

BEREAVEMENT DAMAGES IN THE EU: ITALIAN LESSONS IN A COMPARATIVE PERSPECTIVE

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Abstract

Background. Compensating non-pecuniary damages can be challenging, as non-economic losses, including bereavement damages, are difficult to quantify in monetary terms. This may lead to unfair outcomes and inefficiencies. Such concerns persist in the literature despite adjudicators' increasing use of guidelines to promote consistency and predictability of damage awards.

Aim. This article aims to provide general indications to lawmakers and adjudicators considering setting up or improving their national frameworks for compensating bereavement damages. The focus is on balancing treating all secondary victims equally and providing personalised compensation based on individual circumstances.

Methodology. To this end, the article reviews the lessons that can be drawn from the recent reform of the Italian system for compensating bereavement damages. The article also comparatively discusses the approaches adopted in other European legal systems that have established formal guidelines for compensating bereavement damages in light of horizontal and vertical equity principles.

Results and conclusions. Among the different approaches to the compensation of bereavement damages that have emerged in several European legal systems, particularly promising seem the approaches that prioritise standardisation, with uniform monetary values accompanied by a closed list of objective and easily assessable personalising factors. This approach can foster horizontal equity and

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efficiency while ensuring satisfactory personalisation, provided sufficient personalising factors are foreseen.

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Keywords

Civil liability – Non-pecuniary damages – Bereavement damages – Standardisation –
Comparative law

1. Introduction

When a person is injured, they have the right to claim damages from the person who caused the injury or their insurance company, provided that all the requirements for

civil liability are met.¹ The purpose of damages is to compensate the victim fully.² This means that the victim should be placed in the same position they were in before the accident occurred. Damages can be divided into two categories: economic and non-economic. Economic damages are quite straightforward to calculate as they cover losses that have a market price. On the other hand, non-economic damages are more difficult to determine as they relate to personal losses that do not have a market price. For example, non-economic damages may include the pain and suffering experienced by the victim due to the injury or the loss of a loved one.³

The gradual expansion of civil liability to protect non-monetary interests is a shared concept in European comparative legal studies.⁴ However, quantifying non-monetary damages is challenging because it requires a judge to assign a monetary value to a loss that cannot be measured financially. Without proper guidance, this process becomes highly subjective and discretionary, leading to what is known as a damage lottery.⁵ This damage lottery can create issues of unfairness and inefficiency. On the one hand, it can result in inequitable outcomes,⁶ both horizontally (with similar losses resulting in different damage awards) and vertically (with different losses leading to similar damage awards). On the other hand, highly variable and unpredictable damage awards make it more difficult for injured parties and those responsible for the injury (or their insurers) to settle disputes outside of court.⁷ As judicial adjudication typically involves

¹ C van Dam, *European Tort Law* (Oxford University Press 2013).

² JCP Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2006) 55 DePaul L Rev 435; R Singh, 'Full Compensation Criteria: An Enquiry into Relative Merits' (2004) 18 European Journal of Law and Economics 223 <https://doi.org/10.1023/B:EJLE.0000045083.39477.bc>; P van Wijck and JK Winters, 'The Principle of Full Compensation in Tort Law' (2001) 11 European Journal of Law and Economics 319 <https://doi.org/10.1023/A:1011260419168>.

³ G Comandé, 'International Juridical Overview on Personal Injury Compensation' in SD Ferrara (ed), *Medicine and Justice* (Springer 2017) 293 https://doi.org/10.1007/978-3-319-67092-8_19; R Zimmermann, 'Comparative Report on Non-Pecuniary Damage' in B Winiger, H Koziol, BA Koch, and R Zimmermann (eds), *Digest of European Tort Law, Vol. 2: Essential Cases on Damage* (De Gruyter 2011) 706; C van Dam, 'Damage and Damages' in C van Dam, *European Tort Law* 301.

⁴ BA Koch and H Koziol, 'Comparative Report' in BA Koch and H Koziol (eds), *Compensation for Personal Injury in a Comparative Perspective* (Springer 2003) 419.

⁵ FD Busnelli, 'Prospettive europee di razionalizzazione del risarcimento del danno non economico' (2001) *Danno e Responsabilità* 5.

⁶ SD Sugarman, 'Tort Damages for Non-Economic Losses: Personal Injury' in M Bussani and AJ Sebok (eds), *Comparative Tort Law* (2021) 324.

⁷ FS Levin, 'Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie"' (1989) 22 U Mich J L Reform 310.

lengthy and costly procedures, this increases the individual costs of compensation and its social costs by contributing to a steady increase in judicial workload.

Adjudicators and lawmakers have developed guidelines or tariffs to address these concerns. These guidelines aim to promote equal treatment (horizontal equity) and personalisation based on individual circumstances (vertical equity). The aim is also to help parties in a dispute settle out of court and reduce the judicial workload. Although the scope of these guidelines has been increasing steadily over time, concerns about a damage lottery in the domain of non-pecuniary damages persist in the literature. This raises the question of how a compensation system can be constructed to promote equity and efficiency.

This article aims to provide some general indications that can help lawmakers, adjudicators, and scholars improve the fairness and efficiency of their systems for compensating bereavement damages. This will be done through a comparative analysis of different compensation models. By comparing the advantages and disadvantages of existing models, lawmakers, adjudicators, and scholars can find inspiration to improve their systems. In particular, it may prove instructive for policymakers to look at the lessons that can be drawn from legal systems that have recently attempted to pursue this two-fold objective.

From this point of view, the recent developments in the Italian law of bereavement damages can offer a starting point of particular interest to European lawmakers, adjudicators, and scholars. As will be seen more in detail below, the Italian Supreme Court, the *Corte di Cassazione* (hereinafter also *Cassazione*), released a series of judgments stating that judicial tariffs used by adjudicators to compensate for bereavement damages should ensure equal treatment and personalisation and set several principles that judicial tariffs should comply with to this end.⁸ In response, the Court of Milan, whose tariffs are widely used nationally in Italy to compensate non-pecuniary damages, revised their tariffs on bereavement damages to comply with the principles established by the *Corte di Cassazione*.⁹ As will be seen more in detail below,

⁸ Cassazione civile sezione III, 21 April 2021, n 10579, commented upon by R Pardolesi and R Simone, 'Il danno da perdita del rapporto parentale: giudice (-legislatore?) in fuga da Milano' (2021) *I Foro italiano* 2017; F Ruggiero, 'Si scrive equità ma si legge prevedibilità: la III sezione ritorna sulle Tabelle Milanesi' (2021) *Nuova giurisprudenza civile commentata* 793; P Ziviz, 'Misura per misura (del danno da perdita parentale)' (2021) *Responsabilità civile e previdenza* 85.

⁹ Osservatorio sulla giustizia civile di Milano, 'Criteri per la liquidazione del danno non patrimoniale derivante da perdita del rapporto parentale – tabelle edizione 2022' (29 June 2022) <[4](https://tribunale-</p></div><div data-bbox=)

while these recent developments somewhat improved consistency and predictability in the awarding of bereavement damages, there is still room for improvement. Considering the limitations of the Italian judicial reform of bereavement damages, this article also includes a comparative analysis of different approaches followed by the guidelines used in other European legal systems, in search for best practices.

Accordingly, this article is divided into four sections. Firstly, it discusses the recent case-law developments related to bereavement damages in Italian law. Secondly, it evaluates the advantages and disadvantages of these developments in the quest for equity and efficiency of damage awards. Thirdly, the article examines the guidelines used by other European legal systems for calculating bereavement damages. Lastly, it draws general conclusions from this comparative analysis that may inspire potential revisions of national mechanisms for compensating bereavement damages.

2. Bereavement damages under Italian law: the Tables of the Court of Rome

At the outset, different guidelines are used by Italian lower courts for the compensation of bereavement damages. The most popular guidelines are the Tables of the Court of Milan, followed by the Tables of the Court of Rome. However, these two Tables follow different methodological approaches. The Tables of the Court of Rome guide the quantification of bereavement damages both in case of loss of a close one and in case of a severe injury suffered by the primary victim.¹⁰ The Table applicable to the loss of a close one assigns a numerical score to the suffering experienced by the secondary victim based on five key factors. The degree of proximity of the secondary victim to the primary victim is taken into account under the assumption that a closer relationship corresponds to more intense suffering for the secondary victim. In the event of the loss of a loved one, the consequences can

milano.giustizia.it/index.phtml?Id_VMenu=1&daabstract=1267> accessed 21 May 2024; G Ponzanelli, 'Le tabelle milanesi, l'inerzia del legislatore e la supplenza giurisprudenziale' (2011) *Danno e responsabilità* 957.

¹⁰ Tribunale ordinario di Roma, 'Tabelle per la valutazione del danno non patrimoniale (anno 2019)' <https://www.tribunale.roma.it/allegatinews/A_24405.pdf> accessed 21 May 2024; R Parziale, A Cisterna, F Martini and M Rodolfi, 'Danno non patrimoniale: le tabelle del Tribunale di Roma - L'analisi della «svolta» nella capitale e lo sviluppo dei prospetti' (2019) 2 *Guida al diritto – dossier* 1; M Rodolfi, 'Il calcolo del risarcimento al tribunale della capitale' (2019) 26 *Guida al diritto* 17. Regarding the competition between the Roman and Milanese Tables, see Tribunale di Roma, 7 February 2019, commented upon by M Gagliardi, 'Il nuovo sistema del danno non patrimoniale e la “guerra” delle tabelle' (2019) I *La Nuova Giurisprudenza Civile Commentata* 920.

be more severe for a younger victim. The impact can last for a more extended period. The relationship between the primary and secondary victims is also taken into consideration. It is assumed that if they cohabitated, the level of interaction was higher, and therefore, the suffering experienced by the primary victim would be greater if this interaction was interrupted. The presence of surviving relatives is also factored in. It is believed that a person left entirely alone, without the support of surviving relatives, will suffer more. A numerical score is calculated based on these factors and multiplied by a predetermined monetary amount to determine the actual amount of bereavement damages to be awarded to the primary victim. However, the award may be reduced if there are other circumstances, such as contributory or comparative negligence.

A similar approach is followed by the Roman Table covering bereavement damages in case the primary victim is (not killed, but) severely injured in an accident. In this case, relevant factors include the degree of proximity between the primary and secondary victims, the number of dependents, and the age of the primary and secondary victims. The resulting numerical score is then multiplied by a coefficient based on the number of relatives entitled to compensation. Subsequently, the result of this calculation is multiplied by a predetermined monetary amount. Finally, the resulting monetary sum is multiplied by the degree of permanent disability of the primary victim of the accident. This leads to the bereavement damage award the primary victim is entitled to (again, with the *caveat* that contributory or comparative negligence may apply and reduce the level of the award).

3. Bereavement damages under Italian law: the Tables of the Court of Milan - and the *Cassazione*

Until June 2022, the Milanese Tables on the compensation of bereavement damages in case of loss of a close one¹¹ followed a different structure, revolving around three columns. The first column listed various categories of personal relationships. The

¹¹ Osservatorio sulla giustizia civile di Milano, 'Tabelle milanesi per la liquidazione del danno non patrimoniale – edizione 2021' (8 March 2021) <https://www.ordineavvocatimilano.it/media/allegati/uffici_giudiziari/TABELLE_DANNO_NON_PATRIMONIALE_2021/OssGiustiziaCivileMI%20-%20Tabelle%20milanesi_Danno%20non%20patrimoniale_ed-%202021.pdf> accessed 21 May 2024.

second column indicated the minimum monetary value of each relevant relationship. Finally, the third column indicated the maximum amount that could be reached for each relevant relationship through personalisation. Similarly structured was the Milanese Table for bereavement damages in case of severe invalidity of the primary victim.¹² This provided a maximum monetary threshold, corresponding to the minimum amount established in the Table for the loss of a close one for each type of family relationship. Unlike the Roman Tables, the Milanese Tables did not refer to the degree of invalidity of the primary victim, assuming that such an element was only relevant to assessing the existence (the *an*) of the right to compensation. In contrast, the harmful consequences for the secondary victims should be considered to determine the quantum of compensation. Both Milanese Tables provided lists of criteria for the personalisation of the damage award, including the presence of surviving relatives, cohabitation between the primary and the secondary victim, and the ages thereof.

As anticipated above, despite its relative popularity among Italian lower courts, the system outlined by the Court of Milan attracted the criticisms of the *Corte di Cassazione* in 2021. By judgment no. 10579/2021,¹³ the *Cassazione* held, in particular, that the Milanese Tables were not well-suited to guarantee equal treatment and predictability in awarding decisions, as they failed to provide clear quantifying instructions besides a minimum and a maximum threshold. Thus, the *Cassazione* outlined several fundamental principles to be adopted when drawing up a judicial table for compensating bereavement damages. In particular, the *Cassazione* stated that, in principle, a point-based system is better suited to promote more consistent and predictable compensatory outcomes, coupled with the possibility of adjusting the final award to the specific circumstances of the individual case.

¹² *ibid.*

¹³ Cassazione civile sezione III, 21 April 2021, n 10579. Along the same lines, Cassazione civile, 29 September 2021, n 26301, commented upon by F Poiatti, 'L'inevitabile complessità del danno non patrimoniale. Una compiuta analisi della Cassazione in materia di danno parentale e morale' (2021) *Danno e responsabilità* 212; Cassazione civile, 10 November 2021, n 33005 and 6 October 2021, n 27130, commented upon by C Ragazzo, 'Tra standard e rule: la via maestra del risarcimento del danno alla persona' (2022) *Nuova giurisprudenza civile commentata* 280.

Following this judgment, the Court of Milan quickly incorporated the *Cassazione's* remarks into their Tables, a revised version of which was published in June 2022.¹⁴ This revised version of the Milanese Tables (hereinafter also the new Milanese Tables) included two tables: one addressing the loss of a parent, a child, or a spouse/partner; the other covering cases of loss of siblings and nieces and nephews. According to the accompanying explanatory note, the new Milanese Tables are not entirely new tables but rather the same table supplemented with a point-based system.

In particular, under the new Milanese Tables, the specific circumstances that were already listed in the previous table are given a specific numerical score: a) the age of the primary victim is assigned up to 30 points; b) the age of the secondary victim up to 28 points; c) cohabitation is attributed up to 16 points; and d) the presence of surviving relatives up to 16 points.

In addition, a fifth, more elastic criterion is introduced. This fifth criterion concerns the quality and intensity of the specific relationship between the primary and the secondary victim, which the new Tables assigns up to 30 points. To assess this last parameter and determine the relevant score, the new Tables provide that both the objective circumstances already mentioned and specific, additional circumstances may be considered. These may include, but are not limited to, circumstances such as how often the primary and the secondary victim actually communicated or met each other and whether or not they shared common interests and hobbies. Finally, the Tables provide a maximum compensation threshold (a cap). However, the Q&As annexed to the Tables¹⁵ add that adjudicators may exceed this cap in exceptional circumstances, such as in case of intentional crime.

Finally, the Court of Milan deliberately failed to develop a new Table for awarding damages in case of severe invalidity of the primary victim due to the lack of a significant sample of awarding decisions in the case law. For such cases, the adjudicator can refer to the Table for the compensation of damages for the loss of a close one, with the appropriate adjustments.

¹⁴ Osservatorio sulla giustizia civile di Milano, 'Criteri per la liquidazione del danno non patrimoniale derivante da perdita del rapporto parentale' (n 9) 4, 7; M Franzoni, 'Le Tabelle milanesi sul danno parentale' (2022) *Danno e responsabilità* 548.

¹⁵ Osservatorio sulla giustizia civile di Milano, 'Criteri per la liquidazione del danno non patrimoniale derivante da perdita del rapporto parentale' (n 9) 13.

4. How do the new Milanese Tables fare between horizontal and vertical equity?

The new Milanese Tables had a mixed reception in the literature. On the one hand, the new Tables were hailed as a positive development in the compensation system for bereavement damage, contributing to more transparent, explainable, and predictable compensation thanks to a more precise listing of relevant criteria and their respective weight.¹⁶

On the other hand, the quantification criteria attracted several critical remarks. First, some noted that several criteria confuse elements pertaining to the *an* (the ‘if’) and *quantum* (the ‘how much’) of compensation.¹⁷ In particular, the new Milanese Tables state that, in exceptional circumstances, such as significant conflicts or litigation between the primary and the secondary victim, or in case the secondary victim had committed violence against the primary victim, the *quantum* of compensation indicated in the Tables may be reduced (even down to zero). However, it was noted that such circumstances should actually bar the secondary victim from claiming compensation in the first place, rather than reducing the compensation amount.¹⁸ Secondly, some inconsistencies were pointed out. For instance, it is not entirely clear why the duration of cohabitation, relevant for brothers and sisters or grandparents and grandchildren, is not mentioned for spouses, parents, and children.¹⁹ In fact, for these latter, a longer duration of the relationship corresponds to lower compensation levels because of the inversely proportional relationship between the age of the victims (parameters A and B) and the amount of compensation.

The new criterion of the quality and intensity of the specific relationship between the primary and the secondary victim (criterion E) also lends itself to some critical remarks. This criterion was presumably introduced to allow adjudicators to personalise the amount of compensation considering the concrete circumstances of each case (in sum, to promote vertical equity in awards). While pursuing

¹⁶ G D’Aietti, ‘Le tabelle a punti del danno da morte: una predittività (finalmente) concreta, misurata e realizzata da giuristi’ (2022) V Foro italiano 284. *Contra*, O Troiano, ‘Il «punto» ... sulle tabelle milanesi del danno da perdita parentale. Liquidazione equitativa del danno nell’età degli algoritmi’ (2022) I Foro italiano 2975, where it is argued that the new Milanese Tables are excessively rigid in their reliance on automatic factors.

¹⁷ G Comandé, ‘Il danno parentale, la riguadagnata centralità delle tabelle milanesi e l’esigenza ...di superarle’ (2022) Danno e responsabilità 554.

¹⁸ *ibid.*

¹⁹ *ibid.*

personalisation (or vertical equity) is essential, it is unclear how this objective can be pursued without clear instructions.²⁰ In particular, in lack of clear instructions, an adjudicator may use a specific factor to personalise the award, whereas another may disregard that same factor. Likewise, an adjudicator may assign a higher monetary value to a particular factor, whereas another may set a lower economic value to that specific factor. Such inconsistencies may ultimately undermine vertical equity (as awards may not be personalised consistently) and horizontal equity (similar cases may attract different damages) in awards. For these reasons, the literature argues that the pursuit of vertical equity requires clarity over the personalising factors and their respective weight on the final award amount.

These concerns apply to how criterion E of the new Milanese tables (the quality and intensity of the specific relationship) was structured. While the new Tables provide adjudicators with some factors, these are not exhaustive. This means that further factors may be used by some adjudicators, which may be disregarded by other adjudicators in similar cases. Also, the weight of each factor in determining the score to be assigned to criterion E (and, therefore, on the final award) is left unspecified. This may also lead to inconsistencies, with different adjudicators potentially weighing the same factor differently.

These concerns find some preliminary support in a few first-instance rulings that have used the new Milanese tables. For example, the judgments of the Court of Naples No. 11235/2022²¹ and No. 2264/2023,²² concerning, among other things, cases of loss of a father, seem to apply the criterion of the quality and intensity of the affective relationship quite inconsistently. In particular, the former decision attributes an average score of 15 points (over a maximum of 30 points) to the relationship between father and children since further information was unavailable that their relationship was more intense than the average. Conversely, the latter judgment assigned, in lack of specific elements, a lower value of 10 points to a father-child relationship.

²⁰ LM Zanitelli, 'Determining Pain-and-Suffering Awards Accurately: General or Case-by-Case Law' (2009) 28 *Quinnipiac Law Review* 183.

²¹ Tribunale Napoli, sezione VI civile 16 December 2022, n 11235, *Archivio giurisprudenziale nazionale*.

²² Tribunale Napoli, sezione IX civile 2 March 2023, n 2264, *Archivio giurisprudenziale nazionale*.

Also, the judgments of the Court of Milan n. 9378/2022²³ and 7180/2022,²⁴ concerning cases of loss of a mother, offer examples of unclear assessments of the quality and intensity of the specific relationship. In particular, in the former judgment, the relationship quality attracted 30 points, i.e. the maximum allowed by the Tables. Conversely, in the latter judgment, the same relationship typology was awarded 28 points out of 30. One can only wonder how one can assess the quality and intensity of a specific personal relationship with such a high level of detail, to the point of telling '30-grade' from '28-grade' mother-child relations.

In conclusion, the point-based system embraced by the new Milanese Tables is likely more suitable for promoting consistency and transparency than the previous system revolving around minimum and maximum monetary value intervals. However, lacking clear instructions on personalisation, this point-based system lends itself to inconsistent applications, as suggested by how the new criterion of the quality and intensity of the specific relationship has sometimes been implemented in the case law.

5. The quantification of bereavement damages in Europe: a comparative overview

The limitations of the new Milanese Tables raise the question of how horizontal and vertical equity can be promoted more effectively concerning bereavement damages. To answer this question, comparative reference to other European legal systems is a valuable source of inspiration for best practices. Indeed, compensation of bereavement damages is a widely discussed topic in the European legal landscape, where an increasing number of legal systems admit the possibility of compensating the suffering experienced (indirectly) by secondary victims due to the death or severe invalidity sustained by the primary victim.²⁵

The following paragraphs provide an overview of the approaches to quantifying bereavement damages in the European legal systems where formalised guidelines have been developed specifically for this specific head of non-pecuniary damages.

²³ Tribunale Milano, sezione X civile 29 November 2022, n 9378, *Archivio giurisprudenziale nazionale*.

²⁴ Tribunale Milano, sezione X civile 16 September 2022, n 7180, *Archivio giurisprudenziale nazionale*.

²⁵ BA Koch, 'The Dynamics of Tort Law in Europe – Two Decades of Accumulated Experience' (2021) *European Tort Law Yearbook* 722. Along the same lines, see O Riss, 'XXXII. Comparative Remarks' (2019) *European Tort Law Yearbook* 746, and S Perner, 'XXXII. Comparative Remarks' (2017) *European Tort Law Yearbook* 714.

Besides Italy, these are, in alphabetical order, Belgium,²⁶ Croatia,²⁷ Finland,²⁸ France,²⁹ Ireland,³⁰ the Netherlands,³¹ Portugal,³² Spain³³ and Sweden.³⁴ Annex I of this article provides a schematic overview of the criteria and amounts indicated in the guidelines in these legal systems. For the sake of clarity, this article does not have the ambition of offering an exhaustive, in-depth analysis of how bereavement damages are compensated across the EU.

At the outset, a feature shared by most systems is that the most critical factor for determining the amount of compensation is generally that of the presumed proximity between the primary and secondary victim, with the provision of higher monetary values in the event of damage to the relationship between partners and between parents and children and lower in other cases. Likewise, damages are usually higher for the loss of a close one compared to cases where the primary victim is severely injured in an accident (but not killed). This is on the reasonable assumption that the former case entails higher suffering for the secondary victim than the latter.

²⁶ 'Indicative Tabel 2020/Tableau indicatif 2020' (2021) 2 T Pol/JJ Pol 83.

²⁷ 'Orijentacijski Kriteriji I Iznosi Za Utvrđivanje Visine Pravične Novčane Naknade Nematerijalne Štete', Su-1331-VI/02 i 1372-11/02 <<https://www.iusinfo.hr/aktualno/u-sredistu/novi-orijentacijski-kriteriji-vrhovnog-suda-rh-za-naknadu-neimovinske-stete-42019>> accessed 21 May 2024.

²⁸ The Personal Injury Commission, *Guidelines of the Personal Injury Commission 2020 regarding the amounts of compensation payable under Chapter 5 of the Finnish Tort Liability Act for pain, other temporary harm, permanent harm, and suffering* (2020) 41 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162880/Personal%20Injury%20comission%20Guidelines%202020_.pdf?sequence=1&isAllowed=y> accessed 21 May 2024. See also P Tiilikka, 'IX. Finland' (2012) European Tort Law Yearbook 212.

²⁹ B Mornet, *L'indemnisation des préjudices en cas de blessures ou de décès* (2021) 83. See also M Viglino, *L'indemnisation des préjudices en cas de décès de la victime directe* (Presses Universitaires Savoie Mont Blanc 2020); Y Quistrebert, 'Le respect du principe de la réparation intégrale assuré par la distinction des souffrances psychologiques de la victime par ricochet' (2019) *Responsabilité civile et assurances* étude 9.

³⁰ Section 48, Civil Liability Act 1961. BME McMahon and W Binchy, *The Law of Torts* (Bloomsbury Professional 2013), chapters 41 and 42; E Quill, *Torts in Ireland* (Gill & Macmillan Ltd 2014) 498.

³¹ EGD van Dongen and ALM Keirse, 'XIX. The Netherlands' (2020) European Tort Law Yearbook 409.

³² Annex II Portaria, 25 June 2009, n 679 <https://dre.pt/dre/detalhe/portaria/679-2009-491971> (accessed 25 October 2023).

³³ 'Tablas indemnizatoria Baremo 2021', Tabla 1.A <<http://www.dgsfp.mineco.es/es/Regulacion/DocumentosRegulacion/Tablas%202021.pdf>> accessed 21 May 2024. See also E Karner, 'Quantification of Moral Damages in Personal Injury Cases in a Comparative View' in H Koziol and U Magnus (eds), *Essays in Honour of Jaap Spier* (Jan Sramek Verlag 2016) 125.

³⁴ Trafikskadenämnden, Cirkulär nr 1-2023, Annex 7 (2023 års ersättningsnivåer för skadefall från och med 2002) <<https://www.trafikskadenamnden.se/siteassets/2.-skadereglering/tabeller/skador-fran-och-med-2002/bilaga-7-2023-ars-ersattningsnivaer-for-skadefall-fran-och-med-2002.pdf>> accessed 21 May 2024. See also S Friberg, 'XXVIII. Sweden' (2021) European Tort Law Yearbook 617.

Conversely, national systems diverge wildly on how to balance the pursuit of equal treatment and personalization and on how standardised amounts are put in relation to judicial discretion to this end. In this respect, the national systems can be grouped in two main approaches.

The first approach is mainly based on fixed sums assigned to different typologies of relationships between the primary and the secondary victims, based on the presumption that the closer the relationship between them, the higher the suffering for the secondary victim (and the corresponding award). In Belgium, the *Tableau Indicatif / Indicatieve Tabel*³⁵ assigns specific amounts, ranging from 1,500 to 24,000 euros, to different types of relationships, based on the presumed intensity of the personal relationship between the primary and the secondary victim. The amounts are higher in the case of cohabitation between the primary and secondary victims. The highest amount is provided for the child who loses both parents. The sums indicated in the *Tableau / Tabel* may be flexibly adapted by the adjudicator based on the specific circumstances of the individual case.

Less detailed are the guidelines developed by the Croatian Supreme Court in 2002 and revised in 2020.³⁶ The Croatian Orientation Criteria provide for fixed amounts for certain types of relationships, both in the event of death and in the event of severe disability of the primary victim. The figures vary from 75,000 to 220,000 Croatian *kuna*.

While judicial adjudicators have developed the Belgian and Croatian guidelines, the Dutch system mainly relies on the legislative formant.³⁷ This system, which the Dutch legislator outlined in 2018-2019, assigns fixed amounts to a series of personal relationships, with amounts ranging from 12,500 to 20,000 euros, based on the presumed intensity of the relationship between the primary and secondary victim and depending on whether the case at hand is crime-related or not. The higher figure of 20,000 euros is foreseen for the interruption of most personal relationships. In contrast, the lower figure of 15,000 euros applies in the event of the death of children or parents who no longer live together. Compensation is provided not only in the event of the death of the primary victim but also in the event of a severe personal

³⁵ 'Indicatieve Tabel 2020/Tableau indicatif 2020' (n 26) 83.

³⁶ 'Orijentacijski Kriteriji' (n 27).

³⁷ 'Besluit van 20 april 2018 tot vaststelling van bedragen voor nadeel van naasten dat niet in vermogensschade bestaat' (Besluit vergoeding affectieschade).

injury (which includes but is not limited to, 70% permanent personal invalidity). The figures foreseen in the event of death are higher than those indicated for cases of severe personal injury.

Normative in nature is also the Spanish *Baremo* for road traffic accidents.³⁸ This latter, like the guidelines referenced above, assigns different monetary sums to other kinds of personal relationships. Amounts vary from 10,535.48 to 94,819.28 euros. Alongside these basic figures (*perjuicio personal basico*), the *Baremo* provides for additional sums or fixed percentage increases in the presence of specific circumstances (*perjuicio personal particular*). The circumstances that can lead to a rise in the award include cohabitation between the primary and secondary victims, the death of the only parent, or the death of both parents in an accident. Finally, adjudicators can increase the award by up to 25% in exceptional cases, which the *Baremo* leaves unspecified.

Finally, the Swedish model is highly standardised.³⁹ In particular, compensation for losing a close one is usually 30,000 crowns (approximately 3,000 euros). However, in the case of voluntary homicide, compensation is doubled (thus amounting to 60,000 crowns, i.e. about 6,000 euros).

Other legal systems follow a different quantification approach based on intervals of monetary values, ranging between a minimum and a maximum. The French system⁴⁰ offers an example of this approach. In particular, in case of loss of a parent, different intervals are envisaged depending on whether the surviving son/daughter is a minor (from 25,000 to 30,000 euros) or an adult and, in the latter case, whether or not he or she was living together with the primary victim (respectively, from 15,000 to 25,000 euros and 11,000 to 15,000 euros). An increase in compensation of 40 to 60% is also envisaged in favour of a son/daughter who has lost both their parents. Cohabitation (or the lack thereof) leads to different intervals of monetary values in the relationships between brothers and sisters. In contrast, in those between grandparents and grandchildren, the frequency of contact between them modifies the award level. The

³⁸ 'Tablas indemnizatoria Baremo 2021' (n 33).

³⁹ Högsta domstolen, 26 February 2021, Nytt Juridiskt Arkiv (2021) 46; Högsta domstolen, 29 December 2020, Nytt Juridiskt Arkiv (2020) 1142.

⁴⁰ Mornet (n 29). Cour de cassation, Chambre civile 2, 11 February 2021, n 19-23525, ECLI:FR:CCASS:2021:C200118; Cour de cassation, Chambre civile 1, 7 October 2020, n 19-17041, ECLI:FR:CCASS:2020:C100536; Cour de cassation, Chambre civile 1, 24 October 2019, n 18-21339, ECLI:FR:CCASS:2019:C100872.

intervals foreseen in the latter cases are lower than those proposed for relationships between parents and children. In the event of damage to emotional ties not foreseen in the table, the compensation cannot exceed, except in an entirely exceptional way, 3000 euros.

The Portuguese *Portaria* for road traffic accidents⁴¹ is inspired by a similar model, where the judge can quantify the compensation in favour of the secondary victim up to a maximum sum (a cap) of a variable amount depending on the presumed intensity of the emotional relationship. The highest cap is 25,000 euros and is foreseen in the event of losing a spouse after 25 or more years of cohabitation. Furthermore, circumstances are listed that allow the amount to be paid to be increased up to a maximum percentage. The most significant increase is up to 150% and is foreseen in the particularly dramatic case in which a minor son or daughter loses both parents in the same accident.

Compared to the French and Portuguese instruments, the Finnish guidelines⁴² are decisively more standardised, providing for different intervals depending on the relationship between the deceased family member or partner and the secondary victim. The lowest range is foreseen in the case of the death of a brother or sister (from 2,000 to 8,000 euros), whereas the highest range applies to the loss of a parent (from 3,000 to 15,000 euros). The guidelines do not make the criteria for determining the amount of compensation within the respective ranges explicit.

Finally, the Irish system⁴³ is an outlier in the divide between the abovementioned models. Indeed, access to bereavement damages is restricted to the dependents of the primary victim, and only one action for damages for wrongful death can be brought against the injurer. The compensation, which cannot exceed a cap of 35,000 euros, is to be divided among the dependents of the primary victim in proportion to the damage suffered by each of them.

⁴¹ Portaria 25 June 2009, n 679, Annex II. See also J Bernardo, 'O "Quantum" Indemnizatório Relativamente aos Danos Pessoais' (2019) *Revista de Direito da Responsabilidade* 971.

⁴² The Personal Injury Commission, *Guidelines of the Personal Injury Commission* (2020) 41.

⁴³ Sections 48 and 49, Civil Liability Act 1961. McMahon and Binchy (n 30) chapters 41 and 42; E Quill, *Torts in Ireland* 498.

6. Comparative remarks

To summarise the review conducted above, the first group of approaches provides fixed sums for different categories of personal relations, with different roles played by judicial discretion across different legal systems. Some guidelines are purely indicative, which means that the adjudicators are, in principle, allowed to diverge from the guidelines' instructions (as in Belgium and Croatia). Conversely, other guidelines are more restrictive of judicial discretion, where basic amounts and personalisation factors (and their respective weight) are binding and made more explicit (as in the Netherlands and in Spain, although with very different degrees of room for personalisation). Instead, the second group of legal systems restricts judicial discretion within intervals of value. However, within these intervals, adjudicators enjoy broad discretion in setting the exact award.

Against this backdrop, the approach based on intervals of minimum and maximum values (as emerging in France and Finland) may lend itself to inconsistent and unpredictable decision-making for compensation amounts. This is because it lacks clear awarding instructions besides indicating a minimum and a maximum threshold. This critical remark may also be extended to the Portuguese and the Irish systems, where adjudicators are not given specific instructions on quantifying damages under a maximum threshold.

Conversely, thanks to more precise and transparent instructions, the systems belonging to the first group of compensation approaches (Belgium, Croatia, the Netherlands, Spain, and Sweden) have the potential to promote consistency and predictability of bereavement damages more effectively. However, this statement should be nuanced, considering the specific characteristics of each guideline. In particular, as already stated above, the Belgian and Croatian guidelines are purely indicative, which means that adjudicators are not bound to their instructions and can diverge from these quite freely. This degree of flexibility may help adjudicators account for the specific features of each case. However, as already argued above, if not properly guided, judicial discretion may lend itself to potential issues of inequity and unpredictability in awards.

More binding systems, such as the Dutch and Spanish ones, seem better suited to contribute more effectively to fostering consistency and predictability. This is also because both guidelines clarify which factors affect damage award and to what extent.

In this respect, the two guidelines display substantial differences in terms of room for personalisation. In particular, while the Dutch guidelines rely on a few factors, which in turn lead to limited increases in the award, the Spanish ones are much more analytical, with numerous personalising factors, many of which warrant even significant increases in the level of the award. Despite these differences, the personalisation factors listed in both the Dutch and Spanish guidelines share some common characteristics. In particular, they all refer to objective elements that parties can acquire easily and that are indicative, for the secondary victim, of a more intense moral suffering arises (e.g., cohabitation, which is mentioned in both guidelines) or a more extensive impact on their daily life (e.g., in case of the loss of both parents by the minor child, as mentioned in the Spanish *Baremo*).

This approach of relying on objective and easily acquirable factors to guide personalization also emerges in guidelines that present a different structure (e.g., the French tables, where the intervals of monetary values change based on factors such as cohabitation or the age of the secondary victim) or that have a similar structure but are indicative only (e.g., the Belgian *Tableau / Tabel*, which proposes different, indicative sums based on objective factors such as cohabitation). Conversely, reference to more subjective factors (e.g., the ‘internal’ suffering actually experienced by the victim) or objective factors that are, however, costly to assess accurately (e.g., hobbies shared between the primary and secondary victims)⁴⁴ is generally avoided.

This approach, which, in essence, attempts to standardize the personalisation of bereavement damages, displays two main advantages. First, from a horizontal equity perspective, it can promote equal treatment between similar cases decisively. Secondly, it is a pragmatic approach, leveraging objective factors that can be easily acquired by the parties to a dispute, avoiding considering elements or aspects the assessment of which tends to be excessively costly, subjective, and ultimately unpredictable. These features can inspire a predictable and efficient system capable of facilitating the out-of-court resolution of disputes to benefit both the parties and the judicial workload.

⁴⁴ Both examples come from the new Milanese Table, where they are included in the list of factors adjudicators should consider when assessing the quality and intensity of the personal relation between the primary and secondary victims (criterion E).

On the other hand, the objection may be made that such an approach may prove excessively rigid and undermine vertical equity. This is because no guidelines can possibly foresee all the circumstances that may be relevant in the specific case. Therefore, a closed list of personalising factors will always miss potentially relevant factors, thus preventing the optimal personalisation of bereavement damages.

Two counterarguments can be advanced against this objection. First, the objection presupposes that unrestricted judicial discretion ensures optimal personalisation or vertical equity in damage awards. However, as already argued above (with some supporting evidence from the Italian case law), a lack of precise instructions on the relevant personalising factors and their monetary weight may, in fact, negatively affect vertical (and horizontal) equity. Secondly, while it is true that a closed list of personalising factors can hardly ensure *optimal* personalisation, a *satisfactory* level of personalisation may still be achieved. This is provided that enough relevant discretionary criteria are listed based on an analysis of available historical-comparative data (whereas guidelines relying only on a few personalising factors are probably too rigid).

7. Conclusions

The recent developments occurred in the Italian law of bereavement damages can provide useful insights to policymakers considering reforming their own systems and make them more suitable to promote equity and predictability in damage awards. In particular, the new Milanese Tables (and the way lower courts have been applying them) suggest that, to pursue horizontal and vertical equity, it is not sufficient to foresee quantification criteria. These should also be structured in a way that they convey clear guidance to adjudicators regarding relevant factors and their respective weight on the final award.

The comparative review of the European legal systems conducted in this article suggests that a potential source of inspiration for good practices is offered by those systems that prioritise damage standardisation via a basis of uniform monetary values, accompanied by a list of personalising factors that are objective and easy to assess. Indeed, such an approach has the potential of fostering equal treatment and a (probably not optimal but a) satisfying level of personalisation, provided a sufficient

number of personalising factors are foreseen in the guidelines. Critical reference to the factors referenced in the case law, complemented by a comparative outlook, can offer a valuable source of inspiration to this end.

Annex I

Belgium - Tableau Inficatif / Indicatieve Tabel (2020)	
In favour of spouse, registered partner, or unregistered yet cohabiting partner for loss of respective partner	15000 €
In favour of son / daughter for loss of parent, and vice versa	Cohabiting: 15000 €
	Not cohabiting : 6000 €
In favour of orphan, cohabiting son / daughter for loss of parent	24000 €
In favor of parent for loss of foetus	3000 €
In favour of brother / sister for loss of brother / sister	Cohabiting: 3000 €
	Not cohabiting: 1800 €
In favour of grandparent for loss of grandchild, and vice versa	Cohabiting: 3000 €
	Not cohabiting: 1500 €

N.B. The amounts indicated above do not bind adjudicators. Further secondary victims may be entitled to bereavement damages provided a specific and stable relationship with the primary victim is established.

Croatia - Orijentacijski Kriteriji (2020)

In favour of spouse or cohabiting partner for loss of spouse or cohabiting partner	220000 HRK
In favour of parent for loss of son / daughter	
In favour of parents for loss of foetus	75000 HRK
In favour of son / daughter for loss of parent	150000 HRK
In favour of brother / sister for loss of brother / sister	75000 HRK

N.B. The amounts indicated above do not bind adjudicators.

Finland - Personal Injury Guidelines (2020)

In favour of parent for loss of son / daughter	3000 - 12000 €
In favour of son / daughter for loss of parent	3000 - 15000 €
In favour of brother / sister for loss of brother / sister	2000 - 8000 €
In favour of spouse, registered partner, or unregistered yet cohabiting partner for loss of respective partner	3000 - 11000 €

France - Référentiel Mornet (2022)

Spouses, registered partners, unregistered yet cohabiting partners	20000 -30000 €	
In favour of son / daughter for loss of parent	Minor son / daughter	25000 -30000 €
		Son / daughter that is already an orphan: increase from 40% to 60%
	Adult son / daughter	Not cohabiting : 11000 -15000 €
		Cohabiting : 15000 -25000 €
In favour of parent for loss of son / daughter	20000 -30000 €	
In favour of grandparent for loss of grandchild	Frequent contacts: 11000 -14000 €	
	Unfrequent contacts: 7000 -10000 €	
In favour of grandchild for loss of grandparent	Frequent contacts: 6000 -10000 €	
	Unfrequent contacts: 3000 -7000 €	
N.B. Further secondary victims are entitled to bereavement damages only if they prove a specific affective relationship that warrants compensation, which can only exceptionally exceed 3.000 €.		
Ireland - Section 49, Civil Liability Act		
In favour of <i>dependents</i> of primary victim	Up to 35000 euro, to be apportioned among the <i>dependents</i>	

The Netherlands - Besluit vergoeding affectieschade (2018)		
Spouses and registered partners	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Unregistered yet cohabiting partners	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime 17500 €
Minor sons / daughters and parents	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Adult cohabiting sons / daughters and parents	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Adopted sons / daughters and parents	Death	17500 €
		In case of crime: 20000 €
	Lesioni gravi e permanenti	15000 €
		In case of crime: 17500 €
	Death	15000 €

Adult, not cohabiting sons / daughters and aunts		In case of crime: 17500 €
	Severe and permanent injury	12000 €
		In case of crime: 15000 €
Family care	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Further close personal relations	Death	15000 €
		In case of crime: 17500 €
	Severe and permanent injury	12500 €
		In case of crime: 15000 €
Portugal - Portaria, Annex II (2009)		
In favour of spouse	More than 25 years of marriage: up to 25650 €	
	Less than 25 years if marriage: up to 20520 €	
In favour of son / daughter	Equal or minor of 25 years old: up to 15390 €	
	More than 25 years old: up to 10260 €	
In favour of grandchild or other descendents	Up to 5130 €	

In favour of parent	For child aged 25 or younger: up to 15390 €	
	For child older than 25: up to 10260 €	
In favour of grandparent (in lack of parent)	Up to 7695 €	
In favour of other ancestors or collaterals (in lack of parents and grandparents)	Up to 2565 €	
In favour of brother / sister	Up to 7695 €	
Increases (examples)	Only child: up to 25%	
	Loss of more than one child in the same accident: up to 50%	
	Loss of all children in the same accident: up to 100%	
	Children under the age of 18 who remain orphans of a second parent: up to 100%	
	Children under the age of 18 who lose both parents in the same accident: up to 150%	
N.B. <i>Portaria</i> does not bind adjudicators		
Spain - Baremo (2022)		
In favour of widower	Until 15 years of cohabitation	Primary victim younger than 67 years: 94819,28 €

		Primary victim between 67 and 80 years old: 73748,33 €
		Primary victim older than 80 years: 52677,38 €
	For any additional year of cohabitation	1053,55 €
In favour of ancestors	In favour of parent	Son / daughter of 30 years old or younger : 73748,33 €
		Son / daughter older than 30 years: 42141,90 €
	In favour of grandparent, only if parent of their family branch dies beforehand	21070,95 €
In favour of descendants	In favour of son/daughter younger than 14 years: 94819,28 €	
	In favour of son/daughter between 14 and 20 years old: 84283,80 €	
	In favour of son/daughter between 20 and 30 years old: 52677,38 €	
	In favour of son/daughter older than 30 years: 21070,95 €	
In favour of brother / sister	In favour of brother / sister up to 30 years old: 21070,95 €	
	In favour of brother / sister older than 30 years: 15803,21 €	

In favour of each <i>allegado</i>	10535,48 €	
Increases (examples)	Cohabitation (examples)	In favour of parent, if son/daughter was older than 30 years: 31606,43 €
		In favour of son/daughter older than 30 years: 31606,43 €
	Secondary victim has no other surviving close ones: 25%	
	Loss of the only parent	In favour of son/daughter up to 20 years old: 50%
		In favour of son/daughter older than 20 years: 25%
N.B. If harm is exceptional, adjudicator can increase award up to 25%. <i>Baremo</i> is binding for road traffic accidents and advisory for other cases.		
Sweden - Cirkulär nr 1-2023 and Supreme Court 29 December 2017		
Person that was particularly close to primary victim (spouse, cohabiting partner, parent, child)	Death caused not voluntarily: 30000 SKE	
	Death caused voluntarily: 60000 SKE	

