



Hogan
Lovells

A new milestone in the
Spanish insurance sector:
the reform of the Scale

SEPTEMBER

2015

The Law 35/2015, 22 September, over the reform on the system of valuation of damages caused to people harmed in car accidents, has been published in the Spanish Official Gazette on 23 September 2015. The new system for the valuation of damages in car accidents, known generally as the "Scale" ("Baremo"), has been outlined since 2011 in the Experts Commission designated by the Ministries of Economy, Treasury and Justice. The new Scale will come into force on 1 January 2016.

The Spanish Insurance sector has undergone a significant evolution since 2009 when the Solvency II Directive was published and, above all, during 2014 and 2015, when the Spanish Parliament debated and amended the Private Insurance and Reinsurance Supervision and Solvency Act ("LOSSEAR") that was finally published on 15 July 2015. At present, under the new Scale's criteria, the Spanish Insurance sector set sails for new horizons of deep changes in risk management, prime calculations, determination of reserves and profit margins estimation.

The new Scale that is going to enter into force next 1 January 2016 sets up a new reference scale for the Insurance sector regarding the valuation of personal damages.

Despite the fact that, under the first Transitional Provision of the Law 35/2015, the Scale cannot be applied but to car accidents victims, the Spanish Courts **have taken the Scale as a reference for the calculation of any compensation in terms of personal damages (with the exception of labor Courts).**

From the Insurance Car's sector perspective, it should be highlighted that "whiplash trauma", as well as other injuries impossible to be determined by diagnostic tests lose weight in the valuation of a potential compensation, while severe injured victims compensations are strengthened in order to grant the full reparation of damages.

The new Scale updates the criteria used for the calculation of compensations for personal damages. Before now, these criteria (updated since 2004 yearly) did not take into account issues such as orphanage, family-like living or even the impact of one sequel over the general health of the victim in particular.

The principles underlying the new Scale, articulated already the former reference system for the valuation of damages. Nevertheless, the new legislation aims to shore up the efficacy **principle of full reparation of damages**. Provided the aim of strengthening the full reparation principle, there has been an average increase of 16.5% in the amount of the compensations for car accidents considering that compensation may repair not only corporal damages but also moral damages (50% more in death compensations and 35% more in compensations for permanent sequels).

Besides, the **articulation principle**, established as the second pillar over which the new Scale has been outlined, determines that pecuniary damages and personal damages should be valued separately and, within each of these categories, damages should be valued provided the concepts specifically established in the Scale.

Finally, the **objective damage principle** is established as the "safety valve" of the new system of valuation of damages when it is stated that "*there can be no compensation for concepts or amounts different from those established in the Scale*". Under the objective damage principle provided in the new Scale, there can be no harm if it cannot be determined by diagnostic tests.

There are three types of injuries that can be valued under the new Scale: death, sequels and temporary injuries (known before as incapacity period). Likewise to the former Scale, the new Scale takes into account the aesthetic prejudice and correction factors.

The new Scale divides into three the concepts that should be taken into account when calculating compensation: basic personal prejudice, corresponding to the basic compensation for the harm suffered (death, sequel of temporary injury), particular prejudice, corresponding to those personal circumstances that could temper the final amount of the compensation and, finally, the economic prejudice suffered as a consequence of the corporal damages.

It is worth noting that the former Scale (Royal Legislative Decree 8/2004 and its Annex, hereunder "RLD 8/2004") established that personal and economic damages should be valued as correction factors; the concept "correction factor" simply disappears from the new Scale.

Among the new developments, there should be highlighted:

- **Article 37.** The victim should undergo medical examination by the medical service designated by the party that can be potentially declared liable for the damages. In the event of the victim not complying with this obligation, the Insurance Company will not be subject to delay interests (Article 20 Insurance Contract Act).
- **Article 41.** The new Scale clarifies the calculation system for a lifetime payment that can replace, totally or partially, the whole compensation. At this stage it should be recalled that the former Scale established the possibility of replacing the whole compensation for a lifetime payment (Section 1.8 of the Annex of the RLD 8/2004); however, the calculation of the final compensation, in most cases, was established under Article 251.7^a of the Civil Procedure Act, under which the final amount of the lifetime payment is the result of multiplying by ten the compensation per year.
- **Article 44.** The heirs of the victim should be compensated for the temporary injuries suffered by the victim; under Article 44 death is not supposed to be caused by those temporary injuries. In other words, despite the fact that the victim is dead, the heirs may be compensated by the temporary injuries suffered while the victim was living.
- **Article 45.** The heirs of the victim should be compensated for the sequels suffered by the victim while living. Hence, even if the victim is dead, the heirs may be compensated for the sequels suffered by the victim himself. In this case, the victim's death is not supposed to have been caused by those sequels.
- **Article 46.** Likewise pecuniary damages suffered by the victim while living should be compensated to the heirs of the victim.
- **Article 47.** The new Scale establishes that death compensation is compatible with sequels compensation. It is remarkable that, under the former Scale, as it had been also construed by the Spanish case law, death and sequels were not compatible as it was supposed that the harm "death" absorbed

the harm caused by sequels (even though the compensation for moral damages intended to repair the harm caused by sequels).

- **Article 62.** The new Scale establishes that the prejudiced parties in case of death are: the widower, ascendants, descendants, brothers and sisters and close relatives. This last type of prejudiced party acknowledges family-like situations for, at least, five years before the victim's death.
- **Articles 78 and 79.** The new Scale establishes a basic compensation of EUR 400 in terms of pecuniary damages for each of the prejudiced parties (regardless of his status) in the event of the victim's death. Moreover, Article 79 establishes that burial expenses should be compensated separately from basic harm, particular harm and pecuniary harm.
- **Article 114 et seq.** The Insurance Company has to pay for the healthcare expenses during the lifetime of the victim. This is one of the most remarkable developments of the new Scale. As a matter of fact, the new Scale establishes that the Insurance Company has to pay for the expenses of the future treatment of the patient, even if it takes place in the Public Healthcare System.

Likewise, in the event of home rehabilitation treatment or outpatient treatment, as well as the need of prostheses, orthoses or replacements, the Insurance Company has to pay for them as it is established by the new Scale.

In order to grant the effective payment of healthcare treatments to the Public Healthcare System, the new Scale allows the Insurance Companies and the different Healthcare Systems in Spain (17, one for each Autonomous Community) to achieve an agreement for the reimbursement of the costs in healthcare treatments. This provision can be also applied to private-public healthcare centers.

Moreover, the new Scale sets up weighting mechanisms for the calculation of compensations dealing with:

- The reform of the criteria of valuation of damages related to the loss in quality life (Art. 107 et seq.), the need of a third-party assistance (Art. 121 et seq.), and the

absence of a declared income (exclusive dedication to housekeeping or injured victims under 30 out of the labour market).

- The update of the valuation of the sequel point according to the European criteria: age of the victim, number of points... In the new Scale, age brackets for the valuation of the sequel points disappear. In the same sense, some of the sequels described in the Scale are broken down and, in some cases, such as the *Cauda Equina Syndrome*, the new Scale has notably increased the valuation of the final compensation.

In the end, the new Scale passed by the Spanish Parliament includes important developments in terms of the calculation of a potential compensation for damages. Consequently the new Scale introduces new calculation variables when determining the reserves in connection to the risk of a specific claim. These new variables, regardless of the Insurance Car's sector, will result in an increase in the final amount of compensations which, beyond any doubt, will impact in the prime's calculation.

Therefore, as it has been stated above, the increase in the damage compensations should be countered by a gradual increase in the Insurance premiums that it has been calculated in an average of 5%. Nevertheless, this calculation has been made only in relation to the Insurance Car's sector; there has been no estimation of the economic impact of the new Scale in sectors such as Life Science or prevention of occupational risks.

In conclusion, the new Scale is construed as a milestone in the changing process in which the Spanish Insurance world is immersed, trying to be adapted to the new solvency requirements. In this sense, as it has been established before, the new Scale clarifies the sequels valuation criteria granting solidity to the estimation of the reserves and security to the calculation of damages compensations in terms of civil liability.

In the event of additional information be required,
please do not hesitate to contact:



Luis Alfonso Fernández

Partner, Insurance and Reinsurance
T +34 91 349 82 21
luisalfonso.fernandez@hoganlovells.com



Carolina Revenga

Senior Associate, Insurance and Reinsurance
T +34 91 349 82 89
carolina.revenga@hoganlovells.com



Ian Pérez

Associate, Insurance and Reinsurance
T +34 91 349 82 74
ian.perez@hoganlovells.com

www.hoganlovells.com

Hogan Lovells has offices in:

Alicante	Dusseldorf	Los Angeles	New York	Shanghai
Amsterdam	Frankfurt	Luxembourg	Northern Virginia	Silicon Valley
Baltimore	Hamburg	Madrid	Paris	Singapore
Beijing	Hanoi	Mexico City	Perth	Sydney
Brussels	Ho Chi Minh City	Miami	Philadelphia	Tokyo
Budapest*	Hong Kong	Milan	Rio de Janeiro	Ulaanbaatar
Caracas	Houston	Minneapolis	Riyadh*	Warsaw
Colorado Springs	Jeddah*	Monterrey	Rome	Washington DC
Denver	Johannesburg	Moscow	San Francisco	Zagreb*
Dubai	London	Munich	São Paulo	

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney Advertising.

©Hogan Lovells 2015. All rights reserved.

*Associated offices