or indirect or exclusive or partial.

5.4.5 *Quantum for Temporary and Permanent Impairment (Disability Rate)*

In Portugal, there are specific barémés, introduced with the Decreto Lei n. 352/2007 of the 23rd of October 2007, which have to be used for quantifying the permanent disability rate.

5.4.6 *Other Pecuniary and Non-pecuniary Losses*

In Portugal, the medicolegal expert ascertains and assesses also some pecuniary damages, such as medical or any other additional expenses, which are related to the trauma/injury (*damnum emergens*) or the loss of earnings and other benefits, which the injured person would have received but for the accident (*lucrum cessans*).

The medicolegal expert must analytically describe the repercussion of the temporary and permanent impairment on the followings.

- Educational and training activities.
- General and specific professional activities.

The Portuguese juridical framework considers *aesthetic damage* as a separate injury in itself.

The medicolegal expert has to analytically describe the location, dimension, orientation, colour and morphology of the aesthetic injury in relation to the age, sex and pre-existing condition of the victim. A *scale* is used by the expert in order to grade the “aesthetic damage”, which spans from very slight (1/7) to light (2/7), moderate (3/7), average (4/7), considerable (5/7), important (6/7) and very important (7/7).

Among other non-pecuniary losses, the medicolegal expert has to ascertain also the loss or impairment of the sexual function. Also in this case, a *scale* is used in order to grade the “sexual impairment”, which spans from very slight (1/7) to light (2/7), moderate (3/7), average (4/7), considerable (5/7), important (6/7) and very important (7/7).

Below are listed some general bibliographic sources useful to deepen the issue. They are not reported within the text as they are no cited references.

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