

# Non-Pecuniary Damages in the Louisiana Civil Code Article 1928: Originality in the Early Nineteenth Century and Its Projected Use in Further Codification Endeavors

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# Non-Pecuniary Damages in the Louisiana Civil Code Article 1928: Originality in the Early Nineteenth Century and Its Projected Use in Further Codification Endeavors

Agustín Parise

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**Paul M. Hébert Law Center**

**Louisiana State University**

**Non-Pecuniary Damages in the Louisiana**

**Civil Code Article 1928:**

**Originality in the Early Nineteenth**

**Century and Its Projected Use in Further**

**Codification Endeavors**

By

Agustín Parise

*Submitted in partial fulfillment of the requirements for the degree of LL.M.*

Professor Olivier Moréteau

Professor Christine Corcos

Spring 2006

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The author wishes to dedicate the results of his efforts to his parents.

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Last but certainly not least, the author wishes to thank Ms. Julieta Marotta for her constant support and patience.

## List of Abbreviations

<i>1825 Code</i>	Civil Code of the State of Louisiana of the year 1825.
<i>1870 Code</i>	Revision to the Louisiana Civil Code of the year 1870.
<i>1984 Revision</i>	Revision to the Book III, Titles III and IV of the 1870 Code.
<i>art.</i>	Article.
<i>art. 1928 (3)</i>	Paragraph 3 of article 1928 of the 1825 Code.
<i>Digest</i>	“Digest of the Civil Law now in Force in the Territory of Orleans” of the year 1808.
<i>French Code</i>	Civil Code of France of 1804, also called Code Napoleon.
<i>La.</i>	Louisiana.
<i>New Code</i>	For the purposes of this presentation, the edition of the Civil Code of the State of Louisiana of the year 2005.
<i>Partidas</i>	Spanish Code of Las Siete Partidas, by Alfonso X <i>The Wise</i> .
<i>Project</i>	Project of a revision to the Digest presented by Moreau-Lislet, Livingston and Derbigny in 1823. Entitled “Additions and Amendments to the Civil Code of the State of Louisiana, Proposed in Obedience to the Resolution of the Legislature of the 14 <sup>th</sup> , March, 1822, by the Jurist Commissioned for that Purpose.”
<i>United States</i>	United States of America.

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*Louisiana's legal heritage has long been a source of fascination, curiosity, and, sadly, misinformation. Outsiders have viewed the legal system as an anomaly, an odd appendage at the mouth of the Mississippi, and they have shunned its study because of its perceived quirkiness.<sup>1</sup>*

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<sup>1</sup> Mark F. Fernandez, *Introduction: Louisiana Legal History: Past, Present, and Future*, A LAW UNTO ITSELF? 1 (2001).

## **Abstract**

This presentation provides a complete guide that helps the readers understand the importance of art.1928 of the Civil Code of Louisiana of the year 1825. Article 1928, in its third paragraph, is the cornerstone for the recovery of non-pecuniary damages in the state of Louisiana.

As to achieve the objective of guiding the reader, the presentation contains: a historical background of the legal system of Louisiana (from the purchase to France until present days); a definition of non-pecuniary damages; an analysis of the applications the Louisiana Supreme Court made of non-pecuniary damages (between the years 1825 to 1870); and a description of the influence that art.1928 had in other codification projects, both in Louisiana and abroad.

Throughout the presentation, references are done to the French and Spanish influences on the region. To ignore these important influences would avoid a realistic approach to the study. In addition, a brief description of the case law reporting in Antebellum Louisiana is developed. The description will surely help future research activities, by explaining the sources of case law reporting in the region.

At the end of the presentation, a list of references, a table of cases and an index of names and personalities, are enclosed. These are useful quick-reference tools when reading through the presentation.

## Landmarks to Understand the History of the Louisiana Civil System<sup>2</sup>

- 1699** Pierre le Moyne, Sieur d' Iberville explores the Mississippi and establishes a royal colony at Ocean Springs, Mississippi.
- 1712** By royal charter, France grants Crozat a monopoly on La. commerce.
- 1717** Crozat surrenders his charter.
- 1718** Jean Baptiste le Moyne, Sieur de Bienville establishes New Orleans.
- 1762** France secretly cedes La. to Spain.
- 1768** Local French inhabitants revolt against Spanish rule.
- 1769** Don Alejandro O'Reilly takes possession of La. for Spain.
- 1800** Spain cedes La. to France by the Treaty of San Ildefonso.
- 1803** November 30, Spain formally transfers La. to France.  
December 20, Laussat, a French prefect, transfers La. to the United States.
- 1808** La. Legislature enacts *Digest of the Civil Law Now in Force in the Territory of Orleans* (French Original and English Translation).
- 1823** La. Legislature passes project of Civil Code.
- 1825** La. Civil Code (French and English).
- 1870** Promulgation of the *Revised Civil Code of the State of Louisiana* (English).
- 1948** The La. State Law Institute was instructed to revise the Civil Code.

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<sup>2</sup> S. HERMAN, THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES 57 (1993); and Alain Levasseur & Roger Ward, *300 Years and Counting: The French influence on the Louisiana Legal System*, 46 LA Bar Jnl. 300 (1998) 300, 306 (1998).

## Intention

The Master in Laws program at the Paul M. Hebert Law Center of the Louisiana State University requires the submission of a thesis. This work intends to fulfill such requirement.

As to avoid false expectations and deception in the reader, it is mandatory to express in a clear way and *ad initio* the main points that this work covers.

Initially, it is worth mentioning that this presentation studies the institution of non-pecuniary damages as it was applied in the geographical region of La. as from the early Nineteenth Century.

The following pages show that non-pecuniary damages were first included in the wording of art. 1928 of the La. Civil Code, back in the year 1825. Such inclusion presented originality at that time, and also a starting point for other subsequent codification adventures.

In order to locate the reader historically and geographically, this presentation provides a historical background, summarizing the main events as from the La. purchase to France. Further, it analyzes non-pecuniary damages and the wording of the pertinent articles inside the La. Civil Codes (starting by the 1825 Code). The work continues by studying the La. Court decisions related to that area of law. Finally, it mentions part of the influence art. 1928 had on the work codifiers undertook in La. and other regions of the planet.

In brief, the presentation transports the reader back to the early Nineteenth Century and traces the origins of non-pecuniary damages in La. Also, it helps understand how courts applied the principles of that institution, and finally mentions its influence.

The author has worked with primary and secondary sources during the elaboration of this presentation.

The historical background and the influence on other codification projects have been developed with the grounding that important secondary sources provide, together with some historical materials that could be found in the *Rare Book Room* of the LSU Law Library. On the contrary, the applications of art.1928 have been studied by working with primary sources (*i.e.* Court reporters). This is perhaps the main contribution to the area of study.

These initial words would be incomplete without mentioning that, after being for some time in La., the author shares the opinion that the civilian aspects of La. provide not only a fascinating and rich legal history, but they also provide educators and students the possibility to become adept in both common law and civil traditions.<sup>3</sup>

The author also shares the opinion that, substantively and pedagogically, La. has the best of both worlds for those who wish to take advantage of it. On the one hand, the civil courses prompt deep analysis of legislation that is designed to cover a subject coherently, systematically, and completely. On the other hand, common law subjects provide opportunity for classic Socratic style case analysis and synthesis. In La. it is

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<sup>3</sup> Christopher L. Blakesley, *The Impact of a Mixed Jurisdiction on Legal Education, Scholarship and Law*, LOUISIANA MICROCOSM OF A MIXED JURISDICTION 61, 66 (1999).

possible to receive the double benefit.<sup>4</sup> La. is a melting pot that provides a broader formation for contemporary scholars and law professionals.

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<sup>4</sup> Id. *supra* note 3, at 66.

## First Part

### Historical Background

**Chapter I**  
**The Way to a Civil Law System**

This historical background helps introduce the reader to a situation for better understanding the developments mentioned in the entire presentation. It also provides an interesting background as to understand the origins of the establishment of the civil law system in La.<sup>5</sup>

**1. The Louisiana Purchase, and Before**

Although not central for this presentation, it is enriching to notice that, even before the Spanish and French, Native Americans were the earliest inhabitants of La. When studied, Native Americans in the region have been divided into six general families or language groups who lived in a definitive area, and each spoke its own language.<sup>6</sup> Each general family also was divided into smaller groups or tribes.<sup>7</sup> The land occupied by the six groups had no specific limits, though it was understood that one group should not settle, hunt nor fish in the area of another group. With regards to limits, and showing a significant difference to other primitive human settlements, it is important to notice that

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<sup>5</sup> A reference to the *Landmarks to Understand the History of the Louisiana Civil System* (vide supra pg. xii) is of great help.

<sup>6</sup> According to EDWIN ADAMS DAVIS, *LOUISIANA THE PELICAN STATE* 4-7 (1978) the families were: Atakapan, Muskhogean, Chitimachan, Caddoan, Natchezan and Tunican.

<sup>7</sup> EDWIN ADAMS DAVIS, *LOUISIANA THE PELICAN STATE* 4 (1978).

La. rivers did not necessarily work as geographical boundaries for tribes or groups.<sup>8</sup> With respect to the relation between the groups or families, it has been said that in general the La. tribes were peaceful<sup>9</sup> in their relations.

As from the early years of the Spanish discovery until the mid Sixteenth Century, Spanish colonizers explored the region of La. without establishing permanent settlements. The actual region of La. remained virtually untouched by Europeans for almost 140 years,<sup>10</sup> till French explorers entered the region in the late Seventeenth Century.

For the purposes of this presentation it is central to trace back to the Seventeenth Century. At that time, France expanded its presence in America by pushing into the unexplored western frontiers of the big new continent. Being established in Quebec, the French pioneers moved into the region of the Great Lakes and along North America's great rivers (*e.g.* Missouri, Mississippi), which served as natural highways for explorers and fur traders. That intention to expand the frontiers drove the French to the lower Mississippi River country during the last years of the Seventeenth Century.<sup>11</sup>

Pushed by the need to explore and claim greater portions of the continent in the name of France, Rene Robert Cavelier Sieur de La Salle, sailed down 1,000 miles the Mississippi River to its mouth.<sup>12</sup> There, on April 9, 1682, La Salle claimed the Lower Mississippi River region for the King of France, Louis XIV, and named the region

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<sup>8</sup> *Id. supra* note 7, at 7.

<sup>9</sup> *Id. supra* note 7, at 7.

<sup>10</sup> EDWIN ADAMS DAVIS, LOUISIANA THE PELICAN STATE 18 (1975) cited by Roger K. Ward, *The French Language in Louisiana Law and Legal Education: A Requiem*, 57 La. L. Rev. 1283, 1288 (1997).

<sup>11</sup> *Id. supra* note 10, at 1288.

<sup>12</sup> *Id. supra* note 10, at 1288.

*Louisiane* in his honor.<sup>13</sup> The French law and regulations came to La. together with La Salle.

In 1712, the French Crown officially decreed that the Custom of Paris would govern the colony and placed the colony effectively in the hands of both business speculators and a Superior Council. Later in 1731, the French Crown took over management of the colony again.<sup>14</sup>

In 1762, during the reign of Louis XV and due to the Treaty of Fontainebleau,<sup>15</sup> France gave the territory to Spain. In 1765, Don Antonio de Ulloa arrived in New Orleans, being the first Spanish governor. Due to his unpopularity he was removed by an armed movement, and in 1769, Alejandro O'Reilly was named new governor.<sup>16</sup> O'Reilly installed the Spanish governmental system, replacing the French Superior Council with the Spanish *Cabildo*.<sup>17</sup>

Another very important disposition of O'Reilly was to supersede the French laws (e.g. Custom of Paris and Ordinances of the French kings) and implement the Spanish colonial laws.<sup>18</sup> He proclaimed the French law would be abolished and the Spanish law<sup>19</sup>

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<sup>13</sup> Id. *supra* note 10, at 1288.

<sup>14</sup> David Gruning, *Bayou State Bijuralism: Common Law and Civil Law in Louisiana*, 81 U. Det. Mercy L. Rev. 437, 442 (2004).

<sup>15</sup> Saul Litvinoff, *Codificación en Louisiana*, 2 LA CODIFICACIÓN: RAÍCES Y PROSPECTIVAS 127, 127 (2004).

<sup>16</sup> Ricardo Lifsic, *Historia del Código Civil de Louisiana. Antecedente del Código Civil Argentino*, 12 REVISTA DE HISTORIA DEL DERECHO, 164, 164 (1961).

<sup>17</sup> Id. *supra* note 14, at 442.

<sup>18</sup> Id. *supra* note 16, at 164.

<sup>19</sup> Amongst the laws that were enforced in La. it is possible to mention: *Fuero Juzgo*, *Fuero Viejo*, *Las Siete Partidas*, *la Recopilación de Leyes de Indias*, *la Recopilación de Castilla*, *las Leyes de Toro*, *el Ordenamiento de Alcalá de Henares*, *las Leyes de Estilo*.

would be thereafter the law of the province.<sup>20</sup> By 1785, the province had 32,062 inhabitants (14,215 free whites; 1,303 free people of color; and 16,544 slaves).<sup>21</sup>

In 1800, the French emperor Napoleon Bonaparte secured the return of La. to France through the secret<sup>22</sup> Treaty of San Ildefonso.<sup>23</sup> That return was part of a larger plan to support French interests of crop plantations in the island of San Domingue (present Haiti).<sup>24</sup> He believed La. would be useful as to provide food and supplies to the island, and to start a French empire in America.<sup>25</sup>

In 1803, Thomas Jefferson sent Robert Livingston and James Monroe as plenipotentiaries to Paris to negotiate a potential purchase of La. from France.<sup>26</sup> Due to the fact that the intentions of the French in the Caribbean had failed, and being pressured by the increasing cost of military campaigns in Europe, Napoleon Bonaparte sold La. to the United States.

By the end of that same year, the French flag in La. was replaced definitively by the United States flag.<sup>27</sup> Napoleon Bonaparte had accepted the United States proposal to purchase the territory for a total value of 15 million dollars,<sup>28</sup> or 60 millions francs in

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<sup>20</sup> Alain Levasseur, *La Réception du Système de la Common Law par le Système Législatif Français en Louisiane*, LA RECEPTION DES SYSTEMS JURIDIQUES: IMPLANTATIONS ET DESTINS 382, 382 (1992).

<sup>21</sup> JEFFERSON, AN ACCOUNT OF LOUISIANA BEING AN ABSTRACT OF DOCUMENTS IN THE OFFICES OF THE DEPARTMENT OF STATE AND OF THE TREASURY 17 (1803).

<sup>22</sup> The formal transfer was made on November 30, 1803.

<sup>23</sup> *Id. supra* note 15, at 128.

<sup>24</sup> *Id. supra* note 14, at 442.

<sup>25</sup> *Id. supra* note 7, at 116.

<sup>26</sup> *Id. supra* note 7, at 119.

<sup>27</sup> *Id. supra* note 14, at 442.

<sup>28</sup> *Id. supra* note 16, at 166.

French currency.<sup>29</sup> The cession of La. to the United States was made in December 20, 1803, under the presidency of Thomas Jefferson.<sup>30</sup>

The United States took control of the territory, and Claiborne took possession of La. as commissioner. On 1804, the new territory was divided by the American Congress into the *Territory of Orleans* and the *District of Louisiana*.<sup>31</sup> Finally, in 1812, La. was admitted as a State into the Union and formed its first constitution.<sup>32</sup>

## **2. Legal Dispositions Applied in the Region**

The laws and regulations applied in the region of La. have evolved several times during the last centuries. Those changes are due especially to the constant alterations La. has been subject to with respect to its possession (i.e. Spanish, French, Spanish, French, and United States).

Since the Spanish discovery and until 1712, it is understood that Spanish regulations where applied to the settlements where Spanish people lived or would practice commerce.<sup>33</sup>

As it has been mentioned *supra*, La. was colonized by the French in 1699, but, from the legal point of view, it was in 1712 that the French Ordinances and the Custom of

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<sup>29</sup> CHARLES E. FENNER, THE GENESIS AND DESCENT OF THE SYSTEM OF CIVIL LAW PREVAILING IN LOUISIANA 18 (1886).

<sup>30</sup> *Id. supra* note 15, at 128.

<sup>31</sup> *Id. supra* note 16, at 166.

<sup>32</sup> *Id. supra* note 29, at 19.

<sup>33</sup> It has been mentioned *supra* that the actual region of La. remained virtually untouched by Europeans for almost 140 years. Hence, the Spanish provisions would have applied if any settlement or act of commerce had existed.

Paris started to be applied. Hence, the French laws were applied from that year until 1769.<sup>34</sup>

In 1769 O'Reilly superseded the French law. Therefore, the Spanish laws and provisions turned to be the sole law in the region of La.<sup>35</sup> The end of the application of Spanish law in La. is difficult to establish. In that respect it has been said that the return of La. under the dominion of France, and its transfer to the United States, did not for a moment, weaken the Spanish laws in the province.<sup>36</sup>

Also, it has been said that the Spanish laws and provisions were the law in La. from 1769 until 1808, notwithstanding that La. was returned to France in 1800 and then transferred to the United States in 1803.<sup>37</sup>

It was with the Digest that La. first had a legal regime of its own. As from that landmark, La. has provided its own body of laws at the state level and has adopted the federal dispositions that the Union has demanded.

The Digest had no provision effecting a blanket repeal of the past Spanish jurisprudence. The Digest's enacting legislation repealed only the ancient civil laws that were inconsistent.<sup>38</sup>

In the famous case *Cottin v. Cottin*<sup>39</sup> of 1817, Justice Derbigny explained the principle of implied repeal as: "It must not be lost sight of, that our civil code is a digest

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<sup>34</sup> Id. *supra* note 16, at 164.

<sup>35</sup> *Vide supra* note 18.

<sup>36</sup> L. MOREAU-LISLET AND HENRY CARLETON, THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA. TRANSLATED FROM THE SPANISH XXI (1820).

<sup>37</sup> Id. *supra* note 16, at 165.

<sup>38</sup> Vernon Palmer, *The Death of a Code--The Birth of a Digest*, 63 Tul. L. Rev. 221, 244 (1988).

<sup>39</sup> *Cottin v. Cottin*, 5 Mart.(o.s.) 93. The issue, as briefed by Vernon Palmer, was whether the Digest's definition of an "abortive" child as a child "incapable" of living repealed by implication a Spanish

of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.”<sup>40</sup>

As a consequence of *Cottin*, all Spanish law that was compatible would play the role of supplementing the Digest. The old Spanish law was regarded as “Louisiana's common law” because it remained the background that the Digest partially displaced, but did not expressly repeal.<sup>41</sup>

The principle of implied repeal stated by the court was not new. It could be traced back in the Roman Justinian's digest and could be found also in Toullier. The jurisprudence that followed *Cottin* noted that new laws must be contrary to old laws in order to repeal them and that an exception to a general rule was not repealed by enacting the general rule without the exception.<sup>42</sup>

The 1825 Code seemed to end the dispute by introducing art. 3521<sup>43</sup> amongst its provisions. Notwithstanding, the La. Supreme Court in 1827 held that the Spanish laws

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provision that defined an abortive child as one who did not live at least twenty-four hours. Seeing no necessary conflict between the two ways of defining an abortive child, the court held that the twenty-four-hour test of Spanish law had not been repealed and that it would be applied.

<sup>40</sup> *Cottin v. Cottin*, 5 Mart.(o.s.) 93.

<sup>41</sup> *Id. supra* note 38, at 244.

<sup>42</sup> *Id. supra* note 38, at 245.

<sup>43</sup> 1825 Code read: “From and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this state, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the Ste of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this Code” According to CIVIL CODE OF THE STATE OF LOUISIANA BY AUTHORITY PRINTED BY J. C. DE ST. ROMES [*FROM THE PARISH COURT OF PLAQUEMINES (MANUSCRIPT)*] 1112 (1825).

which were not contrary to the 1825 Code were still in force and that the articles of the Digest, which had been omitted from the 1825 Code, also were in effect.<sup>44</sup> That resolution of the La. Supreme Court led the La. Legislature to adopt two acts<sup>45</sup> that intended to repeal the ancient laws.

Even these acts did not have the effect of eliminating further references to Spanish laws. The La. Supreme Court shortly thereafter held that the acts only repealed positive, written, or statute laws of Spain, and that they did not abrogate those principles of law which had been established or settled by the decisions of the courts. This open ending seems to have kept the Spanish law in effect till present days in La.<sup>46</sup>

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<sup>44</sup> John T. Hood Jr., *The history and development of the Louisiana Civil Code*, 33 Tul. L. Rev. 7, 18 (1958).

<sup>45</sup> La. Acts of 1828, N 40: *An act to repeal certain articles of the Former Civil code...Whereas, doubts have arisen whether the provisions contained in the former civil code, approved on the 31 of March, 1808, which are not reprinted in the new Civil Code of Louisiana, are repealed....Therefore, be it enacted by the Senate and House of Representatives of the sate of Louisiana in General Assembly convened, that all the articles contained in the old civil code of this state, approved on the 31 of March, 1808, and all the provisions of the same which are not reprinted in the new civil code of Louisiana, published under authority of state on the 12 April, 1824, the articles are enumerated from 1 to 3,522 be, and the same are, hereby, repealed; except so much of much of title tenth as is embraced in its third chapter, which treats, "of the dissolution of communities or corporations* La. Acts 1828, 8<sup>th</sup> Legis. 2<sup>nd</sup> Sess., No. 40, p. 66

La. Acts of 1828, N 83: *An act further amending several articles of the Civil Code and Code of Practice: Section 1. Be enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened... Section 25. And be it further enacted, that all the rules of proceeding which existed in this state before the promulgation of the code of practice, except those relative to juries, recusation of judges and other officers and of witnesses, and with respect to the competency of the latter, be and are hereby abrogated and that all the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated, except so much of title tenth of the old civil code as is embraced in its third chapter, which treats of the dissolution of communities or corporations.* La. Acts 1828, 8<sup>th</sup> Legis. 2<sup>nd</sup> Sess., No. 83, p. 150.

<sup>46</sup> *Id. supra* note 44, at 18.

After having described the previous scenarios, it is enriching to note the mutation the La. legal system suffered during the first half of the Nineteenth Century, when changing from its French and Spanish ancestors to a body of law of itself:

1. In the period 1809-1828 the Superior Court of the Territory of Orleans and the Supreme Court of La. cited: i) Spanish codes, customs or ordinances four times more frequently than French codes, customs or ordinances; ii) French treatises and commentaries only slightly more frequently than Spanish treatises and commentaries; iii) Spanish statutes twelve times more frequently than French statutes; and iv) hardly ever Spanish or French judicial decisions.<sup>47</sup>

2. By far the most frequently cited Spanish authorities were the *Partidas* (247 citations), *Febrero* (207), and the *Curia Philipica* (162). These three authorities accounted for 60% of all citations to Spanish authorities.<sup>48</sup>

3. The translation of the *Partidas* into English in 1820 resulted in a 100% increase in the frequency with which it was cited by the La. courts.<sup>49</sup>

4. Citations of Spanish authority declined significantly after the adoption of the 1825 Code and Code of Practice of 1825.<sup>50</sup>

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<sup>47</sup> Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 La. L. Rev. 1485, 1504 (1982).

<sup>48</sup> *Id. supra* note 47, at 1504.

<sup>49</sup> *Id. supra* note 47, at 1505.

<sup>50</sup> *Id. supra* note 47, at 1505.

## Chapter II

### Adopting a Code for the Region

A description of the first legislative attempts the region of La. undertook to reach a Civil Code is provided in this Chapter. In addition, the projects that preceded the fulfillment of such an objective are mentioned. Finally, the 1825 Code is studied considering all the preceding bodies of law enacted in the region.

#### **1. The Digest of the Civil Laws (1808)**

A distinguished Latin American legal historian said that the tremor of falling in a Common Law regime moved the La. Legislature to codify.<sup>51</sup> That pressure to provide a prompt Civil Code moved Brown and Moreau-Lislet to find main grounding in the best available model at that time (*i.e.* the French Code). If they would have had to stick to the vernacular law (*i.e.* the Spanish law) they would have taken much more time to fulfill their work; an inadmissible situation regarding the dangerous circumstances the juridical culture of La. faced.<sup>52</sup> That culture was an isolated *Civil Law island* surrounded by a *sea of Common Law*, a status that if not safeguarded would not survive. Therefore, on March

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<sup>51</sup> Alejandro Guzmán Brito, *La Influencia del Código Civil francés en las Codificaciones Americanas*, 9 CUADERNOS DE EXTENSIÓN JURÍDICA DE LA UNIVERSIDAD DE LOS ANDES 17, 29 (2004).

<sup>52</sup> *Id. supra* note 51, at 29.

31, 1808, the La. Legislature adopted the *Digest of the Civil Laws Now in Force in the Territory of Orleans* by formal enactment.<sup>53</sup>

The Digest was modeled from the project of the French Code, and followed the systematic distribution of its source of inspiration, consisting of: Alphabetical Index of Subjects; Preliminary Title; Book I of *Persons*; Book II of *Things or Estates*; and Book III of *the Different manners of Acquiring the Property of Things.*<sup>54</sup>

The Digest was originally written in French and translated to English.<sup>55</sup> When adopted, the La. Legislature provided that in cases where the text was ambiguous or obscure both the English and French texts should be consulted and should mutually serve to the interpretation. However, further court decisions established that French being the working language of the codifiers, therefore, the French version was to be authoritative.

<sup>56</sup>

The sources the codifiers used when drafting the Digest raised intense scholarly debate. On one hand, Professor Batiza undertook an exhaustive analysis of the provisions of the Digest, and after comparing them with other legal texts available to the drafters, assured that the drafters had been eclectic in their source selection. He concluded that about 85% of the Digest derived from French sources (70% originated in a draft of the French Code), and the remaining 15% from Spanish, Roman, and English sources.<sup>57</sup>

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<sup>53</sup> GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* 156 (1975).

<sup>54</sup> *Id. supra* note 53, at 156.

<sup>55</sup> John M. Shuey, *Civil Codes -Control of the French Text of the Code of 1825*, 3 La. L. Rev. 352, 453 (1941).

<sup>56</sup> *Id. supra* note 53, at 156.

<sup>57</sup> S. HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* 31 (1993).

On the other hand, Professor Pascal assured that the work of the codifiers was even more eclectic and imaginative than what Professor Batiza had suggested.<sup>58</sup> Professor Pascal sustained the codifiers used the French Code and its drafts for the structure of the Digest, and even copied provisions of these when they expressed principles and rules of Spanish and Roman laws then in force in La. Notwithstanding, he mentioned that if French provisions were incompatible with Spanish and Roman law, the codifiers translated or rephrased the Spanish and Roman texts as to reflect and incorporate them into the Digest.<sup>59</sup>

All the scientific community was enriched with the debate of these great scholars because it: (i) brought light to an obscure area of legal history; (ii) reflected that the sources and institutions of the Digest, whether French, Spanish, or Roman, were essentially civilian; (iii) determined the Digest was not a mere copy of the French Code or any other single text; and (iv) demonstrated that the La. inhabitants were able to achieve their goal of tailoring a Civil Code for La.<sup>60</sup> In brief it may be said that, despite the origin of its provisions in Spanish, French, or other sources, the Digest was La. law.<sup>61</sup>

As it has been reflected in the previous paragraphs, the Digest is one of the most interesting and significant developments in the history of codification in the Western

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<sup>58</sup> Although it is not the intention to extend in the debate, it is worth mention that Professor Pascal concluded that Professor Batiza's work had not been in vain. He said that on the contrary, it was a start in the direction of ascertaining both the *literal* and the *substantive* sources of the Digest articles. Professor Pascal also said that Professor Batiza's work emerged finally as a work of concordances rather than an index of sources. See Robert A. Pascal, *Sources of the Digest of 1808: a Reply to Professor Batiza*, 46 Tul. L. Rev. 603, 623-624 (1972).

<sup>59</sup> *Id. supra* note 57, at 31.

<sup>60</sup> *Id. supra* note 57, at 32.

<sup>61</sup> A. N. Yiannopoulos, *The Early sources of Louisiana Law: Critical appraisal of a controversy*, LOUISIANA'S LEGAL HERITAGE 87, 100 (1983).

Hemisphere.<sup>62</sup> It is one of the earliest examples of a code attempt drafted from a variety of European sources, and there is little doubt that the enactment of a digest rather than a code was the intention of the La. Legislature.<sup>63</sup> It was aimed to be a guide<sup>64</sup> and established a civilian system of private law for La.<sup>65</sup> Being a digest it was a summary or compilation of preexisting law designed to make the ancient ruling law known and available. Notwithstanding some formal resemblances to modern civil codes, the Digest lacked the essential element of a genuine work of code law.<sup>66</sup>

The Digest was short lived, and it was abrogated and replaced by the 1825 Code.<sup>67</sup> Agitation encouraged legislative commissions with authority as to recommend alterations, additions and changes to the original text of the Digest. The report of these commissions resulted in the creation of two new separate codes (*i.e.* 1825 Code and Code of Practice). Those new codes should supplant all previous foreign law, civil or common; and create the civil practice and civil law of La.<sup>68</sup>

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<sup>62</sup> Rodolfo Batiza, *The Louisiana Civil Code of 1808: its actual sources and present relevance*, XIII THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY: AN UNCOMMON EXPERIENCE LAW AND JUDICIAL INSTITUTIONS IN LOUISIANA 1803-2003 54, 54 (2004).

<sup>63</sup> *Id. supra* note 53, at 157.

<sup>64</sup> *Id. supra* note 53, at 157.

<sup>65</sup> *Id. supra* note 62, at 54.

<sup>66</sup> *Id. supra* note 53, at 157.

<sup>67</sup> *Id. supra* note 61, at 101.

<sup>68</sup> Henry P. Dart, *The Place of the Civil Law in Louisiana*, XIII THE LOUISIANA PURCHASE BICENTENNIAL SERIES IN LOUISIANA HISTORY: AN UNCOMMON EXPERIENCE LAW AND JUDICIAL INSTITUTIONS IN LOUISIANA 1803-2003 166, 170 (2004).

To close this section, it may be said that the significance of the Digest is not merely historical. Through the intermediate agency of the 1825 Code and the 1870 Code, many of its provisions survived<sup>69</sup> into the Twentieth Century and its recent revisions.

## **2. Project for a Necessary Code (1823)**

The initial need of an immediate body to regulate the civil law in La. had been momentarily fulfilled with the enactment of the Digest. Shortly after 1808, the La. judicial community started to feel the need for a new and more finished Code of civil law.<sup>70</sup>

The Digest showed it could not satisfy the growing judicial needs, and prominent attorneys continued working on the arrangement of legal dispositions and studying sources as for a better development of the practice in La.

Amongst those attorneys it is possible to mention Moreau-Lislet and Carleton. They made a great contribution<sup>71</sup> by translating into English the monumental Partidas. The translation consisted of a list of the titles of the Roman laws, Spanish laws and the Digest (relative to the subject treated) preceded by each title of the Partidas. In addition, it included an index of the contained articles.<sup>72</sup>

There was also a serious concern in the judicial community about the comprehensiveness and proper interpretation that should be made of the Digest's

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<sup>69</sup> *Id. supra* note 62, at 54.

<sup>70</sup> GEORGE DARGO, *LEGAL CODIFICATION AND THE POLITICS OF TERRITORIAL GOVERNMENT IN JEFFERSON'S LOUISIANA, 1803-1808* 358 (1970).

<sup>71</sup> See page 14 and note 49.

<sup>72</sup> *Id. supra* note 36, at xxiii.

provisions. Early judicial interpretations reflected uncertainty about the continuing significance of Spanish, French, and Roman laws then in force.<sup>73</sup>

At that same time, a remarkable and comprehensive codification movement was started having Edward Livingston as its central figure. His objective included not only a Civil Code and a Code of Practice but also a Commercial Code and a Criminal Code.<sup>74</sup> With respect to the first of those codification works, he advocated for a consolidation, not only to consider the necessary adjustments and improvements which past experiences indicated, but also to finish with all the uncertainties the ancient civil laws faced.<sup>75</sup>

Continuing with the search for satisfaction, on March 1822, the La. Legislature appointed Moreau-Lislet, Derbigny, and Livingston himself, to draft a revision of the Digest.<sup>76</sup> Their work was fulfilled when they printed the Project with their proposed revisions, both in French and English.

On March 1823, the La. Legislature ordered that the Project should be printed and distributed as soon as completed.<sup>77</sup> The French text was printed in one volume, a small folio of 425 (3) pages; and the English translation was printed about the same time, separately, in a small folio of 219, 176 (3) pages.<sup>78</sup>

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<sup>73</sup> S. HERMAN ET ALIA, *THE LOUISIANA CIVIL CODE: A HUMANISTIC APPRAISAL* 25-26 (1981).

<sup>74</sup> Joseph Dainow, *Introductory Commentary to the Louisiana Civil Code*, 1 *CIVIL CODE -WEST'S LOUISIANA STATUTES ANNOTATED-* 10,10 (1952).

<sup>75</sup> *Id. supra* note 74, at 10.

<sup>76</sup> KATE WALLACH, *RESEARCH IN LOUISIANA LAW* 47 (1960).

<sup>77</sup> *Id. supra* note 76, at 47.

<sup>78</sup> John H. Tucker, *Source Books of Louisiana Law*, 6 *Tul L. Rev.* 280, 287 (1931-1932).

As the title of the Project indicated<sup>79</sup> only the additions and amendments which they recommended were included, and they omitted the articles of the Digest which they did not propose to amend.<sup>80</sup> Therefore, for a complete text of the projected revisions, the Project had to be used in conjunction with the Digest.<sup>81</sup> The Project indicated all the changes, additions and omissions proposed, and, often indicated the reason for the proposed amendment.<sup>82</sup> In addition, the Project frequently cited the authorities upon which the amendments were based.<sup>83</sup>

In the preliminary report, of February 1823, addressed to the President of the Senate, the drafters advanced their intention to respect the principles which had received the sanction of time. Amongst those principles they mentioned were: the Partidas; other Spain statutes; the Digest; the abundant English Jurisprudence; and the comprehensive French Code.<sup>84</sup> Hence, as in the Digest experience they absorbed sections of the French Code that their experience and wisdom found applicable to La. and did not ignore the

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<sup>79</sup> Complete title of the Project: “Additions and Amendments to the Civil Code of the State of Louisiana, Proposed in Obedience to the Resolution of the Legislature of the 14<sup>th</sup>, March, 1822, by the Jurist Commissioned for that Purpose.”

<sup>80</sup> Id. *supra* note 44, at 17.

<sup>81</sup> Id. *supra* note 76, at 48-49.

<sup>82</sup> Perhaps the most important source book for Research in La. mentions that *the text of each proposed article is preceded by a note explaining where the article will be placed in relation to the article of the Civil Code of 1808. The text is printed in large type. Observations of the redactors are printed in small type below many of the articles. These notations frequently cite the source of the proposed change, and are valuable aids for correct interpretation. Original copies of the Project are very scarce; it has, however, been reprinted as volume one of the ‘Louisiana Legal Archives’.* Id. *supra* note 48.

<sup>83</sup> Id. *supra* note 78, at 287.

<sup>84</sup> Id. *supra* note 76, at 47.

Spanish law that supported principles and practice. In brief, they did not follow French or Spanish law blindly.<sup>85</sup>

### **3. A Code is Born (1825)**

For the purposes of this presentation, the 1825 Code (of which the official edition is entitled *Civil Code of the State of Louisiana*<sup>86</sup>) is an important landmark. It is when non-pecuniary damages were first included into the civil system of La.<sup>87</sup> Therefore, this section centers especial attention to this codification work, both in its origins and repercussions.

Legal history surprisingly shows that there seems to have been no act of the La. Legislature passed for the express purpose of adopting the 1825 Code. There is an act that was approved on April 1824 that orders the printing and promulgation of the 1825 Code as amended.<sup>88</sup> The code was distributed on May 1825, and the La. Supreme Court held that the 1825 Code was promulgated on various dates in different parts of the state.<sup>89</sup> That act, together with the subsequent abrogation of all previous law, completed the work of civilian codification<sup>90</sup> in La.

The 1825 Code had 3,522 articles, having 1,395 articles more than the Digest. Its organization and division were quite similar to the ones of the Digest, hence: similar to

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<sup>85</sup> Id. *supra* note 68, at 173.

<sup>86</sup> Id. *supra* note 76, at 48-49.

<sup>87</sup> *Note bene* that it is referred as with the extension art.1928 (3) provides.

<sup>88</sup> Id. *supra* note 76, at 48-49.

<sup>89</sup> Id. *supra* note 76, at 48-49.

<sup>90</sup> Id. *supra* note 70, at 358.

the ones of the French Code.<sup>91</sup> Notwithstanding, when comparing both tables of contents, it is possible to notice that the 1825 Code addressed topics on which the Digest was silent.<sup>92</sup> Amongst those topics it is possible to find non-pecuniary damages,<sup>93</sup> main point of interest for this presentation.

The abovementioned act of 1824 ordered to print the text in English and French (on opposite pages).<sup>94</sup> Then, both the Digest and the 1825 Code were drawn up originally in French and translated to English.<sup>95</sup> The quality of the translation into English has often been criticized by scholars. The promulgation of the 1825 Code did not instruct any specific provision for the solution of differences or ambiguities when working with the translations. Due to the fact that the original was drafted in French, and existing a notorious consent about the poor quality of the English translation, the French version was accepted as the controlling text.<sup>96</sup>

Certain discussion was also opened with regards to the solution that should be adopted when facing a conflict between the 1825 Code and the Code of Practice. Finally, it was established that the latter should prevail.<sup>97</sup>

Even when it has been mentioned before, it is worth mentioning that the importance of the 1825 Code in the La. legal system depended on the judiciary's application of it in the early years after its enforcement. The La. Supreme Court saw the 1825 Code merely as an expositive document, believing that it could only change the law

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<sup>91</sup> Id. *supra* note 16, at 170.

<sup>92</sup> Id. *supra* note 73, at 25-26.

<sup>93</sup> With the extend of art. 1928 (3).

<sup>94</sup> Id. *supra* note 76, at 48-49.

<sup>95</sup> Id. *supra* note 74, at 12.

<sup>96</sup> Id. *supra* note 74, at 12.

<sup>97</sup> Id. *supra* note 76, at 48-49.

when reflecting that one of its provisions was utterly at odds with the pre-codified law. It was therefore treated as the Digest, and the superior court continued to follow the theory of construction that it had applied.<sup>98</sup>

The law that existed prior codification, essentially Spanish, was preferred even when it contradicted the 1825 Code. As mentioned in previous pages, the Spanish law retained its status as an important source of law<sup>99</sup> and was a strong contestant for the novel code. In addition, the La. Supreme Court denied retroactive effects to the 1825 Code. As a result, the court applied Spanish law<sup>100</sup> to cases where the cause of action antedated 1808 and applied modified Spanish law to those causes which had arisen between the years 1808 and 1825.<sup>101</sup>

Notwithstanding the La. Supreme Court interpretation, art.3521 of the 1825 Code intended to terminate the application of all ancient laws and put an end to the uncertainties of the past.<sup>102</sup> The referred article reads:

*from and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this state, when Louisiana was ceded to the United States, and the acts of the Legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana...are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code.*<sup>103</sup>

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<sup>98</sup> RICHARD KILBOURNE, A HISTORY OF THE LOUISIANA CIVIL CODE. THE FORMATIVE YEARS 1803-1839 131 (1987).

<sup>99</sup> Id. *supra* note 98, at 131.

<sup>100</sup> Spanish law in its pure form, *i.e.* Spanish texts with or without English translation

<sup>101</sup> Id. *supra* note 98, at 131.

<sup>102</sup> Id. *supra* note 74, at 11.

<sup>103</sup> Id. *supra* note 43, at 1112.

The repeal had been added by the La. Legislature, and was not found in the original draft submitted by the codifiers. Nevertheless, the article could be read as not repealing all prior law, for it only applied in *every case, for which it has been especially provided in this code*. That allowed the possibility of searching for limits to the express repeal. If facing no specially provided rule under the code, a recourse to a special rule under prior law (if one existed) could be made.<sup>104</sup> The La. Supreme Court got hold to that interpretation in *Cole's Widow v. His Executors*.<sup>105</sup>

In order to stop that kind of interpretation, the La. Legislature passed two acts.<sup>106</sup> There has been intense scholarly argumentation related to the effects of both acts, and it can be concluded that Spanish and French jurisprudence (due to case law) and doctrine are still consulted by La. courts when rendering decisions.<sup>107</sup>

The 1825 Code fostered its applicability during the mid Nineteenth Century due to court decisions and doctrinal developments. Reaching the turn of the century, in 1870, it was subject to a revision. That revision is the starting point for the following Chapter of this presentation.

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<sup>104</sup> Id. *supra* note 38, at 246.

<sup>105</sup> *Cole's Widow v. His Executors*, 7 Mart. (n.s.) 41.

<sup>106</sup> See *supra* note 45.

<sup>107</sup> Id. *supra* note 76, at 48-49.

### Chapter III

#### After the Enforcement of the First Civil Code

This Chapter focuses its attention to the changes the La. Legislature introduced into the La. Civil law system as from the mid Nineteenth Century. It has been mentioned *supra*, that by means of the Digest and the 1825 Code, La. was able to protect its Spanish and French heritage from the imminent invasion of the Common law system. Time and necessity forced revisions to the 1825 Code; a code that was not able to survive unchanged a complete century, but that survived far more than the Digest.

#### **1. A First Revision Reaching the End of the Nineteenth Century(1870)**

For approximately half a Century the 1825 Code was able to survive without any alteration. It existed, at that time, a request for amendments to its provisions. The legal practice and scholarly<sup>108</sup> opinions demanded changes in the wording of the 1825 Code. In addition, the Civil War was reaching an end and the State of La. had to adapt its regulations to the Federal directions related especially to property. Therefore, and as the result of a revision of the 1825 Code, in 1870 the La. Legislature adopted a new civil code for the State.

As mentioned in the previous Chapter, the Digest and the 1825 Code could be defined as elaborations with dogmatic and scientific background. On the other hand, the

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<sup>108</sup> It should be understood that at that time the main scholar opinions were done by lawyers that practiced in the State.

1870 Code was not the product of a scientific redaction. It was little if anything, not more than a modernized version of its antecessor.<sup>109</sup>

Two aspects must be analyzed when studying the 1870 Code: the structure; and on the substance or content. Regarding the first aspect, it may be said that the French heritage<sup>110</sup> had been strongly attacked. Hence, the 1870 Code was published solely in English.<sup>111</sup> This was perhaps one of the most significant differences with the previous legal tools of the region, because as it has been already mentioned, the Digest and the 1825 Code had been both published in French and English.

The changes incorporated into the code, and that will be mentioned *infra*, forced the need to renumber the articles for the 1870 Code. Notwithstanding that renumbering, the formal structure of the 1825 Code survived.<sup>112</sup>

Regarding the second aspect, *i.e.* the substance or content, it has been said that the 1870 Code was substantially the 1825 Code,<sup>113</sup> with some alterations that were not really significant, or that at least did not change its essence. The underlying theory and the substance of most of the institutions of the 1825 Code survived.<sup>114</sup>

The changes in content introduced by the 1870 Code can be summarized by saying that they merely: (i) eliminated provisions regarding slavery; (ii) incorporated statutory amendments made by the La. Legislature since 1825; and (iii) integrated acts

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<sup>109</sup> Robert Lee Tullis, *The Louisiana Civil Law, in the Light of its Origin and Development*, reprinted from II 2 UNIVERSITY OF TORONTO LAW JOURNAL 301, 301 (1938).

<sup>110</sup> When making reference to French heritage, at this point, is intended to mean the use of French language in the State.

<sup>111</sup> A. N. YIANNOPOULOS, 1 LOUISIANA CIVIL LAW SYSTEM 65 (1971).

<sup>112</sup> *Id. supra* note 111.

<sup>113</sup> *Id. supra* note 111.

<sup>114</sup> *Id. supra* note 111.

passed since 1825, which dealt with matters that had not officially amended the 1825 Code.<sup>115</sup> Amongst the main considerations it is possible to mention the results of the revisory legislation of the year 1855 which was never able to replace the 1825 Code.

As a result of those few and not significant changes, a reader who compares the 1870 Code with the 1825 Code will find many coincidences and similarities in their provisions.<sup>116</sup> In brief, the 1870 Code was a simple work of clerical compilation<sup>117</sup> that at that moment had turned mandatory for the growing State of La. The 1870 Code also represented a change and modernization that would again help the civil system to survive and enter the Twentieth Century.

## **2. A Revision for the New Century(1948)**

With the dawn of a new Century the need of a new code was reborn. There had been changed conditions and the conceptual framework of the 1870 Code had proved to be analytically deficient in certain instances.<sup>118</sup>

Perhaps, due to the sources and materials with which it was built, the 1870 Code had concepts that were sometimes blurred and presented a number of contradictions. Even more, the courts had provided interesting interpretations and the La. Legislature had been repealing or amending a substantial number of articles.<sup>119</sup> With time, other La. statutes covering civil law matters, that had been originally left outside the wording of the

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<sup>115</sup> Id. *supra* note 111.

<sup>116</sup> Id. *supra* note 109, at 301.

<sup>117</sup> Id. *supra* note 29, at 20.

<sup>118</sup> Id. *supra* note 111, at 67-68.

<sup>119</sup> Id. *supra* note 111, at 67-68.

1870 Code, had become part of the Title 9 of the La. Revised Statutes.<sup>120</sup> Facing such scenario made a revision to the existing code mandatory.

It has been said also that the need of revision in La. not only pursued systematic interests, it also tried to create a clear harmony between the “law in the books” (*i.e.* the word of the 1870 Code) and the “living law” (*i.e.* the law created by practice in and out of court).<sup>121</sup> That lack of harmony was a growing problem present in the legal activities in the region of La.

Pushed by the objective and need of updating the existing civil law in the region, the La. Legislature instructed the La. State Law Institute, which was created in 1938, to revise the 1870 Code.

In order to fulfill its duty, the La. State Law Institute faced three possible work projects: i) purify the linguistic, eliminate the obsolete provisions and update the norms; ii) undertake a structural revision that would start by a deep analysis of the grounds for each institution, followed by a study of the existing case law and hence providing a new wording for the articles; and iii) perform a partial revisions of the 1870 Code. The La. State Law Institute finally opted for the third possible way,<sup>122</sup> and started to work with that criterion beginning in 1948.

A brief bullet-point including all partial amendments to the 1870 Code, till the elaboration of this presentation, is provided below:<sup>123</sup>

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<sup>120</sup> *Id. supra* note 111, at 67-68.

<sup>121</sup> *Id. supra* note 111, at 67-68.

<sup>122</sup> *Id. supra* note 15, at 135.

<sup>123</sup> Only the amended parts are mentioned, and in parenthesis appears the year of revision. The review is not chronological. It begins at the front of the Code and develops book by book, title by title, and chapter by chapter rather than according to the respective dates of enactment

**Preliminary Title** (1987)

Chapters 1 and 2 (1987)

Chapter 3 (1987 and 1991)

**Book I** (revision not completed)

Title I -Natural and Juridical Personas- (1987)

Title II -Absent Persons- (1990)

Title IV -Husband and Wife- (1987)

Title V -Divorce- (1990 and 1997)

Title VII -Parent and Child- (1993)

Chapter 2 (1976)

Title IX -Persons Unable to Care for Their Persons or Property- (2000)

**Book II** (Titles I to VI revised by a series of legislative acts from 1976 to 1979)

Title I -Things-

Title II -Ownership-

Title III -Personal Servitudes-

Title IV -Predial Servitudes-

Title V -Building Restrictions-

Title VI -Boundaries-

Title VII -Ownership in Indivision- (added in 1990)

**Book III** (amendments are very disperse)

Preliminary Title (1981)

Title I -of Successions-

Chapters 1-3 (1981)

Chapters 4-6 and 13 (1997)

Title II -of Donations Inter Vivos and Mortis Causa-

Chapter 2 (1991)

Chapter 3 (1996)

Chapter 4 (2001)

Chapter 6 (1997 and 2001)

Chapters 8 and 9 (2004)

Title III -Obligations in General- (1984)  
Title IV -Conventional Obligations or Contracts- (1984)  
Title V -Obligations arising Without Agreement-  
    Chapters 1 and 2 (1995)  
Title VI -Matrimonial Regimes- (1979)  
Title VII -Sales- (1993)  
Title IX -of Lease-  
    Chapters 1 and 2 (2004)  
Title XI -Partnership- (1980)  
Title XII -of Loan- (2004)  
Title XIII -Deposit and Sequestration- (2003)  
Title XVI -Suretyship- (1987)  
Title XV -Representation and Mandate- (1997)  
Title XXII -Mortgages- (1991 and 1992)  
Title XXIII -Occupancy and Possession- (1982)  
Title XXIV -Prescription- (1982 and 1983)  
**Book IV -Conflict of Laws- (added in 1991)** <sup>124</sup>

The information provided above, together with some specific studies, reflect that only Books II and IV can be considered as totally complete. In addition, it has been estimated that approximately 72% of the 1870 Code has been fully revised. Therefore, 28% of the 1870 Code remains still effective, and many old provisions coexist and interact with the new wording.<sup>125</sup>

For specific purposes of this presentation, it is necessary to mention that according to the bullet point provided above, contract law in La. had two mayor revisions

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<sup>124</sup> This information was developed from A. N. Yiannopoulos, *The Civil Codes of Louisiana*, LOUISIANA CIVIL CODE 2005 EDITION XLV- LVII (2005), and complemented by the author of this presentation.

<sup>125</sup> Vernon Palmer, *The French Connection and The Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law*, 63 La. L. Rev. 1067, 1112 (2003).

– on the law of obligations, and on sales.<sup>126</sup> The 1984 Revision is the one which will comeback to the reader with more intensity while advancing through the different sections of this presentation.

Continuing with contract law it is worth mentioning that, even after the new revisions, art.2 of the Uniform Commercial Code (UCC) has not been directly adopted in La.

The lack of a direct application of art.2 of the UCC in La. is an important difference between the civil law in the region and the common-law states. Notwithstanding, the preeminent common-law statute has made its way into the New Code. For instance, with trusts, the UCC rules met with no particular resistance in the civil code because there were no rules at this level of detail present in the Code to interfere with their application. Therefore, the revision of Sales (Book III, Title VII) included a new chapter (chapter 13) that added amongst other things: (i) battle of the forms; (ii) right of inspection for the buyer; (iii) right of rejection of nonconforming goods for the buyer; (iv) acceptance of nonconforming things by the buyer; and (v) right to cure nonconformity for the seller.<sup>127</sup>

The revision comments to the civil code make clear that the incorporated rules are ‘new’, and suggest that they are consistent with the provisions and spirit of the 1870 Code. Hence, the dominant civilian grounding prevails in the civil law system of La. whenever analyzing or applying the articles of the civil code related to Sales.<sup>128</sup>

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<sup>126</sup> Id. *supra* note 14, at 457.

<sup>127</sup> Id. *supra* note 14, at 457.

<sup>128</sup> Id. *supra* note 14, at 457.

## Second Part

### Non-Pecuniary Damages

## Chapter IV

### Damages that Exceed Economic Interests

The Second Part of this presentation helps readers to focus their attention to the study of non-pecuniary damages in La. It also allows readers not to ignore the historical grounding that was provided in the First Part. Together with that initial information, this Part will help develop a complete understanding of the area of the law under study.

Before limiting the comment and analysis to the codification and regulations in La., it is worth providing a general understanding of the area of law that gives the name to this Chapter, *i.e.* non-pecuniary damages. With that objective, two different approaches, from two different starting points, will lead to similar results. Those starting points are non-patrimonial damages and moral damages.

#### **1. Non-Patrimonial Damages**

The failure of a party in an obligation to fulfill his or her commitment may cause a detriment or damage to the other party's interests or assets. Those interests or assets may be of no patrimonial nature, because not all the rights of a person fall within his or her patrimony.<sup>129</sup> In other words, it is generally accepted that not all rights are of a patrimonial nature.<sup>130</sup>

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<sup>129</sup> Saul Litvinoff, 6 LA. CIV. L. TREATISE, *Law Of Obligations* § 6.1 (2d ed.) (www.westlaw.com).

<sup>130</sup> 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY 218 (1966) cited by Id. *infra* note 139, at 1.

Initially, and in a very general manner, it may be said that non-pecuniary damages are those injuries that cannot be measured in pecuniary terms.<sup>131</sup> Also, in a complementary way it can be added that they are injuries that are not able to be ‘appreciated in money’, *i.e.* not capable of a precise monetary calculation.<sup>132</sup> This category of damages includes, amongst others and not in a limited way: mental anguish, annoyance, inconvenience, psychic damage, humiliation, embarrassment,<sup>133</sup> mental suffering, or even emotional distress.<sup>134</sup>

Continuing with the same development of ideas, it could be repeated that some fundamental rights are not regarded as part of a person’s patrimony,<sup>135</sup> although it could be added that to violate or jeopardize the referred fundamental rights may have an adverse impact on the feelings of the holder of such rights and may give rise to potential claims that seek patrimonial reparations.<sup>136</sup>

Therefore, and contemplating the above mentioned, the expression *non-pecuniary damages* is not totally accurate, because a claim for a damage to a non-pecuniary right is generally regarded as pecuniary in nature, and commonly repaired with money.<sup>137</sup>

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<sup>131</sup> Gary P. Graphia, *Non Pecuniary Damages: A Guide to Damage Awards under Louisiana Civil Code Article 1998*, 50 La. L. Rev. 797, 797 (1990).

<sup>132</sup> Henri Wolbrette III, *Damages Ex Contractu: Recovery of Nonpecuniary Damages for Breach of Contract under Louisiana Civil Code Article 1934*, 48 Tul. L. Rev. 1160, 1161 (1974).

<sup>133</sup> *Id. supra* note 132, at 1161.

<sup>134</sup> *Westesen v. Olathe State Bank*, 78 Colo. 217, 240 P. 689 (1925); *Dawson v. Associates Fin. Serv. Co.*, 215 Kan. 814, 529 P.2d 104 (1974); *Batson v. Bean*, 208 Ky. 295, 270 S. W. 801 (1925); *Miholevich v. Mid-West Mutual Auto. Ins. Co.*, 261 Mich. 495, 246 N.W. 202 (1933); *Dallas v. Brown*, 150 S. W.2d 129 (Tex. Civ. App. 1941) cited by *Id. infra* note 139, at 1.

<sup>135</sup> *Id. supra* note 129, at § 6.1.

<sup>136</sup> I A. YIANNOPOULOS, CIVIL LAW OF PROPERTY 218 (1966) cited by *Id. infra* note 139, at 1.

<sup>137</sup> *Id. supra* note 129, at § 6.1.

## 2. Moral Damages

The second starting point that may be used to reach a concept for non-pecuniary damages is the one that gives title to this subsection.

Initially, it must be said that moral damages can be understood as a species included in the gender of non-patrimonial damages. Therefore, there can be damages that jeopardize non-economic interests and that may have no moral connotations.

Tracing the origin of moral damages, it is mandatory to refer to the French jurisprudence and doctrine. There, it is possible to find *dommage moral* and *prejudice moral*. These terms are generally used to define a damage inflicted to interests or assets not strictly patrimonial.<sup>138</sup>

When looking towards other civil law regions, it is useful to refer to Latin America. In those countries the concept of *daño moral* has been accepted. The *daño moral* has a similar application as the one given by the French jurisprudence to *dommage moral*.

One of the most eminent scholars of the civil law system inside La. has stated that greater terminological accuracy would be achieved by adopting in the English language the expression *moral damages*, rather than *non-pecuniary* or *non-patrimonial damages*. Moral damages should then be applied to designate those damages that are awarded as reparation for a loss that, due to its experience in the subjective sphere of a person's

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<sup>138</sup> 7 M. PLANIOL ET G. RIPERT, *TRAITE PRATIQUE DE DROIT CIVIL FRANÇAIS* 182 (2D ED. ESMEIN TRANS. 1954); P. WEILL, *DROIT CIVIL – LES OBLIGATIONS* 427 (1971) cited by Id. *infra* note 139, at 1.

feelings, is not strictly pecuniary.<sup>139</sup> In addition, it has been accepted by the support provided by other important scholarly opinions, that inside the common law system, moral damages are all damages for non-pecuniary loss recoverable under a breached contract in certain situations.<sup>140</sup>

Hence, at this point it is important to share the idea that there should be no semantic obstacle to borrow from the French doctrine and to speak of moral damages when referring to damages that cannot be viewed as sustained by a person's patrimony, or damages to an interest for which a current market-value cannot be readily ascertained.<sup>141</sup>

Notwithstanding, during the last century, the expression *moral damages* has in fact been used by the courts in La. when rendering opinions; while the less clear expression *non-pecuniary damages* is the one currently used in most English legal parlance when trying to mean the reparation owed for a loss that is other than patrimonial.<sup>142</sup> That is the reason why, even when preferring the term *moral damages*, this presentation refers to non-pecuniary damages rather than moral damages.

As closing words it is worth mentioning, even when its treatment exceeds this presentation, that a clear relation between non-pecuniary and pecuniary loss is found when: (i) a loss of a non-pecuniary nature results from a pecuniary one; and (ii) a loss of a pecuniary nature follows a loss which is non-pecuniary.<sup>143</sup>

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<sup>139</sup> Saul Litvinoff, *Moral Damages*, 38 La. L. Rev. 1, 1 (1977).

<sup>140</sup> N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 La. L. Rev. 1265, 1281 (1994).

<sup>141</sup> *Id. supra* note 139, at 1.

<sup>142</sup> *Id. supra* note 129, at § 6.1.

<sup>143</sup> *Id. supra* note 129, at § 6.4.

On the other hand, it is difficult to find a clear relation between non-pecuniary and pecuniary losses when a non-pecuniary loss is neither the result, nor the cause, of another pecuniary loss.<sup>144</sup> Due to that difficulty, some French scholars stated the existence of a *moral patrimony of persons*, consisting of intangible assets (e.g. honor, reputation, feelings, and peace of mind). That *moral patrimony* has two types of assets: social and emotional.<sup>145</sup>

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<sup>144</sup> Id. *supra* note 129, at § 6.4.

<sup>145</sup> Id. *supra* note 129, at § 6.4.

## Chapter V

### Article 1928: A Cornerstone for Non-Pecuniary Damages

Having provided a general idea regarding non-pecuniary damages, it is interesting to focus the analysis into the region of La. The following Chapters of this Second Part, together with the Third Part, will provide a complete analysis.

#### **1. An Introduction to the Recovery of Non-Pecuniary Damages in La.**

Initially, and as to provide a clear introduction for the reader when studying non-pecuniary damages in La., it is useful to develop in the following paragraphs a brief preliminary explanation.

In La., the basic elements of recovery for non-pecuniary damages were set out originally in art.1928 of the 1825 Code. This article was included in Section 4 *of the Damages Resulting from the Inexecution* [from the French *Inexécution*] *of Obligations*, Chapter 3 *of the Effect of Obligations*, Title 4 *of Conventional Obligations*, of the Book III *of the Different Modes of Acquiring the Property of Things*.

When the 1870 Code was enacted, the text of art.1928 was maintained with practically the same wording.<sup>146</sup> The only change the provision suffered was with respect to the number that corresponded to the article inside the La. Civil Code. The original number 1928 was changed to 1934.

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<sup>146</sup> To identify the exact differences *vide* Chapter X of this presentation.

All that has been mentioned in the previous Chapter regarding non-pecuniary damages must be considered when referring to La. In addition, the text of art.1934 (former art.1928) provided, as a general rule, for recovery of the loss sustained, as well as the profit lost by the creditor. The general rule was tempered by determining whether: (i) the breach was in good or bad faith; (ii) the damages were foreseeable at the initiation of the contract or consequential; and (iii) the damages were pecuniary or non-pecuniary.<sup>147</sup>

Due to the fact that the application of art.1934 proved to be difficult and not peaceful, and that cases with similar factual situations had different outcomes, the La. State Law Institute proposed, under the initiative of the La. Legislature, a new text that would replace art.1934.<sup>148</sup> That new text came with the 1984 Revision and together with the new wording that provides art.1998.

At present day, the ruling provision for the recovery of non-pecuniary damages in La. is found in art.1998 of the 1984 Revision. That provision is currently incorporated into the New Code.

For the purposes of this presentation, the focus must be centered on art.1928 during the years of its existence, *i.e.* 1825 to 1870. Even though the text of art.1934 is practically the same as the one of art.1928, the objective of this presentation is to limit its study to the period of years above mentioned, and not to extend after the year 1870.

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<sup>147</sup> Id. *supra* note 132, at 1160.

<sup>148</sup> Id. *supra* note 131, at 797.

## 2. A View of the Innovative Text

At this point it is necessary to provide the reader with a transcription of art.1928. Such transcription will help understand the invocation that the codifiers did to the institution of non-pecuniary damages inside the 1825 Code.

Special attention must be rendered when reading art.1928 (3) (it has been emphasized in bold) due to the fact it is the grounding provision for the application of non-pecuniary damages in La.

*Art. 1928- Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:*

*1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will;*

*2. When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequences of the breach of that contract; but even when there is fraud, the damages cannot exceed this;*

*3. Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach: a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.*

***In the assessment of damages under this rule, as well as in cases of offences, quasi offences, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditors, whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor;***

*4. If the creditor be guilty of any bad faith, which retards or prevents the execution of the contract, or if, at the time of making it, he knew of any facts that must prevent or delay its performance, and concealed them from the debtor, he is not entitled to damages;*

*5. Where the parties, by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is not executed in part, the damages agreed on by the parties may be reduced to the loss really suffered, and the gain of which the party has been deprived, unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement.*<sup>149</sup>

Looking back to art.1928 (3), it is important that the provision extends the analysis to *some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach: a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.*<sup>150</sup> Such extension may easily be assimilated to the examples provided in Chapter IV of this presentation, when speaking of non-patrimonial and moral damages. Hence, it is clear that the codifiers made an allusion to non-pecuniary damages, and that according to the wording of art.1928 (3) where the object of the contract is not appreciable in money, the creditor may recover non-pecuniary damages for breach of the contract under the conditions enumerated in the art.<sup>151</sup>

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<sup>149</sup> Id. *supra* note 43, at 626.

<sup>150</sup> Id. *supra* note 43, at 628.

<sup>151</sup> Id. *supra* note 132, at 1161.

Another significant point of art.1928 (3) is the inclusion of a *judge or jury* with *much discretion* at the moment of the assessment of damages under the provisions of the article. As will be mentioned later, such inclusion was a big innovation at that historical moment, and it did not exist in the Project.

### 3. Sources for the Novel Text

Notwithstanding the broad treatment that will be given to this area of study in the next Chapter of this presentation, it enriches the reader to briefly notice some aspects related to the sources of inspiration for the text of art.1928 of the 1825 Code.

As has been mentioned in Chapter II of this presentation, the redactors of the 1825 Code (*i.e.* Derbigny, Livingston, and Moreau-Lislet)<sup>152</sup> followed the French Code closely and relied on the doctrine and jurisprudence that followed its promulgation. They also identified the sources of most proposed amendments, deletions, and additions to be done to the Digest. Amongst the sources they worked with, it is possible to mention: (i) the treatises of Domat, Pothier, and Toullier; (ii) the Digest of Justinian; (iii) the Partidas; (iv) Febrero; and (v) other Spanish materials.<sup>153</sup>

Although the sources of inspiration that the codifiers relied on have not been limited to French productions, the 1825 Code contains mostly provisions that have an equivalent in the French Code.<sup>154</sup> Such inclusion in the 1825 Code could have been a

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<sup>152</sup> Id. *supra* note 73, at 25.

<sup>153</sup> Id. *supra* note 111, at 62.

<sup>154</sup> Id. *supra* note 111, at 62.

practical necessity due to the scarcity of coherent doctrinal works in the region,<sup>155</sup> and the imminent threat that the common law influence enforced on the region.

Both the French Code and the 1825 Code, in their treatments of conventional obligations (or contracts), expressed a general commitment to human autonomy and the doctrine of freedom of contract. Therefore, men were the best judges of their interests and could freely contract to achieve their goals as long as their goals were not banned by law.<sup>156</sup> Even when that same general principal was shared amongst both bodies of law, the redactors of the 1825 Code introduced new features<sup>157</sup> that tended to modify other aspects of conventional obligations.

As a result, although it received a strong influence from the French Code, the 1825 Code did not lose some distinctive characters that came from its own cultural background.<sup>158</sup> Amongst those distinctive characters it is possible to find some provisions regarding obligations, and with particular interest for this presentation: art.1928.

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<sup>155</sup> Id. *supra* note 111, at 62.

<sup>156</sup> Id. *supra* note 57, at 38.

<sup>157</sup> Id. *supra* note 68, at 174.

<sup>158</sup> ABELARDO LEVAGGI, DALMACIO VELEZ SANSFIELD - JURISCONSULTO 195 (2005).

## Chapter VI

### The Uniqueness of Article 1928

The last Section of the previous Chapter of this presentation briefly introduced a study of the sources of inspiration of art.1928 (3). At this point it is necessary to develop in a deeper extent aspects of its uniqueness. Therefore, a development of such uniqueness in an individual Chapter turns out to be useful.

#### **1. Concordances with Local and Foreign Sources**

The *La. Legal Archives* provides a useful table of concordances amongst the texts of the French Code, the Digest, the Project, the 1825 Code, and the 1870 Code.<sup>159</sup>

Referring to that table of concordances is mandatory when trying to understand the development that different provisions of the civil codification suffered in La. during the entire Nineteenth Century.

By tracing the origins of art.1928, and according to the mentioned table of concordances, it is possible to state that the following provisions were measured by the codifiers of art.1928 of the 1825 Code: (i) art.1149<sup>160</sup>, 1151<sup>161</sup> and 1152<sup>162</sup> of the French

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<sup>159</sup> LOUISIANA LEGAL ARCHIVES VOLUME 3 “ 2 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA” PUBLISHED PURSUANT TO ACT 165 OF THE LEGISLATURE OF LOUISIANA OF 1938, 2043 (1942)

<sup>160</sup> Art. 1149. *The damages and interest due to the creditor are, in general, to the amount of the loss which he has sustained or of the gain of which he has been deprived; saving the exceptions and modifications*

Code; (ii) art. 49,<sup>163</sup> 51<sup>164</sup> and 52<sup>165</sup> from page 268 of the Digest; and (iii) the proposed text of page 258<sup>166</sup> of the Project.<sup>167</sup>

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*following.* According to CODE NAPOLEON OR THE FRENCH CIVIL CODE LITERALLY TRANSLATED FROM THE ORIGINAL AND OFFICIAL EDITION, PUBLISHED AT PARIS, IN 1804 314 (1960).

<sup>161</sup> Art. 1151. *Even in the case where the non-performance of the contract results from the fraud of the debtor, the damages and interest must not comprehend, as regards the loss sustained by the creditor and the gain of which he has been derived, any thing which is not immediate and direct consequence of the non-performance of the contract.* According to *Id. supra* note 160, at 314.

<sup>162</sup> Art. 1152. *When the agreement imports that he who shall fail in executing it shall pay a certain sum under the title of damages, there can be allowed to the other party neither a greater nor a less sum.* According to *Id. supra* note 160, at 314.

<sup>163</sup> Art. 49. *The damages due to the creditor are generally for the loss he has sustained and the profit he has been deprived of, under the following exceptions and modifications.* According to A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808) A REPRINT OF MOREAU LISLET'S COPY CONTAINING MANUSCRIPT REFERENCES TO ITS SOURCES AND OTHER CIVIL LAWS ON THE SAME SUBJECTS 268 (1968).

<sup>164</sup> Art. 51. *Even in case the non execution of the contract resulted from the fraud of the debtor, the damages for the loss sustained by the creditor, and the profit of which he has been deprived, must not exceed what has been the immediate and direct consequence of the non execution of the contract.* According to *Id. supra* note 163, at 268.

<sup>165</sup> Art. 52. *When the contract specifies that he who fails to execute it, shall pay a certain sum by way of damages, the other party can recover neither a larger nor a smaller sum.* According to *Id. supra* note 163, at 268.

<sup>166</sup> According to LOUISIANA LEGAL ARCHIVES VOLUME 1 “ A REPUBLICATION OF THE PROJECT OF THE CIVIL CODE OF LOUISIANA OF 1825” PUBLISHED PURSUANT TO ACT 286 OF THE LEGISLATURE OF LOUISIANA OF 1936 (1937), the text of the Project that was source for art.1928 reads as follows (in bold the differences with the text of art.1928 are emphasized): Art.[\_\_\_\_] - “*Where the object of the contract is any thing but the payment of money,*” *the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:*

*1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this, and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.*

Another important scholarly contribution indicates, during the mid Nineteenth Century, that art.1928 found grounding in arts.1050,<sup>168</sup> 1051,<sup>169</sup> 1052,<sup>170</sup> and 1140<sup>171</sup> of

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2. *When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequences of the breach of **the** contract - but even when there is fraud, the damages cannot exceed this.*

3. *Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether [the 1825 Code added the word “on”] the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience, or other legal gratification; although these are not appreciated in money by the parties, yet damages are due for their breach: a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.*

*In the assessment of damages under this rule, as well as in cases of offences, quasi offences and quasi contracts, much discretion must be left to the judge [the 1825 Code added the words “or jury”], while in other cases **he has** none; but **is** bound to give such damages under the above rules as will fully indemnify the creditors whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor.*

4. *If the creditor is guilty of any bad faith which retards or prevents the execution of the contract, or if at the time of making it he knew of any facts that must prevent or delay its performance and concealed them from the debtor, he is not entitled to damages.*

5. *Where the parties by their contract have determined the sum that shall be paid as damages for its breach; the creditor must recover that sum, but is not entitled to more. But when the contract is not executed in part, the damages agreed on by the parties may be reduced to the loss really suffered, and the gain of which the party has been deprived, unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement.*

<sup>167</sup> Id. *supra* note 159, at 2055.

<sup>168</sup> Art. 1050. *The dispositions allowed by the two preceding articles, shall only be valid as far as the condition of restitution shall be for the benefit of all the children born and to be born of the party subjected thereto, without exception or preference of age or sex.* According to Id. *supra* note 160, at 288.

<sup>169</sup> Art. 1051. *If in the cases mentioned above, the party subjected to restitution for the benefit of his children, dies, leaving children in the first degree and descendants of a child previously deceased, such last shall receive, by representation, the portion of the child previously deceased.* According to Id. *supra* note 160, at 288.

the French Code.<sup>172</sup> Due to the fact that the areas of law covered by the referred arts. of the French Code are not compatible with art.1928 of the 1825 Code, it must be assumed that the scholarly contribution incurred a material error when analyzing art.1928. Probably, even though impossible to be assured, the contribution intended to refer to arts.1150, 1151 and 1152 of the French Code. This last assumption would make the analysis compatible to the one made by Professor Batiza almost 100 years later.

Finally, it has been added that the Digest contained a duplication of the provision of the French Code, and that a reference to art. 46 to 52<sup>173</sup> of the Digest is necessary to understand the provision.<sup>174</sup>

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<sup>170</sup> Art. 1052. *If the child, the brother or the sister to whom property shall have been given by act during life, without charge of restitution, accept a new gift made by act during life testamentary, on condition that the property previously conferred shall be encumbered with such charge, it is no longer permitted them to divide the two dispositions made for their benefit, or to renounce the second in order to get possession of the first, even though they should offer to restore the property comprised in the second disposition.* According to Id. *supra* note 160, at 288.

<sup>171</sup> Art. 1140. *The effects of the obligation to give or to deliver an immoveable are regulated under the title "Of Sales," and under the title "Of Privileges and Mortgages."* According to Id. *supra* note 160, at 311.

<sup>172</sup> P. J. A. DESLIX, ANNOTATIONS ON THE LOUISIANA CODES OR THE LOUISIANA SUPREME COURT GENERAL INDEX AND DIGEST FROM 1809 TO FEBRUARY 1843 668 (1847).

<sup>173</sup> For the complete transcription of articles *vide supra* notes 162, 163, 164:

*Art. 46. Damages are due only when the debtor has delayed to fulfill his obligation, except however when the thing which the debtor had obliged himself to give or do, could have been given or done only at certain time, which he has suffered to elapse.*

*Art. 47. The debtor is condemned if there be occasion, to the payment of damages, either on account of the non execution of the obligation, or on account of the delay of execution, whenever he fails to prove that the non execution is owing to some extraneous cause, not to be imputed to him, and that there is no want of good faith on his part.*

*Art. 48. There is no room for any damages, when by irresistible force, or a fortuitous event, the debtor has been hindered from giving or doing what he was obliged to give or do, or has been compelled to do what he was bound not to do.*

## 2. Doctrinal and Jurisprudential Contributions

It has been said that there is no equivalent for art.1928 (3) in the French Code or the Digest. Unlike the French Code, art.1928 (3) of the 1825 Code contemplates damages of a non-patrimonial or moral nature.<sup>175</sup>

Art.1928 (3) first appears without numeration in the Project, and it has been suggested that the redactors of the Project were influenced by Domat. The French jurist provided an example in which an architect undertook the building of a house for a landlord who had acquired a tenant and failed to fulfill the work within the agreed period of time. If facing that scenario, the architect could be liable for three different losses:<sup>176</sup> *that of the expense of rebuilding the house, the loss of the rent which the landlord ought to have had, and that of the damages which the landlord will be liable for to the tenant for disappointing him of his house.*<sup>177</sup>

Professor Batiza mentions in his monumental work regarding the sources of the Project<sup>178</sup> that amongst the sources of inspiration for art.1928 (3) it is possible to find the

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*Art. 50. The debtor is liable only to such damages as were foreseen, or might have been foreseen at the time of contracting, when it is not owing to his fraud, that the obligation has not been executed.*

According to *Id. supra* note 163, at 268.

<sup>174</sup> Saul Litvinoff, *Obligations* 2, 7 LOUISIANA CIVIL LAW TREATISE §180 (1975).

<sup>175</sup> *Id. supra* note 139, at 6.

<sup>176</sup> *Id. supra* note 132, at 1173.

<sup>177</sup> J. Domat, *I Les Loix Civiles Dans Leur Ordre Naturel* (1777), Book III, tit, V, 2, No. 11, 776 (Cushing ed. 1850) cited by *Id. supra* note 132, at 1173.

<sup>178</sup> Rodolfo Batiza, *The Actual Sources of the Louisiana Project of 1823: A General Analytical Survey*, 47 *Tul. L. Rev.* 1 (1972).

works of both Toullier<sup>179</sup> and Domat<sup>180</sup> (early commentators of the French Code). He states that the influence of these French jurists was partial with respect to the first paragraph of art.1928 (3) and that it was substantial with respect to the second paragraph of art.1928 (3).<sup>181</sup>

Professor Batiza also mentions that the text of the 1825 Code adopted almost verbatim the letter of the Project<sup>182</sup> from page 259<sup>183</sup> and that the 1870 Code adopted verbatim<sup>184</sup> the text of the 1825 Code.<sup>185</sup>

As a conclusion it may be said that, due to the fact the French Code had no similar text to art.1928 of the 1825 Code and according to the abovementioned, the redactors in La. were able to incorporate into the text of art.1928 what the French searched for with doctrinal interpretations and developments. In fact, the fundamental articles of the French Code (*i.e.* art.1149 and 1150) had been introduced into the Digest, and, therefore,

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<sup>179</sup> C.B.M. Toullier, *6 Le Droit Civil Francais, Suivant l'Ordre du Code (1821)*, Liv. III, Tit. III, Chap. III, Sec. IV, § III, n. 293 (305 seqq) cited by Id. *supra* note 178, at 80.

<sup>180</sup> Domat, 1 *Loix Civiles*, Part. I, Liv. III, Tit. V, Sec. II, ns. XI, XII (270) cited by Id. *supra* note 178, at 80.

<sup>181</sup> Id. *supra* note 178, at 80.

<sup>182</sup> *Vide supra* footnote 165.

<sup>183</sup> The author of this presentation consulted LOUISIANA LEGAL ARCHIVES VOLUME 1 “ A REPUBLICATION OF THE PROJECT OF THE CIVIL CODE OF LOUISIANA OF 1825” PUBLISHED PURSUANT TO ACT 286 OF THE LEGISLATURE OF LOUISIANA OF 1936 (1937), and must mention that Professor Batiza apparently has made a material error when mentioning that the sources for art.1928 were found in page 259 of the Project. By checking in the text of the Project, it is possible to notice that the correct page were the sources of art. 1928 start to be mention is page 258.

<sup>184</sup> To identify the exact differences *vide* Chapter X of this presentation.

<sup>185</sup> Id. *supra* note 178, at 80.

art.1928 expressed in precise terms the conclusions of the French doctrine that the codifiers of the 1825 Code had pursued.<sup>186</sup>

### 3. More about the Originality of the Provision

As mentioned *supra*, since the 1825 Code, La. has been one of the few countries with a civil code that expressly contemplates the recovery of damages for non-pecuniary damages occasioned by breach of a contract.<sup>187</sup>

Although the possibility of recovering such kind of damages had developed from several French positive provisions, doctrinal opinions and jurisprudential resolutions, the 1825 Code introduced at that time new features (now common in all states) that included provisions that in the early Nineteenth Century could be invoked only in equity courts;<sup>188</sup> and even when the French Code was silent on this matter, the 1825 Code in art.1928 (3) was very explicit.<sup>189</sup>

It has been assured that art. 1928 has no exact equivalent in the French Code and its sources cannot be readily ascertained. Although, it is possible to trace the sources in a passage of the work of Toullier who: *emphatically supported the view that the breach of a promise of marriage should give rise to damages, in spite of the difficulty that might be encountered in assessing them, a view he expounded against the strong current of opinion to the contrary that prevailed at the time.*<sup>190</sup> He also maintains that, as to know

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<sup>186</sup> W. T. Tête, *Tort Roots and Ramifications of the Obligations Revision*, 32 Loy. L. Rev. 47, 102 (1986).

<sup>187</sup> Id. *supra* note 129, at § 6.11.

<sup>188</sup> Id. *supra* note 68, at 174.

<sup>189</sup> Id. *supra* note 173, at §180.

<sup>190</sup> 3 Toullier, *Le droit civil français* 429-440 (1833) cited by Id. *supra* note 129, at § 6.22.

whether damages for non-pecuniary loss could be recovered, a general principle should be considered: *failure to perform any obligation to do gives rise to damages, and a promise of marriage entails an obligation to do, damages are then owed for the non-fulfillment of such a promise.*<sup>191</sup> Hence, what was required to grant damages was a failure to perform an obligation, and the expectation that the un-rendered performance was supposed to fulfill did not matter.<sup>192</sup>

As closing words for this Chapter, it is worth mentioning that the solution propounded in art.1928 was doubtful during the Nineteenth Century, but finally was admitted by modern law due to bringing contractual responsibility closer to the matter of civil liability at large. This final remark demonstrates the foresight of the redactors of the 1825 Code,<sup>193</sup> a fact that will be developed in the Third Part of this presentation, but that was interesting to introduce at this point.

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<sup>191</sup> Id. *supra* note 139, at 9.

<sup>192</sup> Id. *supra* note 139, at 9.

<sup>193</sup> Carbonnier, Droit Civil 509 (1957) cited by Id. *supra* note 173, at §180.

## **Chapter VII**

### **The French Presence in Civil Codification**

Throughout different sections of this presentation we have made reference to the French Code and the tremendous influence that it had, together with the French culture, in the codification process La. undertook in the Nineteenth Century.

In addition, the French influence did not finish with the enactment of the Digest, the 1825 Code, or the 1870 Code. That influence survived, not only due to the existence of French versions of the codes,<sup>194</sup> but also due to the need of legal interpretations that would help understand the adopted provisions.

Therefore, attention must be focused to the French influence and heritage, without ignoring non-pecuniary interest which are a center point to this Second Part.

#### **1. A Civil Code Not Limited to the Empire (1804)**

Even if the following paragraphs do not refer especially to non-pecuniary damages, they offer solid grounding about the French Code. Such foundation, together with the Historical Background provided in the First Part, could help readers understand some reasons why the French influence was established in the civil law systems during the mid Nineteenth Century.

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<sup>194</sup> Except for the 1870 Code that was exclusively drafted in English.

### a. The Path to a Code in France

In France, during the late Eighteenth Century and early Nineteenth Century, a feeling of general dissatisfaction existed with regards to the resolutions of the Superior Courts and the extent of diversity local customs reflected. Hence, in 1791, the revolutionary Constituent Assembly resolved there was a need of a civil code for the territory. In 1793, the National Convention created a special commission led by Cambaceres, who drafted a project of 719 articles. The project was rejected by the National Convention who alleged that the project was by far too technical and too detailed. Notwithstanding, Napoleon showed interest in the project (with the amendments it had been subject to); finally, in 1804, the different titles of the project became consolidated as a code under the name *Code Civil des Français*. Later, in 1807, the name would be changed to *Code Napoleon*.<sup>195</sup>

The French Code was the product of a rational legislation that reflected distinctive ideological premises and formal qualities. Amongst the main positive characteristics of the French Code, it is possible to mention that it: (i) contained few and brief definitions; (ii) was free of prejudices and based on *sublimated common sense*; (iii) had a claim to universality, completeness, and logical drafting; (iv) had different areas of law systematically<sup>196</sup> arranged and had inner consistence; and in brief (v) logic ruled throughout the entire French Code.<sup>197</sup>

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<sup>195</sup> Id. *supra* note 111, at 42.

<sup>196</sup> According Id. *supra* note 111, at 44: *The 2,281 articles of the code are systematically arranged in a preliminary title dealing with the law and its application in general, and in three “books” dealing with the law of persons, the law of things and methods of acquiring rights. The first book of the code deals with the enjoyment of civil rights, the protection of personality, domicile, guardianship, tutorship, relations of*

When drafting the French Code, the main redactors (*i.e.* Portalis, Tronchet, Maleville and Bigot Preameneu)<sup>198</sup> relied on the drafts of earlier commissions and on the doctrinal contributions of Pothier and Domat.<sup>199</sup> In addition, they eliminated all Spanish law influences that could abrogate for feudal, theocratic, or monarchical features. For example, the French Code was one of the first Codes to eliminate any reference to kings or monarchs and that implemented the separation of powers described by Montesquieu.<sup>200</sup> Professor Yianopoulos is very clear when he explains why such eliminations were decided: *codification in France preceded the revolution.*<sup>201</sup>

Both the French Code and the 1825 Code were aimed at the owner of property and not the peasant or day laborer. Both bodies of law also enhanced the responsible *paterfamilias* who was believed to have judgment and knowledge of business affairs and law. The growing bourgeoisie of both territories depended on safeguarding private property and personal freedom. Consent has been achieved by saying that freedom to interact in economic activities was the most important of all those personal freedoms. In

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*parents and children, marriage, personal relations of spouses and the dissolution of marriage by annulment or divorce. The second book of the code regulates property rights: ownership, usufruct, and servitudes.[...] The third book of the code deals with the methods of acquiring rights by succession, donation, marriage settlement, and obligations. In the last chapter the code regulates a number of nominate contracts, legal and conventional mortgages, limitation of actions and prescription of rights. In the field of successions, freedom of disposition is limited in favor of surviving children and by public policy considerations relating to the prohibition of fideicommissa. With regard to obligations, the law establishes the traditional Roman law categories of contracts, quasi contracts, offenses and quasi offenses. The law of contracts reflects, in general, a highly individualistic spirit.*

<sup>197</sup> *Id. supra* note 111, at 43.

<sup>198</sup> ABELARDO LEVAGGI, 1 MANUAL DE HISTORIA DEL DERECHO ARGENTINO 191 (1986).

<sup>199</sup> *Id. supra* note 111, at 44.

<sup>200</sup> *Id. supra* note 125, at 1100.

<sup>201</sup> *Id. supra* note 111, at 42.

brief, there were three ideological pillars: (i) freedom of contract (*e.g.* provided a new conception of autonomy for parties when contracting); (ii) private ownership of property (*e.g.* stated a new system of ownership that was complete, free, and almost an absolute right); and (iii) family solidarity (*e.g.* it allowed greater liberty of marriage and divorce).<sup>202</sup>

From those pillars, other important issues developed: (i) all citizens were equal before the law; (ii) primogeniture, hereditary nobility and class privileges were extinguished; (iii) civilian institutions were emancipated from ecclesiastical control; (iv) people were free to contract; and (v) private property was protected by inviolability.<sup>203</sup>

#### **b. The Difficulty of Finding Geographical Limits for the Code**

During the early years of the Nineteenth Century, the French Code followed the armies of Napoleon and was, therefore, introduced into Belgium, Luxemburg, German territories on the left bank of the Rhine, the Palatinate, Rhenish Prussia, Hesse-Darmstadt, Geneva, Savoy, the duchies of Parma and Piacenza, Piedmont, the principality of Monaco, Italy, the Netherlands, the Hanseatic territories and the grand duchy of Berg.<sup>204</sup>

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<sup>202</sup> *Id. supra* note 73, at 31.

<sup>203</sup> *Id. supra* note 111, at 44.

<sup>204</sup> *Id. supra* note 111, at 45.

Different was the manner in which the French Code entered into Westphalia, Hanover, the grand duchy of Warsaw, several Swiss cantons and in the Illyrian provinces. In those territories, the French Code was adopted through direct persuasion.<sup>205</sup>

Other European territories voluntarily adopted, either by simple translation or with considerable modifications, the French Code after the expansionist military campaigns of France had finished: Sicilies (1819), Parma (1820), Modena (1852), Sardinia (1837), Italy (-in whole- after its unification in 1865), Netherlands (1838), the Ionian Republic (1842), Rumania (1864), Portugal (1867) and Spain (1889).<sup>206</sup>

The expansion of the French Code was not limited to Europe. In America the code also served as inspiration source in Canada (civil code of Quebec of 1866), Haiti (1825), Dominican Republic (1884), Bolivia (1830), Chile (1855), Ecuador (1857), Columbia (1873), Uruguay (1868) and Argentina (1869).<sup>207</sup>

Last but not least, and adding to this interesting survey Egypt (codes of 1875 and 1883), Lebanon (1834) and Japan (draft of code applied from 1880 to 1896 without legislative approval)<sup>208</sup> also received significant influence from the French Code.

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<sup>205</sup> Id. *supra* note 111, at 45.

<sup>206</sup> Id. *supra* note 111, at 45.

<sup>207</sup> Id. *supra* note 111, at 46.

<sup>208</sup> Id. *supra* note 111, at 46.

## 2. Original French Text for Art.1928

It has been mentioned previously that both the Digest and the 1825 Code were drawn originally in French and translated to English<sup>209</sup> and that the quality of the translation into English Language has been field of study for scholars.

The promulgation of the 1825 Code did not instruct any specific provision for the solution of differences or ambiguities when working with the translations. Due to the fact that the original was drafted in French, and the existing believe that the English translation was of poor quality, the French version was accepted as the controlling text.<sup>210</sup>

The original writing of art.1928 of the 1825 Code was not free of problems of translation. Therefore, it is necessary to provide the reader a transcription of art.1928 in its original French version.

The entire text of art.1928 in the French original version reads:

*Art. 1928 –Lorsque l’Object du contrat consiste dans toute autre chose que le payement d’une somme d’argent, les dommages dus au créancier pour la violation du contrat, sont de la perte qu’il a faite, ou du gain dont il a été privé, sauf les exceptions et les modifications ci-après:*

*1. Lorsque le débiteur n’a été coupable d’aucune fraude ou mauvais foi, il n’est sujet qu’aux dommages que les parties ont eu ou peuvent raisonnablement être supposées avoir eu en vue, au temps du contrat. La mauvaise foi, dont il est question dans cet article et le suivant, ne s’entend pas d’une simple violation de promesse qui résulterait de l’inexécution du contrat, mais d’une violation faite a dessein, et d’après quelque motif d’intérêt ou de mauvaise volonté;*

*2. Quand l’inexécution du contrat est le résultat de la fraude ou de la mauvaise foi, le débiteur est sujet, non seulement a tous les dommages qui ont été ou pu être prévus a l’époque ou le contrat a été fait, mais encore a ceux qui sont la conséquence immédiate et directe de la violation du contrat; néanmoins, même dans le cas de fraude, ces dommages ne peuvent excéder ceux dont il est fait mention dans cet article;*

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<sup>209</sup> Id. *supra* note 74, at 12.

<sup>210</sup> Id. *supra* note 74, at 12.

*3. Quoique la règle générale soit que les dommages doivent être de la perte que le créancier a éprouvée, et du gain dont il a été privé, il est des cas où des dommages peuvent être accordés, sans les calculer en aucune manière sur la perte pécuniaire, ou la privation du gain que la partie peut avoir éprouvée. Lorsque le contrat a pour but de procurer a quelqu'un une jouissance purement intellectuelle, telle que celles qui tiennent a la religion, a la morale, au goût, a la commodité ou a toute autre espèce de satisfaction de ce genre, quoique ces choses n'aient pas été appréciées en argent par les parties, des dommages n'en seront pas moins dus pour la violation de la convention. Un contrat, qui a pour but une fondation religieuse ou charitable, une promesse de mariage, ou l'entreprise de quelqu'ouvrage appartenant aux beaux arts, offre l'exemple d'un cas auquel cette règle peut s'appliquer.*

*Les dommages, qui doivent être accordés d'après cette règle, et dans les cas de délits, quasi-délits, quasi-contrats, sont laissés en grande partie a la prudence du juge ou du jury pour leur fixation ; mais dans les autres cas, le juge ni le jury n'ont aucune discrétion a exercer, et ils doivent accorder les dommages-intérêts, qui, d'après les dispositions précédentes, peuvent dédommager le créancier de la violation du contrat, lorsqu'elle a été la suite de la faute, de la négligence, de la fraude, ou de la mauvaise foi du débiteur;*

*4. Si le créancier est coupable de quelque mauvaise foi, qui retarde ou empêche l'exécution du contrat, ou si, a l'époque où il a été passé, le créancier avait connaissance de quelques faits, qui devaient empêcher ou retarder l'exécution, et les a caches au débiteur, il n'aura droit a aucuns dommages;*

*5. Lorsque les parties, au temps du contrat, ont fixé la somme qui serait payée comme dommage, pour sa violation, le créancier peut exiger cette somme, mais n'a pas droit a davantage. Néanmoins, si le contrat est exécuté en partie, les dommages dont les contractants sont convenus, peuvent être réduits a la perte qui a été réellement soufferte, et au gain dont la partie a été privée, a moins qu'il n'ait été expressément stipulé que la somme fixée par le contrat serait payée même dans le cas d'une violation partielle.<sup>211</sup>*

The article under study is located in *Section 4 Des dommages qui résultant de l'Inexécution des Obligations, Chapitre 3 De l'effet des obligations, Titre 4 Des Obligations Conventionnelles, Livre III Des Différentes Manières dont s'acquière la Propriété des Biens.*

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<sup>211</sup> Id. *supra* note 43, at 627.

Although the Section that follows allows the reader to study in detail the problems that the differences between the French and English versions of art.1928 have created in the legal application of that provision, it is worth mentioning at this point that the English version for *Section 4* of the article reads: *Inexecution* after the French *Inexécution*. In the French version *Inexécution could be interpreted as non-fulfillment or non-compliance with an obligation.*

### **3. Struggles between French and English Versions**

Currently, many La. court decisions make reference to the French text of the Digest and the 1825 Code to make accurate interpretations and applications of the existing law.<sup>212</sup> That is so, because scholarly opinions mention that a number of errors crept-in with the translation into English of the text of the 1825 Code that was originally drafted in French.<sup>213</sup> Hence, *although the corpus of the French language has long since disintegrated, its spiritus continues to haunt La. law.*<sup>214</sup>

The following subsections will identify, in art.1928 of the 1825 Code, any deficiencies of translation from the French original text and will provide some alternative ways to solve those problems. More emphasis will be added to those defects that have a particular relation with non-pecuniary damages.

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<sup>212</sup> Id. *supra* note 10, at 1307.

<sup>213</sup> Id. *supra* note 111, at 63.

<sup>214</sup> Id. *supra* note 10, at 1307.

### a. Object or Cause

The first defect of translation that is worth mentioning is the one that relates to the object or cause of the contract as being an *intellectual enjoyment*. The codifiers when drafting in the French language had applied the French word *but* in art.1928 (3). Later, when translating for the English version, the word *but* was turned into the English word *object*.

A view of the French text provides a clearer understanding. In the original it is stated that: ...*Lorsque le contrat a pour but de procurer a quelqu'un une jouissance purement intellectuelle...*<sup>215</sup>

On the other hand the English translation is: ...*Where the contract has for its object the gratification of some intellectual enjoyment...*<sup>216</sup>

The word *but*, if properly translated from the French, should have turned into *end*, *purpose*, or even  *motive*; these, terms are similar to the ones used to define *cause*.<sup>217</sup> Unfortunately, and due to a misinterpretation of the French, art.1928 (3) refers to the *object* of the contract as being of *intellectual enjoyment*. Therefore, courts in La. tried to transform, by interpretation, the word *object* into *cause*<sup>218</sup> when pursuing non-pecuniary

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<sup>215</sup> Id. *supra* note 43, at 627.

<sup>216</sup> Id. *supra* note 43, at 626.

<sup>217</sup> Kathryn Bloomfield, *Recovering Non pecuniary Damages for Breach of Contract under Louisianan Law*, 47 La. L. Rev. 541, 552 (1987).

<sup>218</sup> *Riche v. Wrestview Mobile Homes, Inc.*, 375 So. 2d 133, cited by Id. *supra* note 217, at 552.

damage recovery or even other words that are nearer to the understanding of *cause*<sup>219</sup> (e.g. *purpose*,<sup>220</sup> *reason*,<sup>221</sup> and *motivating factor*<sup>222</sup>).

## **b. Spectrum of the Intellectual Enjoyment**

Another interesting discussion between the French and English versions has been raised when analyzing art.1928 (3). Another section of that provision of the 1825 Code in its English version reads: *...gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification...*<sup>223</sup>

The referred passage has been subject to three different interpretations due to its ambiguity: (i) that the language should be interpreted in an exegetic way, and therefore the object of the contract should be exclusively intellectual enjoyment, as opposed to partially intellectual and partially physical gratification; (ii) that a wider understanding should be applied, and therefore, if any part of the object is intellectual enjoyment, then damages could be recovered, although the object also contained physical elements; and (iii) that a more liberal interpretation should be applied, and hence, no requirement of intellectual elements is needed, other than that the object of the contract provides some physical benefit not appreciable in money.<sup>224</sup>

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<sup>219</sup> Id. *supra* note 217, at 552.

<sup>220</sup> *Schroeder v. Di Pascal Cabinet Co.*, 467 So. 2d 1380; *Smith v. Andrepont*, 378 So. 2d 479; *Plaisance v. Dutton*, 336 So. 2d 1034, cited by Id. *supra* note 217, at 552.

<sup>221</sup> *Robertson v. Jimmy Walker Chrysler-Plymouth, Inc.*, 368 So. 2d 747, cited by Id. *supra* note 217, at 552.

<sup>222</sup> *Ostrowe v. Darensbourg*, 369 So. 2d 1156-58, cited by Id. *supra* note 217, at 552.

<sup>223</sup> Id. *supra* note 43, at 626.

<sup>224</sup> Id. *supra* note 132, at 1161.

While the broad interpretation (*i.e.* that any intellectual gratification will suffice) has been advocated by the alleged source of inspiration of the article (*i.e.* Domat) and the liberal interpretation is preferred due to policy considerations, the French version of art.1928 (3) seems to indicate that an exegetic interpretation would be the most appropriate.<sup>225</sup>

The French original text reads: *...Lorsque le contrat a pour but de procurer a quelqu'un une jouissance purement intellectuelle, telle que celles qui tiennent a la religion, a la morale, au goût, a la commodité ou a toute autre espèce de satisfaction de ce genre...*<sup>226</sup>

On the other hand the English translation, for the same section, reads: *...Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification...*<sup>227</sup>

Scholarly contributions have proposed the following translation as being more accurate: *...When the contract has for its object to confer to someone a purely intellectual enjoyment, such as those pertaining to religion, morality, taste, convenience or other gratifications of this sort...*<sup>228</sup>

This last interpretation requires the object of the contract to be exclusively intellectual and bans any elements of physical gratification.

In addition, the French text contains no *or* before *taste* so that *convenience* is not a second kind of contractual object, but merely one of the category of purely *intellectual*

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<sup>225</sup> Id. *supra* note 132, at 1173.

<sup>226</sup> Id. *supra* note 43, at 627.

<sup>227</sup> Id. *supra* note 43, at 626.

<sup>228</sup> Id. *supra* note 132, at 1174.

*enjoyments* covered by the 1825 Code. Hence, recovery for breach of a contract that provides purely physical convenience is not granted by the text of the 1825 Code.<sup>229</sup>

Another significant deficiency in the translation which directly relates to *intellectual enjoyment* is that the redactors included the adverb *purely* between *intellectual* and *enjoyment*.

As it has been mentioned *supra*, the original French text reads: ... *une jouissance purement intellectuelle...*,<sup>230</sup> while the English translation says that: ... *some intellectual enjoyment...*<sup>231</sup> Therefore, according to the defective translation, *exclusivity of purpose* was not included in the text of the law.

In addition to the description made in the previous paragraphs, if La. courts followed the English text, they would have not been able to read art.1928 (3) finding the exclusivity of the purpose.<sup>232</sup> On the other hand, if the French text was considered by La. courts when ruling, damages for breach could have been recovered even when the contract had for its object the satisfaction of an *exclusively* non-pecuniary interest.<sup>233</sup>

### **c. The Calculating Method**

Argumentation related to the results of the translation from the French text, appear a third time throughout art.1928 (3). In this opportunity a comment must be done regarding the translation of *en aucune manière* from the French version.

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<sup>229</sup> Id. *supra* note 132, at 1174.

<sup>230</sup> Id. *supra* note 43, at 627.

<sup>231</sup> Id. *supra* note 43, at 626.

<sup>232</sup> Id. *supra* note 129, at § 6.23.

<sup>233</sup> Id. *supra* note 129, at § 6.23.

The article under study, in its original French text, provides that: *...sans les calculer en aucune manière sur la perte pécuniaire...*<sup>234</sup>

On the other hand, the English version of the year 1825, understood that an accurate and peaceful translation would be...*without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party...*<sup>235</sup>

A scholarly contribution has stated that an accurate translation would be: *...without calculating in any manner on the pecuniary loss, or the privation of pecuniary gain to the party...*<sup>236</sup>

In that way a more faithful translation would be achieved and potential problems of complaints in court could be avoided, if parties intend to trace the spirit of the provision back to its French roots.

#### **d. Those and not This**

Even when it exceeds the scope of this presentation, it is interesting to mention that paragraph 2 of art.1928 of the 1825 Code shows a defect in the translation when it reads: *...but even when there is fraud, the damages cannot exceed this...*<sup>237</sup>

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<sup>234</sup> Id. *supra* note 43, at 627.

<sup>235</sup> Id. *supra* note 43, at 626.

<sup>236</sup> WEST'S LOUISIANA STATUTES ANNOTATED, 16 CIVIL CODE 1105 (1972)

<sup>237</sup> Id. *supra* note 43, at 626.

The French version reads in the pertinent section: *...néanmoins, même dans le cas de fraude, ces dommages ne peuvent excéder ceux dont il est fait mention dans cet article...*<sup>238</sup>

Therefore, it has been noticed that the English translation should read, in order to provide a faithful reflection of the original idea, as follows: *...those which are mentioned in this article.*<sup>239</sup>

#### **e. A *Not* not Included in the French Provision**

The last paragraph of art.1928, *i.e.* paragraph 5, reflects another problem in the translation of the French text when transformed into the English legal tool.

The French version of the referred paragraph mentions that: *...néanmoins, si le contrat est exécuté en partie, les dommages dont les contractants sont convenus...*<sup>240</sup>

On the other hand the English translation provides that: *...but when the contract is not executed in part, the damages agreed on by the parties may...*<sup>241</sup>

It is therefore possible to notice that the original French version of art.1928 in its paragraph 5 did not provide a counterpart for the word *not* that is found in the English version of the same paragraph and article.

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<sup>238</sup> Id. *supra* note 43, at 627.

<sup>239</sup> Id. *supra* note 236, at 1105.

<sup>240</sup> Id. *supra* note 43, at 627.

<sup>241</sup> Id. *supra* note 43, at 626.

This last defect of translation could possibly be attributed to a material error at the moment of adapting the French text into an English version that would be a handy tool for those professionals of law that did not speak the French language.

According to all the abovementioned references, it seems quite clear that the English and French versions of art.1928 of the 1825 Code show differences in their texts. Such differences are the result of a deficient work of translation. In addition, the referred differences made the recovery for non-pecuniary loss unclear,<sup>242</sup> and therefore, made uncertain the results of the presentations filed before the La. courts when pursuing claims in that area of law.

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<sup>242</sup> Id. *supra* note 129, at § 6.23.

## Third Part

### Applications of the Doctrine

## Chapter VIII

### Case Law Reporting in Antebellum Louisiana

This Third Part is probably the main contribution of this presentation to the area of study. It will focus the attention of the reader to the application courts have done of the non-pecuniary damages doctrine. In addition, it will describe some influences the 1825 Code, in its art.1928, had on other codification projects, both in La. and abroad.

Initially, it is necessary to mention that in order to achieve a clear understanding of the legal research of case law in La., it is mandatory to read and use the skills Wallach and Downer Pritchett provide in their significant contributions.<sup>243</sup> These texts turned to be a starting point that any research enterprise must face before undertaking the hard task of pursuing positive results.

#### **1. Electronic and Hardcopy Materials**

Before the mid-Twentieth century, the process involved for creating collections and identifying legal materials pertinent to antebellum La. was complex.<sup>244</sup> Until the creation of the main electronic legal databases,<sup>245</sup> *i.e.* *Westlaw*, *LexisNexis* and *Loislaw*,

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<sup>243</sup> *Vide* KATE WALLACH, RESEARCH IN LOUISIANA LAW (1960) and Carla Downer Pritchett, *Case Law Reporters in nineteenth Century Louisiana*, A LAW UNTO ITSELF? 61(2001).

<sup>244</sup> David A. Combe, *An Analysis of Civil Law. Authorities in State v. Martin*, LOUISIANA MICROCOSM OF A MIXED JURISDICTION 295, 295 (1999)

<sup>245</sup> In addition, the La. Supreme Court created a website that allows the search of court decisions as from 1996 ([http://www.lasc.org/opinion\\_search.asp](http://www.lasc.org/opinion_search.asp)).

research of case law in La. had to be done on hardcopy materials, and the availability of reporters was limited. Facing such an activity seemed an enormous challenge, especially as time kept moving and separating the reporters from the date of their printing.

In the last two decades, the electronic legal databases turned to be an extremely useful tool for more recent legal research. By 1999, the databases of *Westlaw* and *LexisNexis* were limited in their scope of research due to the fact they only included La. Supreme Court cases as from 1887; and cases from the Appellate Courts as from 1928 in *Westlaw* and 1944 in *LexisNexis*.<sup>246</sup> In present days, both databases have achieved the satisfactory goal of including all the reporters in an electronic support,<sup>247</sup> while *Loislaw* only covers as from 1921. As a result of that goal, the research has not only turned accessible from every part of the world, but is also much more expeditious.

The use of these electronic devices as tools has lightened the work of researchers. Notwithstanding, a knowledge of the hard copy materials is mandatory, and therefore, this presentation will turn the focus to such task.

## **2. The Starting Point (Martin's Collections)**

François Xavier Martin, who had been appointed justice of the court in 1810, published the first La. Supreme Court reports. This series is referred to as *Martin's Old Series* and covers the period 1809-1823 in 12 volumes. In older judicial cases, this series is sometimes referred as Martin, and not *O.S.* (which is the most used way).<sup>248</sup> A second

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<sup>246</sup> Id. *supra* note 43, at 295.

<sup>247</sup> MORRIS L. COHEN AND KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL -8TH EDITION- 389 (2003).

<sup>248</sup> Id. *supra* note 76, at 75.

series, *i.e. Martin's New Series*, covers in 8 volumes the period 1823-1830. This series is sometimes simply referred to as *N.S.*<sup>249</sup> Martin suffered from weak eyesight from birth, and thus, his diminished vision and heavy workloads forced him to give up case reporting in 1830.<sup>250</sup>

Martin had begun to collect copies of the decisions and briefs of cases before the court, and in 1811, he published the first volume of his reporters, covering cases from 1809-1811. He lamented the absence of reported decisions in La. and mentioned the obstacles to his plans to publish them.<sup>251</sup> Therefore, he described the difficulties faced by local judges with the Spanish and French legal systems, and the limitations that were created by deficient translations due to the unknown different legal systems. In addition, Martin case reports included head notes and arguments of counsel.<sup>252</sup>

Martin published the reporters with his personal funds and in his spare time, therefore, the volumes were understandably slow to appear: by 1817, 3 volumes; by 1822, 9 volumes; and by 1827, the number of volumes had gone up to 17.<sup>253</sup>

### **3. The Legacy Continues (First Louisiana Reports)**

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<sup>249</sup> *Id. supra* note 76, at 75.

<sup>250</sup> Carla Downer Pritchett, *Case Law Reporters in nineteenth Century Louisiana, A LAW UNTO ITSELF?* 61, 61 (2001).

<sup>251</sup> Thomas Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 *Tul. Eur. & Civ. Rev.* 57, 159 (2004).

<sup>252</sup> *Id. supra* note 76, at 75.

<sup>253</sup> *Id. supra* note 251, at 160.

Having Martin abandoned his arduous task, a new period for reporting started in La. in 1830. The 2<sup>nd</sup> Sess., 9<sup>th</sup> Legis., p. 24 provided an Act by which the La. Legislature ordered the publication of Supreme Court reports under the name of *La. Reports*.<sup>254</sup>

The La. Legislature also specified the requirements that should be included when reporting cases: i) brief and clear statements of facts, ii) points made by counsel and authorities cited in support of them, iii) court's opinion, and iv) lucid marginal notes and copious index to each volume.<sup>255</sup>

The *La. Reports* were published by Branch Miller (reporting volumes 1-5) and Thomas Curry (reporting volumes 6-19).<sup>256</sup> As it has been mentioned before, the *La. Reports* started to be published in 1830 and were interrupted in 1841.<sup>257</sup>

The name *La. Reports* was going to be used again from the year 1900 until present days, but it is worth mentioning that this was the first period in which it was used.

#### **4. Reporting for 5 Years (Robinson Reporters)**

In 1841, Merritt M. Robinson and E. Johns & Company of New Orleans were awarded the contract and published the La. Supreme Court decisions.<sup>258</sup> The reporters that resulted from their works are known as the *Robinson Reporters* or *Rob*. The designation was done by an Act of 1841, 15<sup>th</sup> Legis., 2d Sess, N 175, p. 526, which

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<sup>254</sup> Id. *supra* note 76, at 75.

<sup>255</sup> Id. *supra* note 76, at 75.

<sup>256</sup> Id. *supra* note 76, at 75.

<sup>257</sup> WIN-SHIN S. CHIANG, LOUISIANA LEGAL RESEARCH 87 (1990)

<sup>258</sup> Id. *supra* note 257, at 87.

made reference to the concession for the publishing of the case reports of the La. Supreme Court.<sup>259</sup>

A short notice must be provided with respect to the fact that interesting observations on case reporting for the period are included in the preface to the first volume of the *Robinson Reporters*.<sup>260</sup>

The duties of Robinson were terminated in the year 1846, and a total of 12 volumes resulted from his works.<sup>261</sup>

## **5. In an Annual Basis (Louisiana Annual Reports)**

In 1846, the La. Legislature repealed the 1841 Act with a new act<sup>262</sup> and prescribed that each volume should cover a full year and be entitled *La. Annual Reports* or *La. Ann.*<sup>263</sup>

The new series was published in 52 volumes, covering the years 1846 to 1900,<sup>264</sup> by far this series was the one that covered more years till that moment.

Finally, it is worth mentioning that volumes 20, 45, 46, 48, 49 and 52 of the *La. Annual Reports* are printed in two parts.

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<sup>259</sup> Id. *supra* note 76, at 75.

<sup>260</sup> Id. *supra* note 76, at 75.

<sup>261</sup> Id. *supra* note 76, at 75.

<sup>262</sup> *Vide* La. Legislature Acts 1846, N 114, p.89

<sup>263</sup> Id. *supra* note 76, at 75.

<sup>264</sup> Id. *supra* note 257, at 87.

## 6. The Present Days (Second Louisiana Reports and West's Southern Reporter)

In 1900, the La. Supreme Court ordered that future reports should be entitled again *La. Reports*. Due to the fact that till the moment a total of 103 volumes had been published (including all the previous reporters publishing works), the first volume of the new *La. Reports* started with the number 104. In 1904, the La. Supreme Court awarded the contract for printing to West Publishing Company;<sup>265</sup> and this under the direction of the La. Supreme Court published the *La. Reports* until 1972.<sup>266</sup>

As from 1972, the *West's Southern Reporter, Second Series*<sup>267</sup> and *West's Louisiana* have been reporting cases of the La. Supreme Court.<sup>268</sup>

## 7. Quick-Reference Table

The following table will provide to the readers a clear recapitulation of what has been mentioned in the previous subsections of this Chapter.

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<sup>265</sup> *Id. supra* note 76, at 76

<sup>266</sup> *Id. supra* note 257, at 87.

<sup>267</sup> The first series of the *Southern Reporters* started in 1886 and, it has been reporting uninterrupted since that date.

<sup>268</sup> *Id. supra* note 257, at 87.

<b>Exclusive</b>	<b>Louisiana</b>	<b>Supreme</b>	<b>Court</b>	<b>Reporters<sup>269</sup></b>
<b>Name</b>	<b>Cited</b>	<b>Period</b>	<b>Total Volumes</b>	<b>Numbered</b>
Martin (Old Series)	Mart. (O.S.)	1809-1823	12	1-12
Martin (New Series)	Mart. (N.S.)	1823-1830	8	1-8
Louisiana Reports	La.	1830-1841	19	1-8
Robinson	Rob.	1841-1846	12	1-12
Louisiana Annual	La. Ann.	1846-1900	52	1-52
Louisiana Reports	La.	1900-1972	159	263 <sup>270</sup>
Southern Reporter	So. 2d	1972-Present	----	---

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<sup>269</sup> The information for this table was provided by KATE WALLACH, RESEARCH IN LOUISIANA LAW (1960) and WIN-SHIN S. CHIANG, LOUISIANA LEGAL RESEARCH (1990).

<sup>270</sup> Since prior reports from 1 Mart. (O.S.), to 52 La. Ann. Totaled 103, numbering of La. Reports begins with 104.

## Chapter IX

### Reception by the Judicial Courts

This Chapter will focus the analysis of the readers to the results of the research, done on the case reporters in La., during the period of years 1825-1870.<sup>271</sup> In addition, a brief reference to the French jurisprudence will be included as to enrich the perspective of the readers.

#### **1. Louisiana Jurisprudence (1825-1870)**

Amongst the results of the research needed for this presentation, it was possible to find several cases that referred to art.1928 of the 1825 Code. The following paragraphs provide a display that will surely help readers to appreciate and understand the results of this presentation.

In order to fulfill a clear disposition of information, the presentation will initially address the cases that were found on hard copy (*i.e.* the reporters themselves and general indexes) and then the ones provided by electronic databases (*i.e.* *Westlaw* and *LexisNexis*). The search was done limited to the cases that mentioned art.1928 in a broad manner (*i.e.* any of its five paragraphs), thus, once the general cases were found, a deeper analysis was done in order to determine if the reference were exclusively to art.1928 (3).

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<sup>271</sup> The research necessary for this presentation was done with the support of the electronic databases of *Westlaw* and *LexisNexis*, together with hardcopy materials found in the LSU Law Center Library.

If the cases referred specifically to art.1928 (3), a brief comment and analysis was provided.

## **2. Hard Copy Indexes**

The search on hard copy was done mostly with the assistance of two important indexes<sup>272</sup> published in La. before the existence of electronic databases. The first index dates back to the mid-Nineteenth Century and the second to the early Twentieth Century.

### **a. Mid-Nineteenth Century (Deslix Index)**

The first index, *i.e.* Deslix Index, provides that, reaching the mid-century, art.1928 had been mentioned in 14 cases<sup>273</sup> before the La. Supreme Court. From that total amount, only 2 cases refer specifically to art.1928 (3), while the other 12 cases refer to the remaining paragraphs of art.1928.<sup>274</sup>

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<sup>272</sup> P. J. A. DESLIX, ANNOTATIONS ON THE LOUISIANA CODES OR THE LOUISIANA SUPREME COURT GENERAL INDEX AND DIGEST FROM 1809 TO FEBRUARY 1843 85 (1847) and THEODORE ROEHL, ANNOTATIONS TO THE STATUTE LAW OF THE STATE OF LOUISIANA 106 (1917).

<sup>273</sup> *Id. supra* note 172, at 85.

<sup>274</sup> The complete list of cases that refer to art.1928 in a broad manner consists of: *Jones et al. v. Smalley*, 5 La. 28; *George v. Mc. Neil et al.*, 7 La. 124; *Clark et al. v. Giffard et al.*, 7 La. 524; *Morris v. Abat et al.*, 9 La. 552; *Durrive et al. v. Frera*, 11 La. 374; *Noe v. Taylor*, 11 La. 551; *Guice v. Harvey*, 14 La. 198; *Municipality No2 v. Hennen*, 14 La. 559; *Welch & Co. v. Thorn et al.*, 16 La. 188; *McMaster and another v. Brandr and others*, 2 (Rob.) La. 498; *Lobdell v. Parker*, 3 La. 328; *Porter v. Curry et al.*, 7 La. 233.

In October 1839, the La. Supreme Court provided the first decision in the *Miller v. Holstein*<sup>275</sup> case and referred specifically to art.1928 (3) of the 1825 Code.

That case was an action of slander in which Miller claimed that on June 30, 1837, Holstein *had a view to defame and injure his character and good name, and destroy his reputation.*<sup>276</sup> In addition, Miller also said that at other times, Holstein had *maliciously, falsely, and wickedly charge him, with being “a rascal, and having sworn falsely,” alleging at the same time, “that he had the documents to show for it.”*<sup>277</sup> Therefore, Miller claimed from Holstein \$5,000 in damages for those *unprovoked, malicious, slanderous and false charges.*<sup>278</sup>

The court said that arts.2294 and 1928 (3) of the 1825 Code sustained Miller’s pretensions, and according to the provisions of the law, granted a judgment in favor of Miller.<sup>279</sup>

Regarding art.1928 (3), the court said that:

*there is proof that the plaintiff had, since his residence in this neighborhood, “always supported a good character, and been an industrious honest man.” Though this might not suffice for a show of special damage in the sense of the common law rule, yet it is difficult to come to the conclusion that there was no damage shown. If there be any intellectual enjoyment higher than that of possessing a good name, or gratification greater than the respect of our neighbors, they must be looked for in matters out of the reach of the libeller: such a charge as is stated in the petition, is in itself presumption of damage; in this view, the law has left the damages to the jury, subject to the revision of this court.*

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<sup>275</sup> *Miller v. Holstein*, 16 La. 389.

<sup>276</sup> *Id. supra* note 275, at 389.

<sup>277</sup> *Id. supra* note 275, at 389.

<sup>278</sup> *Id. supra* note 275, at 389.

<sup>279</sup> *Id. supra* note 275, at 389.

The great importance of the principles involved in the case allowed a re-hearing and re-argument of *Miller v. Holstein*,<sup>280</sup> one year later.<sup>281</sup> In that second opportunity, the La. Supreme Court provided the same result, although it gave additional arguments to explain its decision. Amongst those arguments it is possible to find references to other court decisions that are not under the scope of art.1928 (3), and therefore, were not included in the Deslix Index.

One of those cases, dated in 1831, *i.e. Cauchoix v. Dupuy*,<sup>282</sup> granted damages when the plaintiff was called a *colored man*. According to the court, the words used would not provide a possibility of action *in themselves by any English or American authority referred to, though under our construction of art.1928 [(3)], that judgment was correct; this is supported by analogy to those common law decisions, which make actionable the charge of some contagious disease, which would have the effect of excluding a man from society.*<sup>283</sup> Therefore, *even though, the moral disease of perjury might produce the same effect, the charge of it is not actionable.*<sup>284</sup>

Another resolution that the La. Supreme Court cited was *Carlin v. Stewart*.<sup>285</sup> In that case Stewart had called Carlin *a perjured villain*.<sup>286</sup> In that opportunity, the court said that *a professional man may not be able to administer positive or direct evidence of his injury.*<sup>287</sup> Therefore, the court concluded that the alleged injurious words would not

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<sup>280</sup> *Id. supra* note 275, at 389.

<sup>281</sup> The re-hearing was reported as *Miller v. Holstein*, 16 La. 395.

<sup>282</sup> *Cauchoix v. Dupuy*, 3 La. 206.

<sup>283</sup> *Miller v. Holstein*, 16 La. 395.

<sup>284</sup> *Id. supra* note 283, at 395.

<sup>285</sup> *Carlin v. Stewart*, 2 La. 73.

<sup>286</sup> *Id. supra* note 285, at 73.

<sup>287</sup> *Id. supra* note 283, at 395.

be held actionable. In order to expand its ideas, the court mentioned that at that time, it would have been much more difficult *for a female, to furnish positive or direct testimony of her injury, or to value it in dollars and cents.*<sup>288</sup> Concluding, the La. Supreme Court said that *by common law rule, [they] must hold these words not actionable, though every intellectual enjoyment may be destroyed for life.*<sup>289</sup>

It could be said that according to the complete discussion of the La. Supreme Court, the moral damages that Miller had suffered allowed him to pursue a recovery of damages under the provisions of art.1928 (3) of the 1825 Code.<sup>290</sup>

Ultimately, with the *Miller* cases, the La. Supreme Court addressed for the first time the complicated interpretation of art.1928 (3).<sup>291</sup>

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<sup>288</sup> Id. *supra* note 283, at 395.

<sup>289</sup> Id. *supra* note 283, at 395.

<sup>290</sup> Readers will surely find of interest the following concluding section of *Miller v. Holstein*, 16 La. 395: *After the adoption of the Louisiana Code, and the repeal by the legislature of the ancient laws, there were not a few lawyers who doubted whether in such actions as slander, and some others sounding in damages, it was not necessary to prove the damages before a party could recover, but the better and more general opinion now prevails, that under the articles 2294, 2295 and 1928, they can be maintained. If that is correct, and the action of this court, the general assent of legal men, and my own convictions induce me to believe it is, we have a law broad enough to cover every case. "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." There is no arbitrary standard prescribed. Every act that causes damage, creates responsibility. To a technical lawyer, this may seem very indefinite, but as it is impossible to provide for every case which fraud or malice may devise, we are obliged to authorize a discretion in the judicial tribunals, that will apply a remedy for every wrong. In actions of slander, I am not an advocate for establishing any particular standard by which words are to be judged as being actionable or not actionable. I am willing to leave every case to be decided on its merits and peculiar circumstances, under the broad principles laid down in the [1825] Code, which are very similar to the laws in force previous to its adoption. Partidas 3, tit. 2, 1.31. But, if any such standard is to be adopted, I object most strongly to that established by the common law, that no words are actionable, and subject a party to damages without special proof, but such as impute an indictable offence, or injure a man in his profession. I believe an action of slander can be, and ought sometimes to be maintained, for words which do not charge an offence that will subject the party to indictment.*

## **b. Early Twentieth Century (Roehl Index)**

The second index includes 19 cases that mention art.1928 between the years 1825 and 1870. It is worth mentioning that these 19 cases are different to those provided by the first index.<sup>292</sup>

From the 19 cases that include a reference to art.1928, 7 cases make a reference exclusively to art.1928 (3), while the remaining 12 cases<sup>293</sup> focus on other paragraphs of art.1928.

Finally, from those 7 cases that mention exclusively art.1928 (3), a new division will be done when analyzing those that focus on the first paragraph and those that focus on the second paragraph of art.1928 (3). This division will help readers to achieve a clear understanding.

## **i. Non-Pecuniary Damages. First Paragraph of art.1928 (3)**

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<sup>291</sup> The results of this presentation show the *Miller* cases were the first cases in which art.1928 (3) was subject to the La. Supreme Court analysis.

<sup>292</sup> THEODORE ROEHL, ANNOTATIONS TO THE STATUTE LAW OF THE STATE OF LOUISIANA 106 (1917).

<sup>293</sup> *Barclay v. Conrad*, 7 La. 261; *Williams v. Barton*, 13 La. 404; *Kernan v. Chamberlin*, 5 (Rob.) La. 116; *Porter v. Barrow*, 3 La. Ann. 140; *Stewart v. Sowles*, 3 La. Ann. 464; *Hutchinson v. Sparks*, 3 La. Ann. 548; *Gaulden v. McPhaul*, 4 La. Ann. 79; *Rugely v. Goodloe*, 7 La. Ann. 294; *Goodloe v. Rodgers*, 10 La. Ann. 631; *Logan v. Hickman*, 14 La. Ann. 300 (this case does no reference to art.1928, therefore I must be understood that the editor made a material error); *Smith v. Thielen*, 17 La. Ann. 239; *Griffin v. His Creditors*, 6 (Rob.) La. 216.

The first case that refers exclusively to the first paragraph of art.1928 (3), in the Roehl Index, is *Wardens of Church of St. Louis v. Blanc*.<sup>294</sup> This decision was dated in 1844, and addressed non-pecuniary damages under art.1928 (3). In this case, the petitioners sought that the bishop, Antoine Blanc, be cited to answer their petition, and that after due proceedings, a judgment for \$25,000 would be rendered in their favor.

The Wardens of the church founded their action on the alleged opinions of Blanc in relation to the government and discipline of the Catholic Church within the diocese of La. They also complained of Blanc's *dereliction of duty towards the corporation they represented -of his non- compliance with the obligations which he contracted when he consented to become their bishop, and whereby he was bound, amongst other things, to grant his institution to the curate presented, unless there should be some obstacle,- modo nihil obstet.*<sup>295</sup> Finally, they sustained that due to their right of patronage, *which is a real one, belonging to those who build a church, and inherent to the right of ownership, they [were] by law entitled to be protected in its exercise. That it is a civil right- verum in jure civili jus patronatus, [...] and that it can be enforced by the civil tribunals.*<sup>296</sup>

In brief, the Wardens implied the bishop, not only had a contractual duty to comply with his obligations, but also had a duty to comply with some obligations that gave them intellectual enjoyment in the terms of art.1928 (3).<sup>297</sup> Hence, they should be

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<sup>294</sup> *Wardens of Church of St. Louis v. Blanc*, 8 (Rob.) La. 51.

<sup>295</sup> *Id. supra* note 294, at 51.

<sup>296</sup> *Id. supra* note 294, at 51.

<sup>297</sup> In words of the court: *The plaintiffs assume, that the Rev. A. Blanc, in assenting to become bishop of New Orleans, undertook towards the Catholic congregation certain obligations, which constitute his part of the contract entered into with them. That on their side, they assumed to do and perform certain things, and to accomplish certain obligations, which they have done, performed and accomplished;-but that the bishop has not only failed to do what he was bound to do, but actually impedes them in the gratification of*

able to recover those non-pecuniary damages. On the other hand, the bishop defended his position by sustaining that art.1928 (3) was not aimed to apply in such situation.<sup>298</sup>

The judge of the Parish court rendered an opinion in favor of Blanc and dismissed the petition,<sup>299</sup> and thus, the plaintiffs appealed. Ultimately, on appeal, the La. Supreme court affirmed the decision of the Parish court giving its own arguments.<sup>300</sup>

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*their dearest intellectual enjoyment, to wit, that of having the ceremonies of their religion and public worship performed; in consequence of all which, they suffer damages to the amount claimed. According to Id. supra note 294, at 51.*

<sup>298</sup> In words of the court: *But the defendant insists, that this is not a question of which the civil tribunals can take cognizance. It must be admitted, that wherever there is a contract, there are obligations created, the non-performance of which gives necessarily rise to the adverse right of claiming indemnification therefor. That it was in the contemplation of the authors of our Code to apply those principles to cases like the present one, cannot be seriously contested. Art. 1928, § 3, of the Civil Code, provides, " that where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. A contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule."*[...] *The duty of the bishop to institute the curate appointed is asserted by the plaintiffs: the assertion remains uncontradicted, and under the pleadings must be taken for granted.[..] If the bishop be bound to discharge this duty, and we have succeeded in showing that it was an obligation contemplated by the law, then the exception is disposed of. According to Id. supra note 294, at 51.*

<sup>299</sup> The judge said: *the curate forms a separate and integral portion of the corporation, and that, during a vacancy in that office, the corporation cannot act. He also sustained the exceptions on the ground, that no action for damages, founded on the refusal of the bishop to give his ecclesiastical sanction to the nomination of a curate made by the wardens, or to nominate one himself, could be maintained, it being, in fact, an action against the bishop to recover damages for his disagreement with the wardens, in regard to a matter of doctrine or church discipline. According to Id. supra note 294, at 51.*

<sup>300</sup> The court said: *It follows, we think incontestably, from what has been said, that the relation which exists between the bishop and the plaintiffs, according to their own allegations, implies no civil contract, and consequently given rise to no civil obligations. It is not alleged, that any such contract exists. On the contrary they allege, that his salary has been withdrawn and suppressed, because the wardens had overstepped their power in allowing it, and because the bishop never preached, as required to do by the canons and laws of the church. We look, therefore, in vain, for any contract between the parties insisted on by one of the counsel for the plaintiffs in his printed brief, having for its object the gratification of some*

The second case is *Black v. Carrollton Railroad*<sup>301</sup> of the year 1855. In that case, the son of the plaintiff, a boy of fourteen years, was a passenger in the trains of the defendants. The accident was caused by the switch being out of place, and thus, being left partly open, the cars were thrown off the track, and the son suffered injuries in his body. Those injuries occasioned great expense and mental suffering to his father. The father alleged that due to the injuries, *he lost time, [was under] mental suffering, [felt] disappointment of his paternal hopes, with regard to the future of his child and the comfort and aid he expected to derive from his society and the fulfilment of his filial obligations.*<sup>302</sup>

In *Black*, the court said that the jury had the authority to determine the extent of the recovery.<sup>303</sup> The decision also mentioned that such extend should have some kind of

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*intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification spoken of in article 1928 of the Louisiana Code. On the contrary, the bishop is quite independent of the church wardens, except in relation to his spiritual or sacerdotal functions.[...] The wardens administer the temporalities of the church, and may give or withhold salaries at their pleasure; and as they cannot compel the bishop to institute a curate of their appointment, so neither can he compel them to pay one whom he may have appointed or approved. No one pretends that the bishop has a right to interfere in the administration of the temporalities of the church, and to appropriate to himself, or his subordinates, any part of the revenues of the corporation. The curate according to the charter, has a deliberative vote in those matters, as one of the wardens. It is true, it is the duty of the wardens to apply the revenues, in part, to provide in a suitable manner for public worship. But they are responsible only to their constituents, for the manner in which they perform that trust; and although they are authorized to make any appropriate contract for that purpose, it does not follow that they can compel any one to contract with them, or that the bishop of New Orleans is in any legal sense, subordinate to the wardens of one of the churches within his diocese, in relation to his clerical functions. According to Id. supra note 294, at 51.*

<sup>301</sup> *Black v Carrollton Railroad*, 10 La. Ann. 33.

<sup>302</sup> Id. supra note 301, at 33.

<sup>303</sup> The judicial resolution stated that decisions of juries, in situations as the one referred in *Black*, provided *a salutary dread, for the reason that their discretion in awarding damages is not limited by any precise rules, and this is calculated to secure vigilance, care and circumspection among those who have the*

comprehensive limit,<sup>304</sup> in words of the court, *sound discretion*. Thus, the La. Supreme Court ordered to reduce the verdict in the case.

It has been said that due to the outcome in *Black*, the La. Supreme Court had narrowed the scope of non-pecuniary damages when refusing to allow recovery of mental anguish suffered by a plaintiff, as a result of an injury or damage suffered by another person.<sup>305</sup> It is important to mention that, even when in this case the father could not recover for mental anguish, the court recognized that in La. non-pecuniary damages were contemplated in art.1928 (3).

The third case, *i.e. Morgan v. Yarborough*,<sup>306</sup> is an action for breach of promise of marriage decided in the year 1850, in which the La. Supreme Court stated that under art. 1928 (3) a reciprocal promises of marriage constituted a legal contract, and therefore, the party violating it was liable in damages.

In 1844, Stephen Yarborough promised to marry Maria Morgan. That promise was accepted by Morgan, who proceeded to New Orleans and made arrangements for the wedding. Later, Yarborough broke his promise to marry Morgan, by marrying another lady.

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*management of railroads, steam vessels and other public conveyances, which would not exist without it.* According to *Id. supra* note 301, at 33.

<sup>304</sup> *The damages in such cases not being susceptible of exact computation are nevertheless assessed according to the sound discretion of the Judge or Jury, and if there are circumstances of aggravation in cases of offences or of gross negligence in cases of quasi-offences, it is quite proper in assessing the damages to adopt the rule [...] of blending together the interests of society and of the aggrieved individual and allowing such damages as would save to prevent the repetition of such conduct.* According to *Id. supra* note 301, at 33.

<sup>305</sup> *Id. supra* note 183, at 111.

<sup>306</sup> *Morgan v. Yarborough*, 5 La. Ann. 316.

Morgan claimed \$20,000 in damages for the breach of promise of marriage, and the jury found a verdict for \$1,000 in her favor. Thus, Yarborough appealed the decision of the court and alleged that every marriage contract must be made in writing, before a notary public and two witnesses, and recorded.

The court understood that *promise to marry* is one thing, and a *marriage contract* is another. According to the facts, the court said Yarborough and Morgan had entered into a *promise to marry*. In addition, the court said that art.1928 (3) refers exclusively to *promise to marry*, and that the *promise to marry* need not be in writing before a notary and two witnesses.

Ultimately, the court concluded that Morgan should recover damages because the *promise to marry* was contemplated in art.1928 (3).<sup>307</sup>

## **ii. Jury Discretion. Second Paragraph of art.1928 (3)**

The first case is *McGary v. City of Lafayette*.<sup>308</sup> This case was decided in 1849, and refers exclusively to the second paragraph of art.1928 (3), *i.e.* the jury decision.

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<sup>307</sup> The following passage will be of interest for the readers: *in conclusion, we may take occasion to observe, that this is the first time we or our predecessors have been called upon to consider an action of this kind. It is a fact creditable to our people; and we hope that such actions may not become frequent. While we are bound, under our jurisprudence and code, to recognise the right of action, we are constrained to say that a female of refined sensibility could scarcely bring herself to such a suit; and that the appeals which are usually made to juries in such cases, on the score of the wounded affections of the woman, can have little foundation in truth. Such suits are not unfrequently the mere instruments of extortion; courts and juries should, therefore, cautiously restrict relief to cases of real injustice.* According to *Id. supra* note 306, at 316.

<sup>308</sup> *McGary v. City of Lafayette*, 4 La. Ann. 440.

In the referred case, after the verdicts of two juries<sup>309</sup> in favor of McGary, damages were measured in accordance to art.1928 (3).<sup>310</sup> Notwithstanding, the La. Supreme Court understood that some limits may be applied to the amount of damages<sup>311</sup> and reversed the decision imposing a diminution in the recovery.

The second case is *Chataigne v. Bergeron*,<sup>312</sup> and also refers to the second paragraph of 1928 (3). The decision was rendered by the La. Supreme Court in 1855.

The facts show that both parties, having quarreled, casually met one night. At that moment, Bergeron's gun was discharged and Chataigne was injured. Bergeron claimed

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<sup>309</sup> *On the first trial in the District Court, the plaintiff obtained a verdict for \$10,000 damages, upon which judgment was rendered in her favor. The Supreme Court affirmed the judgment; but, on an application for a re-hearing, the majority of the court remanded the case for a new trial, principally on the ground that the damages were excessive. The court also intimated a doubt as to the liability of the corporation for the tortious acts charged against its officers. On the second trial the plaintiff obtained a verdict and judgment for \$5,000 and the defendants prosecuted the present appeal. According to Id. supra note 308, at 440.*

<sup>310</sup> *The reparation made must equal the injury inflicted. But an exception is made by art. 1928 C. C., in relation to damages resulting from offences, quasi-offences, and quasi-contracts. In those cases, says the Code, much discretion must be left to the judge or jury [...] This disposition of law while it gives to the judge or jury a discretion which they have not in other actions of damages, clearly intimates that the discretion thus given is not illimited, and in this respect our jurisprudence differs from that of the english courts, upon whose authority the plaintiff's counsel relies. According to Id. supra note 308, at 440.*

<sup>311</sup> *Admitting that the verdicts of juries in those cases should not be disturbed on slight grounds, and that they ought to be maintained, although their amount is something larger than we approve, yet there is a limit beyond which it is our duty to interfere, and we think this a proper case for our interference. The defendants were entitled to the land they claim. The plaintiff being aware of that fact, had abandoned it for the public use, and put up a building on the last line given by the city surveyor. He is not entitled to be indemnified for the value of this land, and it is proved that the damage sustained by the taking down of the wall could not have exceeded three or four hundred dollars. We admit that the actual loss sustained is not the measure of damage, and that the jury had a right to take into consideration the violent and illegal proceedings of the officers of the corporation. The facts of the case would, in our opinion, have authorized a verdict for \$1500, and we will decree accordingly. According to Id. supra note 308, at 440.*

<sup>312</sup> *Chataigne v. Bergeron*, 10 La. Ann. 699.

that his gun went off accidentally as he stooped to pick up a stick. Upon the trial by a jury, a verdict was rendered in favor of Chataigne for \$1,000, thus, Bergeron appealed.

The La. Supreme Court affirmed the lower court decision, and said that according to the facts, the jury did not err in their assessment of damages. Also, the court said that in cases *similar to the one at bar, much discretion in the assessment of damages, is left to the jury* [art.1928 (3) 1825 Code].<sup>313</sup>

The third case under analysis is *Frank v. New Orleans & C.R. Co.*,<sup>314</sup> it dates back to 1868. Frank brought suit to recover damages of the Rail Road Company for injuries suffered by himself, his sons, his daughter, and his wife, from the culpable conduct of its servants.<sup>315</sup> Defendant alleged that Frank had no legal standing to recover damages for the death of his family members.

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<sup>313</sup> Id. *supra* note 312, at 699.

<sup>314</sup> *Frank v. New Orleans & C.R. Co.*, 20 La. Ann. 25.

<sup>315</sup> He claimed that they all: *were passengers in a car belonging to defendant; that while the car was at rest, at the usual stopping place, under charge of defendant's servants, an express train of cars belonging to defendant, and under charge of its servants, came down the track on which rested the car in which he and his family were, with dangerous speed, and that before they could escape from the car in which they were, the express train was hurled against it with irresistible momentum; that by the collision his son, Dennis, was miserably crushed to death; his son, Henry, his daughter, Caroline, and his wife, Mary, were severely injured, and that they were for a length of time under surgical and medical treatment. He further alleged, that although he escaped without any injury, yet, that his life was in great danger, and that from alarm and terror, he suffered great damages; that in consequence of the destruction of the life of his son, Dennis, and of the protracted illness and suffering of his wife and his children, Henry and Caroline, he was put to great expense, and suffered great pecuniary loss and damage, and that his wife and each of his said children, by their injuries, also suffered great damage. He alleged, finally, that the wrongs, injuries, sufferings and damage of himself, his wife and his children, as above set forth, were caused entirely by the gross negligence, want of skill, imprudence, illegal conduct, and recklessness of the New Orleans and Carrollton Railroad Company, its officers and servants, and damaged him and them to the extent of \$30,000, and he concluded his petition by praying for judgment against defendant for that amount.* According to Id. *supra* note 314, at 25.

Notwithstanding, a jury verdict resulted in favor of Frank for \$5,000 due to damages suffered. On appeal before the La. Supreme Court, the same decision was made. The reporter mentions that: *in cases of death of the minor children, through the carelessness of another, the right of action shall survive in favor of the surviving father. In order to bring a case within that statute, the plaintiff should allege the cause of action in, and the damages suffered by, the deceased child.*<sup>316</sup>

Referring to art.1928 (3) it may be added that the La. Supreme Court said that *in cases of this kind, where no exact computation of damage can be made, discretion is left to the judge or jury.*<sup>317</sup>

The last case in this subsection is *Varillat v. New Orleans & C.R. Co.*,<sup>318</sup> of the year 1855. This case shares the same defendant as the previous case, and also refers to the second paragraph of art.1928 (3). The plaintiff, Varillat, filed suit in order to recover damages for the injuries she sustained while being a passenger on defendant's cars. The injuries resulted from a collision between the horse and the steam cars.

The lower court had instructed the jury that no vindictive damages could be granted if it was revealed that no willful fault on the part of the company existed.<sup>319</sup> In

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<sup>316</sup> Id. *supra* note 314, at 25.

<sup>317</sup> Id. *supra* note 314, at 25.

<sup>318</sup> *Varillat v. New Orleans & C.R. Co.*, 10 La. Ann. 88.

<sup>319</sup> In words of the court: *The Judge of the Court below, at the request of defendant's counsel, charged the jury, that if they believed from the evidence there was no wilful fault on the part of the company or its officers, they could not give vindictive damages. He was then requested to charge the jury "that, under such circumstances, the jury cannot give damages with the view to punish the defendant, or to make an example, but are only to consider and assess the damages sustained by the plaintiff; that charge the Judge refused to give, but charged the jury, that if they believed there was gross neglect or carelessness, or want of skill on the part of the servants of the company, then it was for them to assess the damages for such an*

this case, Varillat obtained a verdict and judgment for \$1,000. The Rail Road Company appealed, and the La. Supreme Court affirmed the lower court decision.<sup>320</sup>

In brief, the La. Supreme Court said *it is proper to charge to find any amount as damages which the circumstances of the case justify, if the employees of the company were guilty of negligence, in view of Code, art. 1928, giving the jury “much discretion” in assessing damages in such cases.*<sup>321</sup>

### 3. Electronic Databases

Present day research has a very valuable tool that by far allows the results to be obtained more expeditiously, that useful tool is the electronic database. *Westlaw* and *LexisNexis* are publishing companies that have very important electronic databases.

At this point, it is necessary to mention that the results of the research on the electronic databases provided a list of 29 cases that were not included in any of the hard copy indexes. On the other hand, the electronic databases did not include, when searching

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*amount, as they might deem the circumstances of the case justified. The defendants took a bill of exceptions. According to Id. supra note 318, at 88.*

<sup>320</sup> In words of the court: *The Louisiana Code, Art. 1928, provides, that in the assessment of damages in actions of this nature, much discretion must be left to the jury; and Article 516 of the Code of Practice declares, that the Judge in charging the jury, must limit himself to giving the jury a knowledge of the laws applicable to the cause submitted to them, and that he should abstain from saying anything about the facts, or even recapitulating them, so as to exercise any influence on their decision in that respect. However anomolous it may be to forbid the Judge to charge the jury on the facts when he has the power, and it is even his duty to set aside their verdict, if contrary to his opinion, yet such is the law. In the case recently decided of Black v. Carrollton Railroad Company, we have considered these articles as authorizing a judgment for vindictive damages in actions of this nature, when the circumstances of the case warrant it. According to Id. supra note 318, at 88.*

<sup>321</sup> *Id. supra note 318, at 88.*

for references to art.1928, some cases that the hard copy indexes did includ.<sup>322</sup> This shows that even while faster, not all the electronic searches are totally effective.

From the 29 cases that the electronic databases provided, a total of 12 cases refer to art.1928 (3), more specifically, the second paragraph of art.1928 (3); while 17 cases<sup>323</sup> refer to the remaining paragraphs of art.1928.

The first case that refers to art.1928 (3) is *Pike v. Doyle*,<sup>324</sup> of the year 1867. This case refers exclusively to paragraph 2 of the art.1928 (3). The plaintiffs, claimed that they had been damaged by Doyle, who had counterfeited their brand in selling whisky.

The lower court, following a jury verdict, rendered judgment against Doyle. Thus, the last appealed, and finally, the La. Supreme Court affirmed the lower court decision.

The exact extent of damage done by defendants was not possible to measure with the evidence. Notwithstanding, the La. Supreme Court said that, in cases like *Pike*, the law left *discretion in the Judge or jury to assess damages, without proof of their exact*

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<sup>322</sup> The cases that did not appear after the search in the electronic databases are: *Chataigne v. Bergeron*, 10 La. Ann. 699; *Clark et al. v. Giffard et al.*, 7 La. 524; *Durrive et al. v. Frera*, 11 La. 374; *Frank v. New Orleans & C.R. Co.*, 20 La. Ann. 25; *Gaulden v. McPhaul*, 4 La. Ann. 79; *Guice v. Harvey*, 14 La. 198; *Jones et al. v. Smalley*, 5 La. 28; *Logan v. Hickman*, 14 La. Ann. 300; *McMaster and another v. Brandr and others*, 2 (Rob.) La. 498; *Miller v. Holstein*, 16 La. 389; *Noe v. Taylor*, 11 La. 551; *Smith v. Thielen*, 17 La. Ann. 239; *Stewart v. Sowles*, 3 La. Ann. 464; *Welch & Co. v. Thorn et al.*, 16 La. 188; *Williams v. Barton*, 13 La. 404

<sup>323</sup> The cases are: *City of New Orleans v. Wire*, 20 La. Ann. 500; *Mallerich v. Mertz*, 19 La. Ann. 194; *Gauthier v. Green*, 14 La. Ann. 788; *Feray v. Foote*, 12 La. Ann. 894; *Corning v. Elliott*, 10 La. Ann. 753; *Cronan v. Peters*, 9 La. Ann. 468; *Burrows v. Peirce*, 6 La. Ann. 297; *Le Duff v. Porche*, 5 La. Ann. 148; *Murphy v. Diamond*, 3 La. Ann. 441; *Ryder v. Thayer*, 3 La. Ann. 149; *Smith v. Berwick*, 12 (Rob.) La. 20; *Byrne v. Union Bank*, 9 (Rob.) La. 433; *Vallette v. Patten*, 9 (Rob.) La. 367; *Brown v. Pontchartrain R. Co.*, 8 (Rob.) La. 45; *Longpre v. White*, 6 La. 388; *Reading v. Donovan*, 6 La. Ann. 491, *Goodloe v. Rogers*, 9 La. Ann. 273. (This last case appeared in the hard copy materials -*vide supra* footnote 293- with a different name for the defendant and in a different reporters, but with the same facts).

<sup>324</sup> *Pike v. Doyle*, 19 La. Ann. 362.

*amount.*<sup>325</sup> In other words, where facing quasi offences and having no proof of the damage suffered, an assessment thereof will be within the discretion of the jury.

The second case to be analyzed is *Rayne v. Taylor*,<sup>326</sup> of the year 1866, and also refers to the second paragraph of the article under study. Rayne had filed a claim due to libel against Taylor.

The lower court ruled in favor of plaintiff, and hence, defendant appealed. The La. Supreme Court affirmed the decision.

In brief, and using words of the La. Supreme Court, according to art.1928 (3), *in the assessment of damages in cases of offenses, quasi offenses, and quasi contracts much discretion must be left to the court or jury, a verdict of \$7,500 in a libel suit in which defendant pleaded justification which he failed to sustain was not so excessive as to justify its vacation on appeal.*<sup>327</sup>

The third case is *Grant v. McDonogh*.<sup>328</sup> This case, decided in 1852, states that Grant's plantation was overflowed by the failure of McDonogh to keep the levee in front of his land in repair. Grant said, he therefore, could not recover the amount he would have received from his crops, if he had been able to plant them and erect buildings necessary to manufacture the cane into sugar.

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<sup>325</sup> Id. *supra* note 324, at 362.

<sup>326</sup> *Rayne v. Taylor*, 18 La. Ann. 26.

<sup>327</sup> Id. *supra* note 326, at 26.

<sup>328</sup> *Grant v. McDonogh*, 7 La. Ann. 447.

The case was tried before a jury, who found for the Grant in the amount of \$21,960, hence, the executors of McDonogh appealed. Ultimately, the La. Supreme Court reversed the case and said that not more than \$5,000 should be granted to the plaintiff.<sup>329</sup>

In few words, the court said that *though the jury are not restricted to a bare indemnification for the injury actually proved from the defendant's gross negligence, yet, under their legal discretion, the exemplary should bear some proportion to the real damage sustained.*<sup>330</sup>

The fourth case is *Brown v. Crockett*,<sup>331</sup> and was reported in 1853. In this case, Brown, in his capacity of testamentary guardian of Mary McNeil, a minor, sued for the benefit of his ward. She sought for damages for a wrongful abduction of her person, and various personal wrongs suffered by her at the hands of Crockett.

The jury, under their discretion, gave a verdict against Crockett *in solido* for \$5,000, and from a judgment rendered thereon, Crockett appealed. The La. Supreme Court affirmed the decision of the lower court.

The La. Supreme Court said that in an action for the abduction of a minor, mental pain inflicted on the minor, may be considered by the Jury.<sup>332</sup> The court also said that in

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<sup>329</sup> The court said: *It is true, the jury were not restricted to the allowance of such damages as would merely indemnify the plaintiff for the injury actually proved, but we think, that under the discretion vested in them by the third paragraph of article 1928 of the code, the exemplary damages allowed should bear some proportion to the real damage sustained, and that the verdict should not have exceeded \$5000; to this amount the judgment must therefore be reduced.* According to *Id. supra* note 328, at 447.

<sup>330</sup> *Id. supra* note 328, at 447.

<sup>331</sup> *Brown v. Crockett*, 8 La. Ann. 30.

<sup>332</sup> In words of the court: *In the next place, the jury had clearly a right to consider the mental pain inflicted upon the child, a legitimate subject of amend. See Civil Code, Art. 1928. In doing so, "much discretion must be left to the jury," ib.; and the exercise of this discretion a court will not disturb on light grounds, but will restrict its control to cases of manifest excess. We have no reason to consider the verdict in this*

*doing so they have much discretion, the exercise of which a court will not disturb on light grounds, restricting its control to cases of manifest excess.*<sup>333</sup>

The fifth case, decided in 1853, is *Gould v. Gardner*.<sup>334</sup> This case is an action for damages for a malicious arrest in a civil suit.

A jury gave a verdict in favor of Gould, and thereafter a judgment against Gardner for \$8,900 was ordered, thus, the defendant filled for appeal. The La. Supreme Court reversed the decision of the lower court.

This case is worth mentioning because, even when the facts focus the reader to another area of law (*i.e.* malicious arrest), the La. Supreme Court stated, throughout its decision, that the jury were the exclusive judges when determine the amount of damages.<sup>335</sup>

The sixth case is *Wilcox v. Leake*,<sup>336</sup> and was decided in the year 1856 by the La. Supreme Court. Wilcox claimed the recovery of \$119, for medical and surgical services alleged to have been rendered by him to Leake. On the other hand, when responding, Leake claimed reconvention for \$2,500 in damages due to the fact that Wilcox, as a physician and surgeon, inflicted upon him serious and unnecessary injuries by his neglect and want of skill in performing the services for which he was called.

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*case passionate or capricious; on the contrary, when the aggravated circumstances of the wrongs complained of are considered, it seems to us that the jury used their power with moderation.* According to *Id. supra* note 331, at 30.

<sup>333</sup> *Id. supra* note 331, at 30.

<sup>334</sup> *Gould v. Gardner*, 8 La. Ann. 11.

<sup>335</sup> In words of the court: *Of the amount of damage the Jury are the exclusive judges, and the damages are not confined to mere monied loss. Civil Code, Art. 1928.* According to *Id. supra* note 334, at 11.

<sup>336</sup> *Wilcox v. Leake*, 11 La. Ann. 178.

A jury gave a verdict in favor of Wilcox, awarding him \$72 and rejecting the reconvention. Thus, Leake appealed, and finally, the La. Supreme Court affirmed the decision.

When referring to the amount of damages to be granted, the La. Supreme Court said that it was the exclusive discretion of the jury, and not of the witnesses, to determine such amount.<sup>337</sup> In other words, *an action for medical services in which defendant sets up that the plaintiff had inflicted on him serious injuries from want of skill, it was not permissible for a witness for defendant to give his opinion as to the amount of damage suffered.*<sup>338</sup>

A brief mention will be done to the seventh case, *i.e King v. Ballard*.<sup>339</sup> This case of the year 1855, says that in actions of slander, when pursuing damages, the discretion given to the jury may not be unlimited.<sup>340</sup>

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<sup>337</sup> In words of the court: *It was for the jury, and not the witness, to determine, from all the circumstances disclosed by the evidence, whether the plaintiff had occasioned any damage to the defendant by his negligence or want of skill; and if so, to assess the amount of such damage. It is the peculiar province of a jury to make the assessment of damages in such cases, in which much discretion is vested in them, under the rule prescribed in the third paragraph of Article 1928 of the Civil Code. Were it otherwise, the witnesses, and not the jury, would be the judges to determine the matter.* According to *Id. supra* note 336, at 178.

<sup>338</sup> *Id. supra* note 336, at 178.

<sup>339</sup> *King v. Ballard*, 10 La. Ann. 557.

<sup>340</sup> The court said: *Without examining the evidence in detail, we deem it sufficient to say, that we are all fully satisfied with the verdict so far as it settles the fact of malice against the defendant, but we are of opinion that considering all the facts of the case, the damages allowed are excessive. Whatever may be the rule of the common law on the subject of damages in actions of slander, we consider it settled that under the textual provision of Article 1928 of the Code, the discretion given to the jury in actions of that kind is never unlimited, and that although their verdict should not be disturbed on slight grounds, there are limits beyond which the law makes it our duty to interfere.* According to *Id. supra* note 339, at 557.

The eighth case, *i.e. Arrowsmith v. Gordon*,<sup>341</sup> also deserves a brief mention. In this case of 1848, the La. Supreme Court stated that the discretion of the jury finds a limit when only allowing the recovery of damages that were or might have been foreseen at the time of making the contract, together with the damages that resulted from the immediate and direct consequence of the breach of the contract.<sup>342</sup>

The ninth case is *Franklin v. Alexander*,<sup>343</sup> and was reported in 1830 with unclear facts. The case is founded in the execution of a note given on a settlement between the parties for the balance due for the purchase of 8 slaves by Alexander from Franklin.

The reporter mentions, without too much of an explanation, that *the jury are the legitimate judges of the quantum of damages, in assessing which the law leaves them much discretion [...] Their verdict will be generally sustained, unless excessive or unsupported by the evidence, when the case will be remanded.*<sup>344</sup>

*Bourguignon v. Boudousquie*<sup>345</sup> is the tenth case, and was decided in 1831. The claim originally was done to establish the boundary of contiguous tracts of land, claimed by the parties. Bourguignon obtained a judgment by which she gained about 13 arpens and then prosecuted to recover the fruits and revenues of the land which she was adjudged, for the period it was possessed by Boudousquie.

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<sup>341</sup> *Arrowsmith v. Gordon*, 3 La. Ann. 105.

<sup>342</sup> In words of the court: *Our own law provides that when the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of the contract. But even when there is fraud the damages cannot exceed this, and no discretion is left to the judge or jury. C. C. art. 1928, §2, 3.* According to *Id. supra* note 341, at 105.

<sup>343</sup> *Franklin v. Alexander*, 2 La. 76.

<sup>344</sup> *Id. supra* note 343, at 76.

<sup>345</sup> *Bourguignon v. Boudousquie*, 2 La. 393.

The claim for damages was then submitted to a jury who estimated the damages and gave a verdict for \$919, thus, Boudousquie appealed. The La. Supreme Court reversed the case stating that the amount of damages had been excessive.<sup>346</sup>

In this opportunity, the reporter makes exactly the same commentary as in the previous case.<sup>347</sup> In brief, the reporter says that the jury has a limit in its discretion that may be found in the evidence resulting from the case.

The eleventh case is *Terrill v. Chambers*,<sup>348</sup> and was decided in 1838 by the La. Supreme Court. In this case, Terrill said he was the owner of a tract of land that was invaded by Chambers, without any right or title whatever. He also said that Chambers had interrupted the labor of Terrill's slaves. Terrill said his damages were of \$5,000. On the other hand, Chambers denied, said he was the owner of the land in question, prayed for the establishment of the boundary line, and reconvened for \$5,000 in damages for the illegal detention and cultivation of the land Terrill did during 3 years.

The jury found a verdict in favor of Terrill for \$1,600. Therefore, Chambers appealed. Finally, the La. Supreme Court remanded the case because it found that the damages granted to Terrill, according to the facts and evidence, were excessive.<sup>349</sup>

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<sup>346</sup> In words of the court: *The damages assessed by the jury appear to us so enormous, so illy supported by the testimony of the cause, that we feel ourselves compelled to reverse the judgment of the court below.* According to *Id. supra* note 345, at 393.

<sup>347</sup> In words of the reporter: *The jury are the legitimate judges of the quantum of damages, in assessing which the law leaves them much discretion. LSA-C.C. art. 1928, No. 3. Their verdict will be generally sustained, unless excessive or unsupported by the evidence, when the case will be remanded.* According to *Id. supra* note 345, at 393.

<sup>348</sup> *Terrill v. Chambers*, 12 La. 582.

<sup>349</sup> In words of the court: *By interrupting the labor of plaintiff's slaves, for only fifteen minutes, we think the injury too trifling to be a subject of serious complaint; and although we would disturb the verdict of a jury, assessing damages with great reluctance, yet where such damages are excessive, and altogether*

The last case is *Fredwost v. Daily*<sup>350</sup> of the year 1841. This case is an action for assault and battery, claiming damages. Daily was intoxicated, riotous and noisy in the coffee-house where Fredwost was playing dominos. Daily, without provocation, knocked down and kicked Fredwost's wife and beat him.

The jury arrived to verdict in the amount of \$500 for Fredwost, and therefore, the lower court made a judgment in favor of Fredwost in the same amount. Daily appealed the decision of the lower court. Finally, the La. Supreme Court affirmed the decision because they found no evidentiary reason to reverse it.

The reporter said the jury were the legitimate judges of the quantum of damages, and that the verdicts would be generally sustained, unless excessive or unsupported by the evidence. In this case, such exception was not to be applied because the evidence did not show that the amount was erred.

#### **4. French Jurisprudence**

A brief comment on the French Jurisprudence for non-pecuniary damages may provide some interesting background for the readers. To consider and compare this information when studying La. court decisions will surely provide a richer and broader understanding for the readers.

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*unsupported by testimony, as in the case now before us, it becomes our duty to set it aside and remand the cause to be tried de novo.* According to *Id. supra* note 348, at 582.

<sup>350</sup> *Fredwost v. Daily*, 18 La. 535.

It has been said that in the French jurisprudence some decisions rejected recovery outright when the damages sought by a plaintiff were for a non-pecuniary loss.<sup>351</sup> Two different cases, that are contemporary to the period of time under study in this presentation, provide clear examples.

A decision dated in 1844 ordered recovery for non-pecuniary loss when a banker refused to honor a bill of exchange although the amount of the bill was covered by funds of the drawer in the banker's possession.<sup>352</sup>

Later, in 1873, a less moderate approach of the courts mentioned that a depository that had failed to return a family portrait to its owner had to pay for the intrinsic value of the painting, but not for the loss of the sentimental value that the painting had for the depositor.<sup>353</sup>

Finally, it has been also said, after some French court opinions, that: *later decisions have granted protection to contractual interest of an exclusively non-pecuniary nature.*<sup>354</sup>

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<sup>351</sup> Id. *supra* note 129, at § 6.8.

<sup>352</sup> Decision rendered by the court of the City of Rouen on May 27, 1844, reported in S.44.2.550, cited by Id. *supra* note 129, at § 6.8.

<sup>353</sup> Decision rendered by the Court of the City of Paris on March 27, 1873, reported in in D.P. 74.2.129, S.74.1.477, cited by Id. *supra* note 129, at § 6.8.

<sup>354</sup> Id. *supra* note 129, at § 6.8.

## **Chapter X**

### **Influence in Further Codification Projects**

Last, but certainly not least, this presentation will focus the attention of the readers towards some of the influences art.1928 of the 1825 Code generated in codification projects, both in La. and beyond the state limits.

The references to influences will be limited to mentions and will be far from complete. The sole purpose is to show the reader that the text of art.1928 had an importance that did not find a frontier in the year 1870.

With that objective in mind, the following sections will focus the attention to La., the United States as a whole, Europe and Latin America.

#### **1. Louisiana (1870 Code and 1984 Revision)**

When looking into La. legal history, as it has been mentioned in the First Part of this presentation, two significant points can be found after the enactment of the 1825 Code, those are: the 1870 Code and the 1984 Revision. In order to provide a clear understanding, the influence the text of art.1928 had on the 1870 Code will be addressed first, and it will be followed by the influence in the 1984 Revision.

##### **a. From 1928 to 1934**

When looking specifically to art.1928, it can be said that when the La. Legislature enacted the revision of the 1825 Code in the year 1870, it renumbered art.1928 by giving it the number 1934. Also, it has been said that art.1934, of the 1870 Code, was copied *verbatim* from the mistranslated English version of art.1928 of the 1825 Code.<sup>355</sup> After a detailed reading, this presentation must say that the adoption was not 100% *verbatim*, and that instead, the new code of the year 1870, maintained practically without changes the text of the art.1928 when transformed into art.1934.<sup>356</sup>

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<sup>355</sup> *Id. supra* note 132, at 1175.

<sup>356</sup> *Art. 1934- Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:*

*1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.*

*2. When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequences of the breach of that contract; but even when there is fraud, the damages cannot exceed this.*

*3. Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality [“,” missing] or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.*

*In the assessment of damages under this rule, as well as in cases of offences, quasi offences, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor [“s” missing], whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor.*

According to the above mentioned, the text of art.1928 was therefore a direct source of inspiration for art.1934 of the 1870 Code. This adoption by the La. Legislature of the text of art.1928 allowed the provision under study to enter triumphal into the Twentieth century.

As it has been said in the First Part of this presentation, the 1870 Code was only promulgated in English language, and therefore, it was not clear what would happen with the French versions of the 1825 Code and the Digest.<sup>357</sup>

On the one hand, it has been said that the French versions had no relation to the 1870 Code and that the 1870 Code was as a piece of legislation complete unto itself. Therefore, despite the *verbatim* reenactment of certain code provisions, the La. Legislature intended to change their meaning.<sup>358</sup>

On the other hand, the 1870 Code could have been understood as a continuation of the 1825 Code, with the few amendments incorporated by the report of John Ray in 1869. Hence, the law as contained in an unchanged article was the same after and before

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*4. If the creditor be guilty of any bad faith, which retards or prevents the execution of the contract, or if, at the time of making it, he knew of any facts that must prevent or delay its performance, and concealed them from the debtor, he is not entitled to damages.*

*5. Where the parties, by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is [**“not” is missing**] executed in part, the damages agreed on by the parties may be reduced to the loss really suffered, and the gain of which the party has been deprived, unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement.* According to THE REVISED CIVIL CODE OF THE STATE OF LOUISIANA BY AUTHORITY 238 (1870) The main differences between the texts of the year 1825 and the year 1870 are: Par.1 and subds. 1-4 same as par.1 and subds. 1-4 above; but semicolon (;) after “will”, after “exceed this”, after “of the debtor”, and after “to damages”; colon (:) after “their breach”; comma (,) after “morality”; “indemnify the creditor” misspelled “indemnify the creditors”, after “contract” (not) is missing.

<sup>357</sup> Id. *supra* note 74, at 12

<sup>358</sup> Id. *supra* note 74, at 12.

the revision of 1870. If facing a discrepancy between the earlier French and English provisions, the first would be assumed to be correct.<sup>359</sup>

However, the Appellate Courts of La. had a divided interpretation of art.1934 (3), some applied it broadly, while others narrowly. Some courts allowed recovery of non-pecuniary damages if facing objects of the contract that included physical and intellectual gratification. The remaining courts stated that the objects of the contract had to exclusively include intellectual gratification.<sup>360</sup> The reader may notice that prior La. law on this subject was obscure.<sup>361</sup>

Two significant cases should be mentioned at this point. Those cases will help understand the evolution of the courts interpretations, and also will try to explain why a revision of the text of art.1934 was necessary.

The first case, *i.e. Lewis v. Holmes*,<sup>362</sup> dated in 1903, mentions that damages for humiliation were granted to a bride whose wedding dress had not been tailored appropriately. In the same case, the bride was also able to recover for loss of entertainment owing to the late delivery of the rest of her trousseau.<sup>363</sup>

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<sup>359</sup> Id. *supra* note 74, at 12.

<sup>360</sup> A.L. Barton, *Young v. Ford Motor Co.: "Contorts" – Non Pecuniary Damages in Redhibitory Actions*, 67 Tul. L. Rev. 336, 337 (1992).

<sup>361</sup> LOUISIANA STATE LAW INSTITUTE, REVISION OF BOOK III, TITLES III AND IV OF THE LOUISIANA CIVIL CODE, BOOK III. OF THE DIFFERENT MODES OF ACQUIRING THE OWNERSHIP OF THINGS, TITLE III. OBLIGATIONS IN GENERAL, TITLE IV. CONVENTIONAL OBLIGATIONS OR CONTRACTS 52 (1983).

<sup>362</sup> *Lewis v. Holmes*, 109 La. 1030

<sup>363</sup> Id. *supra* note 361, at 52.

In brief, under such disposition, which contemplates financial and spiritual damages, the young bride was able to recover damages from the store for the annoyance and embarrassment.<sup>364</sup>

Approximately after a Century of inconsistent and not clear judicial decisions related to the area of study,<sup>365</sup> the La. Supreme Court decided in *Meador v. Toyota of Jefferson, Inc.*<sup>366</sup> That case was filed because *following a collision, an eighteen-year-old girl brought her first acquired automobile, a 1971 model Toyota, to defendant, Toyota of Jefferson, Inc., for repair late in February of 1972. It was returned to her on September 20, 1972, some seven months later.*<sup>367</sup> The seven month period shows that there was clearly an excessive delay in the repair of the automobile.

In that same case, the court adopted a broad interpretation of article 1934(3) after examining the French and English versions of art.1928 (3). The court concluded that art. 1934(3) did not exclude non-pecuniary damages simply because the object of the contract also included physical gratification.<sup>368</sup> In other words, non-pecuniary damages could be granted for breach of contracts that had as their principal, though not exclusive, object the satisfaction of a non-pecuniary interest.<sup>369</sup>

Courts tried to believe that with this last decision the problem regarding non-pecuniary damages was going to be settled: history shows this was far from turning into a reality.

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<sup>364</sup> Id. *supra* note 57, at 44.

<sup>365</sup> SAUL LITVINOFF, *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE. A COURSEBOOK* (5th Revised Edition 2000) 486 (1978).

<sup>366</sup> *Meador v. Toyota of Jefferson, Inc., et al.*, 332 So.2d 433.

<sup>367</sup> Id. *supra* note 366, at 433.

<sup>368</sup> Id. *supra* note 360, at 338.

<sup>369</sup> Id. *supra* note 365, at 486.

## **b. From 1934 to 1998**

Article 1928 of the 1825 Code followed the La. civil law into the Twentieth century. The influence was not limited to the 1870 Code; it was able to provide grounding for the text of different articles of the New Code, therefore surviving with alterations in its words but not in its spirit and essence.

As mentioned in the previous paragraphs, under the text of the 1870 Code, non-pecuniary damages for breach of contract was an unsettled issue in the La. courts. Although, the La. Supreme Court had tried to announce a controlling interpretation with *Meador*, inconsistencies and uncertainty kept on arising. In addition, new cases involving delictual fault challenged more questions and ambiguity.<sup>370</sup>

Due to this scenario, in 1984, and with the results of the activities of the La. State Law Institute, art.1934 was repealed, and the principles of former art.1934 were redistributed among arts.1995-2000<sup>371</sup> of the New Code.<sup>372</sup> The new articles became effective on January 1, 1985.<sup>373</sup>

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<sup>370</sup> Id. *supra* note 217, at 541.

<sup>371</sup> Art.1995: *Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.*

Art.1996: *An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made.*

Art.1997: *An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.*

Art.1999: *When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages.*

Art.2000: *When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the*

As a result of the revision on obligations the La. State Law Institution undertook, the third paragraph of art.1934, the most relevant for the purposes of this presentation, was replaced by art.1998<sup>374</sup> in the New Code. The reason for drafting a separate article was to provide clarity and precision when applying to concrete situations. In addition, the change in the language followed the same objective.<sup>375</sup> Also, it has been said that art.1998 of the New Code takes a restrictive approach, which is compatible with the main continental doctrine which approves recoveries of that kind.<sup>376</sup>

The text of art.1998 of the New Code eliminates the difficulties that the term *intellectual enjoyment* presented, and thus removes the potential conflicts due to interpretation. In addition, the new text provides an emphasis on the nature of the contract that is similar to the causal approach of *Meador*. Art.1998 retains the distinction of *Meador* between contractual and delictual actions for non-pecuniary damages. The new text also promulgates a new distinction between non-pecuniary and pecuniary

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*absence of agreement, at the rate of legal interest as fixed by R.S. 9:3500. The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more. If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well.* According to LOUISIANA CIVIL CODE 2005 EDITION VOLUME 437-438 (2005).

<sup>372</sup> Id. *supra* note 57, at 78.

<sup>373</sup> Id. *supra* note 131, at 799.

<sup>374</sup> Art.1998: *Damages for non-pecuniary loss. Damages for non pecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a non-pecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss. Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, thorough his failure, to aggrieve the feelings of the obligee.* According to Id. *supra* note 371, at 438.

<sup>375</sup> Id. *supra* note 129, at § 6.21.

<sup>376</sup> Id. *supra* note 365, at 485.

interests.<sup>377</sup> Ultimately, refers to non-pecuniary loss rather than non-pecuniary damages, providing a distinction more consistent with actual terminology.<sup>378</sup>

In words of the drafters, art.1998 of the New Code *provides for recovery of damages for non-pecuniary loss. Damages for non-pecuniary loss include damages for what is known in continental doctrine as “dommage moral”, that is, injury of a moral nature in the sense that the injury does not affect a “material” or tangible part of a person’s patrimony.*<sup>379</sup>

Even after the enactment of art.1998 of the New Code, some courts feel that the rule of *Meador* can be strictly adhered to or applied more flexibly.<sup>380</sup> Thus, even when strong textual arguments were provided as to overrule *Meador*, courts in La. continue applying the standards it outlined.<sup>381</sup>

Therefore, the La. Supreme Court, in *Young v. Ford Motor Co., Inc.*<sup>382</sup> stated that according to art.1998 of the New Code, a contract must merely be intended for the gratification of a significant non-pecuniary interest of one of the parties in order to allow a recover for non-pecuniary damages.<sup>383</sup> The debate is not closed with this decision of the La. Supreme Court. The end of this argument (if ever possible) is left open, hoping that other research activities will work on its developments.

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<sup>377</sup> Id. *supra* note 217, at 551.

<sup>378</sup> Id. *supra* note 129, at § 6.1.

<sup>379</sup> Id. *supra* note 361, at 51.

<sup>380</sup> Id. *supra* note 365, at 486.

<sup>381</sup> Id. *supra* note 131, at 813.

<sup>382</sup> *Young v. Ford Motor Co., Inc.*, 595 So.2d 1123

<sup>383</sup> Id. *supra* note 129, at § 6.29.

All the above-mentioned in this section, show the readers that the influence of art.1928 (3) of the 1825 Code has not been eliminated with the enactment of art.1998 of the New Code, and that it has survived almost 150 years after it was originally drafted.

## **2. United States**

Unfortunately, the possibility of expanding the results of this presentation into the United States was limited. Thus, it is the intention of this presentation to mention, at least, the existence of a codification movement in the remaining states of the Union. Knowing about that existence, will surely allow future research activities to find possible influences of art.1928 of the 1825 Code in such extensive territory.

The United States was not free from the codification movement that took place worldwide during the Nineteenth century. Amongst the states that sought for a codified system of civil law it is possible to mention: La.; California; South Carolina, where the project failed utterly; and New York, with a limited degree of success.<sup>384</sup>

The United States codification movement found grounding to its activities thanks to two main sources of inspiration: Jeremy Bentham, with his utilitarian theory; and the French Code.<sup>385</sup> The second was a useful mold that seemed to apply to the United States conditions, and provided to the codifiers a code system that seemed to function correctly and with good results.<sup>386</sup>

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<sup>384</sup> CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT A STUDY OF ANTEBELLUM LEGAL REFORM 121 (1981).

<sup>385</sup> Id. *supra* note 384, at 74.

<sup>386</sup> Id. *supra* note 384, at 71.

In addition, the numerous Roman codes, especially the Code of Justinian, were well known and frequently referred to when drafting the projects in North America. Other significant contributions were the Digest and the 1825 Code which provided examples of the possibility of codifying inside the United States territory. Even when the above-mentioned examples were not completely compatible to the common law system states, they provided a methodology of reform from which to learn.<sup>387</sup>

David Dudley Field deserves a special paragraph in this section. His avocation during the period 1830-1860 gave him a paramount position amongst the codifiers in the United States. Field was the fountainhead of the codification efforts in North America and his drafting for the State of New York were very important at that time. In addition, it has been said that his disciples continued with his particular stamp.<sup>388</sup>

### **3. Europe**

It has been said that the influence of art.1928 was not limited to La., and that it was able to cross the Atlantic Ocean and grow in the old continent. An Argentine legal historian, Nestor Pizarro, tries to describe the originality the 1825 Code had for the European community with respect to non-pecuniary damages.<sup>389</sup>

#### **a. A Particular Case (Germany)**

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<sup>387</sup> Id. *supra* note 384, at 74.

<sup>388</sup> Id. *supra* note 384, at 187.

<sup>389</sup> *Vide* the work of NESTOR PIZARRO, EL CODIGO CIVIL ARGENTINO Y EL CODIGO DE LUISIANA (1950).

In 1857, Rudolf Jhering founded a periodical in Germany that was focus to study the potentiality of Roman law as to deal with modern problems. As he said in his first issue, the idea was to evolve through Roman law, beyond Roman law.<sup>390</sup>

Later, in 1880, Jhering submitted for publication the well known paper about the interest of contracts and the presumed need for a pecuniary value of the mandatory obligations.<sup>391</sup> Allegedly, he had been able to find grounding in some texts of the roman digest, and there from built a theory by contractual liability that could exist even when no contract existed,<sup>392</sup> *i.e. culpa in contrahendo*.

The theory of *culpa in contrahendo* had two lines: i) liability for fault when contracting, and ii) classification of damages into positive and negative. The framers of the German Civil Code or *Burgerliches Gesetzbuch fur das Deutsche Reich* (BGB) were influenced by that theory and developed it into a general prong of pre-contractual liability categorized under strict contractual fault. Notwithstanding, those elements used the tort measure of damages as a standard when compensating and required reliance from the innocent party.<sup>393</sup>

It is important to understand that, before the enactment of the BGB, *i.e.* late Nineteenth century, the German civil law was strictly and rigidly construed by courts. Jhering argued against that rigidity, and advocated for an understanding of the law contemplating the involved interests. *i.e.* laws should protect the interests of individuals, and thus, justice and rights must be present in the legal system at the time of applying the

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<sup>390</sup> PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 122 (2003).

<sup>391</sup> Id. *supra* note 389, at 133.

<sup>392</sup> Id. *supra* note 390, at 122.

<sup>393</sup> Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 Tul. Euro. & Civ. Rev. 112, 113 (1997).

law. The theory of Jhering intended to allow judges to interpret the German civil law, both with equity and ensuring the provisions of the BGB would not become outdated.<sup>394</sup>

His contribution of the *culpa in contrahendo* had an outstanding success and turned out to be the main point for the evolution of numerous legislation endeavors. The ideas expressed in that paper of 1880, had been accepted expressly *circa* 50 years before by the 1825 Code. Not only by accepting the non-pecuniary damage but also by establishing that the amount of that reparation should be determined by a jury.<sup>395</sup> In other words, the 1825 Code considered the possibility of recovery for intellectual rights, moral motives, religious, and merely satisfactions that in that sense preceded for many years the conception of Jhering.<sup>396</sup>

It is hard to know and determine if Jhering, at the time of writing his paper, had access to a copy of the 1825 Code, however, he did not mention it.<sup>397</sup> One of the objectives of this presentation is that other research activities continue with the task of defining the originality of the work of Jhering, and determine the influence the 1825 Code could have provided.

## **b. Other Areas of Europe**

A brief comment regarding non-pecuniary damages in Europe may be of interest for the readers. It could help to compare the application of non-pecuniary damages in

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<sup>394</sup> Id. *supra* note 394, at 122.

<sup>395</sup> Id. *supra* note 389, at 133.

<sup>396</sup> Id. *supra* note 389, at 144.

<sup>397</sup> Id. *supra* note 389, at 133.

other regions of the world, and it could develop an interest for future research activities that focus their work in the Old continent.

It has been said that some, though not many, countries in Europe have statutes that expressly address the recovery of moral damages or non-pecuniary damages caused by the breach of a contract.<sup>398</sup>

Amongst those countries it is possible to mention the Switzerland. The Swiss Code of Obligations, of the year 1912, in its art.47 provides that the *rules relative to the liability that arises from quasi-delicts are applicable by analogy to the consequences of contractual fault.*<sup>399</sup> In addition, art.99 of the same code provides that *a person who, through the fault of another, has suffered injury to an interest of a personal nature is entitled to claim, besides other damages, an additional sum of money as moral reparation, when that kind of reparation is justified by the particular seriousness of the moral damage suffered and also of the degree of the fault.*<sup>400</sup>

An intermediate view has been adopted in the italic peninsula by the Italian Civil Code of the year 1942. This modern code continues with the style of the French Code, but has been strongly influenced by the form and content of the German BGB.<sup>401</sup>

Art.1174 of the Italian Civil Code speaks about the patrimonial nature of performance, and in one point says *even not patrimonial.*<sup>402</sup> Hence, Italians have made a differentiation between the prestation and the perstation itself. The first, i.e. the interest

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<sup>398</sup> Id. *supra* note 129, at § 6.10

<sup>399</sup> Id. *supra* note 129, at § 6.10

<sup>400</sup> Id. *supra* note 129, at § 6.10.

<sup>401</sup> THE ITALIAN CIVIL CODE –TRANSLATED BY MARIO BELTRAMO ET AL. VII (1969)

<sup>402</sup> The complete text of art.1174 of the Italian Civil Code reads: *The performance which is the object of an obligation must be of such nature as to be capable of economic evaluation and must correspond to an interest, even if not patrimonial, of the creditor,* according to Id. *supra* note 401, at 313.

the creditor has in the object of the obligation, does not have to be pecuniary. The second, *i.e.* the object of the obligation, has to have some financial relevance in order to allow the creditor to recover due to breach or non-fulfillment.<sup>403</sup> Finally, it has been said that the Italian approach seems to find certain harmony with the provisions of the 1825 Code and the New Code.<sup>404</sup>

If the Swiss and Italian provisions found grounding in the BGB<sup>405</sup>, and knowing some jurists<sup>406</sup> believe the BGB found inspiration in the 1825 Code, an intent to assert a link between the provisions of both continents, *i.e.* America (1825 Code) and Europe (BGB, later Italy and Switzerland), could be tried.

As in the case of the United States, it could be valuable for further research activities to determine if the Italian and Swiss provisions on non-pecuniary damages had their origin or grounding in the 1825 Code.

#### **4. Latin America**

The influence of the 1825 Code in Latin America was very important and it was certainly not limited to art.1928, therefore, several articles of the Latin American codes pull inspiration from the text of 1825 Code.

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<sup>403</sup> Saul Litvinoff, *Obligations I*, 6 LOUISIANA CIVIL LAW TREATISE 56 (1969).

<sup>404</sup> *Id. supra* note 129, at 56.

<sup>405</sup> The pertinent section of the BGB is 253, and it reads: *For an injury which is not an injury to property compensation in Money may be demanded only in the cases specified by law*, according to THE GERMAN CIVIL CODE- TRANSLATED AND ANNOTATED BY CHUNG HUI WANG 57 (1907).

<sup>406</sup> *Vide Id. supra* note 389.

### a. Covering the Whole Region

Two main reasons can explain why the 1825 Code was a source of inspiration to all Latin American codifiers: i) Saint-Joseph and García Goyena were well known by the Latin American codifiers, and both jurists mentioned the 1825 Code in their works; and ii) the 1825 Code was the first civil code in America, and became a model for most new independent countries in Latin America<sup>407</sup>

Regarding the first point, it should be said that Fortuné Anthoine de Saint-Joseph, an industrious man and judge at the court of first instance in Paris, finished by 1840 the monumental compilation work *Concordance entre les Codes civils étrangers et le Code Napoléon*.<sup>408</sup> The *Concordance* helped to compare synoptically the French Code, printed in the left columns, to the most significant codifications at that time.<sup>409</sup> The *Concordance* turned out to be a useful tool throughout the nineteenth century, by providing the codifiers in Latin America with a survey of and aid when codifying in civil law.<sup>410</sup>

The other jurist that spread the existence of the 1825 Code was Florencio García Goyena. In 1851, this Spanish jurist and politician, presented a draft of his

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<sup>407</sup> Rolf Knutel, *Influences of the Louisiana Civil Code in Latin America*, 70 Tul. L. Rev. 1445, 1451 (1996).

<sup>408</sup> Id. *supra* note 407, at 1449.

<sup>409</sup> The *Concordance* included the: Civil Code of the Kingdom of Two Sicilies; 1825 Code; Codice civile Albertino; Civil Code of the Kingdom of the Netherlands, Burgerlijk Wetboek; Bavarian Civil Code, Codex Maximilianeus Bavaricus Civilis; Austrian General Civil Code of 1811, Allgemeines Bürgerliches Gesetzbuch; and Prussian Allgemeines Landrecht of 1794. according to Id. *supra* note 407, at 1449

<sup>410</sup> Id. *supra* note 407, at 1450.

*Concordancias, Motivos y Comentarios del Código Civil Español*. García Goyena pointed out the 1825 Code in several articles of his work.<sup>411</sup>

Both jurists were able to show the world the existence of the 1825 Code, an objective very difficult to achieve at that time regarding the precarious communication and publishing methods.

## **b. Focusing in Argentina**

Argentina participated of the codification movement in Latin America during the mid-Nineteenth century. A particular interest for the readers may arise when studying the Argentine Civil Code of the year 1869 and its modification of the year 1968.

The original text, drafted by Dalmacio Velez Sarsfield in the year 1869, mentions the 1825 Code as the source for 297 of its articles.<sup>412</sup> From those 297 references, only 1 mentions art.1928 of the 1825 Code as its source of inspiration. That sole reference can be found when reading the footnote<sup>413</sup> to art.522<sup>414</sup> of the Argentine Civil Code of 1869.

Although the text of art.522 of the Argentine Civil Code of 1869 does not relate to non-pecuniary damages, *i.e.* does not refer to art.1928 (3), the mention of art.522 is

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<sup>411</sup> Id. *supra* note 407, at 1450.

<sup>412</sup> The author of this presentation has gone through all the articles of the Argentine code and arrived to that result.

<sup>413</sup> The footnote to art.522 of the Argentine Civil Code of 1869 reads: *Code of Louisiana, article1928, says: "Nevertheless, if the obligation has been partially executed, the damages on which the parties have agreed, may be reduced to the loss or deprivation of the real gain,"* according to Law No. 340, Sept. 25, 1869 [1852-1880] A.D.L.A. 496.

<sup>414</sup> The Argentine text reads in art.522: *When upon the obligation it was agreed that if it was not fulfilled it would be paid a certain amount of money, neither a greater nor smaller amount can be given,* according to Law No. 340, Sept. 25, 1869 [1852-1880] A.D.L.A. 496.

significant because, with the Argentine revision of 1968, a curious coincidence took place.

The revised text of art.522 of the Argentine Civil Code, drafted in 1968, provides that *when an obligor fails to perform a contractual obligation the court may hold him liable, according to the nature of the failure and the circumstances of the case, for the moral damage sustained by the other party.*<sup>415</sup> Thus, non-pecuniary damages or *daño moral* may expressly be recovered in Argentina, according to the new wording of art.522.

Ultimately, the 1825 Code was not only a link for La. with its French and Spanish past, but it is a living tie, today, with the legal systems of Latin America. As Professor Leonard Oppenheim stated: *All of these countries also have civil codes based upon the Napoleonic Code. Thus, from the standpoint of legal scholarship, there is a decided line between La. and the Latin American countries, an important link in a chain which is steadily becoming stronger.*<sup>416</sup>

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<sup>415</sup> Free translation and interpretation by Id. *supra* note 129, at § 6.10.

<sup>416</sup> Charles L. Dufour, *The Law in Louisiana*, LOUISIANA CIVIL CODE WITH COMMENTS AND ANCILLARIES xi, xi (1989).

## **Summary and Final Considerations**

Every research activity needs some final conclusions, in addition to those that have been already partially provided. Such conclusions will help the reader to achieve a complete understanding and to focus in the most important and significant contributions of the presentation. Having this in mind, it must be said that throughout the different Chapters of this presentation, the readers were able to gain knowledge in the topics that will be mentioned in the following paragraphs.

Initially, the readers were able to understand the transition from the Spanish and French legal systems, into the La. legal system. That difficult transition started in La. with the enactment of the Digest; and was followed by the Project, the 1825 Code, and 1870 Code. The New Code is the present civil law in La., and is being subject to the revisions that the La. State Law Institute keeps proposing.

The presentation also dedicated a special section to the French Code. In that section, the French Code was described and the influence it had was briefly explained.

Readers also were provided with some definitions of non-pecuniary damages. The difference between moral damages and non-pecuniary was also mentioned. That reference to definitions and differences surely helped the readers to prepare for the understanding of the court applications of non-pecuniary damages in La.

Also, art.1928 of the 1825 Code was carefully analyzed. The originality and importance of the article was mentioned. References to the English and French versions

of the article were made, together with the problems that the deficient translations presented for court interpretation since its drafting.

The period 1825-1870 was especially studied regarding the way the La. Supreme Court applied art.1928. Results from the research done, both on hardcopy and electronic databases, reflect that the La. Supreme Courts faced the need to decide on non-pecuniary damages very rarely. The art.1928 (3) is mentioned in 21 cases during the period of time under study. From all those cases, only 5 refer exclusively to recovery of non-pecuniary damages under art.1928 (3), the remaining 16 cases refer to the jury discretion as to determine the amount to be recovered for damages. Therefore, it could be said that the arguments between the different interpretations of the art.1928 (3) that were mentioned when analyzing the French and English versions, started after the year 1870. That is, when the text was adopted only in English, and when the courts started to receive more claims. Ultimately, before the year 1870, it cannot be said that recovery of non-pecuniary damages had an important presence in La. In addition, some French court decisions related to non-pecuniary damages, dated in the same period under study, were mentioned.

Another important part of this presentation was the reference to the potential influences that art.1928 had in other codification works. The first influences, inside La., were mentioned with respect to the 1870 Code and the New Code. The second potential influences, outside La., were: the work of Jhering in Germany and the BGB, the Italian and Swiss codification, the codification works in Latin America and specially Argentina. In brief, the work tried to detect the potential influence art.1928 had in La. and in other regions of the world.

The development of the text of art.1928 into the text of art.1998 shows that the New Code includes many provisions having a basis in common law and Civil law, and that as it has been said before, La. has developed a legal system of its own, that could be classified as *sui generis*.<sup>417</sup>

Ultimately, it is important to mention that this presentation has neither the pretension of teaching, nor the design of imposing a work; it only wishes to be useful<sup>418</sup> for readers that are interested in the area of non-pecuniary damages. It also pursues to help future researchers when continuing with the activity of analyzing the legal history of the La. legal institutions.

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<sup>417</sup> Id. *supra* note 44, at 7-20.

<sup>418</sup> L. EYMA, STUDIES ON THE CIVIL CODE OF LOUISIANA vi (1840).

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