

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**COMPENSATORY MECHANISM IN DIVORCE AND REPARATION OF DAMAGES
RESULTING FROM DOMESTIC VIOLENCE
(MECANISMO COMPENSATORIO EN EL DIVORCIO Y REPARACIÓN DE DAÑOS
DERIVADO DE VIOLENCIA INTRAFAMILIAR)**

CASE: *Amparo Directo en Revisión 5490/2016*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: March 7, 2018

KEY WORDS: Institution of compensation and double shift, reparation of damages, wrongful act, domestic violence, fair compensation, moral damages, compensation amount for domestic violence.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 5490/2016*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of March 7, 2018, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/ADR5490-2016.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's the Supreme Court of Justice, Excerpt of the *Amparo Directo en Revisión 5490/2016*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO*

BACKGROUND: L sued J for: the dissolution of their marriage, compensation of 50% of the assets and payment of fair compensation for the domestic violence suffered by L and her son C. A judge in Guanajuato declared the dissolution of the marriage, compensation of 50% of the assets in favor of L and ordered J to pay compensation for moral damages resulting from the domestic violence, the amount of which should consider: the standard of living and actual situation of the victims, the environment in which they live and their development, as well as J's economic possibilities. L and J appealed the judge's decision and the Chamber hearing the case affirmed the trial court decision. J and L filed an *amparo* lawsuit. The Collegiate Circuit Court granted the *amparo* to L so the judge could evaluate whether certain real estate could be included in the compensation. The Collegiate Circuit Court also granted the *amparo* to J so that the chamber would evaluate the percentage of 50% of the compensation and determined that, even though the acts of domestic violence had been proven, it was not feasible to order J to pay compensation for moral damages given that article 63.1 of the American Convention on Human Rights (ACHR) was not applicable. L and C filed a *recurso de revisión* which was heard by the First Chamber of the Supreme Court.

ISSUE PRESENTED TO THE COURT: Whether the Collegiate Circuit Court adequately interpreted the use of the compensatory mechanism in divorce and whether the interpretation by the Collegiate Circuit Court on the reparation of the damages resulting from the domestic violence is in accordance with the doctrine of the First Chamber regarding the right to fair compensation and the right to a life free of violence.

HOLDING: The decision of the Collegiate Circuit Court was overturned for essentially the following reasons. The interpretation by the Collegiate Circuit Court of the compensatory mechanism in divorce is in line with the constitutional principles the institution pursues. However, with respect to the reparation of the damages resulting from domestic violence, it was concluded that the Collegiate Circuit Court's interpretation was contrary to the doctrine of the First Chamber regarding the right to fair compensation and the right to a life free of violence. In the view of the

Supreme Court, the patrimonial and moral impacts on victims of violence should be economically remedied fairly and proportionally to the damages suffered.

VOTE: The First Chamber decided this case with the unanimous vote of the five justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=204632>

EXTRACT OF THE *AMPARO DIRECTO EN REVISIÓN* 5490/2014

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of March 7, 2018, issues the following decision.

BACKGROUND

- p.2 L sued J for: (a) the dissolution of their marriage, (b) compensation of 50% of the assets and (c) the payment of fair compensation for the domestic violence she and her son C suffered.
- p.2-3 The trial court judge declared the dissolution of the marriage; approved the compensation of 50% of the assets in favor of L; and ordered J to pay compensation for moral damages, considering that because of the domestic violence, the fundamental rights to health and dignity of L and C were violated. The judge also specified that the amount should be calculated in the ancillary proceeding enforcing the decision, taking into consideration: the standard of living and the actual situation of the victims, the environment in which they live and their development, as well as the economic possibilities of J.
- p. 3 L and J appealed the decision of the trial court. The chamber that heard the appeals confirmed: (a) the dissolution of the marriage; (b) the appropriateness of the compensation of 50% of the assets in favor of L – but changed the assets that should be included in this –; (c) the acts of domestic violence; and, (d) the appropriateness of compensation for moral damages.
- p.4-5 Both parties filed an *amparo* lawsuit. In her claim, L essentially challenged the exclusion of some assets in the compensation. J stated that the compensation should not be granted because his ex-wife did not prove that she had dedicated herself exclusively to the home and care of the children. He also indicated that the order to pay moral damages should not be applicable because the acts of domestic violence were not proven.
- p.5-6 The Collegiate Circuit Court issued a decision in both *amparo* trials. The Collegiate Circuit Court granted the *Amparo* to L so that the chamber would evaluate whether certain real estate can be included in the compensation. J was granted the *amparo* so that the chamber would again evaluate the appropriateness of 50% determined for the compensation, and determine that, in spite of the acts of domestic violence having been

proved, it was not feasible to order J to pay compensation for moral damages given that article 63.1 of the American Convention on Human Rights (ACHR) was not applicable.

- p.7 L and her son C filed a *recurso de revisión* before the Supreme Court. The arguments set forth in the case centered on two themes: compensation considering the right to equal treatment, and economic compensation for moral damages resulting from domestic violence.

STUDY OF THE MERITS

- p.12 In the *Amparo Directo en Revisión* 1340/2015, the Supreme Court decided that in disputes where a situation of violence or vulnerability is raised in which gender issues impede imparting justice completely and equally, the judicial bodies must verify, applying the gender perspective tool, whether there are possible disadvantages due to that condition.
- p.13 This tool requires: (i) verifying the existence of situations of power or contexts of structural inequality based on sex, gender roles or sexual preferences; (ii) that the judges consider, when interpreting the rule applicable to the specific case, whether that rule provokes a direct violation of the right to equal treatment by introducing impacts differentiated by gender, and if it does, then the judge must prefer the interpretation that eliminates that discrimination, or choose not to apply the rule; and, (iii) that when applying the gender perspective method, if the judge considers that the evidence is insufficient to clarify the situation due to gender inequalities, then the judge must request the presentation of the evidence relevant to analyze the gender violence situations or the circumstances of inequality provoked by gender stereotypes, for which the judge, at the moment or assessing the evidence, must read and interpret the facts and evaluate the evidence avoiding discriminatory stereotypes.

I. Institution of compensation and double shift

- p.14 In different precedents, it has been established that the institution of compensation is a mechanism to redress the economic harm suffered by the spouse that, in the interest of the marriage, assumed certain domestic and family burdens without receiving economic remuneration in exchange. Its purpose is to try to compensate the opportunity cost

associated with not having been able to participate in the conventional labor market with the same time, intensity and diligence as the other spouse.

- p.15 Among the principal characteristics of the compensation are the following: its nature is to restitute, not sanction; it can be requested and resolved in favor of either of the spouses that has reported an economic imbalance due to having worked primarily in domestic work; the burden of proof corresponds to the petitioning party; the compensation mechanism only operates with respect to the assets acquired during the marriage, because presumably that is the period during which situations of impoverishment and enrichment were created that would be unjust at the time of dissolving a separate property regime; and the compensation does not imply equalizing the patrimony of the spouses, but redressing the opportunity costs generated in the patrimony of one of them.

It was also established that domestic work may consist of the material execution of tasks in the home; in the material execution of tasks outside of the home but related to the organization of the house and obtaining of goods and services for the family; and in carrying out functions of direction and management of the economy of the home and the care, upbringing and education of the children. It was also indicated that to determine the amount of the compensation, the period that the petitioner engaged in those tasks should be observed.

- p.17 The Supreme Court considers that the interpretation of the institution of compensation and the elements that were used to evaluate its percentage are correct and according to the doctrine of the Supreme Court. The collegiate body did not ignore that the purpose of the institution of compensation is to repair the opportunity cost assumed by the spouse who was dedicated to some degree to the care of the home, since it did not consider the double shift as an obstacle to the validity of the compensation, but rather as an element for determining the duration and degree of dedication to housework by L. Therefore, it determined the opportunity cost faced by L and, consequently, the amount of compensation.

II. Reparation of the damages for domestic violence

p.17-18 The Supreme Court considers this grievance to be justified, since while the Collegiate Circuit Court was right in pointing out that article 63.1 of the ACHR is applied by the Inter-American Court of Human Rights to the States that are parties to the Convention and not to private parties, in the national sphere the First Chamber has interpreted the concept of “fair compensation” as a human right that governs the relations between private parties. The compensation resulting from civil liability cases must be in accordance with the doctrine of the Supreme Court and it is considered that domestic violence constitutes a wrongful act that can be tried in a civil proceeding when the claim consists of receiving a monetary compensation from the aggressor.

i. Scope of article 63.1 of the American Convention on Human Rights in the international sphere

p.19 The Inter-American Court of Human Rights has established that in the case of a violation of a human right attributable to a State signatory of the ACHR, the restitution of the right must always be declared, if possible, which consists of returning a person to the enjoyment of the right violated by the State act. Thus, an obligation is generated for the responsible party to guarantee the enjoyment of the right or remedy the consequences of such violation.

p.19-20 The reparation measures used in the inter-American case law may be grouped under three headings: (i) the restitution of the violated right (*restitutio in integrum*); (ii) economic compensation for the material and intangible damages caused; and (iii) other non-pecuniary measures, called “reconstruction measures”, and among which are the measures of satisfaction and the guarantees of non-repetition.

Nevertheless, in International Law reparation measures have not been understood as a human right but as a legal consequence of the existence of State liability.

ii. Scope of the concept “fair compensation” in the national sphere. Characterization as a human right that governs the relations between private parties

p.21 The concept of “fair compensation” established in article 63.1 of the ACHR is not a human right when applied in the international sphere, since it has been conceived as a legal consequence resulting from the violation of the ACHR. Nevertheless, in Mexico that

concept has been given its own content and scope. In the proceedings that give rise to economic reparations, a “fair compensation” has been understood as a fundamental right that governs the relations between private parties.

p. 22-23 When considering fair compensation in damages lawsuits as a human right, it has been established that the provisions that establish fixed compensation formulas that do not pursue full reparations are unconstitutional. In relation to legality, various parameters have been established to quantify the amount of the reparations.

p.23 In the *Amparo en Revisión* 1068/2011, the First Chamber indicated that “fair compensation” or “full compensation” implies returning things to the state in which they were found, the reestablishment of the prior situation and if that is not possible, establishing the payment of a compensation for the damages caused when the duty to redress arises. From that conception, it was specified that the right to a fair compensation is applicable in the relations between private parties.

p.25-26 In various precedents, this First Chamber has analyzed the legality of the amount of the reparations, establishing various parameters to determine that a reparation is fair. In the *Amparo Directo* 50/2015, it was established that the amount of compensation must be calculated based on two principles: full reparation of the damages and individualization of the payment according to the particularities of each case. Thus, compensation for moral damages must be individualized based on: (i) the nature and extent of the damages caused, that is, whether they are physical, mental or psycho-emotional; (ii) the possibility of rehabilitation of the person affected; (iii) the loss of opportunities, in particular those of employment, education and social benefits; (iv) the material damages, including income and lost profit; (v) the intangible losses; (vi) the expenses of legal assistance or of experts, medications and medical, psychological and social services; (vii) the level or degree of liability of the parties; (viii) their economic situation; and (ix) other particular characteristics.

p.26 In the *Amparo Directo* 30/2013 and the *Amparo Directo* 21/2013 and the *Amparo Directo en Revisión* 4646/2014, the First Chamber determined that to establish the economic compensation resulting from the moral damages, the following must be analyzed: i) the type of right or interest injured, ii) the seriousness of the damages, iii) the expenses accrued or to accrue as a result of the moral damages, iv) the degree of liability of the

person responsible, and v) the economic capacity of the latter; emphasizing that the elements of quantification are merely indicative.

In summary, the right to fair compensation is configured as a human right that governs the relations between private parties, seeking that the reparations of the damages are fair.

iii. The right to fair compensation in damages lawsuits

p.27-28 The claim for “a fair compensation” should be processed and carried out according to the rules and procedures of the lawsuits in which it is invoked, whether civil or administrative. The primary purpose of civil liability and State civil liability lawsuits is the economic reparation of the pecuniary or non-pecuniary impacts resulting from an unlawful act or from the irregular activity of the State. To demand fair compensation, the elements of the liability must be proven, which are: a wrongful act (or irregular administrative activity), damages and a causal link between the act and the damages. It should also be kept in mind that the objective of these lawsuits is essentially economic, since the intention is to mitigate the consequences of the wrongful act through a sum of money and to reproach the guilty party.

p.28 In the *Amparo Directo* 30/2013 and *Amparo Directo* 31/2013, the First Chamber indicated that fundamental objectives are reached in matters of social retribution through compensation, since by requiring the liable party to pay compensation, the victims obtain the satisfaction of seeing their desire for justice met. Through compensation, the victims can see that the damages caused to them also have adverse consequences for the person responsible.

In addition, compensation has a dissuasive effect on harmful conduct, which will prevent future wrongful conduct. Such measure has a double function: people will avoid causing damages to avoid having to pay compensation and, on the other hand, it becomes economically convenient to cover all necessary expenses to avoid causing damages to other people.

iv. Constitutional wrongful acts

p.28-29 Occasionally the wrongful acts or the irregular activity of the State may imply the violation of human rights. In effect, a civil wrongful act occurs when a rule of public order or the *lex artis* is violated. Such duty may constitute a human right when the duty violated is fully

identified with a right recognized internationally or nationally, such as the prohibition on discrimination, or the protection of honor or the freedom of expression. The economic reparation for violations of human rights can be tried through special procedures, created specifically for that (constitutional torts or human right torts) or, in some cases, through civil claims for reparations in which the elements of the liability must be proven: wrongful act, damages, and causal link between the act and the damages.

- p.29-30 Nevertheless, in the absence of specific procedures, the economic reparation derived from the patrimonial or moral damages generated by the violation of human rights may be claimed through a civil lawsuit, when the person responsible is a private party, or an administrative lawsuit when the person responsible is the State. The claims through these proceedings must prove that the violation generated patrimonial or moral damages, and that their only purpose is the economic compensation of the impacts suffered and not the generation of non-pecuniary measures of reparation (of satisfaction and non-repetition).
- p.30 The activity or omission that gives rise to a wrongful act must be clearly identifiable. Thus, the acts or omissions are only a source of liability when they are wrongful, that is, when they are contrary to public order provisions and custom. Therefore, the conduct of the responsible party will be wrongful when that party fails to fulfill a legal obligation it has.
- p.32 In this regard, the reparation of the violation of human rights may be tried in a civil lawsuit, and the compensation that is established must be based on the criteria that this Supreme Court has established regarding the right to fair compensation. Thus, L is right in indicating that fair compensation is a fundamental right that governs relations between private parties.

v. Domestic violence constitutes a wrongful act that can be tried in non-contractual civil liability suits

- p.33 The Supreme Court considers that domestic violence constitutes a wrongful act that takes place in relations between private parties, whose patrimonial and non-patrimonial consequences must be remedied fairly and according to the level of the impact.

The elements that compose civil liability must be shown. These are: the existence of a wrongful act, damages, and the causal link between that act and the damages. Only when these elements have been proven can an economic compensation arise.

a. Wrongful act

A wrongful act is one that is contrary to public order provisions and custom. Therefore, the conduct of the person responsible will be wrongful when that person violates a legal obligation he has. This obligation may arise directly from a duty established constitutionally or through an agreement. The conduct will also be wrongful when the responsible party is negligent (which presumes a duty of care violated).

The First Chamber has recognized that the right to live in a family environment free of violence is a human right that results from the protection merited by the rights to life, health, dignity of persons, equal treatment and the establishment of conditions for personal development, recognized in articles 1, 4 and 29 of the Constitution.

p.35 According to article 7 of the Law to Prevent, Address and Eradicate Violence in the State of Guanajuato and article 6 of the Law for Women's Access to a Life Free of Violence of the State of Guanajuato, domestic violence is any act or omission that is directed toward causing a psychological, physical, patrimonial, economic or sexual impact on or harm to any member of the family.

p.36 The acts or omissions that constitute harmful conduct in the physical, emotional or psychological sphere of a member of the family constitute a wrongful act, since carrying them out violates public order provisions, including those established at the constitutional and international level.

b. Damages

p.37 A wrongful act may generate both patrimonial and non-patrimonial (moral) damages and both must be compensated. Patrimonial damages consist of all the economic losses suffered and the disbursements incurred to address the damages. They also include lost profits, understood as the benefits that the affected party would have received if it had not suffered the wrongful act. Thus, patrimonial damage may have present and future consequences.

p.38 The conceptualization of moral damages centers on the non-patrimonial or spiritual interests that may have been affected. In this regard, anguish, afflictions, humiliations, suffering or pain constitute moral damages because they are impacts on non-patrimonial interests.

p.39 The moral damages resulting from domestic violence are generated by the gamut of physical or psychological pain and suffering that the affected party has suffered or continues to suffer because of the acts or omissions of the generator of violence. The patrimonial damages are generated by all the economic costs that the affected party had to assume because of the actions or negligence of the aggressor.

Various studies show that domestic violence has consequences that compromise the fundamental freedoms of those who are its victims, such as the rights to life and personal security, the highest possible level of physical and mental health, to education, to work and housing, as well as participation in public life.

The women that suffer domestic violence have a variety of physical and emotional health problems, affecting their capacity to earn a living and participate in public life. Their children run a significantly greater risk of having health problems, low academic achievement and behavioral problems.

c. Causal link

p.41 To prove the civil liability that is claimed, the causal link between the conduct of the aggressor and the harm caused to the plaintiff must be demonstrated. The damages experienced must be a consequence of the conduct of the agent. Otherwise liability could be imposed on a person that did not have anything to do with the harm caused.

The causal link between the conduct attributable to the defendant and the adverse effect derived from it for the plaintiff, must be duly proven because the origin of the liability gravitates precisely on the attribution of the harmful act to the defendant. Thus, the liability presumes the attribution of conduct that has sufficient causal effectiveness to generate the result.

In cases of domestic violence, it must be shown that the psychological harm suffered or that will be suffered by the victim, and the economic costs the victim assumed or will

assume in the future, result precisely from the domestic violence exercised by the aggressor. It must be proven that the patrimonial and non-patrimonial impacts are a consequence of the unlawful act that is claimed.

d. Elements to determine the amount of compensation

p.42-43 The reparation of the patrimonial damages may include, according to article 1405 of the Civil Code of the State of Guanajuato, the reestablishment of the prior situation, when that is possible, or the payment of damages and losses. When the damages caused to persons result in death, total permanent disability, partial permanent disability, total or partial temporary disability, their degree will be determined based on the provisions of the Federal Labor Law, and in case of death, the compensation will correspond to the legitimate heirs of the victim.

p.43 The moral damages resulting from domestic violence may also be compensated (both damages must be paid). The translation of the economic reparation resulting from moral damages is more complex than the reparation derived from patrimonial damages. The First Chamber has determined that the following should be analyzed to set the economic compensation resulting from moral damages: i) the type of right or interest harmed, ii) the seriousness of the damages, iii) the expenses accrued or to be accrued because of the moral damages, iv) the degree of liability of the responsible party, and v) the economic capacity of the latter.

e. Determination of the existence of civil liability in this case

p.44 In this case, the wrongful act generating the civil liability was proven: the psychological and emotional violence that L and her son suffered, since the case files show that in each proceeding it was concluded that there were sufficient elements of evidence and indications to prove the domestic violence.

p.46 The Supreme Court considers that harmful conduct in the emotional or psychological sphere has occurred, which under the guidelines explained constitutes a wrongful act, since engaging in such conduct violates public order rules, including those established at the constitutional and international level.

In addition to the wrongful conduct, the harm must be verified, which must be certain quantitatively and qualitatively, even when its exact amount cannot be determined.

p.47 It can be affirmed that the harm did occur and that it is attributable to J's conduct. However, the level of the damages that L and her son suffered was not established. From the evidence provided it is not possible to determine the importance of the value or interest affected, as quantifier of this aspect of the damages, which is to say, the degree of impact produced: minor, medium or severe.

In that regard, it is important to collect more evidence so that, applying the guidelines to determine the amount of compensation, the amount in this case can be established.

III. Effects of the *amparo* in light of the above doctrine

p.47-48 It is considered that L and her son are right to indicate that their claim of domestic violence should have been analyzed as a wrongful act that can be remedied through a "fair compensation" in a civil liability lawsuit. The Collegiate Circuit Court should have stated that, although article 63.1 of the ACHR is applied only for finding States party to the Convention liable in the international sphere, it has different scope and purposes in the national sphere. Thus, the collegiate body should have looked to the ample doctrine that the Supreme Court has developed regarding the concept of fair compensation.

DECISION

The decision of the Collegiate Circuit Court is overturned so that it may, leaving the matter
p.48 of compensation for divorce untouched, order the chamber to reinstate the lower court proceeding, allowing the judge to collect more evidence to determine the degree of impact on the affected parties of the domestic violence suffered by L and C. Thus, once the level of the damages is determined, the amount of the compensation corresponding to them shall be established based on the parameters the Supreme Court has established to reach a fair compensation.