Chapter 6
Methods of Ascertainment of Personal Damage in Spain

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Abstract This chapter illustrates the historical, judicial, and juridical framework of personal injury assessment and compensation in Spain, 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.

6.1 Historical, Judicial, and Juridical Overview

Throughout Spanish history, valuation and compensation for damage has not enjoyed particular importance outside the purely criminal sphere. A chapter on Injury from Crimes and Misdemeanors has always existed in our Penal Code, which has generally given prominence to the valuation of output when the judge decides on the penalty to be imposed. Since the partial reform of the Criminal Code of 1983, there has been an introduction of the assessment of the intention (Dolo), but results have continued to be the essential criminal criteria.

The civil law has also considered the consequences of injury by the appropriate valuation for compensation, but viewing them as minor elements that, with exceptions, did not warrant extreme consequences.

Historically, compensation for personal injury, as in other Western Countries with a clear oriental and religious influence (Leviticus, Chapter XXI, verses 16 and following), has been primarily a vengeful view of compensatory damages, only partially modified by the introduction of Roman law and the development of the Law of the Twelve Tables, especially in financial compensation for injury to slaves,

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S.D. Ferrara et al. (eds.), *Personal Injury and Damage Ascertainment under Civil Law*, DOI 10.1007/978-3-319-29812-2_6

as was also specified in detail in the work of the jurist ULPIANO (Book XVIII, Ad Sabinum).

Later, with the fall of the Roman Empire and the hegemony of the Visigoths in Spain, the German influence was evident. After the initial legislation of the reigns of monarchs such as Leovigild, Eurico, Gaudenciano, and Alaric II, Fuero Juzgo emerged (VII century), which valued the injuries not for their functional anatomical severity, but their localization. For example, a head injury was compensated with five sueldos if it was not bleeding and one hundred sueldos if it was. Bishops or "Buenos Ommes" ("good men") were in charge of injury compensation, while physicians or surgeons were not mentioned in any way. Inspired by the aforementioned Fuero was the Fuero Viejo de Castilla of 1250, which established the first scale of compensation for injuries in our country.

With the vindictive principle as the guiding element of compensatory damages, the foundations of civil responsibility and economic compensation were laid—in addition to the regular participation of medical experts as advisers to the administration of justice in the laws of many cities, such as the Fuero Viejo (VI century)—which provided financial compensation for blood—or the Fueros of Escalona (1130), Toledo (1118), and Santa María de Cortés (1180). Even the Fuero Real of Alfonso X (1255) distinguished different financial compensation for bloodshed (a wound which is hemorrhaging or not, which affects the bone or not, etc.).

In the thirteenth Century, there were also historical references, especially in the documentation generated by the Kingdom of Aragon, concerning the existence of doctors who cared for the wounded and assessed their injuries. Thirteenth-century records already mentioned the charge of "doctor of wounded and tormented by justice." King James I "The Conqueror" nominated doctors to those charges in 1259 and 1272. Later in 1418, he had already acquired rights to exercise those. Records show requests sent to Fernando I of Aragon so that a specific person or somebody delegated by him could declare the end of hospital care in Mallorca and that the injured party was out of danger (and to be judged). That is, the creation of a body of doctors specialized in this type of assessment to practice before the courts of justice is sought, which unfortunately has not been achieved in our country. It is worth mentioning here that the "Laws of Style" (1310) were also derived from the law of Alfonso X (XIII century) with references to injury.

The enactment in 1532 of the Constitutio Criminalis Carolina by the Emperor Charles V (King Charles I of Spain) in the Diet of Regensburg, based on the Ordinances of the Bishop of Bamberg the same year, marked the final settlement of medical expert evidence in a Court of Justice when they had to rule on issues of medical biological basis. Formerly, this principle had been recognized at times and with different rulers, such as Charlemagne, the Assises of Jerusalem, or the Organization Chatelet with Prince Felipe, but at the same time a principle was established that has not changed in Spanish law since today: personal injury cases before Justice must always be evaluated by doctors as advisors to the judges.

Shortly before, King Juan of Castilla (1406–1454) issued a Royal Decree by which the Protomedicato was organized in Spain. This institution, very important in american territories next centhuries, was defined at the time by the Royal Academy

as "the Tribunal constituted by protomedicos (doctors of the king) and examiners (teachers) who recognized the sufficiency of those who aspired to be doctors, granting licenses for such activity, assessed the professional liability cases, et cetera."

After 1492, the institution of Protomedicato reached the New World and new Royal Decrees related to the organization of medicine in new colonies began to be issued. They especially aimed to protect the figure of the chief physician, and the need for professional doctors was previously evaluated by these courts. The most important activity in this sense was developed by King Felipe II, who ruled the Protomedicato in "Las Indias" (spanish colonies in America) in 1555, stating that his Court had three essential functions: teaching, criminal (to examine the faults committed by the physicians in the practice of their profession and pursuing quackery), and economic (setting fines for offenses or violations in the practice of medicine).

As Bonnet pointed out (1980), the Collection of the New Laws of the Indies includes the Royal Decree of 11 January 1570 also issued by Felipe II and consisting of a detailed provision regarding the performance of the protomedicos sent to the New World. It especially rules on requirements for professional practice and training and evaluation of new professionals, but there are likewise references to protomedicos' relations with the Administration of Justice:

"It is our will that are required to reside in one of the cities in which any Court and Chancery, a protomedicos chosen by them and who has to hold the office in that city, about five leagues and not outside. . ."

And in cases where medical intervention was necessary to the aid of justice, doctors:

"(. . .) have to make a judgment to accompany one of the judges of the Court.. The Judge is not in a position to arrive at an official verdict without the aforementioned technical opinion (. . .)"

The main Protomedicatos in America corresponded to the most important administrative areas. Thus, a Royal Edict of June 9, 1646, issued by King Philip IV determined the creation of Protomedicatos of New Spain (now Mexico and part of Central American countries) and Peru. In 1776, Carlos III created the Vice-Kingdom of the Río de la Plata, which included the regions of Rio de la Plata, Paraguay, Tucuman, and Cuyo. In 1798, King Charles IV instituted the Protomedicato of Rio de la Plata. Among his duties as a Court, there were a wide range of functions on the regulation of professional activity and public health control, of which we selected the following.

- To inform about medical problems linked to the ecclesiastical, military, naval, and administrative staff.
- To inform the authority concerning soldiers and sailors on sick leave.
- To control the exercise of the medical profession.
- To advise about measures to be taken for sick prisoners.
- The medical examination of imported or sold slaves.
- To advise Justice in forensic setting.

The damage assessment, firmly framed within Legal Medicine, begins to develop conceptually and scientifically throughout Europe in the sixteenth century when physicians often act as experts in law courts. Medicine begins to see differently and highlights what could be of interest to the judge and the law.

In Spain, the figure of Juan Fragoso is worth mentioning, the personal physician of King Philip II and who analyzed the forensic prognosis in his Declaraciones from 1601. Really, these statements correspond to the second part of his "Universal Surgery," with a complementary text entitled: "Tratado de las declaraciones que han de hacer los cirujanos acerca de diversas enfermedades y muchas maneras de muerte que suceden." ("Handbook abour interventions of doctors at the Court in case of illness and deaths") He would be particularly proud of this:

"(. . .) A brief statement in order to ensure that surgeons may assist judges and ministers of justice, in cases of death, sickness, weakness and depravity of any member"

He studied the injures according to the organ or region where they relapse, the patient's disposition, and the weapon that caused the injuries, in order to better illustrate the legal medical prognosis. Juan Fragoso should undoubtedly be regarded as the father of Spanish Legal Medicine.

During the eighteenth century, French enlightenment and revolutionary influences were essential to the development of concepts such as the economic value of the person and principles such as the need for compensation to all individuals. In my opinion, two figures dominate this period: Jean Jacques Rousseau and his Social Contract published in 1762 and Cesare Bonasena, Marquis of Beccaria, and his "About Crimes and Punishment" (1763). Both emphasized the importance of Science in order to achieve a more equitable and modern Justice. These ideas influenced the legislative and expert development in Spain as well.

During the Naturalist Positivism, several works need to be mentioned, but especially renowned in Spain was Pedro Mata and Fontanet, Full Professor of Legal Medicine at the Central University of Madrid (Complutense University of Madrid, today) who developed the National Forensic Medical Corps from the beginning of the nineteenth century. This led to the introduction of a group of medical officers who depended on the Ministry of Justice as permanent advisors to the Spanish criminal courts. Currently, these official experts advise all judges and courts in medico-biological expert reports in both the Criminal Law and the Civil, Labor, and legal citizen's claims against the State.

Since the promulgation of the Organic Law of Judicial Power of 1985 and the regulation in the Autonomous Communities from the year 2000 (in Andalusia, for example, from the decree of 2002), official experts have been reorganized as a collegiate body in the Institutes of Legal Medicine (one per province), dependent on the governments of the Autonomous Communities, with Services of Forensic Pathology, Forensic Medical Clinic, a Laboratory, and a Unit of Evaluation of Gender Violence. Some of them also have specific training agreements with the University Departments of Legal and Forensic Medicine, but not expert activities.

The Institutes of Legal Medicine (IML) were created as technical bodies to aid judges, courts, offices of the Civil Registry, and prosecutors in those areas

belonging to medicine and human biology that fall within the sphere of forensic medical knowledge.

The continuous increase in the rate of events in which the forensic medical intervention was necessary and the high number of them meant that the work became more specialized, and in this way the mere finding of certain features or elements was replaced, in certain circumstances, by assessment and scientific interpretation. All this was accompanied by a remarkable and significant scientific and technical development through research and publications. The process culminated in our country in the late nineteenth century, particularly with the creation of the National Forensic Medical Corps as a result of the work done by Professor Pedro Mata. The creation began with the Health Act of 1855 and was put into practice by Royal Decree of 13 May 1862, by which those with a certain medical forensic training were assigned to the judicial bodies in order to intervene in relation to any such matters.

Unlike the quick evolution of the scientific knowledge and the complexity of the cases that arise in practice, the functional model has remained relatively rigid under the forensic scheme assigned to a Coroner Court or group of courts, and based on individual and unskilled participation, in which one professional had to respond to any question formulated by a court or tribunal. General scientific expertise and Legal Medicine in particular, linked to technological development which requires knowledge and mastery of a range of instruments in order to study and evaluate the cases arising in practice, have led to a new legal medical model more adapted to the characteristics of the present situation, such as is being developed in most neighboring countries.

The Organic Law of the Judiciary (LO 6/1985) already evaluated the creation of the Institute of Legal Medicine, a process that was completed with the new Organic Regulation of the National Forensic Medical Corps by the Real Decreto (RD) 296/1996 of 23 February) and later Regulation of the Institutes of Legal Medicine (RD 386/1996 of 1 March). A Real Decreto is a Law made by the Government that takes effect 30 days after the promulgation (period for the participation of Parliament to approve or eliminate it). Regulations where the new functional organization and structure of Forensic Medicine around the IML were established, according to the criteria of specialization and rationalization of the human and material resources in order to provide a public service of higher quality.

In Andalusia, the Decree of the Concierge of Justice and Public Administration 176/2002 of 18 June constitutes and regulates the Institutes of Legal Medicine of the region, bringing together the philosophy of the above regulations and reflecting the desire to improve the public medical forensic service and make it a mainstay of knowledge in order to shed light on the shadowy circumstances which have always surrounded crime and court cases. The process culminated with Decree 176/2002 of 18 June, which constitutes and regulates the Institutes of Legal Medicine of the Autonomous Community of Andalusia, and the resolution of the Deputy Minister of Justice and Public Administration, who set 15 July 2003 as the date of entry into operation of IMLs Almería, Cordoba, Granada, Malaga, and Seville. Subsequently, by Resolution of the Secretary General for Relations with the Administration of

Justice of 8 June 2004, he set the date of entry of IMLs of Huelva and Jaen (20 and 26 July), and finally through a similar resolution of January 20, 2005, the date of entry of the IML of Cadiz on 25 January of that year was established.

The creation of eight Institutes of Forensic Medicine in Andalusia and the need to establish guidelines and homogeneous criteria throughout led to the creation of the Coordination Committee of the Institutes of Legal Medicine by Decree 95/2004 of 9 March. This rule also creates the Andalusia Council of Forensic Medicine conceived as a representative college of all institutions involved in the training and medicolegal research, where major research initiatives in these areas are proposed and discussed.

From the above regulations and their spirit there are three basic functions developed by IML. Their development will come tempered by the functional organization of the Institute itself in particular and the existence of other institutions that establish specific projects—we refer mainly to universities in general and in particular medical schools—but also to other Departments and agencies we develop functions related to Legal Medicine, such as the Andalusia School of Public Health (Department of Health) or the Andalusia Women's Institute (Ministry for Equality and Social Welfare).

At the same time, within the MIR test (Internist Resident), which is a national examination plus a term of 4 to 5 years (depending on the type of Specialty) of hospital active attendance, capturing the new generations of doctors for the national health network, the Ministry of Health opens every year a call for posts, in order to train specialists in Forensic Medicine in professional Schools at the Universities of Granada and Complutense of Madrid. In the case of Granada, the call includes an agreement for specific training in forensic pathology at the Institute of Legal Medicine of Granada. These specialists are trained in the extra-hospital setting, and, after obtaining their degree, they do not find a job in the Health Network (not including Medico-Legal hospital jobs) or in the Institutes of Legal Medicine (where only graduates who pass the tests for Forensic Medical convened by the Ministry of Justice are accepted). As a consequence, they end up working for Insurance Companies, as temporary employees or in private practice as Forensic Medical experts.

Finally, to work as an expert for a private practice a specialization is required, so many different specialists in Legal and Forensic Medicine, Orthopedics, Psychiatry, Gynecology, Neurology, Rehabilitation, etc., participate in the valuation and compensation process depending on the case. Sometimes that private practice is official, i.e., requested by a judge or court, what especially happens in criminal matters and to teachers and University departments.

The possible participation of all stakeholders in assessment of injury is particularly widespread in the Civil Law, Labor, and Litigation.

Previously, in Civil law only a weak relationship existed of possible permanent pathologies that the injured could suffer, organized into twelve economic categories that ranged between 1–1000 pesetas (1st category) (1 cent—6.00 €) and 200,000–250,000 pesetas (12th level) (ca. € 1,200.00—€ 1,500.00) in known as "Spanish Scale." Each category contained a minimal set of conditions included in

the same, indicating that, if not included on that relationship pathology rating, it would be included in the more related category.

6.2 Identification and Description of Medicolegal Expert's Qualifications

As previously indicated, the medical expert evidence does not require any specialization except a degree in Medicine, as established in the Laws of Spain Procedure (Criminal and Civil). The expertise is understood as a useful judicial tool for both the court and the parties.

The Official experts (Médicos Forenses) do not receive specific training in damage assessment. Some items on the subject are included in the agenda of the test they have to pass. Then, during the brief period before they start to work, they share those tasks that "Medico Forense" exercises, including the review of injured people in Clinics/ Institutes of Legal Medicine.

In the private sphere Medical Specialists and teachers in Forensic and Legal Medicine (who, in turn, tend to be specialists and, in many cases, "Medico Forense" on leave) have indeed been specifically instructed by university professors during a period of at least six months, attending trials, reviewing cases (including participation in scans of patients), and writing appraisal reports of damage, as well as the corresponding theoretical training.

Medical Specialists accede to University Professional Schools of Legal Medicine (only in Granada and Madrid) in order to follow a training program in Legal Medicine during three years and, within it, a specific training in theoretical and practical damage assessment of about six months, other than Forensic Pathology, Toxicology, Psychiatry, and so on. However, these professionals normally go to work in the private sector because there is no space in the Public Health System or the Institutes of Legal Medicine.

Although they are not obliged, the rest of the professionals conduct additional training in damage assessment offered by many universities as postgraduate training, which is a significant economic benefit for them. For example, at the University of Granada I coordinate a Master of more than 500 hours of training in rating Bodily Injury Assessment (including assessment of oral damage psychic, damage, splash damage, damage to the elderly, Orthopedics, Radiology, etc., Practical training with Forensic Medicine, Insurance Companies, Rehabilitation Services, etc). These graduates are generally preferred by lawyers and citizens when they have to go to a doctor for injury report before the judge. Similar courses are held at the Universities of Madrid, Granada, Barcelona, Deusto (Bilbao), Santiago de Compostela, Murcia, etc. Such courses, although with a much more reduced content, are also offered for attorneys and other healthcare professionals, such as physiotherapists.

These options are present both in the judiciary and in the extra-legal field. In the case of Insurance Companies and Mutual of Labor, physicians receive specific

training, sometimes through the companies they work for, but usually through Masters and Courses offered by the universities.

In conclusion, with respect to expert evidence (in bodily damage or other area), the following unfortunate absurdity occurs in Spain: while no one would go to a non-specialist to be operated on for a heart problem or for a serious fracture—these being professional territories reserved only for specialists—it is possible to go to any type of medical expert, without specialized previous formation in medicolegal materials, to obtain information on matters of such gravity and personal and economic impact as we are analyzing.

6.3 Ascertainment Methodology

Logically, damage assessment and its methodology vary in each case. These variations permit access to patient records or not, the examination of the same patient on more than one occasion or on only one occasion, access to additional diagnostic tests (laboratory tests, images, etc.) in order to understand the circumstances of the damage caused, and the previous condition of the patient before suffering the injuries that we should now quantify, in addition to many other elements. It is also different based on the patient's characteristics, taking into consideration very different cases requiring different methodologies. Thus, whether the patient is independent or not, if he/she is an adult, a child, or an elderly person in a coma or with severe neurological disturbances, or if he/she is affected by pathologies or psychiatric trauma. Like the classic and successful citation of "there are no diseases, only the sick," we should add here: there are no expert reports, only cases of people to inform.

There is no official valuation guide in Spain, and the optional ones are part of the most modern texts on the subject in the form of suggested methodology that in no case bind the work of the expert.

However, there is a quite common element which determines the working methodology significantly in Spain: a scale or "barème."

As I pointed out before, the reform of the Penal Code in 1983, in terms of injuries, had several objectives. One of these was to reduce the number of cases of damage to people demanding penal treatment and, therefore, not saturate the Courts of Justice. To that end, a mandatory scale in the assessment of all injuries resultant from traffic accidents was drafted and came into force, which should be compensated by civil responsibility motor-vehicle insurances. It was a "barème" of mandatory application by medical experts but, of course, not binding on the court's decision, but very approximate and influential in establishing that decision and, above all, as a tool of uniformity in the treatment of cases and to facilitate as much as possible the attainment of amicable agreements in the private sector that do not require court, or even civil, intervention. It was a good system structured and conducted by the association of insurance companies (Unión Española de Aseguradoras: UNESPA) that became a reference document to be considerate in

many cases out of the own injured in traffic incidents. In fact, it has so much influence that often we the experts have it in mind when doing data collection, focusing from the beginning on those aspects that the scale contemplates and, therefore, determining what, how, and with which tools we are going to analyze it.

6.3.1 Collection of Circumstantial and Clinical Data

Data collection is primarily achieved through two pathways: the medical history and patient interview and examination.

In most cases, the expert's work is remote with respect to the trauma suffered by the patient. After the accident and the damage, the patient is treated at the hospital and then in care outside, so that when he/she is recovered or arrives to the final status of his process, he/she goes to a lawyer or to a private medical expert.

Criminal, traffic, and other cases are periodically reviewed by the Médico Forense in the Service of Clinical Forensic Medicine into the corresponding Institute of Legal Medicine, but, usually, when the patient is already out of the hospital and is able to visit the Institute, where he/she is generally reviewed each week or month until the Médico Forense thinks that the process is complete, issuing the final Declaración de Sanidad, which includes the total period of disease, the causal link, and the relationship of consequences, if any. Only in exceptional cases, because of their special importance, social significance, etc., will the Médico Forense visit the patient to the hospital before they are discharged from the medical center. Nor does the Médico Forense usually consult the clinical history as a reference document (except, again, in exceptional cases), but the Informe de Alta, summary document that every hospital must give to the patient at the time of leaving the hospital.

6.3.2 Medical Case History

Any source document is valid, but more often it is the complete medical history, especially in the conduct of private valuations to request from the patient represented by counsel. Patients, through the lawyer, can obtain the medical history documents and the hospital sends a copy to the corresponding Court. Citizens have a summary document of his story from the hospital at the end of the hospital treatment.

Médicos Forenses, in the Institutes of Legal Medicine, tend to work with only the discharge report that the patient provides. In particularly complex cases, full medical history is also requested.

For Mutual Insurance Companies or Labor in which the patient has been treated and reviewed regularly by doctors for these companies, Médicos Forenses use the history made by the medical service itself.

In the case of working with the clinical history as a key source it includes not only documents issued by the various doctors who have attended the patient in different departments and units of one or more hospitals but also the corresponding sheets of nursing, laboratory results, X-rays, or other imaging tests, as well as specialized reports (Eco, Electromyography tests, etc.).

The personal and family history must be taken into consideration. Personal history is crucial in order to know those aspects of the patient's health previous to the injury, whose consequences are especially important for us: other traumatic events, previous hospital stays, previous surgery, longer stay in bed at home, and subjection to previous treatment. But also familiar pathologies could be inherited, conditioning the previous health status of the patient. Clarifying this Previous State is essential to establish further appropriate causal links between each of the effects that the patient may have and the trauma or pathology that could give rise to them or influence their evolution until the final status that we are assessing.

Moreover, on a personal level it is considered to be particularly important to know the family situation of the patient (if he/she is married or permanent partner, if he/she has children and their age) as well as social and leisure situation (sports, hobbies, if he/she drives a motor vehicle, if he/she could treat itself in daily basic activities, if he/she was able to meet its social environment, home, participate in household chores, care of the children, etc.).

In this last section, the patient's psycho-emotional conditions have a big influence. Therefore, the existence of pre-trauma psychological or psychiatric disorders will be very important, including the existence of these disorders in the aftermath of the assessment we are performing. Although, as discussed below, a large battery of tests for the assessment can be used, experts usually go to a specialist psychologist or psychiatrist to obtain the most accurate assessment of the patient's situation in this area and the origin of it.

6.3.3 Systematic Clinical and Medicolegal Visit

As I mentioned above, the expert performance of damage assessment in Spain is usually done later in most cases. If the patient is hospitalized, he usually will not be visited nor assessed by the doctor. Moreover, doctors of insurances companies visit regularly the patients at home every week until the final process. When it is a case interested by Médico Forense, patient must present every week in the Institute of Legal Medicine to be revised. In the first case, the information obtained will be in the Assurance Company Documentation and to read it you need a Court authorization. In the second case, Médico Forense writes a short document with information about the evolution of case (Parte de Estado). At the end, the document (Declaración de Sanidad) contained original diagnosis, time of evolution (hospitality and extra-hospitalary), sequels, and its valoration by the berème. The documents after these work produced by the Médico Forense are publics.

When the patient gets the discharge and returns home, although he continues receiving complementary treatments (rehabilitation, periodic reviews in ambulatory situation, drug treatments, etc.), he is also assisted by professional medical services or Insurance Companies and Professionals Mutual (usually at the state level and as a complement to the Public Health Care System). Both types of entities will have taken charge of the patient from the outset if he did not require hospital treatment.

The Médico Forense, who has the option and privilege of going to the hospital at any time and meeting with the patient or their doctors, or to browse the documentation of clinical history, however, does not usually contact him before discharge, but after, when he reviews periodically (ranging from weekly or monthly, as appropriate) and usually reproduces in his progress reports the essential elements already contained in the Informe de Alta or reports derived from queries facilitated to the patient.

In the cases of private experts, the contact does not occur in most cases until the end of both the previous medical intervention (hospital and extra-hospital) and the Médico Forense one, who usually sets the date when the damage is healing, which will serve to set the period of illness which—counted in days—could be compensable.

Of course, we will conduct a thorough internal review, including the classic stages of the same: inspection, palpation, percussion, and auscultation (cardiac and respiratory), with pulse checking and blood pressure assessment. We will evaluate and ask the patient about his or her eating habits, sleep, sexual relationship, and any possible symptoms of apparatus and system, but especially those involved in the traumatic event to be rated and in relation to the sequels observed.

In many cases, the neurological evaluation acquires special significance, assessing progress, position, balance, reflexes status, sensitivity, etc.

The osteoarticular situation will be evaluated both at rest and with activity, either by active and passive movements. This allows us to know the degree of mobility limitations of the patient and which are true articular disorders produced by pain and which are not.

6.3.4 Additional Investigations

In those necessary situations, it will be possible to do clinical studies and complementary-instrumental studies especially when their complexity and/or significance require specialist involvement, as for the followings.

- Eye Disorders.
- Disorders of the ear.
- Complementary imaging tests (X-rays, MRI, CT scans, contrast evaluations. . .).
- Other physical diagnostic tests: ECG, EEG, EMG, ultrasound, etc.

– Psychological and psychiatric diagnostic tests, going to the most appropriate test battery at the discretion of the specialist who performs them.

Generally, these elements are especially important in Spain: when a complementary test is necessary for medicolegal reasons only (i.e., not for clinical aims), because it has not been done before, or because a lot of time has elapsed since it was made and some changes are expected. No differences based on the presence/absence of invasiveness or X-ray involvement are done.

In this case, the Medical Specialist will perform the test and write a report in order to complete the expert report.

6.4 Evaluation Criteria

The assessment criteria vary depending on the legal consequences of the damage. Although the common element of the assessment will include a proper anamnesis and a complete physical exam, including additional diagnostic tests if needed, the aspects of interest to be evaluated by the court change depending on cases with criminal, civil, labor, or administrative consequences. The expert, in sight of what aspects should be emphasized, will decide what information becomes more important and what could be considered as complementary. Other factors to consider may lead to subtle changes in the assessment, including age, gender, family circumstances, habits and hobbies, usual type of work, etc.

In the area of criminal law, in view of the provisions of Article 147 et seq. of the current Penal Code (Law 1995), the medical assessment of the outcome is particularly important, because any damage requiring, in addition to an initial medical assistance, additional assistance with medical or surgical not considering the attentions linked to the first service as a second medical act (e.g., removal of stitches, antibiotic prevention, tetanus prevention, etc.). Medical assessment is even more important in the territory of the offense as an additional burden will be imposed to the imprisonment depending on those medical data which reveal a particularly harmful intent by the perpetrator in view of the result, used weapons (weapons capable of causing serious injuries, even though they do not), or weakness of the victim (e.g., mental incapable or a child under twelve) or given the particular outcome in a series of sequels which are particularly important to the criminal text: sterility, severe deformity, severe somatic or mental illness, complete loss of a sense, etc. Then imprisonment could be up to twelve years.

For the Spanish Civil Law, compensation for damage must have an integral consideration and all damage and all the consequences in all spheres of the victim's life must be compensated. This also requires a comprehensive evaluation, including all possible elements which vary from case to case depending on the personal circumstances of the patient, but possible to be summarized as illness period, final state (sequels), consequences in the workplace, in the family life, leisure, life in relationship with others and prejudice of relief, old prejudice, kid or youth

prejudice, aesthetic damage, need for assistance from a third person, adequacy home environment (including removal architectural barriers), and special means of transport, etc.

In Labor Law the General Social Security Act of 1974 is the reference text. It establishes the basic concepts of Occupational Disease, Work Accident, Sickness and Common Accident, as well as the consequences either as Temporary Disability (with sequels or not that should be compensated, which is set by the scale or barème, as we see below) or as Permanent Disability in different degrees: Partial for routine work, Total for routine work, Absolute for all types of work, and Severe Disability (Gran Invalidez) where the employee will also require the assistance of a third person to develop the basic activities of daily living. For that, the analysis of the charges of the job position in each case and the compliance with the final state of the patient are not inessential.

Law 41 /2004 Patient Autonomy includes the relationship of rights and duties of users of the Spanish Public Health System and considers the possibility of a claim for damages resulting from the malfunctioning of such services, either as a result of equipment malfunction and/or poor professional performance or the wrong organization and intervention health service itself. This will lead to very similar assessments to those reported for the Civil Law, but it is essential to demonstrate that the negative final results for the patient were disproportionate, arising from malfunction or working method, not attributable to a single professional (because, then, we would be talking about malpractice and a claim for criminal or civil medical responsibility) and demanding an unacceptable degree of sacrifice to the user.

6.4.1 Psychic and Somatic State Prior to the Event/Injury

Previous knowledge of the state of the patient is essential. The cause of trauma must face the consequences produced by him/herself or of which he/she is responsible for, but not those others which his/her action did not affect. As a classical concept of Spanish law (common to other Countries): "It will be valued and compensated the damage, all damage, but only damage." That is, the preexisting disease or that produced in other circumstances and causes unrelated to the initial trauma cannot be considered in the assessment, because they should not have any legal consequences.

That will be very easy in those cases where there are no previous pathologies or these have no connection with the trauma and its consequences, so that they can be established without any doubt. At other times, the relationship between the previous state and consequences of injury is clear, being possible to assert that the previous state is not the responsibility of the person who caused the injury, but the relationship between them (for worsening of prior state or worsening of the consequences of the wound). However, there are some few cases where such limits are not possible to establish, it being very difficult to estimate the responsibility for cause

of the injury in the final result (for example, in the classical case of Parodi). The way to establish causal links between trauma and injury outcome, with or without participation of a previous medical condition, will be discussed below in the corresponding section. I can anticipate that the Spanish courts in cases of reasonable doubt question the experts, not being able to identify a clear causal link, in order to establish the more likely causes of damage so as to be able to declare about the legal responsibilities and consequences.

6.4.2 Detailed Reconstruction of the Event/Injury

The study of the traumatic event and its characteristics, the circumstances in which it occurred, and the personal experience of the injured party is usually performed during the anamnesis by a personal interview with the people involved. As noted, this is a remote action subsequent to the post regarding the timing of events. The interview with the expert is usually carried out when the patient has already recovered from the damage—subtracting or not sequels—and claims the compensation through the attorney. It is very uncommon for the expert to have technical information available from the police (in a traffic accident, in aggression, etc.) but he has the initial data contained in health records (report of transfer to hospital by service emergency assistance, first report of emergency department of the hospital). Therefore, the patient's story is essential to clarify and to assess critical aspects such as the followings.

- Circumstances in which the injury occurred (location, time, activity that developed the victim.).
- Immediate symptoms experienced by the patient (loss of consciousness, submission to extraordinary forces, initial attention by the police, witnesses, etc.).
- Circumstances of the transfer to the hospital (immediate or not, by road, helicopter, ambulance).
- Care and initial health status on arrival to the hospital.
- Earliest diagnostic tests and treatments applied.
- Preliminary information provided by the medical staff to the patient or relatives.

Since that first period usually corresponds to phases of unconsciousness or shock states, the additional information at the time of the assessment is particularly important. The closest relatives who accompanied the wounded from the first time of the incident can provide it, especially if the patient has sequels which make it difficult to communicate or remember facts, is a child, or an old man with psychological, memory, or relationship disorders.

From there the medical record, in addition to the statements of the patient and their close family members, will be added as the main source of information pointed out in the medical record.

6.4.3 Personal Injury

From this moment, personal injuries are analyzed carefully, one by one, to study the mechanisms of production, initial symptoms, results of diagnostic tests, treatments applied (with description of surgical techniques applied, placement of osteosynthesis material...), prescribed medication, evolving process, including important issues that required treatment changes or additional actions not provided in principle, evolution during their stays in special service (with particular reference to intensive care units, etc.), studying all developments over the period of hospital stay and, later, outside the hospital: care at home, specialist revisions (Orthopedics, Neurology, etc.) and its evolution, complementary therapies, including periods of rehabilitation (exercises and techniques, application time, frequency of application, total period of treatment, and final progress report after rehabilitation).

6.4.4 Temporary Impairment

In Spain, the assessment of Temporary Disability varies among the different areas of Law. In some of them, as in criminal law, there is no legal interest, but in other areas it acquires an extreme importance.

In labor law the Temporary Disability (TD) ("Baja" or "Invalidez Temporal" = Inactivity) is considered to be the period during which the worker is prevented from addressing the fundamental tasks of their regular work. During this period, the employee receives medical and pharmaceutical cares, in addition to the temporary economic board that allows their subsistence, and is reviewed by his doctor weekly, who reports the course and treatment applied with copies to the worker, the Social Security System, and the worker's company. This period will last a maximum of twelve months, after which the worker will be in one of the following situations: healing and return to his professional activity or assessment of a possible situation of permanent disability. Only in exceptional circumstances can the TD be extended for six months provided that healing is considered very likely to be achieved during this additional period. TD period may also end by the death of the worker or his arrival at the age of retirement. Medical Inspectors (medical corps of the Health National System who have to review disease processes of workers) also may at any time decide to end the situation of TD ("Alta" = Activity) if they agree with the doctor. The disagreement with this decision by the patient could be studied in the Administration of Justice as long as he denounces through his respective attorney (Social Courts).

In civil and administrative cases, TD period or Baja will be counted in days from the date of the accident or the traumatic event to the date when the healing is considered to be produced (with or without sequences). The establishment of the healing time is often the subject of discussion, since it is difficult to define it and there are special situations in which healing is really never achieved. Instead, we

must now speak of stabilization with squeals when the patient requires later treatment and care, but without new medical events of interest.

Periods of TD do not allow distinction between full or partial considerations in TD or percentages (100% or 50% of TD, etc.), making distinction of different levels of TD only in cases of damage from traffic accidents which, as I pointed above and I discuss below, should be evaluated by a specific scale (barème) that considers three different levels of TD.

- Hospital.
- Non-hospital.
- Impeditive.
- Non-impeditive.

"Impeditive day" is when the patient cannot develop both his normal duties and professional ones.

The days of hospital TD are compensated at a rate of an amount of money per day, the outpatient impeditive about 50 % of the above, and non-impeditive around 20 %.

6.4.5 Permanent Impairment

The establishment of the moment to evaluate the Permanent Impairment (PI) is usually done using classical and medicolegal criteria as follows: There is the maximum possible evolution of this disease, the maximum possible treatment for healing has been applied, and the patient can return to full independent living, partially or minimally. There are special situations where the latter condition is not satisfied (for example, in a persistent vegetative state after head trauma leading to a coma of long evolution that requires specialized care hospital for many years), but clinical criteria are accepted to set the time of stabilization (e.g., in the previous case after a year of evolution without serious incidents in hospital) to set the compensation of damages.

After setting the "date of cure," it is possible to calculate the healing period for further compensation and to establish the existing sequels, if any, and to know if they have produced a permanent disability in the patient, which is evaluated in Spanish law with labor law criteria.

The General Law of Social Security recognizes the following PI ratings.

- Partial PI: The worker cannot attend all the functions of his regular work duties, but the essential ones.
- Total PI: Worker cannot handle the burden of their regular work, even the vital ones.
- Absolute PI: Worker cannot face the burden of any work.

– Large Disability: In addition to being unable to work, the worker needs the help of a third party to do the basic tasks of daily living (dressing, grooming, moving, etc.).

In labor law each of these situations deserves the major attention of the social security service when severity increases (greater economic pension, assistance at home, etc.). Normally, when the worker recovers or consumes the maximum of TD, he/she is evaluated by medical and technical committee that decides his/her rating in one degree or another. If the patient does not agree with the qualification, he could lodge a legal complaint.

In the case of damage caused by traffic accidents, the corresponding scale provides a number of criteria to increase the compensation correction. One of these criteria is the partial or total disability for working, considering similar levels to those set for the labor law which deserve a different percentage of increasing, but the judge will always be the one who ultimately decides, if there is no previous agreement, whether to accept it and the amount of increase.

6.4.6 Causal Value/Link

The establishment of the causal link is essential to admit the existence of liability, so the report of the expert is devoted to investigate two conditions.

– The assessment of the relevant causal links between the traumatic event and the initial injuries.
– The assessment of the relevant causal links among the injuries, their consequences, and the consequences produced in all spheres of the victim's life.

Accepting as valid the most common causal theories, the Spanish Law prefers to apply the principle of the appropriate causality and in many cases by an objective criterion in order to establish the leading cause of the injury to the agent of the damage and determine if it is an unlawful case.

In case of damage, the basic reference focuses on article 1902 of the Civil Code ("The person who by act or omission causes damage to another, by fault or negligence, is obliged to repair the damage."). Useful in the courts of law, in the case of the medical assessment of causality, the concept of "most probable cause" in cases when the medicine is not able to specify a particular cause, which usually happens due to the limitations of medical science and the characteristics of harmful actions, as well by multi-causal origin.

6.4.7 Personal Damage Quantification

We need to distinguish the following.

- Quantum for Temporary Impairment: Usually the quantification of TD period is made in Spain by simply counting the days between the date of the event and the date of recovery or stabilization of injuries. Later, in the civil law on TD are compensated at a rate of a monetary amount per day. The great influence that has represented for damage compensation the appearance of scale for compensation for damage caused by road accidents (barème) in Spain, it is used as a reference text in many cases, including those not resulting from traffic accidents. That includes accepting the differences of Table V scale set for the days of TD (hospital and non-hospital days, non-impeditive, and impeditive days).
- Quantum for Permanent Impairment: For PI, the quantification of the consequences is essential and in Spain is carried out with the use of scales of mandatory application, as appropriate.
    - Labor Law: Quantification of anatomical-functional damage suffered by a worker and after healing (including the possible existence of sequels) does not prevent the implementation of the fundamental tasks of their regular work, i.e., does not produce a situation Total PI and becomes totally recovered or in a possible situation Partial IP for their regular work ("no disabling sequels"). He/she is offered reinstatement to his/her regular work or one very similar and in the same company, but with a unique economic compensation (e.g., osteosynthesis material, postsurgical scars, mild loss of mobility, etc.). To do that, Spanish law joined by "Decree of April 15, 1974 as a compensation 'barème' for not disabling sequels in the field of Social Security," the translated version of the Guide for the Evaluation of Permanent Impairment of the American Medical Association.
- This same American scale was also included as a reference by the Ministerial Order of 8 March 1984, which developed the Law 13/1982 on the social integration of disabled people, such as a mandatory tool to quantify deficiencies (genetic or after trauma) that justify the recognition of the situation of disabled people with all the privileges and economic and social benefits that entails. Since it is a well-known document, I do not find it necessary to comment further here.
    - Civil law: It is mandatory in cases of damage resulting from the application traffic accidents popularly known as the "barème of points" or "traffic scale," which emerged in 1984 through the national consortium of insurers (UNESPA) and it has had different versions, being currently in force by the Royal Decree 8/2004, of 29 October, "Law for Civil Responsibility and Assurance of motor vehicles circulation" which contains an appendix entitled "System for assessing damages to people in traffic accidents" It is structured into six sections or tables. The last one (Table VI) contains the "barème," that is, the sequels ordered by organ systems with their corresponding numeric valuation. This tool is also provided for compensation not only for the TD and IP, but also for cases of death, which justifies the appellation: system.

The structure of this document, the latest version of which is appended to this text, is as follows.

Table I: Compensation for death.
Table II: Correction factors for death benefits.
Table III: Compensation for permanent injury (economic value of Points).
Table IV: Correction factors for compensation for Permanent Damage.
Table V: Compensation for Temporary Disability.
Table VI: Classification and Measurement of sequels.

This last table contains the true scale: the ratio of possible consequences, ordered by organs and systems, with an assessment in points (0 points: no damage, 100 points: maximum damage). Normally each sequel is valued in a range, with a maximum and a minimum, within which the expert must explain the reason for the points assigned for each sequel.

The Aesthetic Prejudice receives similar treatment but independent from the rest of the sequels. Considered in five different categories (mild, moderate, medium, large and very important, with a score interval for each), it is assigned the corresponding score, which is studied separately.

Table III transforms the value of each point in an economic value based on two criteria: patient age (point value is higher in younger patients) and the total of damages or point earned (so a patient with many points, with many sequels, receive more value for each point). The value of the points is updated every year by the Ministry of Finance in relation to the minimum wage set by the Government. So, the Table and the system are constantly updated.

Finally, Table IV lists the Corrector Factors, generally to increase economic compensation under judicial decision. The factors to be considered are pecuniary loss, IP (partial, total, absolute, or severe disability), need of home adequacy (barriers elimination), need for adapted vehicle, permanent assistance from other person, etc. Only one factor will be considered for compensation reduction: the co-responsibility of victim producing the trauma event.

A copy of the "Spanish barème of traffic" accompanying this report (Real Decreto Legislativo 8/2004).

6.4.8 Non-Pecuniary Losses

Among the non-pecuniary losses, plus the factors considered into Table IV of Real Decreto legislativo (RDL) 8/2004, the Spanish damage valuation reports usually consider the following losses.

Loss of Welfare: loss of ability to enjoy the pleasures of life. Usually include limitations to practicing sports and leisure activities (dancing, relationship with friends, activities in cultural societies, etc.).

Aging Prejudice: in the case of elderly patients, especially valuing the loss of life expectancy and decrease of quality of life. Frequently, we use scales to quantify the ability to develop basic activities (bathing, dressing, moving independently, etc.) and the instrumental activities (opening and closing doors and windows, dial a

phone number, read a newspaper, shopping at the supermarket, make small tasks at bank, pharmacy).

Youth Prejudice: Valuing separation from family during the hospital stay, impaired growth, decreasing of overall capabilities to develop different activities (loss of potential ability), negative effects on school, limitations to sport and plays.

In our judicial and juridical context the "loss of chances doctrine" (i.e., a heightened risk of death or injury) is contemplated and eventually reported into the report if it is necessary, but no quantification is provided.

These prejudices are generally reported by the expert but the judge or the Court who admits their existence and their economic value in each case.

6.4.9 Pecuniary Losses

The economic consequences of injury and illness (professional income reduction, costs incurred, etc.) are elements beyond medical competence, so that they are evaluated by the Courts, but never by medical experts.

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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