

Collective Moral Damages in Chilean Consumer Law: Current Situation and Projections

Daño moral colectivo en el derecho del consumo chileno: Situación actual y proyecciones

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Abstract

The work presented aims to analyze the current state of moral damages in collective or diffuse procedures resulting from the implementation of Law No. 21,081 that reforms the Consumer Protection Law No. 19,496. We start with a general overview of moral damage, differentiating between individual and collective interests. Later, we assess the modification introduced by article 51 No. 2 of the Consumer Protection Law, which conceptually restructured the origin hypothesis: physical and psychological integrity and the dignity of consumers. The assessment becomes critical due to the legislator's understanding of legal assets that generate compensation and collective interests, thus concluding that the suitable path, in order to talk of collective non-pecuniary damages - in a more refined sense - can be constructed by an adequate notion of dignity within the context of consumer relations.

Key words: *Collective moral damages; collective interests; moral damages; dignity; compensation.*

Resumen

El trabajo que presento tiene por objetivo analizar el estado actual del daño moral en los procedimientos de interés colectivo o difuso con motivo de la reforma implementada por la Ley N° 21.081 a la Ley de protección del consumidor N° 19.496. En primer lugar, se efectúa un examen general del daño moral distinguiendo sus ámbitos de aplicación respecto de intereses individuales y supraindividuales. Posteriormente, se examina la modificación introducida al artículo 51 N° 2 de la Ley de protección del consumidor, mediante una reconstrucción conceptual de las hipótesis de procedencia: integridad física, psíquica y la dignidad de los consumidores. El examen se torna crítico por la comprensión que el legislador tiene de los bienes jurídicos que dan lugar a la reparación y de los intereses supraindividuales, llegando a la conclusión que el camino idóneo para hablar de daño moral colectivo en un sentido más depurado se puede construir a través de una adecuada noción de dignidad en el contexto de las relaciones de consumo.

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Palabras clave: *Daño moral colectivo; intereses supraindividuales; daño moral; dignidad; indemnización.*

I. INTRODUCTION

Moral damages in Consumer Law has gained importance in the last years from both a theoretical and practical perspective. Regarding the latter, consumer case law, which is anchored in the general evolution of contractual moral damages of civil case law,¹ has made important efforts to categorize and delineate it, at least in individual interest disputes, thus creating a relatively consolidated current state of affairs.

Given the express recognition of the origin of moral damages in Consumer Law (hereinafter LPC) – affirmed in article 3° letter e) of Law No. 19,496 about consumer rights protection – herein forth LPC, the argument to concede said reparation has not presented complexities for judges. In reality, however, the actual problem involves the concept and delineation mechanisms of this compensation criterion, which have not yet found a dogmatic or a case law solution.

Regarding the concept, there are a few definitions that are somewhat consolidated in civil dogmatics,² although courts have a broad notion of moral damages and thus place it on a subjective plane, focusing on the pain or suffering experienced by the consumer which was caused by the providers non-compliance. Indeed, this theory stems from the interpretations

¹ Some examples of relevant rulings in contractual non-material damage which changed the paradigm are: *Rafart v. Banco de Chile* (1994) and *Ruiz v. Laboratorio Biológico and others* (2004). Paragraph 17° indicates: “The cited article 1556 of the Civil Code, as was previously established, does not limit the reparation in contractual affairs to emerging damage and loss of profit, thus it does not exclude moral damage”.

² For example, Alessandri defines moral damage as: “pain, sorrow or discomfort that a person suffers physically or in their feelings, beliefs or affections”. ALESSANDRI RODRÍGUEZ (1943), p. 220. According to Professor Enrique BARROS moral damage involves different application scenarios that do not have a clear-cut expression. In fact, he states that “What is true is that “moral damage” tends to obscure the question regarding the kind of damage they refer to. Indeed, the idea of a “moral” damage correctly alludes to the injury of assets such as honor and privacy, but only imperfectly expresses other non-material damages, like – for example – physical pain, psychological anxiety or the loss of opportunities to live a good life” BARROS BOURIE (2006), p. 231. In the same vein, Professor Carmen Domínguez indicates that “we stand with those who view non-material damage in the broadest possible sense, thus including the damage to the person itself – be it physical or psychological -, as any attempt against their extra-patrimonial interests. Thus, moral damage comprehends any detriment to the human body, considered as a value in its own right regardless of the economic implications.” DOMÍNGUEZ HIDALGO (2000), p. 83. In Spain, we can mention, for example, MARTIN-CASALS *et al.* (2003), p. 858, who state that “non-material damage is the damage that a person experiences and that does not affect their wealth, their income and cannot be measured economically in terms of market value”; Diez-Picazo affirms that “we are inclined to understand that non-material damage has to be reduced to the psycho-physical suffering or disturbance a person experiences, without resorting to broad conceptions in which compensation lacks justification. Even though it is conceived in the strictest of terms, not all psycho-physical suffering produces moral damage that can be compensated, only (...) that which is a consequence of the injuries done to personality rights”. See DIEZ-PICAZO (1999), p. 328.

of the courts which exacerbate the subjective notion when in reality it is an infringement of consumers' rights.³

Bearing this in mind, however, the purpose of this study is to refer to *collective moral damages* implemented with the reform of the LPC through Law 21,081, a norm which recognizes the provenance of this kind of reparation in collective and diffuse interests, as stated by the new article 51 No. 2.

In this scenario we can identify a few problems that directly influence the understanding of this institution, which we will look at with more or less intensity. First, there are problems regarding the effective compensation of moral damages (as well as material damages) in collective interest cases, given that the principles that inspire civil liability tend to exclude compensation (in its pure sense) to undetermined groups. The second matter refers to the way in which the Chilean Consumer Legislator understands collective moral damages. At first glance it seems to be a hybrid category that does not respond to the technical concept of collective damages, but rather to a mix of individual and collective interests based on the origin hypothesis.

II. COLLECTIVE MORAL DAMAGES

Collective moral damages is a special dogmatic category within the general institution of moral damages, stemming autonomously from a double perspective. The first considers it so as to differentiate between the damages a person can experience on an individual plane, regarding others that tend to be linked to a more or less defined collectivity or group of individuals. The second sees it as a response to the considerable change consumer relations have had in a supra-individual sense, in which one or more providers intertwine their activity with a significant number of people –considered as a whole – who are affected by the consequences resulting from the violation of their rights or interests. However, the question that naturally arises is how should collective moral damages be understood?

2.1 What is collective moral damages?

We can initially argue that there is no complete or absolute definition of moral damages within the context of consumer relations, or of collective moral damages. Although we can resort to consumer case law in order to have an idea of what is discussed in judicial

³ *Muñoz v. Administradora de Supermercado Express Limitada* (2012), par. 9°: “Having proved that the provider committed an infraction of article 23 of the cited law, given that they acted negligently in the service provided to the consumer, and that said action evidently resulted in moral damage, which is discomfort and suffering they experienced on account of the loss of their vehicle (...)”. The same idea was reiterated by the Concepción Appellate Court, which stated that: “Moral damage is the feeling of discomfort and disturbance, frustration and feeling of deception experienced by the buyer when she came to the realization that the product, she purchased was not new, when she had been led to believe that it was (...)”. See *Fredes con Multitienda Corona S.A.* (2013), par. 5°.

practice of individual cases, civil dogmatic has made some efforts to delineate it and establish some conceptual parameters.⁴

The central axis of this concept lies on the notion of *interest*. Thus, as we know, the victim's affected *interest* is an independent category to that of the harmed legal asset. Therefore, a person's non-economic interest can be damaged, regardless of the specific nature of the affected asset, good or right. In other words, regardless of whether it is patrimonial or extra-patrimonial.⁵

In *collective moral damages* we must first stress that it is placed on the *supra-individual* interests' plane, and as such it cannot rely on the personal repercussions that affect the members of the injured group. In other words, the individual effects (regardless of their nature) caused by the illicit act are not necessarily linked to the normative concept of collective moral damages. Therefore, collective damages can exist even though the people who form the collectivity have no pain or suffering.⁶ Collective and individual damages can mutually coexist without losing their own independence.

In this sense –given that (moral) collective damages is an autonomous injury regarding the individual repercussions that the members of the collectivity can experience– it tends to be separated in degrees as well as in a qualitative sense. Traditionally moral damages has been intimately linked to a person, to their individual self and essential faculties, which gives it a personal non-transferable nature.⁷ However, collective moral damages veers away from that trait in a way, given that the normative framework of its application is different. It is no longer about the anxiety, pain, suffering, discomfort or unease that affects an individual, or about the pain being experienced by many people; it is actually about the injury of a group

⁴ Scholars have defined non-material damage in the context of consumer relations as: “(...) detriment or injury that affects a person's moral interest, which includes their physical and psychological integrity as well as – for the same reason – a series of incorporeal elements of a spiritual nature as well as a certain quality of life within a particular context” [*disfrute de vida*]. See GONZÁLEZ CAZORLA (2019), p. 142.

⁵ In this sense, Aedo states “the damage will therefore occur when the interest of the victim experiences a disturbance, regardless of whether the asset or right suffers is affected and regardless of its nature – economic or non-economic. Hence, as we have seen, the injury of an economic asset can create a disturbance to economic and non-economic interests, and vice versa”. AEDO BARRENA (2019), pp. 169-170. In the same vein DOMÍNGUEZ HIDALGO (2000), p. 66.

⁶ In a similar line Cavalieri indicates “a person's dignity can be violated without pain, vexation or suffering, just as there can be pain, vexation and suffering without a violation to a person's dignity”. CAVALIERI FILHO (2012), p. 89.

⁷ We can refer to the following cases that use the personal nature of non-material damage as the basis to reject its assignability to the claimant's heirs. For example, *Huentemil and others v. Agro Inversiones* (2007); *Cortez and others v. Cooperativa de Servicios Educativos Windsor School Ltda* (2010); *Cuevas v. Distribuidoras de Industrias Nacionales S.A.*, (2011); *Quezada v. Colmenares Werner Limitada* (2016); *Quezada v. Colmenares Werner Limitada* (2016), in this final ruling the Supreme Court accepted transmissibility of the action for moral damage.

interest⁸ that materializes with the disturbance of their personality rights⁹ or quality of life of the whole collective.¹⁰

This is not an easy matter, as it is not always clear who the affected party must be in order to claim compensation for collective moral damages. Some believe that the individual disturbance legitimizes a group action.¹¹ Others think that collective moral damages should not exist as a category, given the notion and nature of moral damages,¹² and because its subjective character is incompatible with a collective or class action.¹³ However, these criticisms are constructed on the basis of individual and subjective moral damages, rather than from a supra-individual interest's point of view. Additionally, they do not consider that this kind of injury has various areas of application, some of which even have an objective degree – such as the violation of a personality right (image, honour, health, etc.). Consequently, the concept of collective moral damages excludes individual disruptions, and rather consists in the disturbance of a superior asset common to all the involved persons – as is, for example, an injury to their dignity. The degree of the injury and conditions required for their origin, however, are another matter; but it is important to distinguish that moral damages application areas are normatively different, and that a strictly individual and subjective notion cannot be confused with one where said individual trait is not a vital factor. For this reason, I tend to separate the disturbance degrees and place collective moral damages as an injury to a group interest.

Assuming this last notion grants *collective moral damages*, an objective trait and recognizes the current value of the “society of masses”. The era that centers on liberal individualism for the development and protection of humans has given way to a new paradigm that privileges certain common assets as integral part of their life. Some of these include the right to live in an unpolluted environment or the respect of collective interests –

⁸ In the same sense Aldo Molinari points out that “(...) the affected interest is not individual, but rather has a collected nature and – in our opinion – this is the only situation in which we should talk about “collective damage”. Thus, collective damage is not determined by the number of individuals involved in the event that caused the disturbance, but rather by the nature of the affected interest, which involves a collective or group interest”. See MOLINARI VALDÉS (2018), p. 521.

⁹ MEDEIROS BAHIA & GOMES MEDEIROS (2019), p. 40. In Chile, Professor Carmen Domínguez has commented on the importance of that conceptualization of personality rights and protection mechanisms. These rights, as an expression of a person, can be and must be protected in a broad sense – for example with the compensation or reparation action. See DOMÍNGUEZ HIDALGO (2019), pp. 87-88.

¹⁰ PIZARRO WILSON (2013), p. 219.

¹¹ Similarly, “it is improbable that the legal system wants all desolations, sufferings or disgusts to be deemed illegitimate, or that they must all be compensated or satisfied, given that this would lead to the paralysation of individuals in order to avoid any kind of frustration towards the people they interact with. But there will always be situations in which the interpreter can see the certain and unexaggerated way to solve the problem of the disturbance of non-economic interests by way of class action compensation.” LORENZINI BARRÍA (2015), pp. 441-442.

¹² MUNITA MARAMBIO (2019), p. 225. The author states: “This raises the following question: Is it dogmatically sustainable to use collective actions that seek non-material damage reparation of the people involved within its same orbit? or – in other words – is the legal reform coherent regarding the non-material damage considerations we have referred to previously? We do not think so.”

¹³ MUNITA MARAMBIO (2019), p. 225. In a similar vein, MOLINARI VALDÉS (2018), p. 516.

such as those of indigenous peoples, workers or consumers – to show that the law must provide answers to both individual and collective needs. These answers can be granted by protecting these groups. In the case of moral damages these people could experience it is essential to separate the application areas, as mentioned in the previous paragraphs. We have tried to find this separation by categorizing the personality rights, which - although projected from an individual – are materialized in the context of collective or social coexistence, thus gaining an autonomy and life of their own. In general, the violation of any group will materialize in the disturbance of their dignity, quality of life or any other attribute derived from their personality rights or assets.

2.2 Are there any problems with collective moral damages and the beneficiaries of the condemnatory sentence?

Up until this point I have stated that collective moral damages is placed on the supra-individual interest plane; that is, they affect a group of people, not a particular person. If this is correct, the following conclusion is that with a condemnatory sentence—against the provider due to a reparation class action— the injured group, as a whole, would be compensated. However, these legitimate intentions for global protection can – in practice –be detrimental to those who are actually affected by the illicit act.

My premise is the following: collective moral damages is generated by the disturbance of a group interest. However, when the effects of a potential condemnatory sentence are to be enforced, the beneficiaries must be one the people in the injured group (regardless of whether they are determined or not). If the ultimate goal is reparation, based on the principles of civil liability, it cannot be any other way. However, if the goal is not reparation, different distribution methods can be used to obtain the required amount, such as – for example – giving money to charities or providing aid to consumers, discounting prices and other alternatives.

This makes us re-evaluate the possibility that, under the reform introduced to LPC, consumers can be effectively compensated on the grounds of collective moral damages or material damages.

2.2.1 Is it possible to compensate consumers' collective moral damages?

One of the questions regarding the origin and application of collective moral damages refers to the people and beneficiaries entitled to this action. Given this, the reformation of Law 21,081 gains importance as it mentions that compensation for damages can be requested by determined people linked by contract to the provider, as well as by those who are undetermined, according to article 50 paragraph 5° of the LPC.

As we can see, the reform opens – although not expressly – the possibility that undetermined people (diffuse interest) can request compensation for damages with the

collective interest procedure provided by the law,¹⁴ especially moral damages, which – if reading carefully – could cause some distortions.

This matter is indeed deeper than what appears on the surface considering that the discussion about the compensation of undetermined individuals in collective procedures is a topic that – although outside the scope of this work – can equally offer fertile ground to discuss moral damages in this area.

First, we must mention that compensation of moral damages in collective procedures is fully admissible by law (article 51 No. 2 of LPC). However, this is not so clear regarding diffuse interests because there is no certainty about who has suffered the damage. On the other hand, from reading the LPC we can appreciate that the system adopted for collective damages uses an *opt-out* approach when it comes to the sentence that grants consumer compensation (*erga omnes* effect, article 54 LPC), but also uses an *opt-in* approach by demanding the recognition of the affected consumers as members of the damaged group (article 54 D LPC).¹⁵

The question that thus arises is what happens with consumers that cannot be identified, and therefore cannot assert their rights according to article 54 D of the LPC. This leads us to think that the compensation of the moral damages ruled by the judge would never reach the pockets of abstractly affected consumers, either because they cannot prove they are part of the group or because they simply cannot come forward and assert their rights, leaving the remnant of article 53 C of said law.

Additionally, the true compensatory nature of the LPC to undetermined consumers is being severely questioned. As previously mentioned, the reform seems to have given way for the reparation of these people; however, the logic behind this does not seem to be situated in sphere of civil liability as we know it because some elements – such as personality and certainty of the harm¹⁶ – are not present when litigating for diffuse interests. This leads us to believe the structure and essence of the protection of these rights rests more on their punitive or *public enforcement* character, where – over the victim's compensation – the punishment and future deterrence¹⁷ of the person who committed a crime (especially in free competition

¹⁴ In this sense DE LA MAZA GAZMURI (2020), p. 788.

¹⁵ RODRÍGUEZ DIEZ & ZAVALA ACHURRA (2019), p. 171

¹⁶ RODRÍGUEZ DIEZ & ZAVALA ACHURRA (2019), pp. 153 and 166.

¹⁷ Regarding consumer damage compensation we can also refer to HERNÁNDEZ PAULSEN (2018), who at the time his work was published, claimed that if a norm like article 51 No. 2 LPC had existed, collective non-material damage could have been compensated given the anticompetitive conduct of the providers, such as collusion. This, the author states “(...) with the enforcement of the new modification, consumers can hope to be compensated for non-material damage caused by collusion, *v. gr.*, for attempts against the physical or psychological integrity or their dignity. An example of this – thinking of the “*Caso farmacias*” (A pharmacy collusion case)–, if a norm like the one mentioned above had existed at the time when the facts that motivated this occurred, the consumers who were unable to acquire the medication to treat their conditions could have received compensation on the grounds of non-economic damage, given that their pathologies were either worsened or they experienced other health detriments as a direct consequence of the collusion...”. HERNÁNDEZ PAULSEN (2018), p. 113.

matters)¹⁸ is what really matters. This is the part that European regulations of continental law, where compensatory collective procedures are only used for those who can prove their status as a member of the group, excluding undetermined people of compensation. This actually results in a deterring effect for the offending provider, rather than a reparatory effect for the consumer.¹⁹

These compensation models for undetermined individuals are known as *cy près* or *fluid recovery*,²⁰ a doctrine that, although can be originally found in Roman Law,²¹ has a more articulate origin in *common law* – as a way to reassign assets or economic goods of a testator or donor to charities that for some reason cannot carry out their will and a similar alternative is taken, hence the expression “*cy pres comme ce possible*” (as close as possible).²²

The issue stems from whether diffuse moral damages can be compensated under the structure and logic of civil liability, or whether alternative compensation mechanisms can be used according to Chilean law. In this respect, a circular issued by the National Consumer Service (SERNAC) on November 6th, 2020 gains relevance, as it states that according to the current legislation it is possible to compensate undetermined subjects when applying the *cy pres* or *fluid recovery* doctrine. For this it uses a series of criteria that go in the same direction²³ (such as: a) predominance of direct reparation; b) proximity; c) no disturbance of article 11 bis and; d) exceptional and subsidiary nature).

This circular, however, has some elements that in my view are placed on a different plane than that of civil liability, and are thus removed from the true compensatory function of diffuse interests. Firstly, because it considers *cy pres* as a doctrine that has both a compensatory and punitive function, as it seeks to sanction the provider for not complying, giving the compensation a punitive role. Secondly, the alleged *cy pres* that could take place leaves no space for the judge to determine the fate of unclaimed funds, given that –by law– they go directly to the contestable funds of article 11 bis LPC. Finally, the same principle of integral reparation would exclude compensation of undetermined individuals, as the funds would not go directly to their benefit, which in turn would leave many people without compensation.

For these reasons, it is appealing to abandon the idea of an effective compensation for undetermined individuals and – as doctrine tells us – change the vocabulary of civil liability in order to land on a different indirect compensation model.²⁴ *Cy pres* or *fluid recovery* could

¹⁸ In this sense HERNÁNDEZ PAULSEN & TAPIA RODRÍGUEZ (2019), p. 7.

¹⁹ Refer to Directive 2014/104/UE of the European Parliament and the Council of November 26th, 2014, consideration 13.

²⁰ Although they are used as identical terms, there is a vast difference in application. Whilst Fluid recovery “(...) implies global reparation, liquidation and fluid execution for the entirety of the affected class”, *cy pres doctrine* has a more restricted sense that alludes to a “solution that as close or related as possible to the affected class”. See TOLOSA (2017), p. 79.

²¹ RODRÍGUEZ DIEZ & ZAVALA ACHURRA (2019) p. 155.

²² TOLOSA (2017), p. 78. Also REDISH *et al.* (2010), p. 624 state: “The term “*cy pres*” derives from the French expression ‘*cy pres comme possible*’, which means “as near as possible”.

²³ Pages 11 to 14 of the interpretative Circular.

²⁴ DE LA MAZA GAZMURI (2020), pp. 795-796.

work with a different structure where judges have the option to assign amounts of money to a purpose or cause deemed as similar as possible as the one the consumers would have received.

The furthest thing from an effective compensation is that the remaining amounts of money are destined to contestable funds. If reparation is the ultimate goal, the *cy pres* theory must be restructured in our legal system, otherwise it will only fulfill a punitive and deterring function in the non-complying provider, which is not the objective of an action that involves the interests of thousands of consumers.

Hence, the collective moral damages implemented by the reform is an institution that provides a better solution in cases where consumers are certain and determined, rather than for cases of indetermined consumers, and leaves the elements of certitude and personal attribution – which are essential to damages and civil liability– unanswered.

III. INCLUDING COLLECTIVE MORAL DAMAGES WITH LAW 21,081

Law 21,081, issued on September 13th, 2018 was enforced six months later – as indicated by the transitional article 1 of the same legal body, that is, in March of 2019 – and introduced a series of changes to the LPC. The ones examined in this work are those pertaining to moral damages in procedures of diffuse or collective interest, which was expressly forbidden by the legislator prior to this reform.

Unlike Chile, other countries in the region had already recognized the validity of moral damages reparation in collective interest procedures. For example, Brazil, during the 1980's, regulated what they called “public civil action” through Law 7,347 of July 24th, 1985. This law allows to sue liability for damages caused to the environment, to consumers and to assets with artistic, aesthetic, historic, touristic or landscape value.²⁵

However, the broadest and most developed regulation about collective actions is the one introduced by the Consumer Defense Code by Law 8,078 in 1990. Article 6 paragraph VI states that one of consumers' basic rights is: “The effective prevention and reparation of economic and moral, individual, collective and diffuse damages.”²⁶ We can also see strides in

²⁵ OVALLE FAVELA (2013), p. 154.

²⁶ In order to achieve this, a conception difference between both kinds of interests was suggested, which is done in article 81 of this legal body, indicating that diffuse interests or rights are “transindividual, undividable, their holders are undetermined people who are linked by the facts” (Part I, single paragraph). On the other hand, collective interests or rights are “transindividual, undividable, and exercised by a group, category or class of people linked by a base legal relation to each other or against the other party.” (Part II, single paragraph).

this matter in countries like Colombia²⁷ or Argentina,²⁸ although in this latter case with some caveats.

In Chile's case, the letter of law is eloquent in that it offers a series of rules that attempt to model the consumers' compensatory claim in collective or diffuse interest cases. In this sense it is useful to cite the new article 51 No. 2 of the LPC in order to better understand the institution:

Regardless of the general conditions of the action, in terms of petitions referring to damages, it is enough to name the damage that has been suffered and request the compensation that the judge deems appropriate according to the case's merit, which must be equal for all consumers who are in the same situation. With this objective, the judge will proceed according to article 53 A. The reservation of article 173 paragraph 2 of the Civil Procedural Code does not apply.

Compensations determined in this procedure can extend to moral damages only if it has affected consumers' physical or mental integrity, or their dignity. If the facts invoked have caused this disturbance, they will be considered substantial, pertinent and controverted in the evidentiary period.

In order to facilitate access to moral damages in this process, the Service provides a registry for potentially affected consumers. This is a fast and expedited system which allows them to invoke the common basic requirements needed in the determination mechanism regulated in the following paragraphs. The prior is notwithstanding the exercise of the right enshrined in paragraph 4°.

When determining moral damages suffered by consumers, the judge can establish – by their own initiative or by request – a common minimum amount that can be subjected to arbitration, regardless of the fact that other probatory methods can be used. This arbitration shall be paid for by the non-complying party if liability has been determined. If not, article 411 paragraph 2 and 3 of the Civil Procedural Code apply.

If a common minimum amount is determined, any consumer that deems that the value of their damages is more than the established amount can claim the difference in a later trial, where the sole objective will be that amount of money without discussing whether there should be compensation or not.

27 Colombian norms on collective moral damage that consumers can experience is mostly indirect. In other words, this protection measure is materialized by introducing the responsibility for defective products or services and the general recognition of the protection of consumers regarding risks to their health and safety, according to article 1.1 of Law 1,480 of 2011. This, any product or service that affects consumer physical integrity or health legitimizes a class action against whoever causes the damage. Considering the nature of the affected rights and assets, this norm protects the non-material or moral sphere. We must therefore mention a caveat, which is that Colombian Law distinguishes *collective rights and interests* (which includes diffuse rights and interests) and *group rights and interests*, and these latter ones can be used to protected sectoral interests, such as those of consumers. In this sense OVALLE (2013), pp. 161-162.

28 Law 24,240 of 1993, established the Consumer Defense Law (LDC). This norm contemplated the protection of collective interest in article 52, but does not mention collective non-material damage, and – although Argentinian doctrine is divided in this matter, some believe that compensation for this kind of damage can be requested equally in this kind of procedure. SÁENZ (2014), p. 140.

This trial will be carried out before the same tribunal that oversaw the main case, according to the rules of the summary proceeding – where counterclaims are not permitted, or before the competent local police magistrate, at the consumer’s discretion.

The provider can make a moral damages compensation or reparation proposal, which – according to the previous paragraphs – will consider a common minimum amount for all affected consumers. This proposal can differentiate by groups or subgroups of consumers – if applicable – and can be done at any point of the trial.

The extract from the normative text lets us see some important reflections that influence the way in which collective moral damages must be compensated. Given this, we shall analyze to some ideas critically as well as prospectively.

3.1 How does the LPC understand collective moral damages?

Upon reading the law we can point out that the compensation for moral damages in collective or diffuse interest cases occurs when the physical or mental integrity or the dignity of consumers is affected (article 51 No. 2 paragraph 2 LPC). However, one of the critical points of this law is that it associates the damage to a group of individual or particular damages – that occurred due to mere circumstances – rather than viewing it as the damage of a group interest. In other words, the reform introduces a category that does not simply acknowledge the admissibility of collective moral damages but recognizes a homogenous individual damage that has been suffered by a determined or determinable group of people.²⁹

Additionally, the first two origin hypotheses raise important questions, given that – other than in cases of shipping spoiled food or unsafe medications – it is difficult to imagine circumstances that create widespread damage to the physical integrity of a group of people.

A similar thing happens with mental integrity. Outside disturbances and discomfort inherent to all non-compliance or infraction of a right³⁰ it is difficult to imagine how a provider can seriously injure this legal asset of many consumers. Additionally, the question of how to carry out a trial where the goal is to prove that the consumers party to that claim have suffered this damage.

In this regard, it is important to remember that collective damages consist in the injury of a collective asset or rights whose exercise is not exclusive to a person, but rather is undividable.³¹ Hence the criticism extends to the second point. This is that the collective moral damages enshrined by the legislator hangs on the suffering experienced individually by consumers– as is the disturbance to their physical and mental integrity. In these cases, we

²⁹ Similarly, BARRIENTOS CAMUS (2017), p. 23. The author states “(...) it is convenient to show the new directives contemplated in the approved text regarding damage compensation. The first is the establishment of “collective non-material damage” in article 51 N° 2. The nominal error of this institution is rooted in the fact that it tries to compensate homogenous individual interests (of all consumers) rather than collective (which is more than the sum of all of them).

³⁰ In this sense, see GONZÁLEZ CAZORLA (2017), pp. 200-201; LORENZINI BARRÍA (2015), p. 441.

³¹ AGUIRREZABAL GRÜNSTEIN (2014), p. 10.

cannot clearly observe the separation between purely individual damages from collective damages, even if it is indeed experienced by many.

As previously mentioned, collective moral damages in a technical sense cannot rely on the individual sensation people experience regarding the injury of an interest that benefits many people. However, the Chilean legislator confuses these two action planes of moral damages – individual and collective – in circumstances where it actually involves two different fields of legal protection.

Given the former, this conception of moral damages – as collective moral damages – is influenced by traditional case law and doctrine, placing it on a strictly subjective plane as pain or suffering or the disturbance of an essential human asset, such as physical integrity. On the other hand, I believe the new wording provides a more refined technical insight that is similar to collective moral damages. These refer to the disturbance of consumers' dignity as a legal provenance category and hypothesis.

3.2 Consumers' dignity as the gateway to collective moral damages

As we move away from a strictly subjective notion of moral damages that is linked to pain and suffering –and considering that physical and mental integrity do not answer to the concept of collective moral damages as an injury of a group and undividable interest– it is necessary to place the application of this sort of disturbance on an objective plane. This can be as either an injury of a personality asset (in a collective sense) or as the disturbance of the dignity of an individual.³²

I believe that there are three reasons why dignity can make way for the collective moral damages reparation in the purest sense. First, it provides moral damages with a more objective character. Second, it separates the individual disturbances that each person might have independently of the collective plane. Third, because regardless of the notion of human dignity that is used, it is transversal concept and can affect not only one but many determined or undetermined people, legitimizing an eminently collective action. But the real question is: what do we understand as human dignity?

3.2.1 What is human dignity?

I will analyze dignity in the context of consumer relations, given that the term has an open texture that can expand to reflections that exceed the object of this paper.

First, we must remark that consumer dignity is explicitly recognized as a legal category in three hypotheses of the LPC. The first as a limit to security and vigilance mechanisms of commercial establishments (article 15 LPC), the second as an aggravating circumstance of

³² MEDEIROS BAHIA & GOMES MEDEIROS (2019), p. 41. In Chile, Marcelo Barrientos states that the disturbance of a person's dignity entitles them to seek compensation for non-material damage, which goes beyond the reductive *pretium doloris* thesis. In this sense BARRIENTOS ZAMORANO (2008), p. 95.

the provider's conduct (article 24 LPC), and the third as a condition for moral damages reparation in collective interest trials (article 51 No. 2 LPC).

Understandably, the law does not define it as it is a complex and dynamic concept that expands progressively in its legal application in order to protect the human person. In this sense, according to the scholarship:

Human dignity is not a simple ethical declaration. It is a legal norm that guards a person's fundamental right and constitutionally mandates authorities and private persons to respect and protect it for every single individual; understanding it, in its purest sense, as a person's inherent interest to be treated as such for the sake of being one and not as an object, to not be humiliated, degraded, defiled or objectified.³³

In this way, it is particularly interesting to see how the concept of dignity has been constructed in Consumer Law.³⁴ At first there are two ways to tackle it. The first, in a broad sense, as a right that every consumer has in a social or external aspect. In other words, in the treatment a person should have from a provider in a consumer relationship. Generally speaking, it refers to the complete relationship between provider and consumer by which they must be treated and served according to adequate considerations of respect and personal attention. Apparently, the Argentinian legal system followed this path when establishing the protection of consumer dignity in article 42 of their Constitution, which states: "Consumers and users of goods and services are entitled, within the consumer relation, to protection of health, security and economic interests; to adequate and truthful information; to freedom of choice, and equitable and worthy treatment".

This country's scholarship has emphasized the social nature of consumer dignity, stating that "(...) the expression 'equitable and worthy treatment' refers to a social or external aspect. In other words, to the honor and respect you must give a person. Dignity is a basic principle and is supranational in nature".³⁵

On the other hand, the second posture on the notion of dignity is more restricted. This because it does not rely on the human individual, given consumer vexation or humiliation is necessary for a real disturbance to exist, especially if a compensatory action will be used to repair the caused damage.³⁶ A larger scale of damages is required; provider social or external disturbance is not enough.

Chilean case law has swayed in one way and another when it comes to the notion of dignity regarding consumer's use of a reparatory action. Some courts state that the consumer

³³ PÉREZ FUENTES (2018), pp. 118-119.

³⁴ Isler construes consumer dignity from the notion of equality; a constitutionally recognized principle and right that inhibits arbitrary discrimination. See ISLER SOTO (2019), p. 212.

³⁵ IMBROGNO (2005), p. 3.

³⁶ In this sense GONZÁLEZ CAZORLA (2019), p. 124.

must have experienced a vexing or humiliating action,³⁷ whereas others believe inconsiderate social behaviour is enough to merit resorting to the action.³⁸

However, when it comes to collective moral damages and the dignity hypothesis that enables it, we still have the question of which of the two notions should apply. If we take on the first sense of dignity, we can conclude that there is indeed a collective and undividable asset that grants us the right to decent outward treatment in consumer relations. If, on the other hand, the second sense is used, we must recognize two elements: a) that there is a collective right –separate from individual claims, and therefore undividable – to not be humiliated or vexed and, b) that reparation for collective moral damages proceeds only in cases where there is serious humiliation or infraction of this right.

I have already stated how problematic it can be to think about the collective disturbance to consumers' physical and mental integrity. The dignity hypothesis I have just described does not escape that analysis, given that it is also complicated to imagine how a provider can cause social or external damage to many consumers, or humiliate them in a way that legitimizes a collective action.

Notwithstanding, I believe there is a third category of dignity that gives an answer without the theoretical difficulties of the first two variations. It is thus necessary to resort to a more abstract level of dignity that allows the elaboration of a general compensation hypothesis without the burden of proving ill behaviour or humiliation. It is a notion that conceives dignity as the disturbance of a person's quality of life.

In this view, collective moral damages as a group interest is drafted as the detriment that affects a person's life plan, their projections and quality of life in a massive environment, rather than the mere dissatisfaction of collective assets. It is true that if a provider does not comply with their obligations towards consumers, their expectations will be diminished as that they will not have the service or asset intended for their direct benefit. This becomes more serious given the particular circumstances of this situation, for instance in cases of false

³⁷ *Jara v. Administradora de Supermercados Híper Limitada*, (2016), par. 7°: “That the defense of Administradora de Supermercados Híper Limitada, without specifying the form, content and time period for which “the rigorous procedure” was prolonged, recognizes that, in short, this lacked the presupposition that the law establishes to allow the detention of the plaintiff consumer, that is, the commission of a flagrant crime, pretending to justify its action in 'a misunderstanding', since “it was verified that all the products acquired by the plaintiff, appeared registered in the purchase ticket; Thus, the plaintiff, without any justifiable cause, was subjected to a procedure against to law and which has violated her dignity”. *Not stated, not stated* (2008), par. 4°: “That according the facts stated previously summarized are procedure elements analyzed according to legal reasoning rules, we can establish that on August 2nd, 2007 around 2 pm, Ms. (...) entered the Johnsons store in the city of Ovalle, and that when she was leaving, the alarm went off and she was reached by a security guard who forced her to enter the store – which made the alarm go off a second time - and then, with another security guard, forced her to re-enter the store – which set off the alarm a third time – and called *Carabineros*. She was then taken by the security guards to a room so as to be checked, partially stripped and checked, and they found nothing. She was then taken to the police station – where the alarm went off again as she exited the store – where she was checked again, stripped, and nothing was found. The facts described and established allow us to determine that the alarm was activated three times and that after checking the person, they were unable to find any product on her, which leads to the conclusion that the store's security devises malfunctioned, thus leading to the *disturbance of the plaintiff's dignity*” (emphasis added).

³⁸ *Ribeiro v. Sociedad Pacific Limitada* (2007); *Bruna v. Moya* (2009), par. 6°.

or misleading advertising, introducing defective products in the market or providing deficient services for a large number of people, as is the case with drinking water, electricity, internet, etc. In these cases, it is not only the individual interest of consumers that comes in to play, it also involves all the promises that are not fulfilled, give that they frustrate an individual right as well as impair the trust, quality and life plan these people have regarding to these assets or services.

For example, and even though this is a case involving non-contractual civil liability, there was a class action against the *Fisco de Chile*, the Puente Alto Municipality and a property development company for allowing the construction of a residential complex next to a former dumpsite that was still emitting bad odors and gases that were affecting the daily life of the people living nearby. This case went to the Supreme Court, where they discussed the moral damage experienced by the plaintiffs (the neighbors of the area). The Court delivered the following verdict:

Regarding extra-patrimonial or moral damages we can only make the presumption – which is considered evidence – of the existence of a clear psychological suffering from living in proximity to the former La Cañamera dumpsite, which had bad smells during the summer, gas emissions due to the sewage, with chimneys that have been created to evacuate said gases if this Court intellectually places itself in the situation of the plaintiffs (...).³⁹

Although the Supreme Court deemed the caused damage as psychological, we cannot ignore the fact that damages with these characteristics does not affect an individual sphere exclusively, it is a violation of human dignity, a legal asset that is not exercised personally, it can exist in an abstract plane, in a community. Given this, as well the individual suffering experienced by each neighbor, life, coexistence and their social environment was deeply degraded by the sanitary conditions of the polluted area.

3.3 How does the group disturbance occur?

According to the previously cited case, I believe that for the disturbance of a group interest to occur in consumer situations it must degrade the quality of life of consumers or users. In other words, they affect their life plan or conditions of life, health and generally used environment in a way that means they are unable to carry them out as they used to. Given this, prior living conditions will determine the damage caused, rather than the actual psychological pain or suffering that was experienced. Therefore, dignity is transformed into a legal asset that grants a right to moral damages compensation in an objective way, without an individual qualification but rather based on the dissimilarity of the facts at two different moments in time.

A person's dignity – which is projected as a personality right – gives way to more than the psychological and physical disturbance of an individual, given that it encompasses a

³⁹ *Lizana and others Municipalidad de Puente Alto and others* (2013), par. 17°.

broader and deeper spectrum of the human person. Thus, a person's disturbance is viewed in a larger way than in individual cases.

IV. RULINGS REGARDING MORAL DAMAGES IN CHILE

Before ending this paper, it is useful to reference two rulings that have granted collective moral damages against the expressly prohibitive text of the LPC (former article 51 No. 2), prior to the reform of Law 21,081.⁴⁰ The first one is from the 1st Civil Court of Osorno on December 31st, 2014,⁴¹ and the second from the 13th Civil Court of Santiago, on June 13th, 2017.⁴²

The Osorno sentence was ruled on account of a report filed by the *Servicio Nacional del Consumidor* (National Consumer Service – called *Sernac*, for short), given that a provider did not abide by the contest rules set to win an automobile, valued at 23 million pesos. According to the first instance ruling, the contest rules were unclear on the time frame the consumer had to participate – which was done by placing their coupons in a box.

The contest was held at a venue that is normally used as a mess hall, where consumers could acquire the coupons to participate in the draw. However, there were several anomalies; for example, the depositing boxes were closed four hours before the established closing time. Another issue was overbooking at the venue – it could hold only 1500 people therefore hundreds of consumers were unable to access the premises. This caused security issues inside and outside the establishment, and *Carabineros* (one of the Chilean Police forces) was called to control the situation, which in turn led to arrests and injuries, thus requiring an ambulance and paramedics for assistance.

The draw was done after midnight on January 31st, 2011, and consumers claim there were several irregularities. Basically, they disregarded the rule stating that in order to win the person who was called out loud by the host had to 60 seconds to claim the prize. In this case, the winner went on stage after this time frame.

Given these facts, the Osorno Civil Court established the violation of article 3 letter b): the right to true and timely information; article 3 letter d): the right to consume safely; article 12: violation of terms and conditions and article 23, all from the LPC. Similarly, it ordered payment of the corresponding fines for the infractions, a reparation for moral damages to consumers of \$100,000 according to the *Sernac's* requirement, in defense of the collective interest, as well as the reparation of the moral damages caused to each of the plaintiffs that were party to this case (97 of them) for \$100,000 pesos each.

It is important to stress that the court considered that each and every one of the plaintiffs had suffered moral damages, given that it was caused “by the discomfort,

⁴⁰ A detailed analysis of these two rulings can be revised in REVECO SOTO (2019), pp. 75-100.

⁴¹ *Servicio Nacional del Consumidor v. Latin Gaming Osorno* (2014).

⁴² *Servicio Nacional del Consumidor v. Feria Ticket S.A. and other* (2017).

discontentment, frustration, incomprehension, risk, impoliteness and deception that came from the provider's infraction (...)"⁴³

The matter was raised to the Valdivia Court of Appeals, who revoked the first instance ruling pertaining to consumer moral damages, on the grounds that the collective interest was expressly excluded – at the time – in article 51 No. 2 of the LPC. However, it granted the reparation of this damage to the 97 plaintiffs, but lowering the \$100,000 compensation to 3 UTM, according to the following:

The suit brought in by a determined number of individualized consumers, thus establishing their position as people who attended the event, and thus had a concrete claim that qualified them to sue for compensation, which includes moral damages. This is because the plausibility to civilly sue was accredited by verifying the infractions committed by the defendant, as well as the discomfort, frustrations and other personal disturbances indicated in the appealed judgement. We must add what was mentioned in the seventeenth consideration of this ruling, by which we deem it appropriate to set the compensation for this at 3 *Unidades Tributarias Mensuales* (Monthly Tax Units, called UTM) for each civil actor.⁴⁴

As we can see, the Valdivia Court of Appeals granted compensation for the moral damages suffered by 97 consumers who were part of the claim done by the *Sernac*. However, the criticism comes from the fact that it was not necessary to focus on the subjective notion of moral damages – such as discomfort and frustrations – as it does not explain how that would be considered a violation of a collective asset. It would have been more convenient, instead, to talk about the disturbance of consumer dignity as an abstract asset, specifying how that was a disturbance of that legal asset that can be enjoyed by all the affected consumers. We must also state that the second instance ruling was taken to the Supreme Court by a *recurso de casación en el fondo* (a substantive cassation appeal) for infringing article 51 No. 2 LPC that excludes reparation of moral damages. However, the Supreme Court denied it for evident lack of foundation, stating that the defendant did not report this circumstance during the claim's response, therefore the cassation appeal cannot be used to introduce new allegations after the appropriate instance has passed.⁴⁵

The second ruling, by the 13th Civil Court of Santiago, took place with a collective class action spearheaded by *Sernac* against an intermediary company that sold tickets. This was because they did not provide the service of carrying out a concert that was finally cancelled, based on articles 3 letter b) and e), articles 12 and 23, from the LPC, and not returning the money paid for the show's ticket.

According to the first instance sentence, both companies were charged fines for the infraction; but what was unique in this case was that the ticket provider was charged with paying \$50,000 for each of the 4,315 consumers who purchased concert tickets, whereas the company in charge of carrying out the concert was charged with paying \$30,000 for each of

⁴³ *Servicio Nacional del Consumidor v. Latin Gaming Osorno S.A.* (2014), par. 20°.

⁴⁴ *Servicio Nacional del Consumidor v. Latin Gaming Osorno S.A.* (2015), par. 19°.

⁴⁵ *Servicio Nacional del Consumidor v. Latin Gaming Osorno S.A.* (2016).

the 4,315 consumers – with the additional legal price adjustment and interests in both cases⁴⁶– on account of moral damages. After its appeal, it was confirmed as such by the Santiago Court of Appeals.

The *Sernac* lodged a *recurso de casación en el fondo* (substantive cassation appeal) impeaching this sentence on the grounds that the assessment of the compensation for the concert tickets that had to be paid by the defendant. However, this objection was denied as it overtly lacked substance, given that it challenged the deliberation of the facts done by judges of the same competence, and this is an exclusive and fixed power of the Supreme Court.⁴⁷

V. CONCLUSIONS

Throughout this paper we have discovered some key ideas that function as a basis for a better comprehension of supra-individual interests, collective moral damages and the norms created by the reform of the LPC by Law 21,081. Thus, summing up the topics covered, I will refer to some ideas that are considered as well as conclusions:

1. In order to correctly understand the so-called collective moral damages we need to set the conceptual foundation regarding the different interests at play. Specifically, we must focus on the individual interests of the supra-individual interest, the collective and the diffuse.

2. Moral damages can have different application depending on the kind of interest that is involved. Traditional theories are usually used to individual interest cases; however, these same theories do not adequately respond to supra-individual interests.

3. Collective moral damages cannot be explained as the suffering or discomfort experienced by many people given that it is not the sum of all these individual afflictions. Therefore, in order to refer to this kind of injury in a technical sense we must not focus on the individual repercussions experienced by the members of the collectivity because we are talking about an independent and autonomous damage that is different from that suffered personally by these people.

4. Law 21,081 has introduced a particular form of moral damages in the context of collective actions in article 51 No. 2 LPC. The origin hypothesis is based on the physical or psychological integrity or dignity of consumers. Regarding these first two legal assets, the legislator seems to extrapolate traditional doctrine and case law about moral damages as a physical, psychological or emotional affliction, and does not distinguish between an individual or collective interest.

5. However, when it comes to consumer dignity, we can erect the conceptual basis to reach a more genuine notion of collective moral damages. It is thus necessary to land on the idea of dignity as the disturbance of a personality asset in a collective sense, or at least as an injury to peoples' life conditions or quality of life. This way, there is no inconvenient in the

⁴⁶ *Servicio Nacional del Consumidor v. Feria Ticket S.A. and other*, (2017).

⁴⁷ *Servicio Nacional del Consumidor v. Feria Ticket S.A. and other*, (2018).

particular feeling of displeasure caused by the provider's conduct, but rather it is self-sustained as an autonomous injury that seeks reparation.

6. Thus, collective moral damages is the disturbance of a group interest. Said disturbance is materialized with the detriment of the consumers' quality of life or dignity. The existence of a person's suffering, an injury to their personal integrity, is therefore not required; all that is needed is a worsening or alteration of their life condition caused by the provider's conduct.

7. Collective moral damages occurs when consumers are determined or can be determined, given that this element (determination) is used to ensure the victim's identity – that is, the group of people that make up the injured group – and also as a tool to respond to the certainty of the damage, which is part of civil liability. On the contrary, it is not possible to extend the reparation for this damage to undetermined people because it is unfeasible to credit the damaging effect to no one, or to a group whose members are unknown.

8. If *cy pres* or *fluid recovery* is considered a useful tool to compensate a group of undetermined consumers, we must abandon the principles of civil liability and settle on a new paradigm, given that we cannot satisfy the necessary requirements without neglecting that. Instead of effective reparation, the intent is to deter or sanction the sued provider. Additionally, article 11 bis LPC would not give the judge discretionary space determine a similar reparatory alternative.

9. Finally, and as far as know of, there are two sentences that rule in favor of moral damages claimed in consumer class actions in Chile. In both of these the traditional thesis of moral damages rules – that is, as a psychological, emotional disturbance, inconveniences, displeasure or frustration caused by the provider's non-compliance. However, in order to avoid futile confusions, I believe we must work on current interpretations so that in the future we can have sentences that have solid arguments and require less imagining.

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