Revista JURÍDICA PORTUCALENSE

www.upt.pt

IJP PORTUCALENSE INSTITUTE FOR LEGAL RESEARCH

FCT Fundação para a Ciência e a Tecnologia
MINISTÉRIO DA EDUCAÇÃO E CIÊNCIA

N.º 32 | Universidade Portucalense | Porto | 2022

https://doi.org/10.34625/issn.2183-2705(32)2022

Vahid Akefi Ghaziani, Moosa Akefi Ghaziani, Mohammad Akefi Ghaziani

Assessing Non-Material Damages Under the GDPR: A Review of The Recent Judicial Practice of Germany, UK, and the Netherlands

DOI: https://doi.org/10.34625/issn.2183-2705(32)2022.ic-12

Secção I

Investigação Científica*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

Assessing Non-Material Damages Under the GDPR: A Review of The Recent Judicial Practice of Germany, UK, and the Netherlands

Avaliação de danos não materiais sob a ótica do RGPD: Uma revisão da prática judicial recente da Alemanha, Reino Unido e Países Baixos

Vahid Akefi GHAZIANI[1]
Moosa Akefi GHAZIANI[2]
Mohammad Akefi GHAZIANI[3]

ABSTRACT: With the digitalization of technologies, the issue of the valuation of non-material damages that has long been debated among the courts and scholars is taken more seriously. Although according to the General Data Protection Regulation (GDPR) and its recitals, data controllers are liable for such damages. However, there is inconsistency regarding the interpretation of this instrument, in terms of the scope of damages as well as their assessment. Frustratingly, still, there is no unique rule of compensation laid out for the measurement of non-material damages. Hence, an analysis of the judicial practice of different courts in European countries is important. This Article examines the recent approaches to the valuation of non-material damages under the GDPR, in three European countries, namely, Germany, the UK, and the Netherlands. It pursues to answer the key question that do the courts in these jurisdictions award compensation for non-material damages, and how are these non-pecuniary damages evaluated? To answer this question, this article, in two parts, expounds on the concept of non-material damages under the GDPR, and analyzes the respective judicial practices of Germany, the UK, and the Netherlands. It concludes that, so far, the approach of the German courts has been unique in the sense of substantiating the broad interpretation of damages under the GDPR. This legal system has delineated a promising achievement by establishing an implied limitation of liability clause (Lol) which may be equally followed by other European courts.
KEYWORDS: Data protection; GDPR; Germany; Netherlands; UK.

ABSTRACT: Com a digitalização das tecnologias, a questão da avaliação dos danos morais, há muito debatida entre os tribunais e os estudiosos, é levada mais a sério. Embora, de acordo com o Regulamento Geral de Protecção de Dados (RGPD) e os seus considerandos, os responsáveis pelo tratamento de dados são responsáveis por tais danos. No entanto, há incoerência quanto à interpretação deste instrumento, em

[1] BA, LLM, Faculty of Law, Shahid Beheshti University, Tehran, Iran. Attorney at law and Member of Central Bar Association of Iran. Email: vahid_ghazi@yahoo.com; ORCID iD: 0000-0002-4884-1197.
[2] Assistant Professor, Department of Law, Payame Noor University (PNU), P.O. Box 19395-4697, Tehran, Iran. Email: moosaghazi@pnu.ac.ir; ORCID iD: 0000-0001-8884-0773.
[3] PhD student of International Law, Department of International Law, Faculty of Law, University of Qom, Iran. Email: mohammadghazi91@yahoo.co.in; ORCID iD: 0000-0002-5923-8684. (Corresponding author).

termos do âmbito dos danos, bem como da sua avaliação. Ainda assim, não existe uma regra única de compensação estabelecida para a medição dos danos não materiais. Assim, é importante uma análise da prática judicial dos diferentes tribunais nos países europeus. Este artigo examina as recentes abordagens da avaliação dos danos morais ao abrigo do RGPD, em três países europeus, nomeadamente, Alemanha, Reino Unido, e Países Baixos. Procura responder à questão-chave que os tribunais nestas jurisdições atribuem à indemnização por danos morais, e como são avaliados estes danos não pecuniários? Para responder a esta pergunta, este artigo, em duas partes, expõe o conceito de danos morais ao abrigo da RGPD, e analisa as respectivas práticas judiciais da Alemanha, do Reino Unido e dos Países Baixos. Conclui que, até à data, a abordagem dos tribunais alemães tem sido única no sentido de fundamentar a interpretação lata dos danos em conformidade com o RGPD. Este sistema jurídico delineou um feito promissor ao estabelecer uma cláusula de limitação implícita da responsabilidade (Lol) que pode ser igualmente seguida por outros tribunais europeus.
PALAVRAS-CHAVE: Protecção de dados; GDPR; Alemanha; Países Baixos; Reino Unido.

INTRODUCTION

Today the vulnerability of personal, institutional, and governmental data and assets to cyber risks is increasing at an unprecedented rate. Hence, cyber security risks that may cause the loss of confidentiality, integrity, or availability of information, data, or control systems, are considered challenging threats against the assets, functions, and reputation of public and private individuals and entities.[4]

In case of the Internet of Things (IoT), for instance, it is important to note that some physical objects (things) store, reprocess, and distribute more than 50 billion personal information, while according to a survey conducted in 2016, around 39% of the European consumers believed that IoT manufacturers provide no adequate information about the significant aspects of their collected data.[5] However, the number of grids and connected devices is rapidly growing and is projected to double over the next few years to reach 30-40 billion devices by 2025.[6] Hence, cyber risks may cause unprecedented direct or indirect financial and non-material damages due to the loss of production and revenue, damage

[4] Kevin Stine et al., *Integrating Cybersecurity and Enterprise Risk Management (ERM),* NISTIR 8286 (U.S: National Institute of Standards and Technology, 2020).
[5] Junwoo Seo et al., "An Analysis of Economic Impact on IoT Industry under GDPR," *Mobile Information Systems* 2018, no. 6792028 (2018).
[6] International Energy Agency, *Power systems in transition: Challenges and Opportunities ahead for Electricity Security* (Paris: IEA Publications, 2020), 38.

to assets and infrastructure, leakage of sensitive commercial information and reputational damages, etc.[7]

However, there is still no concrete universal framework that could deal with different aspects of cyber security.[8] Frustratingly, the efforts made by the international community to bring security to this mess have not yielded the expected results. Nevertheless, there is no legal vacuum (*non-liquet*) regarding personal and public data and assets in cyberspace.[9] It is important to note that every State must protect the life and property of its inhabitants and citizens from armed attacks and all types of conventional threats.[10] As governments increasingly exert control over cyberspace, it is logical to assimilate cyberspace to the high seas, international airspace, and outer space, as a *res communis omnium*.[11] In other words, similar to their territorial sovereignty, States' sovereignty applies to cyberspace, and this obliges them to prevent such detrimental practices within their territory, s, foreign States and entities.

Accordingly, governments are not only responsible for securing their citizens' privacy in general and their privacy in cyberspace. This may be done, for example, by reacting in self-defense against the citizens or by prosecuting the offenders.[12] Indeed, 'the object of punishment is the prevention of crime' as well as other negligent practices.[13] Therefore governments are adopting laws to avoid malpractices in this arena. It is admitted that such laws and regulations will

---

[7] See generally Laurent Gisel and Lukasz Olejnik, *ICRC Expert Meeting 14-16 November 2018-Geneva: The Potential Human Cost of Cyber Operations* (Geneva: ICRC, 2018).

[8] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd ed., Cambridge: Cambridge University Press, 2016).

[9] Zen Chang, "Cyberwarfare and International Humanitarian Law," *Creighton International and Comparative Law Journal* 9, no. 1 (2017): 29-30.

[10] Paul Wilkinson, "Terrorism," in *Ideas that Shape Politics,* Michael Foley, ed. (Manchester: Manchester University Press, 1994), 195.

[11] Wolff Heintschel von Heinegg, "Legal Implications of Territorial Sovereignty in Cyberspace," in *2012 4th International Conference on Cyber Conflict,* C. Czosseck, R. Ottis, and K. Ziolkowski, eds. (Tallinn: NATO CCD COE Publications, 2012), 9. Patrick W. Franzese, "Sovereignty in Cyberspace: Can It Exist?," *The Air Force Law Review*; *Maxwell AFB* 64, (2009): 1-42. Heiki Jakson et al., *Energy in Irregular Warfare* (Lithuania: NATO Energy Security Centre of Excellence, 2017). Interestingly NATO has recognised cyberspace as a fifth 'domain of operations', next to the conventional domains of land, sea, air, and space: at 31.

[12] *Island of Palmas (or Miangas) (Netherlands v United States of America) (Award)* (Permanent Court of Arbitration, Case No 1925-01, 4 April 1928) para 839. Marco Roscini, "World Wide Warfare- Jus ad Bellum and the Use of Cyber Force," in *Max Planck Yearbook of United Nations Law,* A. Von Bogdandy and R. Wolfrum, eds. (The Netherlands: Koninklijke Brill N V, 2010), 103-130.

[13] Edward W. Cox, *The Principles Of Punishment As Applied In The Administration Of The Criminal Law By Judges And Magistrates* (London: Law Times Office, 1877), 15.

increase deterrence and secure the interests of the users since they discourage detrimental practices, *inter alia*, because of 'cost imposition'.[14]

For instance, China has recently approved its Personal Information Protection Law, which under Article 20 states that 'Where personal information handlers jointly handling personal information harm personal information rights and interests, resulting in damages, they bear joint liability according to the law'.[15] This law is allegedly the strictest data-privacy law so far since it contains provisions that require any organization's or individual Chinese citizens' data to minimize data collection and to obtain prior consent, while the central government maintains broad access to data, and the national security-related provisions in the law, *inter alia,* enables the blacklisting of overseas data handlers who endanger China's national security or public interest. Moreover, illegal activities that are considered serious may be fined up to 5% of the preceding year's business income.[16]

However, the world's most robust international framework for online privacy protection remains to be Europe's General Data Protection Regulation (GDPR).[17] This is a 'regulation' because it is 'binding, directly applicable and immediately enforceable in all member States simultaneously'.[18] Interestingly, it has inspired the data protection laws of various other States (e.g., the UK and Nigeria).[19]

---

[14] Anu Narayanan et al, *Deterring Attacks against the Power Grid: Two Approaches for the US Department of Defence* (Santa Monica: RAND Corporation, 2020).

[15] Personal Information Protection Law of the People's Republic of China (adopted 20 August 2021, entered into force 1 November 2021).

[16] *Ibid.,* arts 42 and 66. It also prescribes a range of punitive measures: at arts 42, 43 and 69. Eva Xiao, "China Passes One of the World's Strictest Data-Privacy Laws," *The Wall Street Journal*, last modified 20 August 2021, available at: https://www.wsj.com/articles/china-passes-one-of-the-worlds-strictest-data-privacy-laws-11629429138.

[17] *European Union, Regulation (EU) 2016/679 of the European Parliament and the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* (GDPR), 27 April 2016, available at: https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN. Mia Hoffmann and Laura Nurski, "What is holding back artificial intelligence adoption in Europe?," *Policy Contribution,* no. 24/21 (2021): 16.

[18] Alberto Martinelli and Alessandro Cavalli, *European Society* (Leiden: Brill, 2020), 217.

[19] Bureau of Economic and Business Affairs, "2021 Investment Climate Statements: United Kingdom," US Department of State, accessed 2 August 2022, available at: https://www.state.gov/reports/2021-investment-climate-statements/united-kingdom/. See also European External Action Service, "EU Annual Report on Human Rights and Democracy in The World 2021: Country Updates," Ares (2022)2359912, adopted 30 March 2022, available at: https://www.eeas.europa.eu/sites/default/files/documents/220323%202021%20EU%20Annual%20Human%20Rights%20and%20Democracy%20Country%20Reports.docx.pdf.

To comprehend the efficacy of the collective approach of the EU, compared with the government-centered approach of countries like China, it is significant to assess various legal aspects of these laws at the drafting and application stages. However, it is beyond the limits of this article to analyze all the recent national laws and regulations which deal with the matter of privacy and data protection in cyberspace. Generally, these laws, *inter alia*, tend to relieve the victims of both material and non-material damages. However, as against material damages, the valuation of non-material damages has challenging complexities. Therefore, this article exclusively deals with this issue. It sheds some light on the recent approaches to the valuation of non-material damages under the GDPR, in three European countries, namely, Germany, the UK, and the Netherlands. It pursues to answer the key question that do the courts in these jurisdictions award compensation for non-material damages, and how are these non-pecuniary damages evaluated?

To answer this question, this article begins in Part 1 by dealing with the concept and nature of non-material damages, under the GDPR. In Part 2 the respective judicial practice of Germany, the UK, and the Netherlands is descriptively analyzed. This part includes counterarguments from the legal point of view. Finally, it concludes that, so far, the approach of the German courts to the interpretation and applications of the GDPR and its recitals in terms of non-material damages in cyberspace has been a turning point in the sense of substantiating the broad interpretation of damages per the GDPR. This legal system has delineated a promising achievement by establishing an implied limitation of liability clause, which may be equally followed by other European courts.

1. The Challenge of Non-material Damages under the GDPR

The right to data protection has been considered one of the fundamental rights in the EU States and such rights are generally accepted as inalienable rights.[20] Therefore, subsequent damages caused by breach and violation must also be compensated and not be ignored, unless otherwise damages made by consent of the victim him/herself (*Volenti non fit injuria*), and there is no exception

[20] Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford: Oxford University Press, 2015), 240-241

to the mentioned rule even for the governments or giant companies (*Lex non a rege est violanda, Rex non potest peccare*).

Essentially, 'Damage' is known for loss or injury to a person or property.[21] In the context of medical sciences, non-material damages refer to the mental suffering of a victim;[22] however, from the legal point of view, its calls, *inter alia*, for economic analysis.[23] Accordingly, this term may be defined as damage that 'does not involve a measurable reduction of the injured party's patrimony'.[24] Since none of the two mentioned definitions are explicitly stated in the GDPR, this legal definition appears most suitable to fill this vacuum.

However, this legal definition presents a blurred explanation since the very meaning and scope of the term 'damage' is not clearly defined.[25] It is unclear whether the definition of damage has been adequately updated to meet the current progress in technology, for instance. To be clear, one must address the subjects of non-material damages (e.g., psychiatric harms and loss of amenities in life). Interestingly, Professor *Berryman* has classified non-pecuniary damages in eight major categories: 1. Pain and suffering, 2. Loss of amenities in life 3. Loss of expectation in life 4. Psychiatric injury 5. Physical inconvenience and discomfort 6. Mental and emotional distress 7. Loss of enjoyment, including feelings of disappointment 8. Loss of reputation, embracing loss of dignity (moral damages).[26]

Although his innovative classification of non-pecuniary damages embraces various possible losses, recent technological developments call for a wider spectrum of conceived damages. In other words, this classification appears incomplete since it does not include the feelings of the properties of human beings, such as their 'Avatars', for instance. In fact, any type of discrimination or

[21] Bryan A. Garner, *Black's Law Dictionary*, Ninth Edition (St. Paul, MN: Thompson West, 2009), 445.
[22] Isabelle Lutte, "Defining personal loss after severe brain damage," *Progress in Brain Research* 177, (2009): 354.
[23] Mohsen Mohebi, "Evaluation of Damages in International Investment Arbitration: Appropriate Method," in *International Law in Motion-Some New Insights*, Mohsen Mohebi et al., eds. (Louvain-la-Neuve: P.U.L., 2020), 132.
[24] Susanna Hirsch, "Children as Victims under Austrian Law," in *Children in Tort Law- Part II: Children as Victims*, Miquel Martín-Casals, ed. (Germany: Springer, 2007), 23.
[25] Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss, Law Commission Consultation Paper No 140* (Norwich: HMSO, 1995).
[26] Jeffrey, Berryman, "Non-Pecuniary Damages in Common Law Canadian Tort Law," (Montreal: Canadian National Judicial Institute, 2014), 3. https://dx.doi.org/10.2139/ssrn.3309912

mental distress of Avatars (data) in the second life (Metaverse), may similarly amount to non-pecuniary damage, and therefore fall within the scope of damages under the GDPR. This interpretation is in line with the wording of Recital 146 which orders the courts to interpret the term 'damage' broadly. It reads as follows:

> The controller or processor should compensate any damage which a person may suffer as a result of processing that infringes this Regulation […] The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation […] Data subjects should receive full and effective compensation for the damage they have suffered.

Although the imprecise reference to 'the Court of Justice' in this recital makes it a bit difficult to perceive the initial intention of the drafters of the GDPR, establishing a dynamic approach owing to the intention of the legislators of the GDPR is not an impossible task whatsoever. Such comprehension is also in line with the principle of *effet utile,* which is a general principle of interpretation, and according to which the drafters of a treaty (or other similar legal instruments, such as the EU regulations) have adopted a norm to be applied, and the judges have to interpret them in good faith and 'following the ordinary meaning to be given to the terms of the treaty in a manner which guarantees its effectiveness (*ut res magis valeat quam pereat*).[27]

However, reports from cyber security specialists suggest a fragmented picture of breaches under the GDPR at best.[28] For instance, many enforcement actions have been brought against the US technology companies, such as Google, throughout the past decades.[29] Before the GDPR came into force in May 2018, 'data subjects' could not readily obtain substantial non-material damages under most European States' laws.[30] Indeed, even after the enforcement of the GDPR, most European courts were initially reluctant to grant significant

[27] Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980) (VCLT) art 31(1). Daniel Rietiker, ' The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis', *Nordic Journal of International Law,* 2010, 79(2): 245-277, at 256.

[28] Kate MacMillan, "Struggling with the GDPR," *Computer Fraud & Security* 2019, no. 6 (2019): 20.

[29] *Lloyd v Google LLC* [2019] EWCA Civ 1599.

[30] Gabriëlle Ras, Marcel van Gerven, and Pim Haselager, "Explanation Methods in Deep Learning: Users, Values, Concerns and Challenges," in *Explainable and Interpretable Models in Computer Vision and Machine Learning,* Hugo Jair Escalante et al., eds. (Switzerland: Springer, 2018). The data subject is the entity or individual whose information is being processed by the application, or the entity which is directly affected by the application outcome: at 23.

compensation for non-material damages under the GDPR.[31] In particular, the courts have historically demanded proof of specific and substantial non-material damage before issuing an award.[32] Therefore, the challenge with non-material damages mostly lies in providing two essential requirements. First, how to prove non-material damages? In other words, how is it possible to prove that a breach of GDPR has scratched one's soul? Second, how are these non-pecuniary damages evaluated?

Therefore, the European courts are challenged with the application of Article 82(1) of the GDPR, which states: 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered'. Particularly because Recital 146 of this regulation calls for a broad interpretation of such damages. Moreover, the GDPR imposes binding obligations upon companies to observe the rights of the individuals who provide data (i.e., 'Data Subjects').[33] Many non-member countries have tried to draft a similar document, therefore, the shortcomings of the GDPR must by no means be overlooked.[34]

The method of the valuation of damages due to the breaches of the GDPR is an immense gap that is easily felt under Article 82. The question is tricky, and some believe there is no mathematical formula to assess these non-pecuniary damages.[35] Therefore the current judicial practice diverges in the course of the valuation of non-material damages.

---

[31] See e.g. *Lloyd v Google LLC* [2019] EWCA Civ 1599, [159]. *Hofuitspraak zoals weergegeven in HR 15 maart 2019* (Supreme Court of the Netherlands, 17/04668, ECLI: NL: HR: 2019: 376, 15 March 2019), [3.2.2].

[32] "GDPR Violations in Germany: Civil Damages Actions on the Rise: Number 2821," *Latham & Watkins*, last modified 18 December 2020, available at: https://www.jdsupra.com/legalnews/gdpr-violations-in-germany-civil-84570/.

[33] Stephen Breen, Karim Ouazzane and Preeti Patel, "GDPR: Is Your Consent Valid?," *Business Information Review* 37, no. 1 (2020): 19.

[34] "Iranians are interested in the GDPR," *Deutsch-Iranische Industry und Handelskammer,* last modified 21 August 2019, available at: https://iran.ahk.de/en/media/news-details-eng/iranians-are-interested-in-the-gdpr. See also Bureau of Economic and Business Affairs, "2021 Investment Climate Statements." European External Action Service, "EU Annual Report."

[35] Huw Davies and Leonard Wigg, "How to Assess Damages for Breaches under the GDPR: A Practical Guide," *Farrar's Building*, last modified 1 February 2021, www.farrarsbuilding.co.uk/how-to-assess-damages-for-breaches-under-the-gdpr-a-practical-guide/. See e.g. *A Claim for Awarding Non-material Damages* (Tehran Appeal Court, Case no. 9209970220101702, 1 March 2014). The court held that: since there is no criterion for assessing such non-material damage, the court dismisses the suit.

For instance, in *Council of the European Union v Lieva de Nil and Christiane Impens*, the European Court of Justice (ECJ) held that:

> [F]or the liability of the Community to be incurred in the case of a claim for damages brought by an official a number of conditions must be met as regards the illegality of the conduct of the institution of which he complains, the *actual harm* suffered and the existence of a causal link between that conduct and the damage alleged to have been suffered.[36]

In *European Ombudsman v Claire Staelen*, the Court of Justice of the European Union (CJEU) has referred to this decision and held that: 'It must be borne in mind that, according to the settled case-law of the Court, the damage for which compensation is pursued must be actual and certain'.[37]

However, calculating the exact amount of harm and pressure suffered by each data subject is not possible; therefore, the aim of stating these two terms (i.e. 'actual' and 'certain') is unclear of non-material damages varies from one person (victim) to another, and it 'actuality' makes the determination of the scope of damage more complicated. In other words, the Judges, instead of interpreting the word 'damage', have provided a criterion full of ambiguousness. Suppose 'A' suffers from the loss of his/her data (an old photo of his/her infancy), which was under the possession of 'B'. Here, the scratches of A's soul are undeniable, but the custom of the competent court, as for '*Lex fori*', may render the lawsuit fictitious.

Another controversial aspect of the GDPR concerns the term 'property'. Property rights relate to the ownership and control of different kinds of assets. In recognizing between 'what is mine', and, 'what is not mine', property has an exclusive qualification that can override the opposing claims of any other person to access, use and enjoyment of a disputed asset.[38] Data, indeed, may embrace economic values for every owner. For instance, an Email may contain details that the potential sender is not happy with its disclosure. As rightly stated by *Justice*

[36] *Council of the European Union v Lieva de Nil and Christiane Impens* (European Court of Justice, C-259/96 P, ECLI: EU: C: 1998: 224, 14 May 1998) para 23. See also *Annibale Culin v Commission of the European Communities* (European Court of Justice, C-343/87, ECLI: EU: C: 1990: 49, 7 February 1990) para 27.
[37] *European Ombudsman v Claire Staelen* (Court of Justice of the European Union, C-337/15 P, ECLI: EU: C: 2017: 256, 4 April 2017) para 91.
[38] Sir John Mummery, "Property in the Information Age," in *Modern Studies in Property Law,* Volume 8, Warren Barr, ed. (Oxford: Hart Publishing, 2015), 5.

M Nadon in *Nautical Data v C-Map USA,* mere information may be counted as property too.[39]

However, some European Courts have issued sophisticated decisions in this respect. For instance in *Your Response Ltd v Datateam Business Media Ltd*, the tribunal stated that:

> Electronic data was not a kind of property that was capable of possession and of being subject to a lien. There were intellectual property rights, such as copyright and data base rights, but there was no case for treating the electronically-held information itself as property. There was a distinction between property in the physical form in which the data was recorded and rights of access to the information, which were not property.[40]

Therefore, the legal systems have provided no single accepted definition of 'property' law, and it is up to the courts to decide which criterion shall govern the disputes regardingf the valuation of losses and damages to data. Should they establish Google's custom in America, which does not consider family photos as property, the custom of England consumers which considers them as a kind of property, or the custom of the place where data has been violated '*Lex loci delicti"*?[41] Given, the increasingly ubiquitous infringements of personal data in cyberspace, there is no *stare decisis* that would be consistently followed by all courts throughout the world in this regard.[42] This appears to be a drawback that should by no means be overlooked. The approaches of different courts remain divergent not only in terms of defining the concept of damage, or the scope of

[39] *Nautical Data Intl Inc v C-Map USA Inc* [2013] FCA 63."Generally speaking, data - mere information - cannot be 'owned' as though it were property. It can be kept confidential by its creator or the person who is in possession of it, and a legal obligation can be imposed on others by contract or by legislation to keep the information confidential. However, there is no principle of property law that would preclude anyone from making use of information displayed in a publicly available paper nautical chart, even if the information originated with the Crown or is maintained by the Crown": at para 14.

[40] *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281. See generally Mummery, "Property in the Information Age," 7.

[41] See e.g. *Microsoft Corp v AT&T Corp,* 550 US 437 (2007). "Def Lepp Music and Others V. Stuart-Brown and Others," *Reports of Patent, Design and Trade Mark Cases* 103, no. 11 (1986): 273–278.

[42] See e.g. *National Football League v PrimeTime 24 Joint Venture*, 211 F 3d 10 (2nd Cir, 2000). This is an example of a US case law which has recognised the principle of *Lex loci protectionis.* Toshiyuki Kono and Paulius Jurcys, "General Report," in *Intellectual Property and Private International Law: Comparative Perspectives*, Toshiyuki Kono, ed. (Oxford: Hart Publishing, 2012), 158. In contrast with the foresaid US case law, Japan has admitted the principle of *Lex loci delicti,* under Article 7 of the International Private Law (2007).

property but also, in adopting a consistent method for the valuation of such damages. A weakness that can be seen in many recent cases.[43]

However, as for now, the CJEU has restrictively interpreted the scope of non-pecuniary damages, particularly since there is a conflict between the broad interpretation of 'damage', and the establishment of an 'actual harm'. Thus, it is important to once again recall the purpose of 'compensation' under the GDPR, since each legal instrument should generally be interpreted in the light of its object and purpose.[44]

In brief, the main purposes of the GDPR may be singled out as follows: 1. Compensation of loss and satisfaction for the data subject. 2. Principle of complete reparation: the plaintiff must be in the position where he would have been but for the event giving rise to his claim.[45] 3. Prevention of violations that are compensable under the GDPR.[46]

Given the principle of complete reparation, observing the subsequent situation of data subjects becomes an important issue; accordingly, this requirement is met if the member courts apply for fair compensation due to the implementation of both the CJEU case law and the GDPR. Therefore, the narrow interpretation should be relinquished, and the broad interpretation must be established as a norm of interpretation.

This method may be applied conveniently in jurisdictions that have not yet established settled-case laws. The situation in countries with many cases regarding non-material damages under the GDPR is different, as they do not require such a method due to the theory of contract '*Pacta sunt servanda*' and *implied terms*. This suggestion may respond to many problematic situations, particularly in the cases that are pending on the basis of tort law and non-contractual relationships. Therefore, these courts are able of deciding the grants upon contractual relationships (e.g., employment).

---

[43] E.g. *Lane v Facebook, Inc,* 696 F 3d 811 (9th Cir, 2012). In this case "the plaintiffs alleged violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 (1986); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986); the Video Privacy Protection Act, 18 U.S.C. § 2710 (1988); California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750; and California's Computer Crime Law, Cal. Pen. Code § 502": at para 816. Nevertheless, the court did provide no definition of damage or non-material property.

[44] VCLT, art 31(1).

[45] Bénédict Winiger et al., *Digest of European Tort Law: Volume 2: Essential Cases on Damage* (Berlin: Walter de Gruyter, 2011). This is an accepted principle of contractual liability in many countries, including Germany: at 15-20.

[46] GDPR, arts 82-83.

1.1. Punitive or Compensatory Nature of GDPR

Although Punitive or 'exemplary' damages have an agreed definition as pecuniary damages granted to a plaintiff in a private civil action, in tandem with compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff's rights,[47] there is no comprehensive definition of this concept, due to the rejection of such extra-compensatory damages, in many Civil law countries.[48] Given the different basis of the two legal systems, it might be a question of the original intention of the GDPR's legislators. Literally, by scrutinizing the wording of Article 82, one may infer a mere obligation to pay 'real compensation' and nothing beyond that. The hermeneutics and customary reason for such literalism is the existence of two common words after one another (i.e., material or non-material damage). Here the well-known rule of *Ejusdem generis* may be of some use in finding the original intention of the legislator. According to this rule, when two general words are used consecutively in a sentence, the second word is interpreted in the semantic realm of the first word.[49] Similarly, this rule is applied to other interpretive regimes known as text *Prima facie*.[50] Although it might appear that the rule does not apply to this case, since both the words are general and according to *Ejusdem generis*, the second word must be specific, this condition is not necessary. The reason is that even if the second word is general, customers will have the same impression as in the first case (i.e., specific word). In any case, the relationship between the two words should be observed, especially when there is doubt regarding the definition of the words.

[47] David G. Owen, "A Punitive Damages Overview: Functions, Problems and Reform," *Villanova Law Review* 39, no. 2 (1994): 364-68.

[48] For instance, the courts in Italy, Germany, the Netherlands, and France have precluded the payment of extra-compensatory damages in many cases. See e.g. *Parrott v Soc Fimez*, Italian Supreme Court 1183/2007, 19 January 2007. In this case, the Italian Supreme Court held that punitive damage conflicts with fundamental principles of the law and is thus not available: at 2724. See also Federal Court of Justice (BGH) NJW 1992, 3069. Here the German Federal Court of Justice made it clear that damages may have a penalisation factor that focuses on the wrongdoer's behaviour and serves personal and general prevention with a punitive intention but should not be compared to the US generic term 'punitive damages'. See also Cour de cassation [Cass.] [Supreme court for judicial matters] 2e civ., July 5, 2001, Appeal number: 99-18.712, Bull. civ. II, No. 135. In this case, the court has instead accepted the principle of full reparation 'réparation intégrale'.

[49] Wex Definitions Team, "ejusdem generis," *Cornell Law School,* last modified February 2020, available at: https://www.law.cornell.edu/wex/ejusdem_generis.

[50] Text *Prima facie* is highly accepted and used by Islamic jurisprudence and principles of interpretation.

However, Article 82(1) implies that compensation is awarded for either material or non-material damages. In this way, material and non-material damages are two types of damage and should be interpreted in their context. In this case, the rule of *Ejusdem generis* may easily be applied as going beyond the meaning and implications of the first word is considered to be contrary to the conventional understanding.

Besides this line of understanding, other legal opinions provide valuable arguments in this respect. For instance, in *UI v Österreichische Post AG,* advocate general, Campos Sanchez-Bordona, has argued that 'Punitive damages have a deterrent aim' which needs to be mentioned by the legislator. So far, EU directives have rarely mentioned this type of damage,[51] and as for now, in EU law, direct awards of such damages are an exception.[52]

It is important to mention at this point that generally punitive damages are recoverable in tort actions for actions or omissions that demonstrate malice, aggravated or egregious fraud, oppression, or insult, where the defendant has participated in, authorized, or ratified such actions or omissions of an agent or servant.[53] However, the GDPR being the *lex specialis* concerning data protection has restricted such damages to cases of personal sufferance.[54] On the other hand, trivial harm, such as mere upset as a result of the infringement of provisions of the GDPR does not result in the sufferance of data subjects, since according to *de minimis non curat lex* it is not considered a proper ground for awarding compensation.[55]

[51] See e.g. *Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast),* OJ L 204/23. Art 25. See also *Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC,* OJ L 390/38. Art 28.

[52] *UI v Österreichische Post AG*, Case C-300/21: Request for a preliminary ruling from the Oberster Gerichtshof (Austria) (12 May 2021), Opinion of Advocate General Campos Sanchez-Bordona (6 October 2022) para 38.

[53] See e.g. *Zarcone v Perry*, No. 591, Docket 77-7469, 572 F.2d 52 (Second Cir. 1978) para 57. *Mathie v Fries*, No. 1274, 121 F.3d 808 (2d Cir. 1997) para 818. *Darulis v Pennell,* No. 17654, 680 N.E.2d 684 (Ohio Ct. App. 1996) para 172.

[54] GDPR, art 82(1).

[55] *UI v Österreichische Post AG*, Opinion of Advocate General Campos Sanchez-Bordona, para 117.

2. Analyzing the Recent Judicial Practice of the European States

Regardless of the criteria that may be applied by the courts to measure the compensation for mental injuries, it is important to note that the very establishment of 'mental injury' is a new concept. It was first referred to in French jurisprudence.[56] Later on, this institution was also developed in the German legal theory, which identified the notion of the gradual growth of damage, and this development was directly influenced by the concept of personality rights; respectively, the rights related to personality, such as rights of liberty, life, name, reputation, etc.[57] As for now, there is no unique judicial approach to this issue, and the European courts have diverse practices in this regard. For instance, some judicial decisions (particularly in the German Courts) have endorsed the wide interpretation of the term damage under Article 82 of the GDPR,[58] while others stick to the traditional narrow interpretation of the conceptAnother point [59]. of difference is in concern with the granted amounts.

Whether the litigation takes place in France, Germany or the Netherlands, etc., the concept of damage in terms of its scope and compensation should be applied in a relatively consistent method because the European Court of Justice has ruled that non-material damage must be 'actual and certain'.[60]

However, analyzing the judicial approach of every European State is beyond the limits of this article. Thus, the current practice of three European States (i.e., Germany, the UK, and the Netherlands) regarding the breaches of GDPR, and the landmark cases in these jurisdictions will be discussed below.

---

[56] Winiger et al., *Digest of European Tort Law*. According to French law, every damage, regardless of its type and category, is *a priori* compensable: at 25.

[57] Asmir Sadiku, "Immaterial Damage And Some Types Of Its Compensation," *Prizren Social Science Journal* 14, no. 1 (2020): 50.

[58] E.g. *Arbeitsgericht Düsseldorf* [Düsseldorf Labor Court], 9 Ca 6557/18, 5 March 2020, paras 97-118.

[59] E.g. *Hofuitspraak zoals weergegeven in HR 15 maart 2019* (Supreme Court of the Netherlands, 17/04668, ECLI: NL: HR: 2019: 376, 15 March 2019) [3.2.2]. Lorcan Moylan Burke, "European Union: Change Of Approach By Germany To Claims For Non-material Damage Under The GDPR," *Mondaq,* last modified 4 March 2022, available at: https://www.mondaq.com/ireland/data-protection/1168240/change-of-approach-by-germany-to-claims-for-non-material-damage-under-the-gdpr.

[60] *European Ombudsman v Claire Staelen* (Court of Justice of the European Union, C-337/15 P, ECLI: EU: C: 2017: 256, 4 April 2017). It must be borne in mind that, according to the settled case law of the Court, the damage for which compensation is sought must be actual and certain: at para 91. Mark Egeler, Auke-Frank Tadema, "Collective actions and non-material damages under the GDPR: is it a match?," *Freshfield Bruckhaus Deringer,* last modified 4 March 2021, available at: https://technologyquotient.freshfields.com/post/102gs7v/collective-actions-and-non-material-damages-under-the-gdpr-is-it-a-match.

2.1. The Approach of the German Courts

The *Judgment of 25 May 2020* was a decision held by the Darmstadt Regional Court, concerning a dispute that originated from a spontaneous business email sent by a retailer to a client who apparently didn't agree to the sending of publicizing email. The Magistrate Court of Goslar dismissed Plaintiff's claim, ruling that he was not authorized to compensation under Article 82 of the GDPR because he failed to show that he has suffered any relevant damages from the unsolicited message that met the *de minimis* threshold of impairment. Following this, Plaintiff filed a constitutional complaint (*Verfassungsbeschwerde*), arguing that the decision violated his right to a trial before a legal judge under the German Constitution. Plaintiff argued that the Magistrate Court had wrongly applied its own interpretation of the law rather than referring to the ECJ jurisprudence to clarify the question of whether or not it is necessary to meet a *de minimis* threshold of impairment to be qualified for compensation of non-material damages under Article 82 of the GDPR. The Federal Constitutional Court agreed with the plaintiff and held that the term 'damage' must be interpreted broadly. Accordingly, the Court awarded a sum of €1,000 in favor of the plaintiff.[61]

The *Lübeck Labor Court decision of 20 June 2019* was another instance where a former employer (respondent) published his employee's photo on Facebook without his consent; the court considered the respondent as a 'controller' within the meaning of the GDPR and perceived the publishing action unlawful since there was no consent of the employee. Concerning the assessment of damages for pain and suffering, the court transferred the existing case law on the violation of the right to one's own image (violation of the right of personality) to the GDPR; and based on various factors, such as the intensity, type, significance, the extent of the violation, the reason and motive for this action, arrived at an amount of € 1,000.00 as the upper limit for the compensation. The court considered this award to ensure that violations of data protection are effectively suspected, and thus the enforcement of the GDPR is ensured.[62]

---

[61] *LG Darmstadt* [Darmstadt Regional Court], Az 13 O 244/19 (REWIS RS 2020, 4460), May 25, 2020. Detlev Gabel et al., "Compensating non-material damages based on Article 82 GDPR – is there a de minimis threshold?," *White & Case LLP*, last modified 2 March 2021, available at: https://www.whitecase.com/insight-alert/compensating-non-material-damages-based-article-82-gdpr-there-de-minimis-threshold.

[62] *Arbeitsgericht Lübeck* [Lübeck Labor Court], 1 Ca 538/19, 20 June 2019. See also Stefan Hessel, "Data protection: Lübeck Labour Court estimates a fine of €1,000 for the illegal use of an

The *ArbG Dresden Judgment of August 26, 2020,* is another example of legal jurisprudence that the Dresden Labor Court has protected the 'health data' of the employee by awarding a sum of € 1500 in damages, based on the alleged violation of Article 82 of the GDPR because the employer had unlawfully passed on the health data from the employee to both the Foreigners' Registration Office and the Employment Agency.[63] Interestingly, in the *Arbeitsgericht Düsseldorf Judgment of 5 March 2020*, the award rendered in favor of the plaintiff was declared to be € 5,000.[64] A relatively considerable amount of compensation is, so far, granted for the non-material damages suffered by an individual data subject.[65]

The German Courts have typically had a strict approach to claims for non-material damages. However, the recent judicial practice demonstrates a development in this context.[66] After the ratification of the GDRP the German courts have adequately adapted to the concept of damage under Article 82 of the GDPR, and departed from their traditional *De minimis non curat lex* approach. The German courts have awarded, on average, € 2,133 in response to the accepted non-material compensation claims.[67]

Germany has established a *jurisprudence constante* concerning the limitation of liability (Lol) by means of a binding agreement for any type of non-material

employee photo on Facebook," *Linkedin*, last modified 14 January 2020, available at: https://www.linkedin.com/pulse/data-protection-l%C3%BCbeck-labour-court-estimates-fine-1000-stefan-hessel.

[63] *Arbeitsgericht Dresden* [Dresden Labor Court], 13 Ca 1046/20, 26 August 2020. See especially Kai Judemann, "€1,500 in damages according to GDPR – ArbG Dresden of August 26, 2020, Az. 13 Ca 1046/20," *Judemann Lawyers*, last modified 24 October 2020, available at: https://ra-juedemann.de/1-500e-schadensersatz-nach-dsgvo-arbg-dresden-vom-26-august-2020-az-13-ca-1046-20/.

[64] *Arbeitsgericht Düsseldorf* [Labor Court of Düsseldorf], 9 Ca 6557/18, 5 March 2020.

[65] See also, *Amtsgericht Pforzheim* [Pforzheim Local Court], 13 C 160/19, 25 March 2020. Where the court awarded €4,000 for illegal disclosure of health data. *Landesarbeitsgericht Köln* [Regional Labor Court of Cologne], 2 Sa 358/20, 14 September 2020. In this case the court awarded only a sum of €300 for disclosure of a pdf file of the plaintiff after the termination of employment between plaintiff and respondent. See Christoph Werkmeister, Philipp Roos, and Annabelle Hamelin, "Non-material damages and the GDPR – Germany," Freshfield Bruckhaus Deringer, last modified 26 August 2021, available at: https://technologyquotient.freshfields.com/post/102h5g4/non-material-damages-and-the-gdpr-germany?_t_id=1B2M2Y8AsgTpgAmY7PhCfg%3D%3D&_t_q=+&_t_tags=language%3Astandard%2Csiteid%3Aba2121b4-3779-4fa6-8e49-49e502a9987c&_t_ip=66.249.65.170&_t_hit.id=web_conte

[66] Moylan Burke, "European Union".

[67] See: *Lloyd v Google LLC* [2019] EWCA Civ 1599. The court calls the assessing damage discussion a hypothetical negotiation: at 140. Also see Davies and Wigg, "How to Assess Damages for Breaches under the GDPR."

damages. Focusing on these frequent judicial decisions in the German courts, this opt-in has been established in the German legal system, hence, ignorance of the law is no excuse *(Ignorantia juris non excusat).*

2.2. The Approach of the United Kingdom

For several years the UK legal system was protected and regulated by the GDPR but now that the country has left the EU, it has its own equivalent set of data protection regulations. The Data Protection Act of 2018 ('DPA 2018') is the UK's third-generation data protection legislation.[68] It replaces the previous 1998 law with a similar title and updates the country's legal framework in response to new technologies.[69] Section 168 of the DPA (2018) makes it clear that the right to compensation for 'non-material damage' under Article 82 of the GDPR includes compensation for 'distress'.[70] However, to be able to present a criterion for the classification of the judgments of the UK's courts on breach of personal data, there needs to be an overview of the case law in this regard.

For instance, in the recent case of *Lloyd v Google LLC*, the respondent has issued a claim alleging that the appellant ('Google') has breached its duties as a data controller under the Data Protection Act 1998 ('DPA 1998') to over 4 million Apple iPhone users during a period of several months in 2011 and 2012 when Google was able to gather and use their browser-generated information. The respondent sued on his own behalf and on behalf of a class of other residents in England and Wales whose data was collected in this way. He applied for permission to serve the claim out of the jurisdiction.[71] In this case, *Lord Leggatt* declared that:

> The amount of damages recoverable per person would be a subject for argument, but a figure of £750 was advanced in a letter of claim. Multiplied

[68] Data Protection Act (25 May 2018). It was amended on 01 January 2021 to reflect the UK's status outside the EU, after the Brexit.
[69] "About the DPA 2018," *Information Commissioner's Office*, accessed 10 August 2022, available at: https://ico.org.uk/for-organisations/guide-to-data-protection/introduction-to-dpa-2018/about-the-dpa-2018/#:~:text=The%20DPA%202018%20sets%20out%20the%20framework%20for%20data%20protection,UK's%20status%20outside%20the%20EU.
[70] In Article 82 of the GDPR which refers to the right to compensation for material or non-material damage, "non-material damage" includes distress.
[71] *Lloyd v Google LLC* [2021] UKSC 50, [1].

> by the number of people whom Mr. Lloyd claims to represent, this would bring into being an award of damages of the order of £3 billion.[72]

He also believed that:

> Where the individual claims are of sufficiently high value, group actions can be an effective way of enabling what are typically several hundred or thousands of claims to be litigated and managed together, avoiding duplication of the court's resources and allowing the claimants to benefit from sharing costs and litigation risk and by obtaining a single judgment which is binding in relation to all their claims.[73]

However, the court rejected the idea that non-material breaches of the DPA (1998) entitle the claimants to compensation for 'loss of control' of their personal data.[74]

It is important to mention at this point that the right to claim compensation under Article 82 of the GDPR is substantially the same as the right to recover compensation under Section 13 of the DPA (1998).[75] Section 13 of the DPA (1998) only covers physical damages, and therefore, the subject of compensation under this instrument differs from that of the GDPR.[76]

In addition, it is interesting to know that Section 13 of the DPA (1998) differentiates between 'damage' and 'distress'.[77] It seems that the legislator has considered these two words as antonyms.[78] Accordingly, the court must find a pecuniary loss to award for distress.[79]

However, a restrictive approach to compensation for distress was the practical trend among the courts until 2015, when the Court of Appeal in *Vidal-*

---

[72] *Ibid.*, [5].
[73] *Ibid.*, [25].
[74] *Ibid.*, [148]-[160].
[75] Andrew Jones, "How much are personal data breach claims really worth?," *Lexology*, last modified 19 April 2021, available at: https://www.lexology.com/library/detail.aspx?g=25ca722d-b8d7-41cc-b2be-a2478250748b.
[76] DPA 1998, section 13(1): "An individual who suffers damage by reason of any Compensation for contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage".
[77] DPA 1998, section 13(2): "An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if (a) the individual also suffers damage by reason of the contravention, or (b) the contravention relates to the processing of personal data for the special purposes".
[78] This distinction is also evidenced in sections 10(1)(a), and 40(2).
[79] See e.g. *Johnson v Medical Defence Union* [2007] EWCA Civ 262. This issue of construction matters in the present case in particular because by the terms of Section 13 distress damages are only available if damage in the sense of pecuniary loss has been suffered: [75].

Hall v Google struck down the typical judicial practice on the grounds that it was inconsistent with the EU Data Protection Directive.[80]

In this case, *Lady Justice Sharp* presented a new view on interpreting Article 13 of the DPA 1998. Her conceptualism approach becomes clear when she states:

> The DPA was intended to implement Directive 95/46/EC ('the Directive') which is a directive 'on the protection of individuals with regard to the processing of personal data and on the free movement of such data'. The Directive as a whole is aimed at safeguarding privacy rights in the context of data-management. This is repeatedly emphasized in the recitals […] Two issues arise in respect to the DPA. The first is whether the plaintiffs are allowed to recover damages for distress for the alleged breaches of the data protection principles. It is common ground that on a literal interpretation of section 13, they are not entitled to recover such damages because their claims do not fall within either section 13(2)(a) or (b).[81]

But this may be a wrong conceptual interpretation as the DPA (1998) clearly exempts non-pecuniary damages unless a data subject meets the provisions under Section 13(2). It is doubtful that the governing approach of the English courts would render imputing a former style of interpretation (i.e., literalism) to English Judges.[82] In any case, the UK Case-law decisions under the DPA (1998) demonstrate no direct practice in terms of the valuation of non-pecuniary damages because 1) The survey, starts in 2015 when *Lady Sharp* calls the governing practice a literal way of interpretation. 2) Despite some landmark cases that have addressed the mere non-material damages, there are still no consistent judicial decisions (a sort of *jurisprudence constante*) as to the fair assessment of non-material losses in the UK's judicial practice.[83] Moreover, the theory of contract or the so-called 'opt-in regime' is detrimental to data subjects as there is no settled case law in respect to the breaches of the GDPR in the UK, so far;

---

[80] Jones, "How much are personal data breach claims really worth?." *Vidal-Hall v Google Inc* [2015] EWCA Civ 311. *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,* OJ L 281/31.

[81] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [55]-[59].

[82] In *Computer Associates UK Ltd v The Software Incubator Ltd* [2018] EWCA Civ 518, Judge *Gloster* has explicitly illustrated the British court approach by stating: 'I am not persuaded that it is open to this court to impute what many might think was a common-sense meaning of "goods" to the legislators of the Directive in 1986 and the Regulations in 1993 when the Directive was implemented': at [55].

[83] See e.g. *Johnson v Medical Defence Union* [2007] EWCA Civ 262. The Appellate court granted £ 5.000 for distress: [13]. *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446.

nonetheless, this situation may leave a rich, fertile ground for IT Technologies to invest, and make business in the UK.[84]

2.3. The Approach of the Netherlands

In a recent Dutch case held on March 2019, the Supreme Court of the Netherlands ruled that when claiming non-material damages, the plaintiff must verify their impairment with 'concrete information'.[85] In this case, the Dutch Court has unprecedentedly accepted the new point of view about non-material damages and states that:

> In any case, the injured party must provide sufficient and specific information that shows that psychological damage has occurred in connection with the circumstances of the case, which requires that the existence of mental injury be established by objective standards.[86]

At this point, it is important to note that, principally, non-material damages are any damages that cannot be felt; thus, using 'objective standards' to assess such damages may be doubtful. In any case, this does not merely call for legal knowledge. Therefore, if an expert, say a psychiatrist, for instance, puts his opinion forward, the court must follow their conclusion and accordingly grant compensation for non-material damages. However, no other notable cases have been reported in this context; hence, it is still to be seen how the Courts of the Netherlands would deal with this issue.[87] As for now, the judicial practice of the Netherlands resembles other European countries (e.g., Ireland) that have not yet handed down a judgment which addresses compensations for non-material damages.[88]

CONCLUSION

Although there are inconsistent and divergent judicial decisions concerning the assessment of non-material damages under the GDPR, the theory of contract

---

[84] Generally, the lack of acceptable judgments, and precedent, cause legal uncertainty, for both the parties and particularly the one who has a weaker place in a contractual relationship.
[85] *Hofuitspraak zoals weergegeven in HR 15 maart 2019* (Supreme Court of the Netherlands, 17/04668, ECLI: NL: HR: 2019: 376, 15 March 2019) [3.2.2].
[86] *Hoge Raad* (Dutch Supreme Court, ECLI: NL: HR: 2003: AF4606, C01/246HR, 9 May 2003).
[87] See generally "When are you entitled to immaterial compensation under Dutch law?," *Insurance Law Global*, last modified 24 July 2019, available at: https://www.insurancelawglobal.com/news-views/articles/when-are-you-entitled-to-immaterial-compensation-under-dutch-law/.
[88] Moylan Burke, "European Union."

can be useful by including *prima facie* a new implied term for the limitation of liability. Accordingly, owing to the uninvited LoI clause which is established by some European States' Courts, gradually, a cap for the liability of wrongdoers and the violators of contracts is being created in terms of claiming non-material damages. Germany has been the pioneer State in establishing such an implied LoI clause since the German courts have awarded, on average, € 2,133 in response to the accepted non-material compensation claims. On the other hand, other States like the UK and Netherlands have not still come up with such a LoI. Given that the mere breach of the GDPR concerns non-material damages, the approach of the European Courts in the UK and the Netherlands have, to a large extent, rendered Recital 146 of the GDPR, which calls for a broad interpretation of 'damage', nugatory.

At the bottom, it is important to note that, in other jurisdictions, the courts are principally able to adopt the same amount of LoI concerning the parties to contracts that are concluded in Germany. This comprehension is also in line with the underlying principle of freedom of contract, which includes the freedom to choose the place of concluding a contract and to shape the content of each contract (*La liberté de façonner le contenu du contrat*).

REFERENCES

Journal Articles

Breen, Stephen, Ouazzane, Karim, and Patel, Preeti. "GDPR: Is Your Consent Valid?." *Business Information Review* 37, no. 1 (2020): 19–24.

Chang, Zen. "Cyberwarfare and International Humanitarian Law." *Creighton International and Comparative Law Journal* 9, no. 1 (2017): 29-53.

Hoffmann, Mia, and Nurski, Laura. "What is holding back artificial intelligence adoption in Europe?." *Policy Contribution,* no. 24/21 (2021): 1-19.

Lutte, Isabelle. "Defining personal loss after severe brain damage." *Progress in Brain Research* 177, (2009): 353-359.

MacMillan, Kate. "Struggling with the GDPR." *Computer Fraud & Security* 2019, no. 6 (2019): 20-40.

Owen, David G. "A Punitive Damages Overview: Functions, Problems and Reform." *Villanova Law Review* 39, no. 2 (1994): 364-68.

Rietiker, Daniel. "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with

Public International Law – No Need for the Concept of Treaty Sui Generis." *Nordic Journal of International Law* 79, no. 2 (2010): 245-277.

Sadiku, Asmir. "Immaterial Damage And Some Types Of Its Compensation." *Prizren Social Science Journal* 14, no. 1 (2020): 50-56.

Seo, Junwoo, et al. "An Analysis of Economic Impact on IoT under GDPR." *Mobile Information Systems* 2018, no. 6792028 (2018). https://doi.org/10.1155/2018/6792028.

Tarrant, John. "Obligations as Property." *UNSW Law Journal* 34, no. 2 (2011): 677-695.

W. Franzese, Patrick. "Sovereignty in Cyberspace: Can It Exist?." *The Air Force Law Review*; *Maxwell AFB* 64, (2009): 1-42.

Books

A. Garner, Bryan. *Black's Law Dictionary*, Ninth Edition. St. Paul, MN: Thompson West, 2009.

Barr, Warren. *Modern Studies in Property Law*, Volume 8. United Kingdom: Hart Publishing, 2015.

Berryman, Jeffrey. "Non-Pecuniary Damages in Common Law Canadian Tort Law." Montreal: Canadian National Judicial Institute, 2014. https://dx.doi.org/10.2139/ssrn.3309912

D. Solis, Gary. *The Law of Armed Conflict: International Humanitarian Law in War,* Second Edition. Cambridge: Cambridge University Press, 2016.

George, Alexandra. "The Difficulty of Defining 'Intellectual Property'." In *Constructing Intellectual Property*, edited by Alexandra George, 31-80. Cambridge, Cambridge University Press, 2012.

Gisel, Laurent, and Olejnik, Lukasz. *ICRC Expert Meeting 14-16 November 2018-Geneva: The Potential Human Cost of Cyber Operations*. Geneva: ICRC, 2018.

Heintschel von Heinegg, Wolff. "Legal Implications of Territorial Sovereignty in Cyberspace." In *2012 4th International Conference on Cyber Conflict,* edited by C. Czosseck, R. Ottis, and K. Ziolkowski, 7-19. Tallinn: NATO CCD COE Publications, 2012.

Hirsch, Susanna. "Children as Victims under Austrian Law." In *Children in Tort Law- Part II: Children as Victims*, edited by Miquel Martín-Casals, 7-28. Germany: Springer, 2007.

International Energy Agency. *Power systems in transition: Challenges and Opportunities ahead for Electricity Security*. Paris: IEA Publications, 2020.

Jakson Heiki, et al. *Energy in Irregular Warfare.* Lithuania: NATO Energy Security Centre of Excellence, 2017.

Kono, Toshiyuki, and Jurcys, Paulius. "General Report." In *Intellectual Property and Private International Law: Comparative Perspectives*, edited by Toshiyuki Kono, 1-216. Oxford: Hart Publishing, 2012.

Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss, Law Commission Consultation Paper No 140* (Norwich: HMSO, 1995).

Lynskey, Orla. *The Foundations of EU Data Protection Law*. Oxford: Oxford University Press, 2015.

Martinelli, Alberto, and Cavalli, Alessandro. *European Society.* Leiden: Brill, 2020.

Mohebi, Mohsen. "Evaluation of Damages in International Investment Arbitration: Appropriate Method." In *International Law in Motion-Some New Insights*, edited by Mohsen Mohebi et al., 131-64. Louvain-la-Neuve: P.U.L., 2020.

Mummery, Sir John. "Property in the Information Age." In *Modern Studies in Property Law,* Volume 8, edited by Warren Barr, 3-12. Oxford: Hart Publishing, 2015.

Narayanan, Anu, et al. *Deterring Attacks against the Power Grid: Two Approaches for the US Department of Defence*. Santa Monica: RAND Corporation, 2020.

Ras, Gabriëlle, van Gerven, Marcel, and Haselager, Pim. "Explanation Methods in Deep Learning: Users, Values, Concerns and Challenges." In *Explainable and Interpretable Models in Computer Vision and Machine Learning,* edited by Hugo Jair Escalante et al., 19-36. Switzerland: Springer, 2018.

Roscini, Marco. "World Wide Warfare- Jus ad Bellum and the Use of Cyber Force." In *Max Planck Yearbook of United Nations Law,* edited by A. Von Bogdandy and R. Wolfrum, 85-130. The Netherlands: Koninklijke Brill N V, 2010.

Stine, Kevin, et al. *Integrating Cybersecurity and Enterprise Risk Management (ERM)*, NISTIR 8286. U.S.: National Institute of Standards and Technology: U.S. Department of Commerce, 2020.

W. Cox, Edward. *The Principles Of Punishment As Applied In The Administration Of The Criminal Law By Judges And Magistrates*. London: Law Times Office, 1877.

Wilkinson, Paul. "Terrorism." In *Ideas that Shape Politics,* edited by Michael Foley, 189-98. Manchester: Manchester University Press, 1994.

Winiger, Bénédict, et al. *Digest of European Tort Law: Volume 2: Essential Cases on Damage*. Berlin: Walter de Gruyter, 2011.

Legal Documents

A Claim for Awarding Non-material Damages (Tehran Appeal Court, Case no. 9209970220101702, 1 March 2014).
Amtsgericht Pforzheim [Pforzheim Local Court], 13 C 160/19, 25 March 2020.
Annibale Culin v Commission of the European Communities (European Court of Justice, C-343/87, ECLI: EU: C: 1990: 49, 7 February 1990).
Arbeitsgericht Dresden [Dresden Labor Court], 13 Ca 1046/20, 26 August 2020.
Arbeitsgericht Düsseldorf [Düsseldorf Labor Court], 9 Ca 6557/18, 5 March 2020.
Arbeitsgericht Lübeck [Lübeck Labor Court], 1 Ca 538/19, 20 June 2019.
Computer Associates UK Ltd v The Software Incubator Ltd [2018] EWCA Civ 518.
Council of the European Union v Lieva de Nil and Christiane Impens (European Court of Justice, C-259/96 P, ECLI: EU: C: 1998: 224, 14 May 1998).
Darulis v Pennell, No. 17654, 680 N.E.2d 684 (Ohio Ct. App. 1996).
Data Protection Act (25 May 2018).

"Def Lepp Music and Others V. Stuart-Brown and Others," *Reports of Patent, Design and Trade Mark Cases* 103, no. 11 (1986): 273–278, https://doi.org/10.1093/rpc/1986rpc273.

Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securabouttted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390/38.

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the freaboutsuch data, OJ L 281/31.

European Ombudsman v Claire Staelen (Court of Justice of the European Union, C-337/15 P, ECLI: EU: C: 2017: 256, 4 April 2017).

European Union, Regulation (EU) 2016/679 of the European Parliament and the Council on the protection of natural persons with regard to the processing of personal data and oaboutemeabatementdata, and repealing Directive 95/46/EC (General Data Protection Regulation). 27 April 2016. Available at: https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN.

Hofuitspraak zoals weergegeven in HR 15 maart 2019 (Supreme Court of the Netherlands, 17/04668, ECLI: NL: HR: 2019: 376, 15 March 2019).

Hoge Raad (Dutch Supreme Court, ECLI: NL: HR: 2003: AF4606, C01/246HR, 9 May 2003).

Island of Palmas (or Miangas) (Netherlands v United States of America) (Award) (Permanent Court of Arbitration, Case No 1925-01, 4 April 1928).

Johnson v Medical Defence Union [2007] EWCA Civ 262.

Landesarbeitsgericht Köln [Regional Labor Court of Cologne], 2 Sa 358/20, 14 September 2020.

Lane v Facebook, Inc, 696 F 3d 811 (9th Cir, 2012).

LG Darmstadt [Darmstadt Regional Court], Az 13 O 244/19 (REWIS RS 2020, 4460), May 25, 2020.

Lloyd v Google LLC [2019] EWCA Civ 1599.

Lloyd v Google LLC [2021] UKSC 50.

Mathie v Fries, No. 1274, 121 F.3d 808 (2d Cir. 1997).

Microsoft Corp v AT&T Corp, 550 US 437 (2007).

Murray v Big Pictures (UK) Ltd [2008] EWCA Civ 446.

National Football League v PrimeTime 24 Joint Venture, 211 F 3d 10 (2nd Cir, 2000).

Nautical Data Intl Inc v C-Map USA Inc [2013] FCA 63.

Personal Information Protection Law of the People's Republic of China (adopted 20 August 2021, entered into force 1 November 2021).

UI v Österreichische Post AG, Case C-300/21: Request for a preliminary ruling from the Oberster Gerichtshof (Austria) (12 May 2021), Opinion of Advocate General Campos Snchez-Bordona (6 October 2022).

Vidal-Hall v Google Inc [2015] EWCA Civ 311.

Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

Your Response Ltd v Datateam Business Media Ltd [2014] EWCA Civ 281.

Zarcone v Perry, No. 591, Docket 77-7469, 572 F.2d 52 (Second Cir. 1978).

Web Sources

Bureau of Economic and Business Affairs. "2021 Investment Climate Statements: United Kingdom." US Department of State. Accessed 2 August 2022. Available at: https://www.state.gov/reports/2021-investment-climate-statements/united-kingdom/.

Davies, Huw, and Wigg, Leonard. "How to Assess Damages for Breaches under the GDPR: A Practical Guide." *Farrar's Building*. Last modified 1 February 2021. www.farrarsbuilding.co.uk/how-to-assess-damages-for-breaches-under-the-gdpr-a-practical-guide/.

Deutsch-Iranische Industry und Handelskammer. "Iranians are interested in the GDPR." Last modified 21 August 2019. Available at: https://iran.ahk.de/en/media/news-details-eng/iranians-are-interested-in-the-gdpr.

Egeler, Mark, Tadema, Auke-Frank. "Collective actions and non-material damages under the GDPR: is it a match?." *Freshfield Bruckhaus Deringer.* Last modified 4 March 2021. Available at: https://technologyquotient.freshfields.com/post/102gs7v/collective-actions-and-non-material-damages-under-the-gdpr-is-it-a-match.

European External Action Service. "EU Annual Report on Human Rights and Democracy in The World 2021: Country Updates." Ares (2022)2359912. Adopted 30 March 2022. Available at: https://www.eeas.europa.eu/sites/default/files/documents/220323%202021%20EU%20Annual%20Human%20Rights%20and%20Democracy%20Country%20Reports.docx.pdf.

Gabel, Detlev, et al. "Compensating non-material damages based on Article 82 GDPR – is there a de minimis threshold?," *White & Case LLP*. Last modified 2 March 2021. Available at: https://www.whitecase.com/insight-alert/compensating-non-material-damages-based-article-82-gdpr-there-de-minimis-threshold.

Hessel, Stefan. "Data protection: Lübeck Labour Court estimates a fine of €1,000 for the illegal use of an employee photo on Facebook." *Linkedin*. Last modified 14 January 2020. Available at: https://www.linkedin.com/pulse/data-protection-l%C3%BCbeck-labour-court-estimates-fine-1000-stefan-hessel.

Information Commissioner's Office. "About the DPA 2018." Accessed 10 August 2022. Available at: https://ico.org.uk/for-organisations/guide-to-data-protection/introduction-to-dpa-2018/about-the-dpa-2018/#:~:text=The%20DPA%202018%20sets%20out%20the%20framework%20for%20data%20protection,UK's%20status%20outside%20the%20EU.

Insurance Law Global. "When are you entitled to immaterial compensation under Dutch law?." Last modified 24 July 2019. Available at: https://www.insurancelawglobal.com/news-views/articles/when-are-you-entitled-to-immaterial-compensation-under-dutch-law/.

Jones, Andrew. "How much are personal data breach claims worth?." *Lexology*. Last modified 19 April 2021. Available at: https://www.lexology.com/library/detail.aspx?g=25ca722d-b8d7-41cc-b2be-a2478250748b.

Judemann, Kai. "€1,500 in damages according to GDPR – ArbG Dresden of August 26, 2020, Az. 13 Ca 1046/20." *Judemann Lawyers*. Last modified 24 October 2020. Available at: https://ra-juedemann.de/1-500e-schadensersatz-nach-dsgvo-arbg-dresden-vom-26-august-2020-az-13-ca-1046-20/.

Latham & Watkins. "GDPR Violations in Germany: Civil Damages Actions on the Rise: Number 2821." Last modified 18 December 2020. Available at: https://www.jdsupra.com/legalnews/gdpr-violations-in-germany-civil-84570/.

Moylan Burke, Lorcan. "European Union: Change Of Approach By Germany To Claims For Non-material Damage Under The GDPR." *Mondaq.* Last modified 4 March 2022. Available at: https://www.mondaq.com/ireland/data-protection/1168240/change-of-approach-by-germany-to-claims-for-non-material-damage-under-the-gdpr.

Werkmeister, Christoph, Roos, Philipp and Hamelin, Annabelle. "Non-material damages and the GDPR – Germany." *Freshfield Bruckhaus Deringer*. Last modified 26 August 2021. Available at: https://technologyquotient.freshfields.com/post/102h5g4/non-material-damages-and-the-gdpr-germany?_t_id=1B2M2Y8AsgTpgAmY7PhCfg%3D%3D&_t_q=+&_t_tags=languag

e%3Astandard%2Csiteid%3Aba2121b4-3779-4fa6-8e49-49e502a9987c&_t_ip=66.249.65.170&_t_hit.id=web_conte

Wex Definitions Team. ”ejusdem generis.” *Cornell Law School*. Last modified February 2020. Available at: https://www.law.cornell.edu/wex/ejusdem_generis.

Xiao, Eva. “China Passes One of the World’s Strictest Data-Privacy Laws.” *The Wall Street Journal*. Last modified 20 August 2021. Available at: https://www.wsj.com/articles/china-passes-one-of-the-worlds-strictest-data-privacy-laws-11629429138.

Data de submissão do artigo:14/08/2022

Data de aprovação do artigo: 19/12/2022

Edição e propriedade:

Universidade Portucalense Cooperativa de Ensino Superior, CRL

Rua Dr. António Bernardino de Almeida, 541 - 4200-072 Porto

Email: upt@upt.pt