

# THE PECULIARITIES OF COMPENSATION FOR NON-PECUNIARY DAMAGE IN UKRAINE AND SOME EUROPEAN COUNTRIES: INTERNATIONAL EXPERIENCE

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## ABSTRACT

*Description: The article is devoted to the study of peculiarities of compensation for non-pecuniary damage in some European countries. Methodology: During the research general scientific and special methods were used. Thus, the analysis and synthesis method as well as the logical method were used to formulate a holistic view on non-pecuniary damage in Ukraine and some other European countries in general, as well as the features of its compensation. The logical-semantic method was used to establish the meaning of the term “non-pecuniary damage”. The comparative method was used when analyzing international and national legislation of Ukraine and some other European countries, as well as scientific categories, definitions and approaches. The system-structural method was applied to determine the elements of non-pecuniary damage. The studied materials are the legislation of Ukraine and some other European countries, as well as the scientific works of Ukrainian and foreign scientists on this issue. The results of the study made it possible to study the peculiarities of non-pecuniary damage in Ukraine and some other European countries, as well as to examine the legislation of the countries under study, which regulates this issue. Practical implications: According to the results of the research, proposals were made to amend and to adjust the relevant legislation of Ukraine. Value/originality: The features of non-pecuniary damage and the specificity of its compensation in Ukraine and some other European countries were studied in order to study the positive foreign experience and to introduce it in the legislation of Ukraine.*

**Keywords:** Non-Pecuniary Damage, Compensation, Amount of Compensation, Upper and Lower Limits, Compensation Table, European Countries, Ukraine.

## INTRODUCTION

The protection of human rights and freedoms is one of the most important tasks of today. For its implementation, a number of international legal acts have been adopted, which recognize the person as the highest social value, and the protection of his (her) rights and freedoms as the main duty of a democratic rule of law.

According to Article 9, Part 5 and Article 14, Part 6 of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, 1976), and Article 5, Part 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation (Law of Ukraine, 2019). Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity (Article 13 of the Convention).

Indeed, a person must be entitled to compensation for non-pecuniary damage caused as a result of the offense, as the attack on such an intangible good as the dignity of the individual necessarily entails violation of the rights and freedoms guaranteed by the Constitution. This means that any offense, including that which did not result in physical harm, is necessarily accompanied by moral suffering of the person, who was the victim of an offense.

## MATERIALS AND METHODS

During the research general scientific and special methods were used. Thus, the analysis and synthesis method as well as the logical method were used to formulate a holistic view on non-pecuniary damage in Ukraine and some other European countries in general, as well as the features of its compensation. The logical-semantic method was used to establish the meaning of the term “*non-pecuniary damage*”. The comparative method was used when analyzing international and national legislation of Ukraine and some other European countries, as well as scientific categories, definitions and approaches. The system-structural method was applied to determine the elements of non-pecuniary damage.

The studied materials are the legislation of Ukraine and some other European countries, as well as the works of Ukrainian and foreign scientists, who have studied the investigated issue.

## RESULTS AND DISCUSSION

These abovementioned principles were also enshrined in Article 55 of the Basic Law of Ukraine, which states that the rights and freedoms of a person and a citizen are protected by a court, that is, any person whose rights have been violated may apply for their protection to a judicial institution, as well as to claim damages, including non-pecuniary damages (Law of Ukraine, 2019).

Pursuant to paragraph 3 of the decision of the plenum of the Supreme Court of Ukraine no. 4 of March 31 (Law of Ukraine, 1995), “*On case-law in cases of compensation for non-pecuniary damage*” (hereinafter–Decision of the plenum no. 4) by moral harm one means the loss of non-pecuniary nature as a result of moral or physical suffering or other negative phenomena caused to an individual or legal entity by unlawful acts or omissions of others.

The definition of non-pecuniary damage is also enshrined in Article 23, Part 2 of the Civil Code of Ukraine. In accordance with the provisions of this article non-pecuniary damage is:

1. Physical pain and suffering, which an individual is experiencing in relation to the injury or other damage to health;
2. Mental suffering, which an individual is experiencing in relation to the unlawful behavior towards himself (herself), his (her) family or close relatives;

3. Mental suffering, which an individual is experiencing in relation to the destruction or damage to his property;
4. Humiliation or degradation of an individual, as well as the damage to business reputation of a natural or legal person.

Paragraph 3 of the Decision of the plenum no. 4 additionally states that non-pecuniary damage can also be manifested: in mental suffering in relation to personal injury, in violation of property rights (including intellectual), the rights granted to consumers, other civil rights, in relation to illegal arrest or detention, in violation of normal life ties due to the inability to continue an active social life, in violation of relations with others, or in case of other negative consequences.

Non-pecuniary damage is often more tangible than material one and therefore causes more acute suffering to the victim. It cannot be fully reimbursed as such, but it must be compensated somehow. In the absence of a better method to overcome the mental discomfort of the victim, monetary compensation becomes this method.

Compensation for non-pecuniary damage is possible if there are all general conditions of liability for the damage. In particular, the following shall be ascertained: the presence of such damage, the wrongfulness of the act (omission) of the perpetrator, the existence of a causal link between the damage caused and the wrongful act of the perpetrator and the fault of the latter in causing such damage. The court must determine whether the fact of assignment of mental or physical suffering to the plaintiff is confirmed, under which circumstances or by which acts (omission) it was inflicted, in which sum of money or in which material form does the plaintiff evaluate the damage caused and why therefore, as well as other circumstances relevant to the resolution of the dispute (Decision of the plenum no. 4).

Experience shows that in cases related to compensation of non-pecuniary damage, many claimants tend to exaggerate their mental and physical suffering as a result of a violation of their legal rights or interests. However, the courts also permit unjustified underestimation of the amount of compensation claimed by the victim. It is primarily due to the fact that when determining the monetary equivalent of mental and /or physical suffering, the court has to consider a number of factors that are solely psychological by their nature. Among them are the depth and duration of mental suffering caused, attacks on a person's honor or reputation, damage to business reputation, etc. (Shevtsov & Tymoshenko, 2011).

The Civil Code of Ukraine in this regard states that the amount of monetary compensation for non-pecuniary damage is determined by the court depending on the nature of the offense, the depth of physical and mental suffering, the deterioration of the victim's abilities or deprivation of his (her) ability to realize them, the fault of the person who caused non-pecuniary damage, if the fault is grounds for compensation, as well as other relevant circumstances. In determining the amount of compensation, the requirements of reasonableness and fairness are taken into account.

Pursuant to Article 9 of the Decision of the plenum no. 4, the amount of compensation for non-pecuniary damage is determined by the court depending on the nature and extent of the suffering (physical, mental, etc.), the nature of non-pecuniary damage (its duration, possibility of the resumption, etc.) and taking into account other circumstances. In particular, the state of health of the victim, the severity of the forced changes in his (her) life and industrial relations, the extent of damage to prestige, business reputation, the time and efforts required to restore the

previous condition, etc. In doing so, the court must proceed from the principles of reasonableness, prudence and fairness.

Compensation for non-pecuniary damage in German law until recently had been regulated by § 847 of the German Civil Code, and the doctrine is known as “*Schmerzensgeld*”– “*money for suffering*” or “*monetary compensation for suffering*”. However, due to the fact that this term had been developed by German legal doctrine and jurisprudence, and it is absent in the text of the Civil Code of Germany, the German Supreme Court usually refers to “*so-called compensation for suffering*” (Lorenz, 1981). Directly in the text of § 847 German Civil Code it was about paying monetary compensation for damage, which is “*not material one*”, and this compensation was provided for by this norm only for cases when such non-property damage occurred as a result of an unlawful act causing bodily harm or other harm to health or unlawfully restricting the freedom of the victim.

Currently, the issue of non-pecuniary damage in Germany is regulated by Article 823 of the Civil Code of Germany. Thus, according to the provisions of this article a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this (Civil Code of Germany).

With regard to compensation for non-pecuniary damage, according to clause 1, § 253 of the Civil Code of Germany, it is subject to compensation only in cases expressly provided by law. Such cases are: bodily harm, harm to health, liberty, and sexual self-determination. It does not matter whether such liability is based on the requirements of the law, or whether it follows from the provisions of the contract. In order to receive compensation, it is not necessary to prove the offender’s guilt. It is enough the requirements of strict liability or contractual liability to be fulfilled (i.e. liability that arises regardless of guilt).

The procedure for compensation of damages is very similar to that one, stipulated by the legislation of Ukraine. Thus, compensation for suffering should be fair, taking into account the general principle of equalization of benefits; the victim must be recovered to pre-invasion conditions, but he should not get the benefit as a result of compensation to him such harm. In the process of establishing the size of fair compensation, judicial practice takes into account such indicators: physical suffering of the victim (special sensitivity to pain, type of bodily injury, duration of treatment and consequences), mental suffering (consequences, distortions of appearance, age, possibility of continuing previous work, degree of awareness of the difficulty of one's position, unrest for the fate of the family, the possibility of preserving the individual qualities of the individual (talents, inclinations), special mental vulnerability, propensity to experiences), the degree of the fault of the causer of harm, his property status, etc. In calculating the amount of compensation for moral harm, the amounts of compensation that were previously intended by courts in similar cases will also be taken into account (Noshadha, 2019).

All those circumstances that disrupt the accustomed lifestyle of the victim may be the subject of a claim for compensation for non-pecuniary damage. The victim has the right to compensation of not only monetary but also non-pecuniary losses. Therefore, both material and non-pecuniary damages are liable to compensation when they are the direct and immediate consequence of a destructive act. Courts in France usually award a substantial amount of compensation for non-pecuniary damage, but divide it into categories according to the type of the damage caused. There are quite a few subtypes of non-pecuniary damage in French civil law. They are: suffering from physical pain, inability to lead an accustomed lifestyle, temporary and

permanent mental disorder, aesthetic damage, loss of job function, deprivation of a suitable job (service) or ability to run a household, loss of life expectancy, recoverable and irreversible damage to mental health, coma, vegetative disorders, brain lesions, sexual dysfunctions, etc. (Panchenko, 2019).

To calculate the amount of non-pecuniary damage in France, a special compensation table is used—“*Nomenclature Dintilhac*”, created in 2005 by a task force led by the President of the Second Civil Division of the Court of Cassation. This Table 1 Nomenclature draws up a list of all recoverable damages and establishes a strict method of valuation (Lousson, 2007).

<p style="text-align: center;"><b>Table 1</b> <b>NOMENCLATURE DINTILHAC</b></p>				
<p style="text-align: center;"><b>Non Pecuniary Losses</b></p>				
Temporary Physical Impairment or Disfigurement	Pain and Suffering	Temporary Disability Total/Partial	Other Expenses	Temporary Professional Income Loss
Physical impairment or disfigurement before the “ <i>Consolidation</i> ” date-Rated from 1 to 7.	Physical and psychological suffering -Rated from 1 to 7 (mild to severe).	It compensates the loss in quality of life until the consolidation date (physical and psychological disability, loss of autonomy, immobilization, impact of the injuries on the family life, social life, personal activities)  It can be total (hospitalization) or partial.	Any other expense in relation to the accident that can be justified. For ex :  Assistance from a third person or a family member to help the claimant to accomplish acts of the everyday life	Loss of income resulting from the impact of the injury on the professional life (example absence from work for several days/weeks—therapeutic part-time works).
Can be determined by a medical expert.  Can also be proven with evidence:  Photos of the claimant after the accident – Medical certificates	The rating is determined by a medical expert based on the nature of the injuries, the duration and intensity of the suffering, the duration and importance of the treatments needed.	The period of total and/or partial temporary disability is determined by the medical expert.	Determined by the medical expert (number of hours/day or week for how many days or weeks)	Medical expert’s opinion for the duration of the work stoppage that is attributable to the accident.  Proof of income before the accident and after the accident until the date of “ <i>consolidation</i> ”

However, the compensation table is not compulsory for the French courts. Since it is impossible to determine the extent of non-pecuniary damage, it is for the judge to decide for himself (herself) what amount is adequate to compensate the victim (satisfactory compensation). However, this amount of compensation may be modified by the decision of the Court of Appeal. The judge may not follow the statutory rules when assessing the damage. The judge should not award compensation for damages, for which the victim did not bring a claim, and is not obliged to justify in detail the assessment of damages when awarding a lump sum.

However, it should be noted that due to the absence of well-established framework, in which judges are required to set a certain sum of money, it is problematic for the latter to determine the amount of compensation. This situation creates fertile soil for making subjective decisions and as a result, the courts award double or one third less than claimed by the victim. In order to avoid this situation, lower and upper limits of compensation for non-pecuniary damage are set in most of the leading European countries.

Let's consider, for example, the statutory compensation for non-pecuniary damage for illegal arrest and detention in some European countries. In Finland, for example, the State Treasury compensates innocent persons who have been deprived of their liberty by the authorities. In 2010, the amount of compensation for unlawful detention was between € 100 and € 200 per day and about € 150 if imprisonment lasted more than two weeks.

Compensation for illegal arrest and conviction in Lithuania is paid under a separate budgetary compensation program coordinated by the Ministry of Justice. Compensation can be paid both by the court order and extra judicially, but the amount of compensation for property damage may not exceed 5,000 liters (1 448 euros), for non-pecuniary damage-10 thousand years (2 896 euros).

In Austria, the minimum amount of compensation for non-pecuniary damage is limited to EUR 20 and a maximum compensation to EUR 50 per day.

Article 447 of the Code of Criminal Procedure of Norway provides for compensation for non-pecuniary damage caused by arrest or detention in the case of acquittal, or if the case has not been brought to trial. These provisions also include fixed rates whereby a person is not compensated if the term of imprisonment is less than four hours. For the first two days of detention, EUR 183 (1,500 Norwegian kroner) are paid for each day. If the accused person is transferred to prison, the compensation for each subsequent day is 400 Norwegian kroner (EUR 49). If the person is in complete isolation, then the amount of compensation should be increased by 25% of the amount calculated.

Illegal arrest, unjustified detention are also the grounds for compensation for material and non-pecuniary damage in Montenegro. The court determines the amount of compensation at its discretion, but the legal position is that the amount of compensation for non-pecuniary damage caused by the wrongful imprisonment (arrest) must be paid monthly from EUR 3,000 to 4,000, depending on the circumstances of the case.

The means of compensation for damage caused by wrongful arrest are provided in a separate budget line. The average monthly payment is EUR 3000–4000, but the final amount will depend on the gravity and the type of crime the person was accused of, his (her) previous history (whether ever convicted or not), during which time he (she) was arrested, and whether his (her) case was publicized in the mass media (European Commission for Justice, 2014).

In our opinion, the so-called Compensation Scheme, which is valid in the UK, is very well-designed one. It is being applied by the Commission for Compensation for Damage Caused

by Crime. The compensation scheme came into force on August 1, 1964 and since then has been continuously modified. The scheme compensates for physical or mental harm, caused by violent crimes, which has led to a decrease in life activity: reduced work capacity, learning abilities, breaking social ties, mental disorders and other (including biological) injuries. The lower limit of compensation is 1 thousand pounds. Some types of damage are divided into 25 groups, with a single amount of compensation in each group (Erdelevskiy, 2004) (Table 2).

<b>Table 2 MENTAL HARM RATES</b>		
Severity of Mental Disorder	Damage Group	The Amount of Compensation, Pounds Sterling
moderate—lasting from 6 to 16 weeks	1	1,000
serious—lasting from 16 to 26 weeks	9	4,000
severe—lasting over 26 weeks but not permanent	12	7,500
very severe—a permanent loss of vital activity (except for the constant manifestation of exclusively physical symptoms, which is evaluated by group 12)	17	20,00

The principle of application of the Tariff Scheme is to consider each application based on the factual circumstances of a particular case. Causing personal injury is considered criminal if it is directly related to the behavior constituting the crime, which requires evidence of the intention or gross negligence of the perpetrator.

If, for example, the victim is threatened with physical harm or illegal detention, or feels fears for a beloved one or some other kind of fear in relation to a criminal act, and this leads to mental harm, the victim acquires the right to compensation under the scheme only if mental harm is directly related to the crime. Mental harm is recognized as such if, from the standpoint of a reasonable person, who knows all the circumstances, the occasion that caused the mental harm is the main, though perhaps not the only, cause of this harm. The condition of direct causation is considered to be fulfilled in respect of anyone who has witnessed the violent infliction of injury or death (Erdelevskiy, 2004).

## CONCLUSION

Therefore, in most of the countries discussed above, lower and upper limits of compensation for non-pecuniary damage are set at the legislative level. Most often, the amount of compensation depends on the gravity and the type of crime the person was accused of, the person's previous history (whether he (she) was ever convicted or not), during which time his (her) arrest and criminal proceedings against him (her) was publicized in the mass media, etc.

If we transfer this experience of European countries to Ukraine, then some domestic scientists are the supporters of this practice, although the priority for the others is the amount of

damage caused. In our view, the introduction of the practice of determining the amount of non-pecuniary damage within certain limits is more than appropriate for Ukraine. This will help to reduce the number of cases, in which courts award absolutely different amounts of compensation when considering similar cases. Secondly, it will release the victim from the need to state the amount of compensation for non-pecuniary damage in the claim, based solely on his (her) own assessment of the physical or mental suffering. Thirdly, it will significantly reduce the time of consideration of the case, as there will be no need to the study the practice of foreign courts or the European Court of Human Rights to find out what amount of compensation should be given under the circumstances.

Finally, it should be noted that the problem of compensation for non-pecuniary damage, and in particular the determination of its amount, has not yet been resolved. At the moment, there is no single legal act in Ukraine that could be used to resolve this issue. That's why it is more than appropriate to borrow foreign experience in the current situation.

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