

QUANTIFICATION OF LOSS

GENERAL PRINCIPLES OF SPANISH LAW & THE NEW BAREMO

Introduction

For the calculation of damages suffered by the victims of traffic accidents, Spanish law has a scale system¹ known as the “Baremo” which regulates civil liability and insurance matters in road traffic accidents. The Baremo is mandatory and binding on judges in respect of injuries resulting from traffic road accidents. Consequently, the judges are bound by the Baremo when assessing the damages resulting from road traffic accidents.

Although primarily designed for motor accidents in practice, it generally acts as the basis for assessing compensation in all personal injury claims in Spain. The Baremo is binding in traffic road accidents and in any other cases the valuation of the value of the claim would be calculated taking as a reference the Baremo.

The use of the Baremo in non-traffic road accidents has been recognised by the Spanish Supreme Court in numerous occasions and there is a wealth of precedents in this respect (Supreme Court Judgments 776/2013, of 16 December; 403/2013, of 18 June; 907/2008, of 9 December; 135/2010, of 9 March, among others).

This paper will outline the new Baremo, but not the old. Although the old will still apply to any cases involving accidents pre 01/01/2016.

The new Baremo: Key changes

The reform is substantial and covers fatal accidents claims as well as claims for personal injury. It substantially amends the approach to compensation for both past and future loss.

In very broad terms, it is expected to result in increased awards of compensation as follow:

- Compensation for death: Increases 50%
- Compensation for permanent injury: Increases 35%
- Compensation for Temporary injury: Increases 12,8%

Insofar as fatal accidents are concerned, it recognises as people entitled to compensation, in the event of death, those who have lived with the family for 5 years and were close by blood or personal closeness. The beneficiaries in fatal accident cases are increased and considered independently. Cohabiting couples can also receive compensation.

This paper however focuses on claims for personal injury. In that regard, key changes include:

- Household work compensation is recognised for male and female

¹ Governed by Law 35/2015 of 22 September

- Loss of future earnings are now recoverable and there are more generous tariffs for past and future loss of earnings.
- Possibility of receiving compensation by annuity. The Judge has discretion in the event of minors or person with mental incapacity.
- It includes Tariffs setting up the amounts for the insurance company to reimburse to the Spanish National Health service.
- It clearly differentiates for first time patrimonial (material) damages from non-patrimonial damages (personal injury). It divides the compensation in three groups of tariffs:
 1. Fatal injuries
 2. Permanent injuries (secuelas)
 3. Temporary injuries

In a personal injury case involving a permanent or lasting injury, an award is made under both two and three above.

Each tariff is subdivided into:

- A. Basic non patrimonial (personal injury) damage (perjuicio personal básico)
- B. Specific non patrimonial (personal injury) damage (perjuicio personal particular)
- C. Patrimonial (material) damage (perjuicio patrimonial)

1. Permanent Injuries

A) Basic personal damage (perjuicio personal básico):

a) Tariffs 2.A.1 and 2.A.2

The Tariffs contain a catalogue of different categories of injury and disability: physical disability, intellectual disability and sensorial disability and aesthetic injuries which remain after rehabilitation is complete. This category applies in cases where there is an incomplete recovery from injury.

Those entitled to compensation are:

- The victim; and
- Exceptionally, members of the family of the victim who has complete disability for medical and psychological treatment up to 6 months.

The Tariffs contain a description of each possible kind of injury and allocate a range of points to each injury. A maximum of 100 points may be awarded to each victim.

Calculation of permanent damages will be done as per the following formula, where M is the highest punctuation allocated to permanent injuries and m the smallest. Aesthetic damage is calculated separately.

$$\frac{[(100 - M) * m]}{100} + M$$

b) Aesthetic damage

It has a specific Tariff ranging from light to very severe damage allocating a range of points depending on its category. The appropriate tariff amount is added to the amount resulting from the above formula.

B) Specific non-patrimonial (personal injury) damage: Tariff 2B

1. **Additional psychophysical, organic and sensorial injury:** they are applicable when one single injury reaches 60 points or all the injuries exceed 80 points. It includes the increase to be added for severe injuries described in the basic moral damage and includes all physical and psychological injuries. From 19,200€ to 96,000€.
2. **Additional aesthetic damage:** applicable when the aesthetic damage reaches 36 points. From 9,600€ to 48,000€.
3. **Personal damage for the loss of quality of life as a consequence of the injury:** Identifies the loss of quality of life as very severe, severe, moderate or light.
 - a. **Very severe:** loss of personal autonomy to carry out almost all essential activities to carry out an ordinary life. From 90,000€ to 150,000€.
 - b. **Severe:** loss of the ability to carry out some of the essential activities or loss of ability to carry out any professional activity. From 40,000€ to 100,000€.
 - c. **Moderate:** The loss of a relevant part of his specific activities for his personal development or the occupation that he was carrying out up to that moment. From 10,000€ to 50,000€.
 - d. **Light:** Injuries that reach more than 6 points and he is prevented for carrying out activities that have special relevance in his personal development and the limitation or partial loss of the professional activity that he was carrying out regardless of the number of points reached. From 1,500€ to 15,000€.
4. **Moral/personal damage for the loss of quality of life by the family of those very severely disabled:** It always has to be claimed by the victim. It compensates the substantial alteration that they will suffer in their lives as a consequence of the care and continuous attention required. It is received by the victim who may distribute it as he

wishes. The Law envisages that he should use the money received to compensate the damage suffered by the family members. From 30,000€ to 145,000€.

5. **Loss of the foetus as a consequence of the accident:** Only payable to the mother.
 - a. First twelve weeks of gestation: 15,000€; and
 - b. After the first twelve weeks of gestation: 30,000€.
6. **Exceptional damage:** Singular circumstances not sufficiently defined in the Baremo. An uplift of up to 25% can be applied to the award.

C) Patrimonial (material) damage: Tariff 2C

For past losses, see 'Temporary Injury, Tariff 3C', below.

Future recoverable losses (the upper limits are caps on the recoverable losses):

- Expenses arising from the injuries (daño emergente)
 - o Foreseeable expenses regarding future medical assistance: Tariff 2.C.1
 - o Prosthesis and orthotics: Up to 50,000€ per new item
 - o Home and hospital rehabilitation: From 5,850€ to 13,500€.
 - o Technical help and items to assist the victim to gain autonomy: Up to 150,000€.
 - o Home adaptation: Up to 150,000€.
 - o Increase in the cost of mobility: Up to 60,000€.
 - o Third party personal care or assistance (paid or unpaid) is set by a tariff:
 - Tariff 2.C.2: number of hours of help required at home depending on the category of injury
 - Tariff 2.C.3: amounts to be paid per hour referred to above.
- Loss of future earnings (lucro cesante): loss of earning capacity; damage suffered by the injured person for loss or net loss of income from his work. It is regulated in Article 126 et seq of the Baremo.
 - o Tariff 2.C.4: Very severe disability;
 - o Tariff 2.C.5: Severe disability;
 - o Tariff 2.C.6: Moderate;
 - o Tariff 2.C.7: Very severe disability for people who has not yet accessed the employment market up to 30 years old;
 - o Tariff 2.C.8: Severe disability for people who has not yet accessed the employment market up to 30 years old.

The law takes into account the net income of the victims (or an estimate of the value of their dedication to housework or earning capacity) – it also compensates those under 30 years of age who have not yet access the employment market) (multiplicand) and establishes different amounts in the Tariffs (multiplier).

The Tariffs take into account the net income of the victim, the estimated value of their dedication to the household work, the estimation of the value of their potential capacity to earn an income for those under 30 years old. It also takes into account the severity of the inability to carry out the work as absolute, total or partial permanent disability.

The multiplicand would be calculated as follows: net income of the work during the year preceding the accident, or the average net income of the previous three years if this calculation results in a higher amount. Unemployment benefits are taken into account as a reference to calculate the compensation for loss of income, not to deduct them from the compensation.

The tariffs take into account the following factors:

- a) State benefits for absolute, total or partial permanent disability to which the victims are entitled;
- b) The length of the damage;
- c) Life expectancy according to the degree of disability; and
- d) The discount interest rate, which takes into account inflation.

The tariff assumes that all recoverable state disability benefits are being received, and if that is not the case, a 25% uplift is applied to the award.

There is no provision for stepping the multiplicand up or down at different times in the future.

2. Temporary Injury: Tariff 3

A) Basic Moral damage (perjuicio personal basico): Tariff 3A

30€ per day from the date of the accident until the date of stabilization of the injuries.

B) Special Moral Damage (perjuicio personal particular): Tariff 3B

Compensation for temporary loss of quality of life; damage suffered by the victim for the impairment or limitation in their autonomy or personal development. The compensation of 30€ per day under (a) is increased by the following amounts, in the following circumstances:

- Very severe (situation similar to coma) 100€ per day;
- Severe (the victim loses most of his autonomy): 75€ per day;
- Moderate (the victim cannot perform a significant part of his daily activities): 52€ per day;
- For each surgery intervention: from 400€ to 1,600€ (lump sum).

C) Patrimonial (material) damage (perjuicio patrimonial) Tariff 3C

The following heads of loss are recoverable

- Medical sanitary expenses, aid and equipment: real cost.
- Other expenses such as increase in mobility costs, family members' expenses to assist, etc.: real cost
- Loss of earnings: real cost.

The following claims may not be recoverable under Spanish law

- Contractual sick pay paid by C's employer as a result of injury is not mentioned expressly.

Additional general principles under Spanish law

Tax

Lump sums awards are quantified and paid net of tax.

Costs

Costs are recoverable out of the Claimant's damages award.

Credits

Spain applies the principle of unfair enrichment to decide on credit matters. Credits are not contemplated but the multipliers include an assumption that state benefits have been received and therefore when this is not the case a 25% increase should be added. The other exception is in the event of the care of third party that any amount that the victim may be receiving from any public health should be deducted.

Interest

Normally, no interest is payable provided that the pre-litigation protocol is followed and the applicable tariff damages are paid at the time when the prognosis becomes clear. Penalty interest is payable under Spanish law at the rate of the legal interest (fixed by the Bank of Spain, currently 3%) plus a further 1.5% up to two years after the accident; after that date a statutory amount of 20% interest shall be applicable.

Interest shall not be accrued on any amounts paid by the Defendant to the victim after submitting a justified offer within 3 months after the date of the accident.

Interest is payable only on the balance not paid on account.

The payment on account must reflect the minimum sum known by the Defendant to be due in accordance with the information to hand.

The initial date for the calculation of the interest shall be the date of the loss or the date of the notification of the loss (depending on the circumstances). In addition, the final date for the calculation of interest is either the date of the payment on account or, if this has not been paid, the date on which the final award of damages is paid.

It is important to remark that there shall not be interest is payable for delay by the Defendant when such delay is due to a justified reason or if said reason is not attributable to the Defendant. A justified reason is, for example, a founded dispute on liability and/or quantum in which a judicial decision to solve such dispute is necessary.

There is an issue as to whether or not interests are a procedural question to be decided under the Law of the Forum in accordance with Section 1.3 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to non-contractual obligations (*Rome II*).

The annual interest applied must be the legal interest current at the moment in which is accrued. Therefore, the annual percentage applied must be the percentage for each year until the compensation be effected².

Forms of award

In Spain, claimants recover damages by way of a lump sum award in respect of all damages.

Article 41 of the new Baremo establishes however that at any time the parties or the Judge at the request of either of them, may agree for the total or partial replacement of the lump sum for a life annuity in favour of the victim.

The lump sum is turned into an annuity and there is a Tariff contained in the Baremo to calculate the conversion (Tariff TT1).

In any event, the judge may, at his own discretion, determine the above substitution, at least partially, in the case of a minor or a person who lacks mental capacity and the judge considers necessary to protect their interests in a more effective way.

Where there is a dispute about the form of award, the ultimate decision rests with the Judge, but if the Claimant has mental incapacity and the claim is settled, the choice remains with the parties.

It remains to be seen whether annuities would be subjected to tax; it is unclear.

² Article 20.4 of the Spanish Insurance Contract Law 50/1980

Recital 33

It also remains to be seen how the court will approach the new Baremo in the context of Recital 33 of Rome II.

The Baremo makes no reference whatsoever to Recital 33. The Baremo states that the multiplicand limit of 120,000 euros can be increased by means of an actuarial report.

With regards to material/ pecuniary loss the main problem regarding article 33 will appear in the caps set up by the Baremo, such as the expenses arising from the injuries (daño emergente), i.e. foreseeable expenses regarding future medical assistance (Tariff 2C1), technical help and items to assist the victim to gain autonomy (up to 150,000 euros), home adaptation (up to 150,000 euros), etc.

On a general note, in the Spanish hierarchy of law the European Regulations are above than national law and therefore there may be room for a challenge, even when the law establishes that the Spanish Tariffs are binding for the judges in RTAs.