

# InDret

## **With an Eye to compensation (I)**

**Pablo Salvador Coderch**

Facultad de Derecho  
Universitat Pompeu Fabra

**Sonia Ramos González**

Facultad de Derecho  
Universitat Pompeu Fabra

**Álvaro Luna Yerga**

Facultad de Derecho  
Universitat Pompeu Fabra

**Barcelona, June 2000**

[www.indret.com](http://www.indret.com)

## **Summary**

### ***With an eye to compensation (I)***

- Where does the law stand?
  1. Eye injuries caused maliciously
  2. Eye injuries caused through negligence
  3. The legal scheduling of eye injuries
- Where do the courts stand?
  1. Comparative analysis of compensation awarded by the SC and that which would result from applying the law of schedules
  2. The different types of case
    - 2.1 Doubly innocent victims: children and the disabled
      - a. The cases
      - b. Negligence and strict liability: a war of words
      - c. The unwritten privilege of domestic relations
    - 2.2 Fights and assaults

### ***With an eye to compensation (II)***

- 2.3 Medical accidents
  - 2.4 Police conduct
  - 2.5 Fireworks
  - 2.6 Sport
  - 2.7 Workplace injuries
  - 2.8 Defective products
- Where are we heading and where should we be?
  - Two representative rulings
  - Table of rulings cited

## **Abstract**

*Between the beginning of 1996 and the end of 1999 the Spanish Supreme Court settled 47 cases of claims for damages from eye injuries, a type of damage that enables a precise intersubjective analysis of how the social costs of personal injury are assessed from a legal and case law perspective. The legal regulation of eye injuries and the applied case law are first analyzed and compensations awarded by the Supreme Court are then compared with those which would be applied by the schedules of the 'Ley de Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor' (law on civil liability and motor vehicle insurance). Finally, the different types of cases are identified, normative changes which could reduce the frequency and seriousness of this type of injury are proposed, the distinction between negligence and strict liability is discussed and the fact that prosecution of highly similar damages is spread among different jurisdictions is criticized.*

*The next issue of InDret will include With an eye to compensation (II).*

- ***Where does the law stand?***

In Spanish Law the legal texts relevant to eye injuries are: the Criminal and Civil Codes, (PC)<sup>1</sup> and (CC)<sup>2</sup> respectively, Law 30/1992 ('LRJAP' - law on public administration)<sup>3</sup> and finally, the 'Ley de Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor' ('Ley de baremos' – schedules law)<sup>4</sup>.

### ***1. Eye injuries caused maliciously***

An **eye injury caused maliciously** is normally a **crime** or **misdemeanor** leading to injury which is regulated under arts. 147 and ff. and 617 PC, the code which is applied in **15 cases**.

Protection of individuals is primarily a criminal issue, at least in cases of malicious conduct, and, in terms of the law's deterrent effect, compensation for damages has a secondary role compared with imprisonment or other types of sentence.

InDret would like to point out for its non-Spanish readers that a peculiarity of Spanish Criminal Law is that civil liability resulting from a crime or misdemeanor is regulated by the Criminal Code (arts. 109 and ff. PC) and is settled by criminal proceedings, in accordance with arts. 100, 107 and ff. of the 'Ley de Enjuiciamiento Criminal' (LECr) (code of criminal procedure)<sup>5</sup>.

### ***2. Eye injuries caused through negligence***

An eye injury **caused through negligence** may be an **offence** or **misdemeanor** leading to injury, or a **tort**, covered by arts. 1902 and ff. CC (17 cases), or give rise to **liability** of the **Public Administration** according to arts. 139 and ff. 'LRJAP' (11 cases).

More specifically, the responsibility of the Public Administration **resulting from eye injuries** and other types of harm has traditionally been regarded as simply **strict liability** (*Gefährdungshaftung*), but the most significant cases are more difficult to describe: the Supreme Court (SC), in order to restrict the imputation of damages to the facts, uses different criteria of proximate causation ([Causalidad y Responsabilidad](#)) (*causality and liability*) which bring strict liability and negligence closer together.

<sup>1</sup> Constitutional Law 10/1995, 23<sup>rd</sup> November, of the Criminal Code (B.O.E. n° 281, of 24<sup>th</sup> November).

<sup>2</sup> Royal Decree of 24<sup>th</sup> July 1889, that orders publication in the "*Gaceta de Madrid*" of the revised edition of the Civil Code (*Gaceta de Madrid* of 25<sup>th</sup> July 1889; Legislative Collection of Spain, volume CXLIII, second semester of 1889, pag. 138).

<sup>3</sup> Law 30/1992, of 26<sup>th</sup> November, of the 'Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común' (public administration legal system and common administrative procedure (B.O.E. n° 285, of 27<sup>th</sup> November).

<sup>4</sup> The 8<sup>th</sup> D. A. of Law 30/1995 (B.O.E. n° 268, of 9<sup>th</sup> November), changed the name of the 'Ley de Uso y Circulación de Vehículos de Motor', Revised Text approved by Decree 632/1968, of 21<sup>st</sup> March, to the "Ley de Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor", and rewrote Title I.

<sup>5</sup> 'Ley de Enjuiciamiento Criminal', enacted by Royal Decree of 14<sup>th</sup> September 1882.

### 3. The legal scheduling of eye injuries

In terms of the **legal assessment of bodily injury**, the ‘Ley de Responsabilidad Civil y Seguro en la Circulación de Vehículos de Motor’ established [baremos](#) (*schedules*) for the compensation of bodily injuries resulting from **traffic accidents** (art. 1.2 and section 1º.1 of the Appendix). This law provides **a comparative criterion for identical injuries caused to different individuals**. With this in mind, let us consider the following four hypothetical cases:

- New-born child.
- 25 year old lawyer with a net annual income of 2,500,000 pts. (15,025.3 €).
- 50 year old architect with a net annual income of 10,000,000 pts. (60,101.21 €).
- 75 year old retired person with cataracts in both eyes and a net annual income of 780,000 pts. (4,687.89 €).

Table 1 shows the compensation that would result from legal schedules being applied to each of the four cases were that individual to suffer the type of eye injury specified in the table:

**Table 1**

|                    | <b>New-born child</b> | <b>Lawyer, 25, 2.5m pts. annual income</b> | <b>Architect, 50, 10m pts. annual income</b> | <b>Retired person, 75, 780,000 pts. annual income</b> |
|--------------------|-----------------------|--|--|---|
| Loss of one eye    | 8,813,789             | 7,407,592                                  | 9,203,602                                    | 6,704,994   |
| Loss of both eyes  | 60,467,350            | 49,267,828                                 | 65,934,540                                   | 21,421,703  |
| Loss of second eye | 23,941,011            | 12,326,834                                 | 22,472,264                                   | 6,704,994   |

This model becomes more complicated if we distinguish between loss of sight and loss of the eye itself ([Table 2](#)).

The breakdown of the sums which would result from applying the law of schedules to each of the four cases, for both loss of sight and loss of an eye, is shown in Table 3.

- **Where do the courts stand?**

#### **1. Comparative analysis of compensation awarded by the SC and that which would result from applying the schedules law**

In 35 of the 47 cases settled by the SC, claimants received all or part of the compensation claimed. We know the amount awarded or agreed by the SC in 32 of these. In eight cases,

the claimant received no compensation at all<sup>6</sup>. While it is not possible to establish a clear trend on the basis of such a small sample, the following can perhaps be surmised:

- a) In cases where an eye is lost the SC usually awards higher compensation than would result from applying the schedules law.

In eight of the cases where loss of an eye was imputable to the defendant or accused, and where we know the amount of compensation awarded, the average is 12,719,372 pts. (76,444.97 €), almost 40% more than would result from applying the schedules law.

- b) However, when the claimant has lost the sight of both eyes the SC tends to consider fair compensation to be less than would result from applying the schedules law.

In four of the cases where the injury concerned loss of sight in both eyes, and was to be compensated by the defendant or accused, the average is 31,493,018 pts. (189,276.85 €). Unlike what happens in section a), the average compensation for new-born children and young or middle-aged people is almost 50% less than would result from applying the schedules law<sup>7</sup>.

- c) There are no significant differences in the average sums awarded or agreed by the different chambers of the SC for the same types of cases and the discrepancies which are at times observed are usually due to differences in the facts of the case and, in particular, the age of the different victims.

Thus, for example, in a case of loss of one eye and loss of sight in the other (STS, 2<sup>nd</sup>, 14.4.1998: young female victim of a malicious assault), the compensation was 26,961,611 pts. (162,042.54 €), and in another, where there was loss of sight in both eyes (STS, 3<sup>rd</sup>, 26.3.1999: flying instructor involved in an accident in 1960 loses his sight 30 years later), it was 10,290,000 pts. (61,844.15 €).

These conclusions are set out in [Tables 3 and 4](#).

- d) The limitations of abrogation prevent SC case law from being used to assess the frequency and seriousness of accidents causing eye injuries.

In particular, the rules of civil and contentious-administrative abrogation, which prevent accession of those issues whose sum does not exceed 6,000,000 pts. (36,060.73 €)<sup>8</sup> and 25,000,000 pts. (150,253.02 €)<sup>9</sup> respectively, make it practically impossible for rulings on mild or less serious eye injuries to be overturned.

---

<sup>6</sup> Finally, in three cases, the SC reduced the sum awarded and in two the amount of compensation went unchallenged.

<sup>7</sup> However, in the case of the retired person, the average compensation is almost 33% higher.

<sup>8</sup> Art. 1687.1 c) of the Royal Decree of 3<sup>rd</sup> February 1881, that enacting the 'Ley de Enjuiciamiento Civil' (*Gaceta de Madrid*, from 5<sup>th</sup> to 22<sup>nd</sup> February 1881).

<sup>9</sup> Art. 86.2. b) of Law 29/1998, of 13<sup>th</sup> July, governing contentious-administrative jurisdiction. For cases within the reference period it is art. 93.2. b) of the Law of 27<sup>th</sup> December 1956, governing contentious-administrative jurisdiction (B.O.E. n<sup>o</sup> 363, of 28<sup>th</sup> December), annulled by the first, that sets a limit of 6,000,000 pts. (36,060.73 E.).

The criteria of access to criminal abrogation established by the LECr are based principally on the crime's seriousness: only rulings by the 'Audiencias' (provincial courts) on injurious crimes causing the loss or uselessness of an eye, those for which the PC recommends prison sentences of more than 5 years, can be reviewed by the SC<sup>10</sup>.

However, the criterion of access to labor abrogation, which limits the cognisance of the SC - in cases of eye injuries reviewed by petition of the Supreme Courts of Justice - to those appeals which would unify legal doctrine, is not relevant<sup>11</sup>.

The above illustrates the limitations of any evaluation or proposal that may be made on the basis of the 47 cases studied. One only has to compare the cases with statistics published by the 'Ministerio de Trabajo y Asuntos Sociales'<sup>12</sup> (Department of Labor) on accidents occurring during a working day and which affected the eyes: in 1998 there were 51,234 workplace accidents causing eye injuries of various kinds (6.8% of the total number of accidents), of which 395 were serious.

## **2. The different types of case**

The 47 SC rulings on eye injuries can be relatively easily grouped according to eight types of case, albeit of different degrees: injuries suffered by **children and adolescents** (10 cases); **fights and assaults** (12 cases); **medical negligence** (7 cases); **police conduct** (6 cases); **popular festivities** –firework accidents- (3 cases); **games and sport** (2 cases); **workplace injuries** (5 cases) and **defective products** (1 case).

In the pages that follow we will briefly describe these types and analyze the dogmatic, analytic and legal policy problems which each one of them poses.

### **2.1 Doubly innocent victims: children and the disabled**

#### **a. The cases**

Accidents caused and suffered by children and adolescents whilst playing or, what often amounts to the same thing, whilst fighting – just as children do – is one of the groups with the highest number of cases.

---

<sup>10</sup> The SC reviews under appeal those sentences passed by the 'Audiencias' in oral proceedings and without right of appeal (art. 847 LECr.). These only hear cases without right of appeal for crimes where the law recommends a custodial sentence of more than 5 years (art. 14.3º and 4º LECr.). For cases within the reference period, changes in the criteria for access to criminal abrogation introduced by the Criminal Code of 1995 and the successive modifications to the 'Ley de Enjuiciamiento Criminal' do not, in general, alter the above conclusions, although the 1<sup>st</sup> D.F. PC of 1995 allowed milder eye injuries to be reviewed under appeal.

<sup>11</sup> Art. 216 and ff. of the Legislative Royal Decree 2/1995, of 7<sup>th</sup> April, which passed the Revised Text of the 'Ley de Procedimiento Laboral' (code of labour law procedure) (B.O.E. of 11<sup>th</sup> April).

<sup>12</sup> 'Ministerio de Trabajo y Asuntos Sociales' (Department of Labor). Statistics on workplace injuries during 1998, in: <http://www.mtas.es/Estadisticas/EAT/ACT/Index.htm>.

Many of what could be considered **dangerous games** are also **perfectly avoidable**: it is very easy to hurt oneself or others when playing with sticks and stones, but it is also easy, at least in a school, to stop children from playing with such things (STS, 1<sup>st</sup> , 18.10.1999, games with sticks; STS, 1<sup>st</sup> , 16.2.1999, rubber balls whose diameter was less than that of an eye socket). Similarly, on other occasions children handle **objects that should never have been within their reach** (a broach with pin, STS, 1<sup>st</sup> , 10.12.1996; or a catapult, STS, 1<sup>st</sup> , 17.9.1998; even more clearly: a hand grenade, STS, 1<sup>st</sup> , 17.4.1997). However, if it is practically **impossible to prevent** use of the object with which the child caused the injury (for example, a pencil, STS, 1<sup>st</sup> , 10.3.1997), the SC can take this circumstance into account and reject the claim. The same applies if the **game is intrinsically dangerous**, but **socially acceptable** and the child injures him- or herself (fireworks, STS, 1<sup>st</sup> , 11.12.1996: the child was injured whilst handling a firework). Of course, it is not only the degree of danger in a game which is relevant, but also whether those playing it can be supervised: we have already seen that schools are responsible for what occurs on their premises and can be easily avoided ([Niños y adolescentes](#)) (*children and adolescents*). But schools are also responsible when the injury results from **inadequate maintenance of the premises**, for example, a hole in the metal fence surrounding a school (STS, 3<sup>rd</sup> , 12.2.1996), as would be the owner of a highly dangerous place - for example, a shooting range - who didn't fence his property off (STS, 3<sup>rd</sup> , 17.4.1997)<sup>13</sup>.

Finally, there are extreme cases. For example, that of a **22 year old autistic** young man, already blind in one eye, who **lost a second eye** whilst moving furniture in the occupational workshop he attended; the school's director and the parents' association which managed it being held jointly liable for the accident (STS, 1<sup>st</sup> , 3.7.1998). It should be highlighted that an important peculiarity of this case was that the court **ordered** the defendants to **pay a monthly life pension** (100,000 pts.) instead of a lump sum. This is not the first time that the SC has given a ruling of this nature; on other occasions they have also ordered a pension to be paid instead of a lump sum (STS, 1<sup>st</sup> , 26.2.1998; STS, 1<sup>st</sup> , 17.3.1998; STS, 1<sup>st</sup> , 29.7.1998).

This case law limiting the legal representatives' powers clearly shows that the judges had little confidence in the supervision offered by parents and tutors, but it is difficult to justify: it cannot be justified by the law itself as this does not limit the powers of those responsible for care (art. 164 CC) or that of tutors (art. 271 CC) in the way the SC recommends. Although existing legislation on the supervisory powers and disposition of parents and tutors may be debatable, and perhaps there are those who believe it should be changed in order to reduce the supervisory abilities of the above-mentioned legal representatives, it is even more questionable that judges can leave aside legal standards and, what's more, do so without justifying their decision (STS, 1<sup>st</sup> , 6.5.1998: the SC awarded compensation of 60,000,000 pts. and imposed the previous judicial authorization on the injured child's parents in order to have access to sums greater than 3,000,000 pts.; STS, 1<sup>st</sup> , 15.10.1996: the SC awarded compensation of 80,776,000 pts., ordered a part of this sum - 60,776,000 pts.- to be deposited in a bank account in the child's name and enforced the previous judicial authorization so that the parents of the injured child could have access to the capital). If, for example, the SC had had, in this or other cases, reason to believe that the parents'

---

<sup>13</sup> Abuse of children (STS, 2<sup>nd</sup> , 28.6.1999) can be considered under the second type of case, fights and assaults.

administration would place their child's assets at risk (art. 167 CC), then it should have made this clear and justified its position. From a practical point of view, the converting of trust into control carries obvious additional costs, a central feature of the theory of agency costs which InDret has pointed out on more than one occasion ([Agency Models in Law and Economics](#)). Perhaps the most reasonable solution would be to compound the pension and invest the capital in a fund.

### ***b. Negligence and strict liability: a war of words***

The child, who is often both causer and victim of the injury<sup>14</sup>, is a **doubly innocent victim** and there is a common theme running through the above-mentioned cases: in almost all of them there is a failure to take adequate safety measures on the part of the person or organization in whose realm of influence the accident occurred. It is understood that schools must prevent children who are carrying dangerous objects from entering the premises and that they should stop dangerous games before they begin, but it should also be noted that the SC does not usually pass sentence simply because an accident was caused unless it could reasonably be attributed to a failure to take adequate safety measures. Due to a nuance that we will deal with below, simple misfortune does not lead to compensation. The doctrine of the general risks of life is also applicable, albeit to a limited extent, to children.

It remains to be seen whether this First Chamber criterion would also be applied by the Third Chamber. According to the dominant reading of existing legislation, those public bodies who are in charge of centers or premises in which a child is injured in an accident are strictly liable i.e. for the simple causing of an injury aside from any considerations regarding failure to take adequate safety measures or, to put it another way, the abnormal functioning of public services. But the cases of eye injuries decided by the Third Chamber do not fit this picture, nor do they clearly distinguish between negligence and strict liability (for example, STS, 3<sup>rd</sup>, 12.2.1996; STS, 3<sup>rd</sup>, 16.2.1999). In fact, the way in which decisions are reached does not really differ between the Third and First Chambers and indeed, it would not make much sense to apply different standards of liability to the same type of accident simply because one took place in a public school and another in a private one. The phenomena that can be observed, however, are as follows:

- i. As by law the Third Chamber cannot deal with negligence, and given that neither would it be reasonable to associate responsibility with simple causal connections, the debate over negligence leads, in practice, to questions of causality, that is to say, to proximate causation (*Objektive Zurechnung*), and provided that the Third Chamber considers that the accident is not imputable to a material causer what it does is exclude the issue of causality (STS, 3<sup>rd</sup>, 10.2.1998). Once again we see that an important part of the argument about negligence and causality is interchangeable, fungible.

---

<sup>14</sup> Of the ten cases decided by the SC in which the victim was a child or disabled person, the victim and causer was the same person in four of these.



The SC, in the above-mentioned STS, 3<sup>rd</sup> , 10.2.1998, denied there was a causal relationship between the oxygen supplied to a premature baby's incubator and the blindness which the child suffered as a result of the subsequently diagnosed disease *retrolental fibroplasia*: "It is clear that the etiology of this disease is multifactorial (...) its precise cause being unknown and, furthermore, the supply of oxygen is utterly necessary when seeking the viability of premature babies (FD. 5)". "Therefore, a causal relationship was essential for declaring the liability of the Public Administration (...) and, in the case in question, this remains to be demonstrated (FD. 8)».

- ii. Another technique used by the Third Chamber to furtively introduce issues of negligence into the legal realm of strict liability is to simply deny unlawfulness, the said chamber considering this to be a requisite in accordance with art. 141.1 LRJAP (STS, 3<sup>rd</sup> , 18.10.1999). Once again, this is a verbal artifice: traditionally, negligence has been defined as a breach of the duty of care towards others, a duty which is graded in each area according to social norms and criteria that the judge then translates into legal terms. When the Third Chamber declares that the action of the accused administration is not unlawful this means that there has been no failure of duty with regard to precautions:

The SC (STS, 3<sup>rd</sup> , 21.12.1998) denied unlawfulness in the case of the injury suffered by the plaintiff who, during an unauthorized demonstration, suffered a detached retina when he was hit by the water jets being used by the police to break up the demonstration: "In a democracy, the police are constitutionally and legally empowered to maintain public order (...); in no way can it be said (...) that the police exceeded their powers. It could even be said that among the control measures which the police are authorized to use in such cases – once those requisites demanded by the law have been fulfilled (...) – the one used in this case posed the least danger to those on the receiving end of the police action" (FD. 3).

- iii. Thirdly, a further nuance, which may be implacable, should be specified, one which perhaps results from the care function that characterizes the Welfare State. In terms of a specific criterion for accusing the Public Administration, the body responsible for the service in which the accident took place, the damage caused could be considered as the seriousness of the accident plus its high degree of improbability. A very serious and unexpected accident would lead, above and beyond any notion of negligence, to compensation more in line with strict liability, and thus come under Spanish administrative law and the Third Chamber. From this perspective, the Administration would provide insurance against injuries suffered in unforeseen, serious and improbable accidents (but, however, not against non-serious and easily foreseeable accidents, such as mild sporting injuries).

### ***c. The unwritten privilege of domestic relations***

It must also be pointed out that in the majority of cases that give rise to liability it is not only the breach of precautionary duties which is relevant, but also the fact that the child was subject to an educational or similar regime and under no circumstances did the accident occur in the context of family or domestic life. There is thus an unwritten privilege ascribed to family relationships in that parents and siblings - at least - or close relatives - whether younger or older - are not responsible for eye injuries, however serious they may be, which are caused through negligence, and even less so if these were unforeseen. There are two reasons for justifying this privilege which is inscribed in *Common Law (Domestic Relations)*:

- i. Pain and suffering of the injurer himself is in itself a punishment that provides incentives for deterrence.
- ii. Increasing the costs of being a parent or sibling by adding the duty to assume the costs of damages caused to a close relative is considered to be counterproductive.

Whatever the case, the previous doctrine is on its way out and parents and children are now always held responsible for malicious damage and increasingly are so in cases of severe negligence: the figures for child abuse rise exponentially from the point at which its definition included an increasing number of physical and psychological abuses, not only sexual in nature, and, in addition, ended up including all the imaginable forms of neglect (HACKING, Ian. *The Social Construction of What?*, Cambridge, Massachusetts, Harvard University Press, 1999).

## ***2.2 Fights and assaults***

With a single exception, the twelve cases of fights and assaults ending in a serious eye injury were settled by the Second Chamber of the SC. In all of them the damage was malicious and, almost as a consequence of this, absurd: **sailor**, angry at the punishment imposed on him by his captain (one hour of guard duty!), hits him and makes him **lose an eye** (STS, 2<sup>nd</sup>, 23.4.1996); **soldier** fights with his corporal who receives a punch resulting in a **hematoma** (STS, 5<sup>th</sup>, 19.7.1999); **two flatmates** argue, one knocks the other to the floor and stabs him repeatedly in the face with a gas poker, removing one of his eyes and leaving him blind in the other (STS, 2<sup>nd</sup>, 14.4.1998); woman who has fallen out with her neighbor unexpectedly hits her with a blunt instrument causing her **serious injuries in one eye** (STS, 2<sup>nd</sup>, 8.4.1999); couple argue due to the woman's jealousy and her partner hits her in the face with an electric fan causing **almost total loss of sight** (STS, 2<sup>nd</sup>, 30.11.1999); woman, separated from her husband, **runs him over** with her car in an attempt to kill him and

causes him serious physical and psychological injuries including **partial loss of sight in one eye** (STS, 2<sup>nd</sup>, 11.2.1999); **a nightclub bouncer** pushes a customer out onto the street, fights with him and two other men, kills one of them and causes several injuries to the others, in particular, a hemorrhage in the right eye of one of the victims (STS, 2<sup>nd</sup>, 8.7.1998); **bouncer of a singles bar** who gets involved in an argument between a barman and a **drunk customer** whom he then throws out and beats up in the street causing him very serious injuries (aphasia, cognitive and locomotor difficulties), among whose sequelae are a right **hemiparesis** (paralysis) of one eye (STS, 2<sup>nd</sup>, 11.11.1998); **customer in a bar, drunk**, argues with another and hits him with a glass **causing several serious injuries in one eye** (STS, 2<sup>nd</sup>, 25.11.1998); **couple in a bar attack a young woman**: the man punches the victim in the eye causing a contusion while his partner bites one of her ears off (STS, 2<sup>nd</sup>, 21.4.1999); **bar owner**, with a criminal record, forces a customer who is a jeweler to hand over the keys to his shop and when the victim tries to shout for help he is knocked to the floor and hit, suffering **injuries in one eye** (STS, 2<sup>nd</sup>, 8.10.1999); **young man**, bothered by a conversation (*“Young people today are all poofs because they don’t smoke marihuana”*), turns around and **attacks** the **two people** who were talking, causing a **bruised eye** in one whilst the other, who had AIDS, died as a result of the injuries suffered from being hit in the mouth and stomach (STS, 2<sup>a</sup>, 29.5.1999); **young girl, assaulted by her parents**, suffers, among multiple injuries (edema and hyperemia of the left side of the skull, left parietal fracture), a serious palpebral hematoma in one eye (STS, 2<sup>nd</sup>, 28.6.1999).

We have already said that in the cases reviewed there is an inherently absurd aspect to the malicious or gratuitous fights described, and in most of them this is more than likely brought on by alcohol. It should be noted that in only one of them does the aggressor appear to act with personal profit in mind (robbing a jeweler: STS, 2<sup>nd</sup>, 8.10.1999). The norm is the gratuitousness of the malicious violence, not its instrumental rationality.

Secondly, in all the above-mentioned cases, although the amount of compensation awarded for damages appears to be similar to that awarded for equivalent damages by the First or Third Chambers of the SC, its deterrent effect is greatly reduced when one compares it to the penalty, in the strict sense of the word, imposed by the Second Chamber.

Actually, it is difficult to make comparisons because in cases of multiple injuries Second Chamber case law does not quantify the amount of compensation that corresponds to each type of injury, not exactly good practice from the point of view of tort law (STS, 2<sup>nd</sup>, 11.11.1998; STS, 2<sup>nd</sup>, 11.2.1999; STS, 2<sup>nd</sup>, 8.4.1999; STS, 2<sup>nd</sup>, 28.6.1999; STS, 2<sup>nd</sup>, 8.10.1999).

**TABLES****Table 2**

|                                 | <b>New-born<br/>Child</b> | <b>Lawyer, 25, 2.5m<br/>pts. annual<br/>income</b> | <b>Architect, 50, 10m<br/>pts. annual<br/>income</b> | <b>Retired person,<br/>75, 780,000 pts.<br/>annual income</b> |
|---------------------------------|---------------------------|--|--|---|
| Loss of sight in one eye        | 7,084,587                 | 5,480,058  | 7,250,163  | 4,749,832   |
| Loss of sight in both eyes      | 59,809,438                | 48,549,522   | 65,482,855   | 21,353,176  |
| Loss of sight in the second eye | 21,871,234                | 10,176,719   | 20,233,471   | 4,848,675   |

**Table 3**

Table 3 shows the breakdown of the amounts of compensation which result from applying the schedules law to the four cases for each of the different eye injuries: loss of one eye, of both eyes or the second eye; and loss of sight in one eye, in both eyes or the second eye.

It should be remembered that the schedules law works with very wide compensation margins so there is inevitably a degree of subjectivity when applying it to the cases studied.

### 1. LOSS OF AN EYE

| <b>New-born child</b>                 |                       |
|---------------------------------------|-----------------------|
| <b>Categories</b>                     | <b>Amounts (pts.)</b> |
| <b>Permanent injuries</b>             |                       |
| <b>Basic compensation</b>             | <b>5,816,190</b>      |
| <b>Correction factors</b>             |                       |
| ▪ <b>Partial permanent disability</b> | <b>2,196,662</b>      |
| ▪ <b>Cosmetic injury</b>              | <b>317,337</b>        |
| <b>Temporary disability</b>           |                       |
| <b>Basic compensation</b>             |                       |
| ▪ <b>With time in hospital</b>        | <b>82,320</b>         |
| ▪ <b>Without time in hospital</b>     | <b>401,280</b>        |
| <b>TOTAL</b>                          | <b>8,813,789</b>      |

| Lawyer, 25, 2.5m pts. annual income      |                  |
|--|------------------|
| Categories                               | Amounts (pts.)   |
| <b>Permanent injuries</b>                |                  |
| <b>Basic compensation</b>                | <b>5,345,370</b> |
| <b>Correction factors</b>                |                  |
| ▪ Pecuniary loss                         | 534,537          |
| ▪ Partial permanent disability           | 500,000          |
| ▪ Cosmetic injury                        | 495,525          |
| <b>Temporary disability</b>              |                  |
| <b>Basic compensation</b>                |                  |
| ▪ With time in hospital                  | 82,320           |
| ▪ Without time in hospital               | 401,280          |
| <b>Correction factor: pecuniary loss</b> | 48,360           |
| <b>TOTAL</b>                             | <b>7,407,592</b> |

| Architect, 50, 10m pts. annual income    |                  |
|--|------------------|
| Categories                               | Amounts (pts.)   |
| <b>Permanent injuries</b>                |                  |
| <b>Basic compensation</b>                | <b>4,874,580</b> |
| <b>Correction factors</b>                |                  |
| ▪ Pecuniary loss                         | 2,437,290        |
| ▪ Partial permanent disability           | 1,000,000        |
| ▪ Cosmetic injury                        | 83,166           |
| <b>Temporary disability</b>              |                  |
| <b>Basic compensation</b>                |                  |
| ▪ With time in hospital                  | 82,320           |
| ▪ Without time in hospital               | 401,280          |
| <b>Correction factor: pecuniary loss</b> | 241,800          |
| <b>TOTAL</b>                             | <b>9,203,602</b> |

| Retired person, 75, 780,000 pts. annual income |                  |
|--|------------------|
| Categories                                     | Amounts (pts.)   |
| <b>Permanent injuries</b>                      |                  |
| <b>Basic compensation</b>                      | <b>3,223,560</b> |
| <b>Correction factors</b>                      |                  |
| ▪ Pecuniary loss                               | 322,356          |
| ▪ Serious disability                           | 3,000,000        |
| ▪ Cosmetic injury                              | 68,526           |
| <b>Temporary disability</b>                    |                  |
| <b>Basic compensation</b>                      |                  |
| ▪ With time in hospital                        | 82,320           |
| <b>Correction factor: pecuniary loss</b>       | 8,232            |
| <b>TOTAL</b>                                   | <b>6,704,994</b> |

**2. LOSS OF BOTH EYES**

| New-born child                  |                   |
|---------------------------------|-------------------|
| Categories                      | Amounts (pts.)    |
| <b>Permanent injuries</b>       |                   |
| <b>Basic compensation</b>       | <b>31,359,220</b> |
| <b>Correction factors</b>       |                   |
| ▪ Additional pain and suffering | 10,983,309        |
| ▪ Permanent total disability    | 10,983,309        |
| ▪ Serious disability            | 6,000,000         |
| ▪ Cosmetic injury               | 657,912           |
| <b>Temporary disability</b>     |                   |
| <b>Basic compensation</b>       |                   |
| ▪ With time in hospital         | 82,320            |
| ▪ Without time in hospital      | 401,280           |
| <b>TOTAL</b>                    | <b>60,467,350</b> |

| Lawyer, 25, 2.5m pts. annual income      |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | <b>28,943,265</b> |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 2,894,327         |
| ▪ Additional pain and suffering          | 10,983,309        |
| ▪ Partial permanent disability           | 2,196,662         |
| ▪ Serious disability                     | 3,000,000         |
| ▪ Cosmetic injury                        | 718,305           |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | <b>48,360</b>     |
| <b>TOTAL</b>                             | <b>49,267,828</b> |

| Architect, 50, 10m pts. annual income    |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | <b>26,527,225</b> |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 13,263,612        |
| ▪ Additional pain and suffering          | 10,983,309        |
| ▪ Permanent total disability             | 10,983,309        |
| ▪ Serious disability                     | 3,000,000         |
| ▪ Cosmetic injury                        | 451,685           |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | <b>241,800</b>    |
| <b>TOTAL</b>                             | <b>65,934,540</b> |



| Retired person, 75, 780,000 pts. annual income |                   |
|--|-------------------|
| Categories                                     | Amounts (pts.)    |
| <b>Permanent injuries</b>                      |                   |
| <b>Basic compensation</b>                      | 15,693,295        |
| <b>Correction factors</b>                      |                   |
| ▪ Pecuniary loss                               | 1,569,330         |
| ▪ Additional pain and suffering                | 1,000,000         |
| ▪ Serious disability                           | 3,000,000         |
| ▪ Cosmetic injury                              | 68,526            |
| <b>Temporary disability</b>                    |                   |
| <b>Basic compensation</b>                      |                   |
| ▪ With time in hospital                        | 82,320            |
| <b>Correction factor: pecuniary loss</b>       | 8,232             |
| <b>TOTAL</b>                                   | <b>21,421,703</b> |

### 3. LOSS OF SECOND EYE

| New-born child               |                   |
|------------------------------|-------------------|
| Categories                   | Amounts (pts.)    |
| <b>Permanent injuries</b>    |                   |
| <b>Basic compensation</b>    |                   |
| <b>Correction factors</b>    |                   |
| ▪ Permanent total disability |                   |
| ▪ Serious disability         |                   |
| ▪ Cosmetic injury            |                   |
| <b>Temporary disability</b>  |                   |
| <b>Basic compensation</b>    |                   |
| ▪ With time in hospital      | 82,320            |
| ▪ Without time in hospital   | 401,280           |
| <b>TOTAL</b>                 | <b>23,941,011</b> |

| Lawyer, 25, 2.5m pts. annual income      |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | 5,345,370         |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 534,537           |
| ▪ Partial permanent disability           | 2,196,662         |
| ▪ Serious disability                     | 3,000,000         |
| ▪ Cosmetic injury                        | 718,305           |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | 48,360            |
| <b>TOTAL</b>                             | <b>12,326,834</b> |

| Architect, 50, 10m pts. annual income    |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | 4,874,580         |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 2,437,290         |
| ▪ Permanent total disability             | 10,983,309        |
| ▪ Serious disability                     | 3,000,000         |
| ▪ Cosmetic injury                        | 451,685           |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | 241,800           |
| <b>TOTAL</b>                             | <b>22,472,264</b> |

| Retired person, 75, 780,000 pts. annual income |                  |
|--|------------------|
| Categories                                     | Amounts (pts.)   |
| <b>Permanent injuries</b>                      |                  |
| <b>Basic compensation</b>                      | 3,223,560        |
| <b>Correction factors</b>                      |                  |
| ▪ Pecuniary loss                               | 322,356          |
| ▪ Serious disability                           | 3,000,000        |
| ▪ Cosmetic injury                              | 68,526           |
| <b>Temporary disability</b>                    |                  |
| <b>Basic compensation</b>                      |                  |
| ▪ With time in hospital                        | 82,320           |
| <b>Correction factor: pecuniary loss</b>       | 8,232            |
| <b>TOTAL</b>                                   | <b>6,704,994</b> |

#### 4. LOSS OF SIGHT IN ONE EYE

| New-born child                 |                  |
|--------------------------------|------------------|
| Categories                     | Amounts (pts.)   |
| <b>Permanent injuries</b>      |                  |
| <b>Basic compensation</b>      | 4,404,325        |
| <b>Correction factors</b>      |                  |
| ▪ Partial permanent disability | 2,196,662        |
| <b>Temporary disability</b>    |                  |
| <b>Basic compensation</b>      |                  |
| ▪ With time in hospital        | 82,320           |
| ▪ Without time in hospital     | 401,280          |
| <b>TOTAL</b>                   | <b>7,084,587</b> |

| Lawyer, 25, 2.5m pts. annual income      |                  |
|--|------------------|
| Categories                               | Amounts (pts.)   |
| <b>Permanent injuries</b>                |                  |
| <b>Basic compensation</b>                | 4,043,725        |
| <b>Correction factors</b>                |                  |
| ▪ Pecuniary loss                         | 404,373          |
| ▪ Partial permanent disability           | 500,000          |
| <b>Temporary disability</b>              |                  |
| <b>Basic compensation</b>                |                  |
| ▪ With time in hospital                  | 82,320           |
| ▪ Without time in hospital               | 401,280          |
| <b>Correction factor: pecuniary loss</b> | 48,360           |
| <b>TOTAL</b>                             | <b>5,480,058</b> |

| Architect, 50, 10m pts. annual income    |                  |
|--|------------------|
| Categories                               | Amounts (pts.)   |
| <b>Permanent injuries</b>                |                  |
| <b>Basic compensation</b>                | 3,683,175        |
| <b>Correction factors</b>                |                  |
| ▪ Pecuniary loss                         | 1,841,588        |
| ▪ Partial permanent disability           | 1,000,000        |
| <b>Temporary disability</b>              |                  |
| <b>Basic compensation</b>                |                  |
| ▪ With time in hospital                  | 82,320           |
| ▪ Without time in hospital               | 401,280          |
| <b>Correction factor: pecuniary loss</b> | 241,800          |
| <b>TOTAL</b>                             | <b>7,250,163</b> |

| <b>Retired person, 75, 780,000 pts. annual income</b> |                       |
|---|-----------------------|
| <b>Categories</b>                                     | <b>Amounts (pts.)</b> |
| <b>Permanent injuries</b>                             |                       |
| <b>Basic compensation</b>                             | <b>1,508,536</b>      |
| <b>Correction factors</b>                             |                       |
| ▪ Pecuniary loss                                      | <b>150,844</b>        |
| ▪ Serious disability                                  | <b>3,000,000</b>      |
| <b>Temporary disability</b>                           |                       |
| <b>Basic compensation</b>                             |                       |
| ▪ With time in hospital                               | <b>82,320</b>         |
| <b>Correction factor: pecuniary loss</b>              | <b>8,232</b>          |
| <b>TOTAL</b>  | <b>4,749,832</b>      |

## 5. LOSS OF SIGHT IN BOTH EYES

| <b>New-born child</b>           |                       |
|---------------------------------|-----------------------|
| <b>Categories</b>               | <b>Amounts (pts.)</b> |
| <b>Permanent injuries</b>       |                       |
| <b>Basic compensation</b>       | <b>31,359,220</b>     |
| <b>Correction factors</b>       |                       |
| ▪ Additional pain and suffering | <b>10,983,309</b>     |
| ▪ Permanent total disability    | <b>10,983,309</b>     |
| ▪ Serious disability            | <b>6,000,000</b>      |
| <b>Temporary disability</b>     |                       |
| <b>Basic compensation</b>       |                       |
| ▪ With time in hospital         | <b>82,320</b>         |
| ▪ Without time in hospital      | <b>401,280</b>        |
| <b>TOTAL</b>                    | <b>59,809,438</b>     |

| Lawyer, 25, 2.5m pts. annual income      |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | <b>28,943,265</b> |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 2,894,326         |
| ▪ Additional pain and suffering          | 10,983,309        |
| ▪ Partial permanent disability           | 2,196,662         |
| ▪ Serious disability                     | 3,000,000         |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | <b>48,360</b>     |
| <b>TOTAL</b>                             | <b>48,549,522</b> |

| Architect, 50, 10m pts. annual income    |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | <b>26,527,225</b> |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 13,263,612        |
| ▪ Additional pain and suffering          | 10,983,309        |
| ▪ Permanent total disability             | 10,983,309        |
| ▪ Serious disability                     | 3,000,000         |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | <b>241,800</b>    |
| <b>TOTAL</b>                             | <b>65,482,855</b> |

| <b>Retired person, 75, 780,000 pts. annual income</b> |                       |
|---|-----------------------|
| <b>Categories</b>                                     | <b>Amounts (pts.)</b> |
| <b>Permanent injuries</b>                             |                       |
| <b>Basic compensation</b>                             | <b>15,693,295</b>     |
| <b>Correction factors</b>                             |                       |
| ▪ Pecuniary loss                                      | <b>1,569,329</b>      |
| ▪ Additional pain and suffering                       | <b>1,000,000</b>      |
| ▪ Serious disability                                  | <b>3,000,000</b>      |
| <b>Temporary disability</b>                           |                       |
| <b>Basic compensation</b>                             |                       |
| ▪ With time in hospital                               | <b>82,320</b>         |
| <b>Correction factor: pecuniary loss</b>              | <b>8,232</b>          |
| <b>TOTAL</b>  | <b>21,353,176</b>     |

## 6. LOSS OF SIGHT IN SECOND EYE

| <b>New-born child</b>        |                       |
|------------------------------|-----------------------|
| <b>Categories</b>            | <b>Amounts (pts.)</b> |
| <b>Permanent injuries</b>    |                       |
| <b>Basic compensation</b>    | <b>4,404,325</b>      |
| <b>Correction factors</b>    |                       |
| ▪ Permanent total disability | <b>10,983,309</b>     |
| ▪ Serious disability         | <b>6,000,000</b>      |
| <b>Temporary disability</b>  |                       |
| <b>Basic compensation</b>    |                       |
| ▪ With time in hospital      | <b>82,320</b>         |
| ▪ Without time in hospital   | <b>401,280</b>        |
| <b>TOTAL</b>                 | <b>21,871,234</b>     |

| Lawyer, 25, 2.5m pts. annual income      |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | <b>4,043,725</b>  |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 404,372           |
| ▪ Partial permanent disability           | 2,196,662         |
| ▪ Serious disability                     | 3,000,000         |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | <b>48,360</b>     |
| <b>TOTAL</b>                             | <b>10,176,719</b> |

| Architect, 50, 10m pts. annual income    |                   |
|--|-------------------|
| Categories                               | Amounts (pts.)    |
| <b>Permanent injuries</b>                |                   |
| <b>Basic compensation</b>                | <b>3,683,175</b>  |
| <b>Correction factors</b>                |                   |
| ▪ Pecuniary loss                         | 1,841,587         |
| ▪ Permanent total disability             | 10,983,309        |
| ▪ Serious disability                     | 3,000,000         |
| <b>Temporary disability</b>              |                   |
| <b>Basic compensation</b>                |                   |
| ▪ With time in hospital                  | 82,320            |
| ▪ Without time in hospital               | 401,280           |
| <b>Correction factor: pecuniary loss</b> | <b>241,800</b>    |
| <b>TOTAL</b>                             | <b>20,233,471</b> |



| <b>Retired person, 75, 780,000 pts. annual income</b> |                       |
|---|-----------------------|
| <b>Categories</b>                                     | <b>Amounts (pts.)</b> |
| <b>Permanent injuries</b>                             |                       |
| <b>Basic compensation</b>                             | <b>1,508,436</b>      |
| <b>Correction factors</b>                             |                       |
| ▪ Pecuniary loss                                      | 249,687               |
| ▪ Serious disability                                  | 3,000,000             |
| <b>Temporary disability</b>                           |                       |
| <b>Basic compensation</b>                             |                       |
| ▪ With time in hospital                               | 82,320                |
| <b>Correction factor: pecuniary loss</b>              | 8,232                 |
| <b>TOTAL</b>  | <b>4,848,675</b>      |

**Table 4**

|                | <b>1<sup>st</sup><br/>Chamber</b> | <b>2<sup>nd</sup> Chamber</b> | <b>3<sup>rd</sup> Chamber</b> | <b>Average total</b> |
|----------------|-----------------------------------|-------------------------------|-------------------------------|----------------------|
| Loss of an eye | 10,882,707                        | 13,179,971                    | 14,095,439                    | 12,719,372           |

**Table 5**

|                            | <b>1<sup>st</sup><br/>Chamber</b> | <b>2<sup>nd</sup> Chamber</b> | <b>3<sup>rd</sup> Chamber</b> | <b>Average total</b> |
|----------------------------|-----------------------------------|-------------------------------|-------------------------------|----------------------|
| Loss of sight in one eye   | 17,019,660                        |                               | 7,303,842                     | 12,161,751           |
| Loss of sight in both eyes | 62,604,360                        | 21,584,695                    | 10,290,000                    | 31,493,018           |