

LOVE PAIN OR LOVE DAMAGE? RENITENT JURISPRUDENCE: THE PROBLEM OF THE QUANTUM
INDEMNITIES OF CIVIL LIABILITY IN MARITAL RELATIONSHIP

*DOR DE AMOR OU DANOS DE AMOR? JURISPRUDÊNCIA RENITENTE: O PROBLEMA DO QUANTUM
INDEMNIZATÓRIO DA RESPONSABILIZAÇÃO CIVIL NO PLANO DAS RELAÇÕES CONJUGAIS*

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RESUMO

O artigo traça algumas considerações acerca do Acórdão do Supremo Tribunal de Justiça de Portugal, proferido em Lisboa, no dia 12 de maio de 2016 – Proc.2325/12.3TVLSB.L1.S1. O Acórdão em comento entende que foram violados os deveres de fidelidade e de coabitação, mas, simultaneamente, foram também violados o direito de personalidade, o direito à dignidade pessoal e o direito à saúde. O artigo é posto segundo o regime jurídico português e possui breve entendimento da matéria se-gundo a doutrina brasileira.

Palavras-Chave: Casamento. Deveres Conjugais. Responsabilidade Civil. Danos Extrapatrimoniais. Quantum Indemnizatório.

ABSTRACT

The article outlines some considerations about the Judgment of the Portuguese Supreme Court of justice, ruling issued in Lisbon on 12 May 2016 – Proc.2325 / 12.3TVLSB.L1.S1. The judgment under consideration states that the duties of fidelity and cohabitation were breached, but at the same time the right of personality, the right to personal dignity and the right to health were also violated. The article is presented under the Portuguese legal regime and has a brief understanding of the subject according to Brazilian doctrine.

KEYWORDS: Marriage. Marital Duties. Civil Liability. Extra-Patrimonial Damages. Compensatory Quantum.

INTRODUCTION

The present work aims to make some considerations about the Judgment of the Superior Court of Justice, of 12/5/2016 Proc.2325/12.3TVLSB.L1.S1.

It aims to understand to what extent, at the time of divorce, it is appropriate for either spouse to claim compensation for non-material damages suffered during the marriage.

In the case under analysis, the marriage lasted fifteen years, but throughout this period, and intermittently, the husband would leave the conjugal home leaving his wife and two daughters. The particularity of the case lies in the fact that, interspersing periods of absence and cohabitation and as he also ended other brief relationships, this man left the de facto divorce in abeyance, and even the interpersonal relationship with the plaintiff, who resumed the role of wife and wife whenever her husband returned home. From the relationship with her husband, who alternated sporadic appearances, a permanent state of sadness and loss of *joie de vivre* developed in the plaintiff, culminating in depression. Fifteen years later, the wife sought compensation.

The intention is to address article 1.792 of the Civil Code, which allows for compensation and makes no distinction between types of damage.

According to the Judgment, it is understood that the duties of fidelity and cohabitation were violated, but at the same time, personality rights, the right to personal dignity and the right to health were also violated.

The text of art. 1.792 of the Civil Code, no. 1, expressly advocates the right to compensation. The rule admits that a claim for compensation is applicable for damages suffered as a result of the dissolution of the marriage and also for damages suffered for the violation of rights during the marriage.

And on the issue of the type of damage, the question is whether the damages that can be compensated are only those resulting from violations of the right to personality, or also damages due to the violation of marital duties.

And how can the issue of endofamily illicit be understood?

In this way, we also intend to address the issues related to the quantum of compensation, because after all, in a society where almost everything has pecuniary value, how much is the pain of love worth?

1.1 ASSIGNING LEGAL EFFECTS TO THOSE AFFECTED

1.1 The Principle-Based Approach to Marriage Law

One of the most widely performed works on stages around the world, *Romeo and Juliet*, encapsulates the idea of romantic love, marriage, and youthful raptures¹. The well-known play, although marked by tragedy, is one of the most important love stories in literature and is also a story about destiny and the sacrifices that are made in the name of love².

Stefano Rodotá questions whether there is compatibility between the words "law" and "love", or whether they belong to conflicting logics. The author explains how the law, since ancient times, has been used as a tool to neutralize love in its social presence, and states that in the historical experience, law has taken over love³. For Renata Multedo, "the law has limited love to a single perimeter that is considered to be the only legally legitimate one: marriage"⁴.

Thus explained, even despite the soul content that the idea of marriage may carry, it is in the Civil Code that the legal notion of family and marriage is established. Art. 1.576 presents the marriage relationship as the first of the family relationships. A relationship that "as a consequence of marriage binds the spouses to each other. It is a relationship that affects the condition of the spouses in a deep and lasting manner, influencing in its regime, one may say, the generality of the obligatory legal or real legal relationships of which they are holders"⁵. The approved law (Law 61 of October 31st, 2008), in effect since December 1st, 2008, is based on the concept of marriage as a way of personal fulfillment, "valuing only the dimension of the affective relationship to the detriment of institutional impositions, of individual well-being to the detriment

¹ Daniela Diana, "Romeu e Julieta. Resumo de livros". In <<https://www.todamateria.com.br/romeu-e-julieta>> Acesso em: 17/07/2019.

² Blogue Literário Bertrand. Um amor para vida toda. In <<https://bertrandptsomoslivros.blog/2019/02/01/um-amor-para-toda-a-vida-romeu-e-julieta>>. Acesso em 10/08/2019.

³ Stefano Rodotá, *Diritto d'amore*, Bari, Laterza, 2015, in <<https://www.libreriauniversitaria.it/diritto-amore-rodota-stefano-laterza/libro/9788858121245>> e <<https://books.google.pt/books>>. Acesso em: 10/8/2019.

⁴ "Um contrato de direito público: vigiado pelo Estado; baseado na estabilidade social, na procriação e na educação dos filhos; e portador de uma moral considerada como prevalente, a católica" Renata Vilela Multe

Do, *Liberdade e família – Limites para a intervenção do Estado nas relações conjugais e parentais*, Rio de Janeiro, Editora Processo, 2017, p. 285.

⁵ Francisco Pereira Coelho e Guilherme De Oliveira, *Curso de Direito da Família*, Volume I, Coimbra : Coimbra Editora, 2016, p. 32.

of family well-being”⁶. This is what the Explanatory Memorandum of Law nr. 509/X recommends: "Freedom of choice and equality of rights and duties between spouses, affection at the center of the relationship, full communion of life, cooperation and mutual support in the upbringing of children, when there are any, these are the fundamentals of marriage in our societies. Marriage is thus understood as a means of personal fulfillment, where affections predominate and, when these cease to exist, the unhappy spouse has the right to put an end to this source of unhappiness "7. Thus, the new concept of marriage is based on a principle of freedom, in which the Portuguese legislator unequivocally assumes that no one is obliged to remain married against his or her will if there is no longer any love. In other words, "any spouse who considers that his or her marriage no longer meets the conditions of affection or emotional balance, or that it offends his or her dignity, must be able to end the marital relationship, even against the will of the other spouse "8. In this way, the absence of love should be enough for the definitive end of the life in common. The lack of will to continue together, the lack of affection, should be sufficient grounds for divorce to be decreed, without the need for further conditions and without depending on the other spouse's acceptance. Thus, it is important that people are happy in the marriage they have contracted, so that it should only be maintained as long as affection and well-being persist.

The abandonment of the fault basis in divorce is convergent with the most recent trends in other European law systems and was strongly influenced by the European Family Law Principles on Divorce and Maintenance Obligations between Ex-spouses elaborated by the Commission on European Family Law⁹.

Professor Jean Hauser, when dealing with the subject of love and freedom, was clear in stating that, simply put, it is explained that love is initially an individual demand, but that when shared, it must contain reciprocity¹⁰.

In line with article 1.781 d) of the Civil Code, the contentious divorce regime based on the culpable violation of marital duties has been eliminated, and divorce without consent has been instituted, based on objective facts capable of

⁶ António José Fialho, *Guia Prático do Divórcio e das Responsabilidades Parentais*, 2.ª Edição, CEJ, Lisboa, p. 9.

⁷ Exposição de Motivos da Lei nº 509/X, in <<https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=33847>>, Acesso em: 17/7/2019.

⁸ António José Fialho, *Guia Prático do Divórcio e das Responsabilidades Parentais*, ob. cit., p.10.

⁹ Idem.

¹⁰ Jean Hauser, *Amour et liberté, la devise contemporaine du couple? La famille en mutation*. Archives de Philosophie du Droit. Paris: Dalloz. Tome 57, (2014), p. 73 e ss.

demonstrating the definitive breakdown of the marriage, with the consequent attribution of the right of either spouse to file for divorce, regardless of their greater or lesser contribution to the matrimonial crisis.

The reform of family Law adopted in 2008 in Portugal demonstrates the desire to adapt to contemporary society and is a direct result of the movement observable during the last decade in which the Portuguese legislature has paid particular attention to family law. By abandoning the punitive-type model that required an evaluation of individuals' behavior and establishing fault, the new system appears to have been designed to make divorce possible and to allow a definitive breakup, while admitting future independence¹¹.

In Portugal, divorce without consent is possible, in which it is requested by one of the spouses against the other based on a certain cause. There is also divorce by mutual consent, which may be requested by both spouses by mutual agreement and without indication of the cause for which it is requested¹².

In divorce by mutual consent there is the assumption that both parties agree on the dissolution of the marriage. But the divorce modality, without consent, requires the fulfillment of the requirements contained in the paragraphs of article 1.781, which are: "de facto separation for one consecutive year (al. a), alteration of the other spouse's mental faculties, when it lasts for more than one year and, due to its gravity, compromises the possibility of living together (al. b); absence, without news of the absent for a period of not less than one year (al. c.); absence, without news of the absent for a period of not less than one year (al. d). b); absence, with no news of the absent spouse, for a period of not less than one year (al. c); any other facts that, regardless of the spouses' fault, show the definitive rupture of the marriage (al. d) "¹³.

Divorce without consent is requested based on very broad objective causes¹⁴, and if one considers "any other facts that, regardless of the fault of the spouses, show the definitive rupture of the marriage "¹⁵, one should apply the

¹¹ Paula Távora Vítor, Les implicites des techniques de règlemente des comptes dans les couples séparés: les obligations alimentaires entre ex-époux, in *Lex Familiae, Revista de Direito Portuguesa, Centro de Direito da Família, Coimbra Editora, Ano 14 – n.º 27-28, (2017), p. 137 e ss.*

¹² Francisco Pereira Coelho e Guilherme De Oliveira, *Curso de Direito da Família, Volume I, Coimbra, Coimbra Editora, 2016, p. 690.*

¹³ Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo, 4ª Ed., Lisboa, AAFDL Editora, 2015, p. 522 e ss.*

¹⁴ Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo, ob. cit., p. 522 e ss.*

¹⁵ Abílio Neto, *Código Civil Anotado, Lisboa, Ediforum Edições Jurídicas, Lisboa, 20ª Ed., 2018, p. 1.443.*

understanding of author Sandra Passinhas, for whom the procedural behavior of the parties is relevant as a fact that proves the rupture¹⁶.

In spite of the importance of divorce, with regard to situations of rupture of common life, it is important to note the *de facto* separation. The doctrine does not attribute autonomy to the matter and opts to follow the legal orientation, in which separation appears as one of the causes of divorce without consent. According to Jorge Duarte Pinheiro, "de facto separation has an importance that goes beyond its impact in the field of the causes of divorce", because a couple may live apart for the most diverse reasons, such as the belief in reestablishing life in common, the desire to avoid formal litigation or even simple inertia¹⁷.

The authors Francisco Pereira Coelho and Guilherme de Oliveira, in their course on Family Law, detail the principles concerning the family area¹⁸ and deal in detail with Articles 36, 67, 68 and 69 of the Constitution, which enshrine the principle base that delimits the mobility of the ordinary legislator in Family Law. Given the limits of the present exposition, only some of the constitutional principles of Family Law will be briefly mentioned.

The principle expressed in Art. 36 (1) (2) on the right to marry, for example, states that ordinary legislation may not establish impediments that are not justified by fundamental public interests. In such a way as to consider unconstitutional any rule that tends to establish impediments based on the race, religion or nationality of the fiancées, or that, for example, "prohibits transsexuals, in their new sexual identity, from contracting marriage, etc "¹⁹. It is noticeable the importance of the "right to found a family" attributed by art. 36, n° 1, 1st part, CRP, art. 67, n° 1, which grants the family itself (considered a "fundamental element of society"), a "right to protection by society and the State", thus making it the object of institutional guarantees. Also noteworthy is the principle enshrined in paragraph 2 of art. 36, which aims specifically to subtract from canon law the regulation of the matters provided for therein, assigning competence to civil law to regulate the requirements and effects of marriage and its dissolution, regardless of the form of celebration. Art. 36, no. 2, 2nd part, advocates the principle of admissibility of divorce for any marriages, since a rule

¹⁶ Sandra Passinha S, O novo paradigma do divórcio em Portugal – Ainda há deveres no casamento? AAVV. O Divórcio, Lisboa, Centro de Estudos Judiciários, 2014, p. 34.

¹⁷ "Dois cônjuges podem viver separados de facto até a morte de um deles. Só então a morte dissolverá o casamento." Jorge Duarte Pinheiro, O Direito da Família Contemporâneo, ob. cit., p. 496 e ss.

¹⁸ Francisco Pereira Coelho e Guilherme De Oliveira, Curso de Direito da Família, ob. cit., p. 32.

¹⁹ Idem.

that prohibited divorce, either in general or even only for Catholic marriages (as happened before Decree-Law no. 261 of 1975)²⁰, would be equally unconstitutional.

According to Guilherme de Oliveira, art. 36, nr. 3, enshrines the principle of equality of the spouses, which is an application of the general principle of art. 13 with great practical interest as far as matrimonial law is concerned, because the principle "rendered unconstitutional the rules of the Civil Code that placed the married woman in an unfavorable situation in relation to her husband, rules that the 1977 Reform eliminated or adapted to the new constitutional imperatives(')"²¹.

In view of the above, the primacy of freedom in divorce matters was confirmed. It is then worth considering the lessons of Jean Hauser, in the sense of observing whether freedom is sacrificed more or less in the definition that the norm requires. According to the author's understanding, the whole modern question is perhaps to know when this sacrifice of freedom occurs. That is: finally to know when to leave the moment (or the momentary relationship) for duration, or the lasting relationship for freedom. From this point of view, the modern French legislator has never been able to be very clear, except for the role of the celebration of marriage²². Differently, the Portuguese legislator has pacified the understanding of divorce by mutual consent and "as a consequence of the elimination of the fault declaration in divorce, the accessory property sanctions and the right to compensation for damages caused by the dissolution of the marriage are excluded, the spouses being referred to the common courts when the reparation of damages caused by the other spouse is at issue and under the general terms of civil liability (article 1792 of the cited Code)"²³.

As much as we started this chapter invoking Romeo and Juliet, truly, love does not interest the Law, neither does the freedom to love, and the "couple" even less.

It is freedom. This is an individual and objective idea. Everything else concerns other branches of science. But the definition of what a couple is, is what concerns the Law, and the objective pursued by its members controls the qualification in

²⁰ Francisco Pereira coelho e Guilherme De oliveira, Curso de Direito da Família, ob. cit., p. 32.

²¹ Francisco Pereira coelho e Guilherme De oliveira, Curso de Direito da Família, ob. cit., p. 148.

²² Jean Hauser, *Amour et liberté, la divise contemporaine du couple? La famille en mutation.* ob. cit., p. 80.

²³ António José Fialho, *Guia Prático do Divórcio e das Responsabilidades Parentais*, ob. cit., p.10.

structure. Nor is freedom per se sufficient without consideration of the desired duration, that is, when a couple begins and when it must end²⁴.

For Jorge Duarte Pinheiro, the current discussion about Family Law is the result of this branch having both symbolic and practical predominance, so that for the author "it is not the mere intellectual pleasure of discussion and contestation that animates movements and criticism. Family Law influences or intends to influence, in a broad way, the life of each individual"²⁵.

The evolving and controversial content of Family Law²⁶ is undeniable, allowing new debates and broadening understandings, in order to understand which individuals, and which rights, even within marital relations cannot be neglected and require legal protection.

1.1 Contemporary discussions on common life and protection

According to António Menezes Cordeiro, "the family, as a result of psychological, sociological, moral and cultural data that should not be stressed, constitutes a primordial enlargement of people's spheres"²⁷.

Although there is no historical distance that allows the observation of the differences and the evolution of marriage and shared common life, one must be careful when using the words affection (very fashionable in Brazilian doctrine, for example) or love. This care is due to the need to use a grammatical element that corresponds to the nature of the institute or that explains the legal phenomenon²⁸. In this sense, as previously mentioned, the author Jean Hauser states that love, first of all, becomes a legal notion only after a very reductionist functional framework. As an individual phenomenon, it is of no interest to Law, which only reaches love as a creative source of a social reality. Only in this creative alchemy does love enter into a variable part in relation to other social demands. As for classical, or traditional, marriage, it remains dominated by a preoccupation with regulation that owes more to politics than to love itself.²⁹

²⁴ Jean Hauser, *Amour et liberté, la devise contemporaine du couple? La famille en mutation*. ob. cit., p. 80.

²⁵ Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo*, 4ª Ed., Lisboa, AAFDL Editora, 2015, p. 16.

²⁶ Idem.

²⁷ António Menezes cordeiro, *Tratado do Direito Civil Português I*, 4ª Ed., Coimbra, Almedina Editora, 2012, p. 950.

²⁸ Regina Toledo Damião, António Henriques, *Curso de Português Jurídico*, ob. cit., p. 183. "A língua portuguesa, tanto ou mais que suas irmãs neolatinas, exige do redator uma criteriosa relação sintagmática (...) porque a mensagem pretendida pelo emissor só logra obter seu desiderato quando, conhecido previamente o pensamento que se busca exprimir há uma distribuição lógica e concatenada das ideias."

²⁹ Jean Hauser, *Amour et liberté, la devise contemporaine du couple? La famille en mutation*. ob. it., p. 74.

For Maria Berenice Dias, affective bonds are not a prerogative of the human species, since "mating has always existed among living beings, whether as a result of the species' perpetuation instinct or the true aversion to loneliness"³⁰. In her view, "instead of rights and duties innocuously foreseen in the law, it would be better if marriage were nothing more than a nest, in which bonds and knots of affection are established, serving as a refuge, protection and shelter "³¹. For the author, the establishment of rules that assure rights and duties in marriage represents a type of "nationalization of affection": "The private sphere of conjugal relations tends more and more to reject the interference of public power, and one cannot help but conclude that a true and unjustifiable nationalization of affection is taking place "³². Maria Berenice Dias considers that the omnipotence of the State is not limited to sanctioning marriage and attributing responsibilities to the couple, but that "it interferes in their intimate life, imposing duties and assuring rights, such as reciprocal fidelity, common life and mutual assistance. The will of the spouses is of little value "³³.

According to the author, it is a "clearly unreasonable interference", due to its legal ineffectiveness, if we consider the fact that non-compliance by itself is not capable of enabling compliance via a court decision and that in the "validity of the conjugal society, the non-compliance with these duties by one or both spouses in no way affects the existence, validity or effectiveness of the marriage "³⁴.

Respectfully, one cannot reconcile the idea that the rights and duties contained in the norm are ineffective. It is certain that in evidence are rights of personality that cannot escape State protection. Nor can we lose sight of the situation of domestic violence in Portugal, and not taking into account the duties and rights contained in the norm would also mean turning our backs on the intention of the legislator, who properly aimed to ensure that this "nest" was, above all, not only a place of affection, protection, and refuge, as in the words of Maria Berenice Dias, but a safe place. And safety in the legal sense of the term, without euphemism, and without using it in an allegorical sense; this is because one must take into account, with the scope of the analysis of the judgment,

³⁰ Casamento: nem direitos nem deveres, só afeto, in <<http://www.mariaberenice.com.br>> Acesso em: 19/7/2019.

³¹ Idem

³² Estatização do afeto, in <<http://www.mariaberenice.com.br>> Acesso em: 19/7/2019.

³³ Idem.

³⁴ Ibidem.

specifically the duty of cohabitation and which elements characterize marital violence.

Francisco Pereira Coelho and Guilherme de Oliveira present the best doctrine in the understanding that "to cohabit" implies communion of life, in the sense of sharing a dwelling, a table and, above all, a bed. They give the verb "to cohabit" a proper and broader meaning in matrimonial law.

For the authors, the communion of bed follows the understanding that "marriage obliges the spouses to the so-called 'conjugal debt'. We have already seen that marriage implies a lawful limitation of the right to sexual freedom, in the double sense that the married person is obliged to have sexual relations with his spouse and not to have such relations with third parties"³⁵.

Jorge Duarte Pinheiro states that in the Portuguese language, cohabitation means "the habitual practice of sexual acts with another person"³⁶.

Contrary to the Portuguese doctrine, Maria Berenice Dias believes that "there is no way to affirm that the State has imposed an obligation on the couple to maintain sexual relations". The author argues that it is not the exercise of sexuality that maintains the marriage, and that the refusal of bodily contact does not generate the possibility of moral damages. Likewise, sexual abstinence does not give rise to compensation. For Maria Berenice Dias, it is "unreasonable and excessive to intend that the 'absence of physical contact of a sexual nature' be recognized as a default of marital duty"³⁷.

Once again, the understanding of this paper points in the opposite direction of what the author states. The frustration of the sexual expectations of either spouse must also be considered under the aspects of marital violence, if used in the context of unjustified or punitive refusal. The ruling that forms the basis of the present work describes, among other facts, the repeated absence of the male spouse who returned to the conjugal home in the intervals of the relationships he maintained in parallel. The defendant did not intend to end his marriage to the plaintiff, nor did he cease to live with her when he returned home, taking on the marital role. The woman became ill as a result of this behavior, and the Ruling should have taken into account the conceptual issues about domestic violence and its psychological aspects.

The study published in 2016 by the Center for Judicial Studies, in multidisciplinary research, presented that when dealing with violence, "we will be

³⁵ Francisco Pereira Coelho e Guilherme De oliveira, Curso de Direito da Família, ob. cit., p. 413.

³⁶ Jorge Duarte Pinheiro, O Direito da Família Contemporâneo, ob. cit., p. 382.

³⁷ Casamento ou terrorismo sexual, in <<http://www.mariaberenice.com.br>> Acesso em 19/07/2019.

talking about any form of intentional use of force, coercion or intimidation against a third party or any form of intentional action that in any way harms the rights and needs of that person".³⁸

In common sense, domestic violence is largely understood only in terms of physical violence. However, violence against women also includes sexual and psychological violence. And there is no distinction if the violence occurs in the private sphere, in the "nest" desired by Maria Berenice Dias, that is, within the family or domestic unit, or in any other interpersonal relationship in which the aggressor lives or has lived "in the same domicile as the victimized woman, being linked by ties of consanguinity or cohabitation "³⁹.

It is worth stating that marital relationships, besides being intimate, are complex. The interactions between partners are involved by a strong emotional and sexual component. One cannot deny the impact and the traumatic consequences on the victim of domestic violence, even if it leaves no apparent mark on the skin. The psychological aspect must be viewed with the same rigor.

The transformations that have occurred in the last three decades have led European states to consider the need for a review of the judicial models in force. There have been initiatives from the European Union, specifically from the Council of Europe, to promote the revision and universalization of the judicial systems with regard to the protection of victims of crime. Based on this objective, Recommendation No. R (85)11 of the Council of Europe arises. This document consists of a set of guidelines aimed at improving the administration of justice from the victim's point of view. Specifically, Recommendation n° R (85)11 can be divided into three strands, namely: information given to the victim; compensation from the offender or the State; treatment and protection of the victim by Justice.⁴⁰

For the present work, "compensation of the offender or the State" stands out. This is because of the symbolic issues: "the judicial system not only has to be more efficient in the way it deals with domestic violence, but it must also adopt a strategy that demonstrates to public opinion its concern for victims, for justice

³⁸ Violência Doméstica – Implicações sociológicas, psicológicas e jurídicas do fenómeno – Manual Pluridisciplinar, Caderno Especial, Centro de Estudos Judiciários, Lisboa, (2016), p. 18 e ss.

³⁹ Violência Doméstica – Implicações sociológicas, psicológicas e jurídicas do fenómeno, ob. cit., p. 18 e ss.

⁴⁰ Indemnização das vítimas de crimes, in <<https://e-justice.europa.eu/home.do?plang=pt&acton=home>>, Acesso em: 19/7/2019.

and the adequacy of procedures, for the punishment and regeneration of offenders".⁴¹

The interpretation of the judgment in question is that it failed to stick to the need to demonstrate to the public opinion a real concern for the victim. However, the Superior Court of Justice did not consider the case to be one of domestic violence or marital violence, thus contradicting a logic of protection that presides over all Family Law, in Jorge Duarte Pinheiro's understanding: "the protection of one spouse before the other, against inequality and violence during the marriage"⁴².

Even if the questions concerning individual freedom are admitted and taking into account that the defendant, in the judgment in question, used his freedom to act, for Jorge Duarte Pinheiro the exercise of individual freedom is fully admissible, provided it is done in a responsible way and does not unjustifiably threaten family cohesion⁴³. Thus, even if sheltered by marriage, "the common-law guarantee applies to conjugal rights. The infringement by one spouse of individual rights, patrimonial or personal, of the other, which falls within a violation of the duty of respect, is liable to determine civil and criminal liability under the general terms"⁴⁴.

For Jorge Duarte Pinheiro, under the terms of articles 483 and following, the violation of marital duties, such as fidelity and cohabitation, may lead to civil liability under the general rule, considering that civil liability is an instrument to protect all subjective rights and, therefore, the violation of a marital duty, predominantly personal, may meet the requirements of the obligation to indemnify.⁴⁵

2.1 CIVIL LIABILITY IN FAMILY LAW

2.1 The illicit act within family relations

The lessons of Antunes Varela in dealing with Obligations in General are precious, because they determine that "the main differences between obligations and family relationships essentially comes from the fact that they are part of a

⁴¹ Violência Doméstica – Implicações sociológicas, psicológicas e jurídicas do fenómeno – Manual Pluridisciplinar, ob. cit., p. 18 e ss.

⁴² Jorge Duarte Pinheiro, O Direito da Família Contemporâneo, ob. cit., p. 60.

⁴³ Idem.

⁴⁴ Jorge Duarte Pinheiro, O Direito da Família Contemporâneo, ob. cit., p. 394.

⁴⁵ Idem, p. 395

social institution (family), whose purposes exert a strong influence on its legal system "⁴⁶. For the author, in regard to duties of a personal nature, such as, for example, the personal relations between spouses, they cannot be the object of any extra-circle obligation of persons bound by the respective family tie⁴⁷. In this context, the violation of personal family duties does not incur a simple obligation to indemnify the other party, except for the violation of certain marital duties, whose damaged interests are wider⁴⁸.

Briefly, it is possible to define civil liability as the legal figure that occurs when one person must repair damage suffered by another, since the law gives rise to an obligation in which the person responsible is a debtor and the injured a creditor. It is important to say that it is an obligation that arises directly from the law, and not from the will of the parties⁴⁹. The verification of damage or injury is a requirement for the existence of civil liability, and that "only in function of the damage does the institute achieve its essentially restorative or reintegrative purpose"⁵⁰. It is also required that there be a connection between the fact and the damage in order to comply with the provisions of Article 483.1 of the Civil Code, since it is not the duty to "compensate all and any damage arising from the illicit fact, but only that which it has actually caused. Thus, the causal link has a dual role: as a presupposition of civil liability and as a measure of the obligation to indemnify⁵¹.

For Rodrigo da Cunha Pereira, the Brazilian system, in marital relations, is the principle of responsibility, the motivator for the understanding and elimination of the discussion of guilt for the end of the marriage, since "the discourse of guilt has been replaced by that of responsibility"⁵².

Considering the issues related to intimate relationships and love relationships in general, for the writer, "whoever enters into a love relationship must assume the risks of pain", but that it is possible, in other types of injuries, for the injured party to take shelter in the sphere of Criminal Law or Civil Law in order to seek

⁴⁶ Antunes Varela, *Das Obrigações em Geral*, Vol. 1, 10ª Ed., Coimbra, Ed. Almedina, 2000, p. 198 e ss.

⁴⁷ *Idem*.

⁴⁸ *Ibidem*.

⁴⁹ Mário Júlio De Almeida costa, *Direito das Obrigações*, 12ª Ed. Revista e Atualizada, Coimbra : Almedina Editora, 2016, p. 517 e ss.

⁵⁰ *Idem*.

⁵¹ Mário Júlio De Almeida Costa, *Direito das Obrigações*, ob. cit., p. 605

⁵² Rodrigo Da cunha Pereira, *Princípios fundamentais norteadores do direito de família*, 3ª ed. São Paulo, Editora Saraiva, 2016, p. 248 e ss.

redress. However, the State is not interested in the intrinsic reasons for the couple's dissolution⁵³.

However, it is certain that Bruna Barbieri Waquim is right when she states that "in the search for happiness, for personal realization, each member of the family is subject to minimum ethical and legal rules, so that in this search process they do not violate the dignity and the very happiness of their peers". According to the author, the damages suffered by the spouses, within the marital relationship, have been conventionally called "love damages"⁵⁴.

These so-called "damages of love" can be understood as, among others, damage to the immaterial assets of one of the members of the affective relationship by his or her partner, or, further, the breach of the expectation of commitment, and as "the unjustified frustration of a communion of life". The author continues in the understanding that, although the spouses have the freedom to choose the best way to conduct their lives, "this freedom must be exercised in solidarity, observing the ethics of the conjugal relationships"⁵⁵.

It is not the case of allowing a kind of monetarization of love and affective relationships, but, first of all, a certain care to avoid that one of the pairs, acting in abuse of rights or flagrant breach of trust or expectations generated by him, "gives rise to the violation of the dignity of his consort," and given that any preventive action would not be possible, nothing more certain than to allow the violated dignity to be repaired⁵⁶.

In the Italian context, the figure originated in doctrinal and jurisprudential construction, from the highly symptomatic name, called endofamily illicit⁵⁷.

For Italian doctrine, this is considered a subcategory of the common crime of the aquilian matrix, which has its own defining origins and its own *raison d'être* in the particular circumstance that the extra-contractual responsibility finds its genesis here within the domestic walls, in which "victim" and "executioner" are part of the same nucleus (not necessarily founded on marriage) and the failure of the relationship is often accompanied by an offense against the inalienable values of the individual; that is, those values, such as the moral and physical

⁵³ Idem.

⁵⁴ Bruna Barbieri Waquim, Universos paralelos e danos de amor: balizas para a responsabilidade civil no âmbito das relações simultâneas conjugais, in Revista Brasileira de Direito das Famílias e Sucessões. A. 13, nº 23 (ago./set. 2011), p. 65-83.

⁵⁵ Idem.

⁵⁶ Ibidem.

⁵⁷ Os textos em língua estrangeira foram por mim livremente traduzidos. E a expressão "endofamiliar", informo não ter encontrado correlativo no léxico português, utilizando-se aqui a expressão, na qualidade de neologismo.

integrity of the person, that exist before any social formation. These are the assets that must always be safeguarded in their entirety, receiving protection from the Magna Carta before and regardless of the insertion of the individual in any social context⁵⁸.

But according to the authors Giuseppe Cassano and Giacomo Oberto, the question is whether compensation can be differentiated according to the context in which it takes shape. Strictly in logic and respecting the common sense of fairness, the answer should be negative, because an effective jurisdictional protection should be independent of the area in which the right matures, as well as of the subject responsible. For the authors, such questions are of great relevance, for they involve ethical aspects against which answers cannot be unique and definitive. However, for the doctrinaires, in relief is the legitimate objective, for every legal operator, of seeking equal treatment as an expression of a justice that sanctions prevarications from whichever direction they come from and in whichever environment they appear; therefore, not granting a right in the name of a superior interest (often not clarified in its content) results in its denial at root⁵⁹.

2.2 The socio-legal evolution and the Right to Dignity

⁵⁸ *“L’illecito endofamiliare: le premesse. Si è venuta in tal modo elaborando una figura di derivazione dottrinale e giurisprudenziale dall’assai sintomatico nome, l’illecito endofamiliare. Questo è considerato una sottocategoria dell’illecito ordinario di matrice aquiliana che affonda le proprie origini definitorie e la propria ragion d’essere nella peculiare circostanza che la responsabilità extracontrattuale trova qui la sua genesi all’interno delle mura domestiche, ove “vittima” e “carnefice” fanno parte del medesimo nucleo (non necessariamente fondato sul matrimonio) ed ove al fallimento del rapporto non di rado si accompagna l’offesa ai valori irrinunciabili del singolo; ossia a quei valori, quali integrità morale e fisica della persona, che preesistono ad ogni formazione sociale. Si tratta dei beni che vano sempre e comunque salvaguardati nella loro interezza, ricevendo essi protezione dalla Carta dei diritti prima ed a prescindere dall’inserimento dell’individuo in qualsiasi contesto sociale”.* Giuseppe Cassano, Giacomo Oberto, (et al.), ob. cit., p. 4 e ss.

⁵⁹ *“Il doveroso obbiettivo, per ogni operatore giuridico, della ricerca del trattamento paritario come espressione di una giustizia che sanziona le prevaricazioni da qualunque direzione provengano ed in qualsiasi ambiente si manifestino; quindi, che non concedersi un diritto in nome di un c. d. interesse superiore (spesso non chiarito nei suoi contenuti) si risolve nella sue negazione alla radice”.* Giuseppe Cassano, Giacomo Oberto, (et al.) - *La famiglia in crisi: invalidità, separazione e divorzio dopo le riforme, come si quantificano i profili patrimoniali, quali le conseguenze personali e le relative tutele*, Milano, Wolters Kluwer: CEDAM, 2016, p. 1 e ss.

Gomes Canotilho outlines an important aspect about dignity when he states that there is an express recognition of the dignity of the human person as the essential core of the Portuguese Republic⁶⁰.

Thus, the consecration of the principle of human dignity, which has as one of its pillars the protection of individual freedom, "refers to the existential autonomy, seen as the possibility that each individual has to build his or her life project"⁶¹.

Based on this idea, and on the fact that marital relations enjoy the possibility of greater freedom of choice, for Brazilian doctrine, the option for the family structure that best suits each individual is materialized, thus, the debate about less state regulation of marital relations gains importance and relevance⁶².

Despite the idea that there are sectors of private life that should certainly be beyond the reach and interest of the State, and even though the current concept of freedom has been remodeled and expanded, it is necessary to "recognize the instrumentality of the role played by private autonomy, conditioned to the constitutional dictates "⁶³

For Renata Vilela Multedo, regarding conjugality as an essentially volitive relationship, the family will only exist as long as it represents the will of the spouses, and that is why the State has no restrictions whatsoever on its constitution or dissolution, since "the discovery of the path to the realization of their life project belongs exclusively to the couple"⁶⁴.

In the wake of this understanding, the author defends a critical revision of the conjugal duties, affirming that "it is necessary to question the appropriateness and the limits of state action in the sphere of intimate life of conjugal relationships through the imposition of reciprocal rights and duties"⁶⁵.

The author cites, for example, that the duty to live together in the conjugal home, that is, the duty of cohabitation, "is not compatible with the spouses'

⁶⁰ J.J. Gomes Canotilho, *Direito Constitucional e a Teoria da Constituição*, 7ª Ed, Coimbra, Editora Almedina, 2003, p. 250.

⁶¹ Renata Vilela Multedo - *Liberdade e família – Limites para a intervenção do Estado nas relações conjugais e parentais*, Rio de Janeiro, Editora Processo, 2017, p. 39 e ss.

⁶² *Idem*.

⁶³ *Ibidem*.

⁶⁴ Renata Vilela Multedo, *Liberdade e família – Limites para a intervenção do Estado nas relações conjugais e parentais*, ob. cit., p. 196 e ss.

⁶⁵ Renata Vilela Multedo, *Liberdade e família – Limites para a intervenção do Estado nas relações conjugais e parentais*, ob. cit., p. 227.

freedom to determine the possibility and convenience of living in separate homes"⁶⁶.

The present work tends to disagree diametrically with this statement. This in view of the general part of the Portuguese Civil Code, in which private autonomy is not considered absolute; besides the issues related to social security "materialized in the protection of the weakest "⁶⁷. Finally, the fact that the duty of cohabitation can also be understood as cohabitation according to what Jorge Duarte Pinheiro prescribes, for whom "this idea of cohabitation underlies article 1673: the adoption of a family residence is imposed as a rule so that the couple's daily life may take place there"⁶⁸.

In the Portuguese legal system, Family Law "strives for balance between integration and independence" and is governed by the logic of protection that permeates the entire system⁶⁹.

In any event, there is the understanding that the notion of civil liability, before referring to damages and reparations, "should be understood as a mechanism for the protection of the physical, moral and psychological integrity of human beings"⁷⁰. The present work fully agrees with this idea, because each concrete case will demand a careful observation of the limits for the application of civil liability.

2.3 The Judgment of the Superior Court of Justice, dated 12/5/2016 (Proc. 25/12.3TVLSB.L1.S1)

The Superior Court of Justice Ruling of May 12, 2016, rapporteur Tomé Gomes – 2.325/12.3TVLSB.L1.S1⁷¹, revolves around the extent to which, at the time of divorce, one of the spouses may seek compensation for non-material damages suffered throughout the marriage.

⁶⁶ Idem, p. 231.

⁶⁷ Heinrich Ewald Hörster, *A Parte Geral do Código Civil Português, Teoria Geral Do Direito Civil*, Coimbra, Editora Almedina, 2007, p. 104.

⁶⁸ Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo*, ob. cit., p. 380.

⁶⁹ Idem, p. 60.

⁷⁰ Bruna Barbie Riwaquim, *Universos paralelos e danos de amor: balizas para a responsabilidade civil no âmbito das relações simultâneas conjugais*, ob. cit., p. 82.

⁷¹ Acórdão Acórdão do STJ de 12 de maio de 2016 Relator Tomé Gomes - 2325/12.3TVLSB. L1.S1, in <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/c56c09e13e9d3e7e80257fb1004ef1d5?OpenDocument>>, Acesso em: 19/7/2019.

The couple remained married for fifteen years. As already explained, the male spouse left the house, his wife and two daughters, but returned home from time to time as he had other intermittent simultaneous relationships.

The defendant's behavior caused the plaintiff permanent sadness, a loss of *joie de vivre*, which culminated in a depressive state, and for the damages described, she sought compensation.

The Court of Appeal understood that it would not be the case of indemnity, since, at the time, the Plaintiff, by not having filed for divorce, would be renouncing the claim for indemnity. The Court of Appeal also held that the damages were not serious and did not deserve the protection of the Law, and although the 1.792° of the Civil Code refers to indemnification for damages suffered by the spouse, the Court considered that the article should be interpreted systematically and, once correctly interpreted, this Law does not give rise to indemnification, except for damages to rights previously acquired by people, such as personality rights.

The Supreme Court of Justice again accepted the plaintiff's claim for compensation, but awarded the amount of € 15,000.00 (fifteen thousand Euros). In the understanding of the Supreme Court of Justice, the damage with the greatest impact had occurred at the very beginning, therefore, at some point, she would be expecting the relationship to return to what it was, i.e., there was a break in the plaintiff's expectation of life together. The Supreme Court also held that article 1.792 of the Civil Code allows for compensation and makes no distinction as to the type of damage.

The ruling was that the duties of fidelity and cohabitation were violated, but at the same time personality rights, the right to personal dignity and the right to health were also violated.

For the Court, the mere invocation of the general right of personality is not enough, but it must be clearly specified which rights have actually been violated.

As for the plaintiff's health, it was proven that the lady suffered damage to her health; however, it is not enough for there to be damage of a certain type, since one cannot automatically conclude that there has been a violation of the right to health, or that an illicit act has been committed, because, after all, every person is liable to simply fall ill. To configure an illicit act of violation of the right to health, it would have to exist, for example (or at least be proven), the incidence of domestic violence, since the behavior itself is typically capable of causing damage to the right to health.

In any case, there was the understanding that there could be a claim for any damages in a proper action, other than in the divorce action.

After 2008, with the emergence of art. 1.792 of the Civil Code, paragraph 1 of the article advocates the right to compensation. The text of the law expressly admits that there can be a claim for compensation for damages suffered from the dissolution of the marriage and also for damages suffered from the violation of rights during the marriage.

Regarding the question of what damages are, whether they are recoverable damages that affect personality rights or also damages caused by the violation of marital duties, in the exposition of the class in the Jurisprudence course given by Professor Doctor Francisco Manuel de Brito Pereira Coelho, he affirmed that only damages resulting from the violation of personality rights are recoverable.

The spirit of the law is that spouses are not unprotected by the fact that they marry. People keep their personality rights intact.

The grammatical element of the expression: "under the general terms of civil liability" deserves attention, i.e. the spouse is entitled to claim contractual or extra-contractual damages. An example is the case of a wife going into depression because her husband decided to change political parties. Here there is damage to health, but there is no tort of violation of the right to health.

2.4 The proof of extra patrimonial damage and the Quantum of Compensation

In the case described in the Judgment, it was not proven that the plaintiff suffered from anxiety and depression, nor that she had suffered an aggravation of the depressive condition. Also not proven were questions about whether attempts at therapeutic and psychotropic stabilization had been made without success, or whether there were side effects from the medication. Nor had it been proven that she suffered from emotional reactions and unpleasant thoughts or that she had major sleep rhythm disturbances corrected on medication. Hence, in questioning the scope of such expressions, the trial court considered that the plaintiff had dispensed with the evidence, since the medical reports presented, which were contested by the defendant, could not be ratified, since the

signatories of these reports, although listed as witnesses, did not appear in court⁷².

The issue could have been solved if judicial expertise, commonly used, for example, in the regulation of parental responsibilities, had been carried out, as Paula Casaleiro explains, that "besides judicial expertise resulting from research developed especially for the case (social reports, international social reports, psychological and psychiatric evaluations, and evaluations of parental skills), the sample includes judicial expertise that results from an investigation or examination carried out in another context, which may have relevance to the case and is requested by the magistrate, as part of his/her freedom to gather information "⁷³.

However, there is a new questioning regarding the validity of the expertise and the possibility of subsuming the understanding of the court to an expertise conducted by a doctor who did not follow the evolution of the plaintiff's condition, due to the singularity of the treatment of psychological illnesses, because, in the words of Paula Casaleiro, "the judicial expertise that is called to tell the 'truth' offers a reading of reality that tends to condition the application of law".⁷⁴

Expert truth is then elevated almost to the dominant position that used to belong only to the Law, since resorting to expert opinions can be understood as a change in the foundations and modes of action of the judicial institution, which is, in a way, conditioned, placing judges "in a position no longer of decision-maker, but above all of 'supervisor', that is, of legitimization of the decisions pre-established by the expert opinions".⁷⁵

Although this process of transformation can be observed, and although the judicial expertise and testimony of the signatories of the reports presented by the plaintiff were absent, the Court, in the review, maintained as proven factuality that the plaintiff's mental state is due to the marital relationship. Thus, the role

⁷² Acórdão do STJ de 12 de maio de 2016 Relator Tomé Gomes - 2325/12.3TVLSB.L1.S1, in <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/c56c09e13e9d3e7e-80257fb1004ef1d5?OpenDocument>, Acesso em: 25/7/2019.

⁷³ Paula Casaleiro, A regulação do exercício da regulação das responsabilidades parentais na ponte entre o Direito e outros saberes, in *Direito de Família – Vária*, Lisboa, Centro de Estudos Judiciários, (2018), p. 63 e ss.

⁷⁴ Paula Casaleiro, A regulação do exercício da regulação das responsabilidades parentais na ponte entre o Direito e outros saberes, ob. cit., p. 63 e ss.

⁷⁵ Paula Casaleiro, A regulação do exercício da regulação das responsabilidades parentais na ponte entre o Direito e outros saberes, ob. cit. p. 63 e ss.

of the judiciary professionals was ratified while taking into account the Court's pre-eminent duty-power in protecting spouses.

The ruling states that "as regards the replacement of the term "depressive" used in point 14 of the sentence by the word "mental", given that this qualifier has a more distinct denotation with the pathological clinical state considered to be unproven, the substitution made in the judgment under appeal is considered correct, given that it is more neutral, being, as it is, substantially connected with point 12 of the proven facts. Moreover, it is a term that is not intended, per se, to characterize A.'s psychological state, but merely to mention, generically, that which is contained in point 1.12 of the facts described above, in order to connect it with the conjugal relationship "⁷⁶.

Thus, it seems to be the case to pay attention to the lessons of Giuseppe Cassano and Giacomo Oberto, since with regard to proof, the key word concerning the existence of the damage itself seems to be concrete. In other words, for the authors, the one who claims to be injured in his inviolable sphere will have to prove that it was effectively due to the illicit behavior of another.

The concreteness of the proof that is sought is that it be endowed with an objective appreciation, verifiable, even presumably, in the field of current reality according to data from common experience, and not left to the simple whim of those who consider themselves to be recipients of the right. The gradations in terms of offering proof of damage may vary depending on the situation that is being examined by the judge⁷⁷.

Having overcome the questions about the proof of damage, it is essential to discuss another extremely relevant issue in the claim that provoked the decision: the quantum to be fixed.

Right from the start, it is important to consider that the reparation, in which the extra patrimonial damages are converted into money, must have a compensatory character, so that the offended party, receiving a certain pecuniary sum, can lessen the effects resulting from the act of which he was a victim.

In this sense, for the present work, the compensation value must be substantial, otherwise it would not be fulfilling its role of adequately compensating the offended party. In light of this reasoning, one must weigh, in

⁷⁶ Acórdão do STJ de 12 de maio de 2016 Relator Tomé Gomes - 2325/12.3TVLSB.L1.S1, in <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/c56c09e13e9d3e7e-80257fb1004ef1d5?OpenDocument>>, Acesso em: 26/7/2019.

⁷⁷ Giuseppe cassano, Giacomo oberto, (et al.), La famiglia in crisi: invalidità, separazione e divorzio dopo le riforme, come si quantificano i profili patrimoniali, quali le conseguenze personali e le relative tutele, Milano, Wolters Kluwer, CEDAM, 2016, p. 49.

the concrete case, all the circumstances that may influence the determination of the compensation amount, taking into consideration that the extra patrimonial damage encompasses, in addition to the internal valorative losses, those externalized in the daily personal, family, professional and social relationship of the offended party.

From another angle, the compensation for extra patrimonial damages must be fixed in such a way that the condemnation effectively and significantly affects the assets of the person who caused the damage.

Although there are no strict parameters to find the real value of the compensation, there is orientation in the sense that the amount should not be so small as to not valorize the extra patrimonial damage, nor so high as to cause undue enrichment to the victim.

In other words, the economic conditions of the parties, the circumstances in which the fact occurred, the degree of the offender's guilt, the intensity of the suffering, providing the victim with satisfaction, with care not to constitute a means of undue enrichment, must be considered when fixing the compensation. In short, the reparation of the extra patrimonial damage is conjugated to the satisfaction of the offended party and should always be applied in accordance with the principle of reasonableness.

Such was the understanding of the Superior Court of Justice. However, on the effective reparation of the damage, the Court decided timidly to reduce the value to the amount of fifteen thousand Euros, since, in the case in question, the plaintiff's right to compensation, via indemnification for extra patrimonial damage, for the defendant's negligence and inattention, embodied in the practices described above, caused not only a permanent state of anxiety and depression, but also unhappiness.

The defendant made a choice when he left the conjugal environment for the first time. However, from the lessons of Pedro Pais de Vasconcelos, we learn that "the original and fundamental dignity of the person and his consequent freedom and autonomy can only be coherently articulated with the person's responsibility for his actions"⁷⁸.

Now, if "the freedom and autonomy of the individual have as their correspondents civil and criminal liability"⁷⁹, and, with regard to the principle of liability, civil liability is restricted to unlawful acts that are free and culpable, it is

⁷⁸ Pedro Pais De Vasconcelos, Teoria Geral do Direito Civil Relatório, Revista da Faculdade de Direito da Universidade de Lisboa, Lisboa, Coimbra Editora, 2000, p. 61.

⁷⁹ Idem.

not, therefore, a matter of mere annoyance, which would depend exclusively on the plaintiff's decision for divorce⁸⁰.

The case in question was apt to give rise to really effective indemnity reparations, in such a way that, regarding the establishment of the effective amount to be paid, the jurisprudence of the Court, at least in the present case, was too stubborn.

CONCLUSION

In analysis of the Judgment of the Supreme Court of Justice, of 12/5/2016, Pro-c.2325/12.3TVLSB.L1.S1, it was understood that the duties of fidelity and cohabitation were violated, but, simultaneously, personality rights, the right to personal dignity and the right to health were also violated.

The text of art. 1.792º of the Civil Code, nº1, expressly establishes the right to indemnity. The rule admits that a claim for compensation is applicable for damages suffered as a result of the dissolution of the marriage and also for damages suffered for the violation of marital rights during the marriage.

The conclusion is that, in relation to the type of damage, damages resulting from violations of the right to personality are recoverable, as well as damages due to the violation of marital duties, as a logical corollary of the duty of protection that covers Family Law.

Specifically, regarding the quantum of compensation, it is not a matter of attributing a pecuniary value to love, but the reparation intended by civil liability must objectively compensate the injured party.

The marital relationship is an essentially volitional behavior. The individual is safeguarded the freedom to love, to be loved or to stop loving. However, if there is a violation of rights and legal goods protected, it is fair to the injured family

⁸⁰ Pelos limites do trabalho, a opção foi no sentido de prescindir maiores explicações acerca da função ressarcitória da indemnização e também acerca das causas justificativas do facto danoso. Entretanto, apenas ad argumentandum tantum, informa que cabe reflexão a respeito do comportamento da autora da ação no sentido de que o consentimento do lesado é uma causa justificativa, que retira ao fato que ocasionou o dano a sua ilicitude nos termos do art. 340º, nº 1 e 2, no qual o "ato lesivo dos direitos de outrem é lícito, desde que o ofendido consinta na lesão", e o nº 3 do art. 340º quanto à presunção de consentimento. (cfr. Mário Júlio De Almeida costa, Direito das Obrigações, 12ª Ed. Revista e Atualizada, Coimbra, Almedina Editora, 2016, p. 576.). Também não se avalia se o comportamento inerte da autora serviu como uma exteriorização do consentimento, uma vez que poderia exercer sua vontade e requerer o divórcio no início. Todavia não se perde de vista que possam existir casos em que os indivíduos proponham ações meramente argentárias de exclusivo interesse patrimonial.

member to seek reparation or compensation for the damage suffered, even if the violation has occurred under the conjugal relationship.

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