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КОМПЕНСАЦІЯ МОРАЛЬНОЇ ШКОДИ ЗА ПОРУШЕННЯ ПРИВАТНОПРАВОВИХ ЗОБОВ'ЯЗАНЬ

Анотація. *Незважаючи на певне вдосконалення судової практики з розгляду відповідної категорії справ, наразі залишається надзвичайно актуальним завдання виробити ефективні підходи до визначення справедливого обсягу компенсацій, що присуджуються учасникам приватноправових відносин за завдану їм моральну шкоду. Метою статті є аналіз правового аспекту у питанні компенсації моральної шкоди. Провідним методом дослідження був аналіз, що дозволив детально розглянути визначену проблему та зробити ряд висновків. Були охарактеризовані різні теоретичні і практичні підходи до проблеми компенсації моральної шкоди; розглянуті думки вітчизняних дослідників з цього питання. З аналізу наведених моделей підходів компенсації моральної шкоди, на нашу думку, у договірних відносинах є найбільш вдалим та таким, що відповідає принципу добросовісності, справедливості та розумності, є перший описаний підхід. Адже саме співвідношення завданої шкоди та розміру стягнення на морально вивіреній основі гарантуватиме додержання юридичної рівності сторін договірних відносин. Розглянуті аспекти компенсації моральної шкоди за договорами свідчать про велику схожість законодавчих підходів України та підходів іноземних законодавців, а також проблем, що виникають при застосуванні норм цього інституту. Законодавче закріплення компенсації (відшкодування) моральної шкоди лише за її завдання життю або здоров'ю учасників договірних правовідносин не забезпечує охорону їх немайнових прав. Цього можна уникнути внесенням відповідних змін до цивільного законодавства України, згідно з якими правовим наслідком порушення прав, в тому числі й споживачів послуг, що поставило під загрозу їх життя чи здоров'я, буде відшкодування матеріальної і компенсація моральної шкоди.*

Ключові слова: законодавство України, відшкодування, немайнові втрати, цивільне право, невиконання договору.

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COMPENSATION FOR NON-PECUNIARY DAMAGE FOR BREACH OF PRIVATE OBLIGATIONS

Abstract. *In spite of certain refinement of case law in dealing with the relevant category of cases, the task now remains to work out effective approaches to determining the fair amount of compensation awarded to participants in private relations for the non-pecuniary damage they suffered. The purpose of the article is to analyse the legal aspect of non-pecuniary damage. The leading method of research was analysis, which allowed to examine the identified problem in detail and draw a number of conclusions. Various theoretical and practical approaches to the problem of non-pecuniary damage were characterized; the views of domestic researchers on this issue are considered. From the analysis of the presented models of approaches to compensation for non-pecuniary damage, in our opinion, in contractual relations, the first described approach is the most successful and consistent with the principle of good faith, justice and reasonableness. Indeed, it is the correlation of the damage inflicted and the amount of recovery on a morally verified basis that will guarantee the legal equality of the parties to the contractual relations. The considered aspects of compensation for non-pecuniary damage under the treaties testify to the great similarity between the legislative approaches of Ukraine and those of foreign legislators, including the issues that arise upon applying the norms of this institution. Legislative consolidation of compensation (recovery) for non-pecuniary damage for the sole purpose of causing the life or health of the parties to a contractual relationship does not ensure the protection of their non-material rights. This can be avoided by introducing appropriate amendments to the civil legislation of Ukraine, according to which the legal consequence of violation of rights, including the consumers of services, which endangered their lives or health, will be repair for material damage and compensation for non-pecuniary damage.*

Keywords: Ukrainian legislation, compensation, non-pecuniary loss, civil law, non-performance of contract.

INTRODUCTION

The issue of non-pecuniary damage has always attracted the attention of not only lawyers [1] but also economists, sociologists, and others. After all, the intangible (ideal) content of non-pecuniary damage and the associated lack of a natural equivalent between the non-material loss of the victim and their material compensation create substantial difficulties in determining the specific amounts of the victim's proper

compensation [2]. Therefore, in spite of some improvement in the case law on the consideration of the relevant category of cases, it remains extremely urgent to develop effective approaches to determining the fair amount of compensation awarded to participants of private relations for the non-pecuniary damage they suffered.

In general, non-pecuniary damage means loss of non-material nature as a result of moral or physical suffering or other negative effects caused to an individual or legal entity by unlawful acts or inaction of other persons. The same position is expressed by R. O. Stefanchuk. Thus, according to the scientist, non-pecuniary damage is not the physical pain and suffering itself, but losses of non-material nature caused by them. In a contractual relationship, non-material losses do not arise through any act or inaction, but as a result of non-performance or improper performance of the contract; for a natural person such losses are accompanied by suffering, humiliation of honour, dignity, business reputation, and for a legal entity – only humiliation of business reputation [3].

In accordance with Art. 23 of the Civil Code of Ukraine[1], non-pecuniary damage lies, in particular: a) in the mental suffering experienced by the individual due to unlawful behaviour regarding them, their family members or their close relatives; b) in the mental suffering experienced by the individual due to destruction or damage of their property; c) in the degradation of honour, dignity and business reputation of an individual or legal entity. However, as noted in the legal literature, the provision of Art. 23 of the Civil Code of Ukraine[2] can be considered a legislative interpretation of the concept of non-pecuniary damage only with a caveat: it considers the specific features of non-pecuniary damage in terms of its origin and does not provide a comprehensive idea of the content of this concept [4].

That is, the definition of non-pecuniary damages that is consolidated in the Civil Code of Ukraine can hardly be called a universal concept that can be applied to any contractual obligations. Thus, for example, the collapse of the terms and conditions of the contract, including the right to compensation of non-pecuniary damage, is a negative reflection of development of civil relations, and cannot be considered as its normal stage. In the Civil Code of Ukraine, the legislator defines breach of obligations as a generic category by indicating its types, without defining its essence[3].

1. MATERIALS AND METHODS

Aristotelian and general scientific methods of scientific cognition, such as analysis, synthesis, concrete definition, etc. were applied in the research. An analysis of the legislation and case law suggested diversity of opinions in the literature and in the practice with regard to compensation for non-pecuniary damage in the events of

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] *Ibidem*, 2003.

[3] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

breach of obligations on tourist services rendering. Considering the different theoretical and practical approaches to the issue of non-pecuniary damage compensation, attention was paid to the idiosyncrasy of the solution of this issue in the countries of the Romano-German system of law.

Analysing the current legislation of Ukraine, it was noted that the right to compensation for non-pecuniary damages for non-performance or improper performance of contractual obligations, including in the field of services, is provided for in the Law of Ukraine "On Consumer Protection"[1]. An analysis of the current legislation governing consumer involvement and case law research has led to the conclusion that there are no clear and unambiguous provisions regarding compensation of non-pecuniary damage to consumers upon violation of their rights.

Using the synthesis method, we identified three main approaches to compensation for non-pecuniary damage in Ukrainian private law doctrine. The first focuses on the moral and legal evaluation of the offense and certain foreseeable consequences in the non-material field of the victim. Upon using such an approach to the issue of non-pecuniary damage, one should first and foremost determine the fundamental moral priorities, in particular, the public's confidence in judicial decisions and their ability to formulate a sustainable practice in resolving such a category of cases. This should also factor in the victim's fault, which is a key component in the fair amount of non-pecuniary damage. In addition, the cause-and-effect relationship between the offense committed and the expected loss in the non-material field should be optimally coordinated. Thus, the most morally validated understanding of the specifics of this function in the obligation to compensate for non-pecuniary damages will most fully reflect the non-proprietary nature of non-material damage.

In the second approach, the focus is on maximizing the specific non-pecuniary damage inflicted and, accordingly, eliminating specific manifestations. Such approach is implemented thanks to the compensatory mechanisms existing in tort liability for pecuniary damage. The third approach is to achieve fairness in the proportion of compensation awarded for violations of personal non-material goods of various kinds, including to determine certain limits of expected compensation

2. RESULTS AND DISCUSSION

2.1 Analysis of approaches to compensation of non-pecuniary (non-material) damage in national legislation

Upon referring to offenses in the field of private law, we shall note that they constitute legal facts that create legal relations between the subjects (clause 4 of Part 2 of Article 11 of the Civil Code of Ukraine[2]) and form certain requirements of the latter

[1] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[2] Civil Code of Ukraine, op. cit.

to the delinquent for damages caused by it in its unlawful acts. It is known that, for a long time, commonplace was the general rule, according to which, in the event of violation of the terms and conditions of civil contracts, only material damage was subject to compensation. Non-pecuniary damage was only possible in the event of tort. For example, S. E. Sirotenko states that moral damages can only be compensated in monetary or other tangible forms in the form of non-contractual obligations [5]. It is also known that courts have repeatedly tried to equate compensation for non-pecuniary damage caused to consumers by monetary compensation with a minimum wage or by equalizing compensation for non-pecuniary damage or improperly rendered service. The specified case law has not received adequate support in the doctrine of law.

Thus, for instance, M. M. Hudyma fairly states in his study that such judiciary practice is wrong, because determination of the amount of compensation for non-pecuniary damage should not in any way follow from the price of the contract for the provision of tourist services, and the amount awarded for compensation should reflect the real compensation of the consumer's psychological experiences and be determined by the tourist's age, social and financial status in connection with the cost of the service consumed, the availability of alternative services of the same consumer value, their accessibility. Upon determining the amount of non-pecuniary damage, the court should not set the amount depending on the material damage, cost of services, etc., and should be based on the nature and amount of moral and physical suffering caused to the consumer in each case [6].

At the same time Part 1, 4, 5 of Art. 23 of the Civil Code of Ukraine[1] stipulate that a person shall have the right to compensation for non-pecuniary damage inflicted as a result of violation of their rights; non-pecuniary damage shall be compensated irrespective of the pecuniary damage to be recovered and disregarding the amount of such compensation; non-pecuniary damage shall be compensated for on a one-time basis, unless otherwise stipulated by contract or law. Such legislative approach to the "compensation" of non-pecuniary damage has repeatedly been criticized in the doctrine of law. However, in our opinion, such a mechanism is correct, because the legislator allows the subjects of legal relations to regulate the procedure for compensation for non-pecuniary (non-material) damage in the contract at their own discretion. An example may be the court case No. 641/8022/17 [7].

Thus, the Komintern District Court of Kharkiv considered the case of PERSON_1 versus the Kharkivski Teplovi Merezhi Utility Enterprise on protection of consumer rights and compensation for non-pecuniary damage. In support of their claims, the plaintiff referred to the fact that they reside in the apartment at ADDRESS_1 and are consumers of the services rendered by the Kharkivski Teplovi Merezhi Utility Enter-

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

prise. Plaintiffs pay for the services rendered in a timely manner, moreover, they have overpayments as of May 1, 2017. However, from May 18 to October 20, 2017 (with the exception of two days only, August 22 and 29, 2017), the defendant breached its obligations and the terms and conditions of the Model Agreement on the Provision of Centralized Heating, Cold and Hot Water Supply and Drainage as approved by the Resolution of the Cabinet of Ministers of Ukraine No. 630 dated July 21, 2005 did not provide hot water services. For five months, the plaintiff was forced to provide themselves with hot water. The plaintiff stated that they were an elderly person (90 years old) and underwent inpatient treatment at the municipal institution "Kharkiv City Clinical Hospital No. 2". On discharge from the hospital on May 19, they were strictly forbidden to lift any objects weighing over 2 kg, especially in the postoperative period. [7].

Referring to these circumstances, including the requirements of the current civil legislation and Art. 1, 4 of the Law of Ukraine "On Consumer Protection"[1], the plaintiffs asked to collect from the Kharkivski Teplovi Merezhi Utility Enterprise 10,000 UAH in their favour for non-pecuniary damage. The defendant denied the claims, citing their groundlessness and lack of guilt of the Kharkivski Teplovi Merezhi Utility Enterprise in causing the plaintiff's non-pecuniary damage, since the hot water service was not provided from May 18 to October 20, 2017 (except for two days 22 and 29 August 2017) due to repair work. Having heard the arguments of the parties, the court concluded that the relationship between the economic entity whose subject of activity is the provision of housing and communal services (contractor) and the individual and legal entity (consumer) receiving or intending to receive services of centralized heating, supply of cold and hot water and drainage are regulated by the Resolution of the Cabinet of Ministers of Ukraine No. 630 dated 21.07.2005 "On Approval of the Rules for the Provision of District Heating, Cold and Hot Water Supply and Drainage Supplies and the Model Contract for the Provision of District Heating, Cold and Hot Water Supply and Drainage Services"[2]. The plaintiffs are registered and permanently reside at: ADDRESS_1 and are the consumers of the services provided by the defendant of the Kharkivski Teplovi Merezhi Utility Enterprise. The terms and conditions of cl. 18 of The Model Agreement establish an obligation for the contractor to compensate for the damage caused to the property and/or premises of the consumer and/or their family members, damage caused to their life or health as a result of improper provision or failure to provide services, including non-pecuniary damage in the manner and the amounts to be determined in accordance with the law and this agreement.

[1] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[2] Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Rules for the Provision of District Heating, Cold and Hot Water Supply and Drainage Supplies and the Model Contract for the Provision of District Heating, Cold and Hot Water Supply and Drainage Services". (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/630-2005-%D0%BF.

In view of the above, the court found that the defendant had not been provided with evidence of not providing hot water services to the plaintiff's place of residence and decided to satisfy the claim in part, in particular, to recover from the Kharkivski Teplovi Merezhi Utility Enterprise a compensation for non-pecuniary damage in favor of PERSON_2 in the amount of UAH 1,000 (one thousand). Other claims are subject to refusal [7].

Scientific literature often offers certain models of determining the compensation for non-pecuniary damage. Thus, P. Rabinovich and O. Hryshchuk propose to determine the non-pecuniary damage by factoring in the following: 1) proceeding from the joint evaluation of the facts of the case; 2) proceeding from the victim's subjective evaluation of the factual circumstances of the case, including the depth and duration of the psychological suffering that emerged through the unlawful acts; 3) a comprehensive approach that combines the previous two [8]. According to V. D. Prymak, the determining criterion for constructing and classifying various models of fair amount of compensatory penalties applicable in the event of violation of the personal non-material rights of the subjects of civil law, are: 1) a certain vision of the essence of non-pecuniary damage and the purpose of its compensation; 2) the focus of the proposed concept on the predominant implementation of certain functions of civil liability; 3) a particular attitude to the meaning and substantive interpretation of the individual terms of responsibility (primarily guilt and causation); 4) correlation of the proposed approaches with the legislative criteria for specifying the amount of compensation for non-material expenses; 5) determining the role of judicial discretion and the conditional legal weight of the various types of evidence that may be presented by the parties to a dispute over compensation of non-pecuniary damage [9].

Case law indicates that upon considering cases in a court of first instance or in the court of appeal, a violation of contractual obligations to render tourist services constitutes the basis for compensation for non-pecuniary damage. With that, non-pecuniary damage is reflected in the suffering caused by the non-provision or improper provision of services and the necessity of appealing to court to protect their rights. At the same time, the courts of cassation adhere to the approach set out in paragraph 2 of the Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of non-pecuniary damage" dated March 31, 1995, in the wording dated February 27, 2009[1], pursuant to which courts are recommended to consider such disputes only when the right to such compensation is expressly provided for in the Constitution of Ukraine[2] or enshrined in legislation establishing liability for non-pecuniary damage. Accordingly, the courts conclude that in the events where compensation for non-pecuniary damage is not stipulated by the contract concluded by the parties and there is

[1] Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of non-pecuniary damage". (1995, March). Retrieved from https://zakon.rada.gov.ua/laws/show/v0004700-95.

[2] Constitution of Ukraine. (1996). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

no law stipulating it in the legal relations between the parties, then the claim for non-pecuniary damage should be denied. The contractual relations arising between the parties may not be subject to the grounds of compensation stipulated in Art. 1167 of the Civil Code of Ukraine[1], which regulates non-contractual (tort) relations. Instead, the case law of the European Court of Human Rights has grouped the two main features by which there are:

– either expressive dominance of the moral factor in evaluating the circumstances of the case and determining a fair balance of interests of the parties, which implies a certain absolutization of the presentation of the subject of law enforcement regarding the adequacy of the compensation burden imposed on the offender;

– or the desire for the most reliable identification and subsequent elimination of the actual non-material consequences of the offense, determined on the basis of a detailed study of the individual features of the victim [10].

It should be noted that the positions expressed above by both scientists and practitioners are not convincing enough, because in this case, guided by paragraph 4 of Part 1 of Art. 611 of the Civil Code of Ukraine[2], the same requirements (prescriptions either by law or by contract) would have to be put forward to compensation for material damage, which, of course, would lead to nonsense. In our opinion, a kind of connecting link in the problem of determining the amount of compensation for non-pecuniary damage in cases of violation of contractual obligations should be those scientific models and separate legislative decisions aimed at ensuring equal, guaranteed justice in determining the amount of compensation for the non-pecuniary losses of the injured individual. However, this issue still requires further consideration.

2.2 Features of compensation of losses in national legal systems of other states

Considering the chosen course of Ukraine on the adaptation of national legislation to the EU standards, it can be argued that compensation for non-pecuniary damages caused by violation of civil contracts has certain specific features in Western states [11; 12]. Thus, the approach to this issue in Anglo-American law is noteworthy [13]. The doctrine establishes that English lawyers, upon studying the issue of damages, do not see any difference between material and non-material damage [14]. Any damages must be recovered if they are genuine and serious, without regard to whether the damage was caused by wrongful acts or breach of contract [15]. Having separated the grounds of liability, the English doctrine does not make the compensation for non-pecuniary damage dependent on compensation for pecuniary damage and, does not limit this compensation to the scope of torts only [16].

Thus, the court's refusal to recover damages cannot be an obstacle to satisfying a claim for non-pecuniary damage. This issue is especially relevant in the aspect of the

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] *Ibidem*, 2003.

service contract, as it usually does not end with a material result. This is directly pointed out in Part 4 of Art. 23 of the Civil Code of Ukraine[1], which states: "non-pecuniary damage shall be compensated irrespective of the pecuniary damage to be recovered and not related to the amount of such compensation". This means that non-pecuniary damage can be compensated even in the absence of material damage. An example would be a transfer contract when, as a result of the bus delay, the passenger was late for a meeting that was important for his personal development and informative enrichment. In such circumstances, material damage may not occur, but the fact of causing non-pecuniary damage is evident and must be compensated [17].

At the same time, the equally problematic issue of determining the amount of compensation for non-pecuniary damage was resolved in a rather peculiar way. It is stated that, as a general rule, when awarding compensation for pecuniary damage, the court is not obliged to be guided by the amount of the damage caused: seeing the unscrupulous violator, the court can impose liability on then, not only in the amount of damage caused, but also more than this amount. Balance in excess of actual damages is non-pecuniary damage [18]. In our view, the general approach of the English doctrine is a good one and one that could be used to compensate for non-pecuniary damage for non-performance or improper performance of the terms and conditions of civil contracts, since it does not make the institution of non-pecuniary damage derivative, minor, and such that deserves attention only because it is stipulated by a clearly defined legislative or contractual rule [19; 20].

The French doctrine traces the departure from the indecisiveness in using the institution of non-pecuniary damage for contractual liability. In the current context, the cases of non-pecuniary damage recovery are no longer a rarity for judicial practice. Decisions in such cases are justified by the courts in that the Civil Code of France[2] does not limit the claim for damages in contractual relations by material damage alone. The basis is Art. 1149 of the Civil Code of France[3], which establishes a general rule on compensation for damage. In addition, it is considered that there are no grounds to address the issue of non-pecuniary (non-material) damages depending on whether such claim is connected with a breach of contract or an offense (tort) [15]. A similar approach exists in Swiss legislation, where the possibility of compensation for non-pecuniary damage is provided in principle for tort obligations. At the same time experts note that the provisions of para. 3 of Art. 99 of the Swiss Obligations Act[4] allow to extend the possibility of compensation of non-pecuniary (non-material) damage and contractual obligations.

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[1] *Ibidem*, 2003.

[2] Code Napoléon. (1804). Retrieved from https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721.

[3] *Ibidem,* 1804.

[4] Swiss Civil Code. (1907). Retrieved from https://www.admin.ch/opc/en/classified-compilation/19070042/index.html.

A separate approach to compensation for non-pecuniary (non-material) damage exists in legislation of the Federal Republic of Germany. The general provision of § 253 of the Civil Law Book[1] stipulates that compensation for non-pecuniary (non-material) damage is possible only in cases expressly stipulated by law. As is evident, the law of Germany in this matter takes the most cautious position. Widely allowing competition of claims, the courts of Germany are guided by the rule that non-pecuniary damage for violation of contractual terms for the provision of services can only be compensated if the victim has grounds for tort claim at the same time [21]. Thus, by making the possibility of compensation for non-pecuniary damage dependent on a violation of absolute rights, the law of Germany significantly narrows the scope for applying the institution of non-pecuniary damage in violation of contractual obligations, in particular compared to French legislation.

To summarize the above, we come to the conclusion that the legislation of Ukraine, which is at the development stage, absorbs the possibilities of several of the approaches we have examined. As is evident, this somewhat resembles a similar situation in US law, namely, in cases where the law allows compensation for non-pecuniary damage, which so far come down to contracts under which one of the parties must provide personal services related to the welfare of the other party, and failure to provide or improper performance of the terms and conditions of such contracts entails physical or mental suffering [22]. Thus, part 3 of Article 23 of the Civil Code of Ukraine[2] stipulates that non-pecuniary damage shall be compensated by money, other property, or in another way. From this it follows that the legislator determines the dominant property form of compensation for non-pecuniary damage. According to R. A. Stefanchuk, monetary compensation is the only possible form of compensation for non-pecuniary damage [3]. Considering such approach, the given form of compensation for non-pecuniary damage is the most studied in the legal literature.

With regard to compensation for non-pecuniary damage caused by products dangerous to human life and health, we shall note that until recently, a special legislative act aimed at protecting consumer rights, namely, the Law of Ukraine "On Protection of Consumer Rights", provided for a rather controversial norm (part 1 of Art. 4 of the Law)[3], according to which the consumer had the right to compensation for non-pecuniary damage caused by products dangerous to human life and health in cases provided for by law. At the same time, it was this article that generated serious contradictions in matters of compensation of non-pecuniary damage to consumers in practice. For example, we provide the following case. On June 29, 2010, the Plaintiff and its subsidiary Travel Agency "Proland" (Respondent) entered into an agreement for tourist services,

[1] The Bürgerliches Gesetzbuch. (1896). Retrieved from http://www.gesetze-im-internet.de/bgb/.

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[3] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

according to which the defendant undertook to provide them, as a tourist, with the provision of tourist services for organizing a tourist trip. The plaintiff performed his obligations in full, but the trip did not take place, since Karya Tour Ukraine LLC (tour operator) went bankrupt. The plaintiff filed a lawsuit against TA Proland LLC for the recovery of funds, in which they asked the court to oblige the defendant to pay UAH 25,000 in their favor for violation of the terms of the contract, 1500 UAH for non-pecuniary damage, 120 UAH for expenses connected with information and technical support of the proceedings [23].

By the decision of the Babushkinskiy District Court of Dnipropetrovsk dated January 24, 2011, the plaintiff's claim was partially satisfied: UAH 12,500 was recovered from the Proland SE TA as the cost of the travel services provided, UAH 1,000 for non-pecuniary damage and UAH 120 for legal costs. In addition, 133 UAH 50 kopecks of state duty were collected in favour of the state. However, the defendant filed a corresponding appeal to set aside the court decision and to refuse the lawsuit [23]. The panel of judges of the appellate court on claims for non-pecuniary damage established that the trial court referred to Article 23 Civil Code of Ukraine[1] and Art. 4 of the Law of Ukraine "On Protection of Consumer Rights"[2] and proceeded from the fact that the plaintiff, instead of the expected quality rest, found themselves in a stressful situation, not only failing to rest where they wanted, but failing to rest in the summer, as the defendant did not return the money. Furthermore, the plaintiff did not receive moral satisfaction from the tourist trip, which indicates that they suffered non-pecuniary damage through the fault of the defendant.

The Court of Appeal of the Dnipropetrovsk Region did not agree with this conclusion, according to which the trial court found that the defendant's failure to provide tourist services and the refusal to return the funds paid were dangerous to the plaintiff's life and health, therefore the court's decision to recover non-pecuniary damage in accordance with paragraph 4 part 1, part 2 of Article 309 of Civil Procedure Code of Ukraine[3] shall be subject to cancellation with the adoption of a new decision to refuse to recover non-pecuniary damage. Unfortunately, such justifications of a court decision to refuse to satisfy a claim for compensation for non-pecuniary damage to consumers are not rare [24], although there are isolated cases of satisfaction of claims for compensation for non-pecuniary damage. We shall cite a case as an example.

The plaintiff filed a lawsuit against the Defendant for compensation for material and non-pecuniary damage. The claims were justified by the fact that, according to the verdict of the Obukhov District Court of the Kyiv Region dated 06.06.2018, Person_5

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[3] Code of Civil Procedure of Ukraine. (2004). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15.

was found guilty of an offense under Art. 124 of the Criminal Code of Ukraine [1] and sentenced to restriction of liberty for a period of one year. In this criminal proceedings, the plaintiff is granted victim status. A civil lawsuit was not filed in criminal proceedings, so the plaintiff filed a lawsuit in the court and asked to recover pecuniary and non-pecuniary damage. The representative of the defendant at the hearing did not recognize the claim, provided a response to the statement of claim, wherein asked to refuse to satisfy the claim because of its unprovenness and groundlessness, believing that the defendant compensated the plaintiff for material and non-pecuniary damage by paying 200 US dollars, about which there is a receipt. After hearing the explanations of the representative of the plaintiff, the representative of the defendant, having examined the case file, the court found that according to the expert opinion No.84 of PERSON_3, INFORMATION_1, according to the medical documentation provided, injuries were found in the form of a penetrating wound in the chest on the right with damage to the diaphragm, liver. The detected bodily injuries were formed from the action of an object with piercing and cutting properties and in the complex are classified as severe bodily injuries by the criterion of danger to life at the time of infliction. During the investigation, the plaintiff PERSON_3 wrote a receipt on receipt of cash assistance in the amount of 200 US dollars, which is recognized by the parties, and confirmed during the consideration of the case. The plaintiff believes that the funds received from the defendant do not compensate for all the damage inflicted by the defendant [25].

On the basis of Art. 23 of the Civil Code of Ukraine[2] a person has the right to compensation for non-pecuniary damage, which consists, in particular, in the mental suffering that an individual has experienced in connection with unlawful behaviour against them, their family members or close relatives, including in connection with property damage. Non-pecuniary damage shall be compensated by money, other property, or in another way. 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 the deprivation of their ability to actualize them, the degree of guilt of the person who caused non-pecuniary damage, if the fault is the basis for compensation, and also considering other circumstances of significant importance. In determining the amount of compensation, the requirements of reasonableness and fairness are factored in.

The plaintiff filed a claim for compensation for non-pecuniary damage caused by the commission of a crime against him and causing grievous bodily injury. According to the decision of the Plenum of the Supreme Court of Ukraine "On the practice of civil courts hearing claims for compensation for non-pecuniary (non-material) damage"[3]

[1] Criminal codex of Ukraine. (2001). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14.

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[3] Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of non-pecuniary damage". (1995, March). Retrieved from https://zakon.rada.gov.ua/laws/show/v0004700-95.

it is mandatory to clarify when resolving a dispute for compensation for non-pecuniary (non-material) damage: the existence of such damage, the wrongfulness of the action of its causer, the existence of a causal relationship between the damage and the wrongful act of the causer and the guilt of the latter in causing it. Consequently, the court fairly satisfied the claims in full, noting that the plaintiff's claims for non-pecuniary damage must be satisfied, because as a result of the crime the plaintiff suffered mental suffering, suffered stress, was undergoing treatment for a long time, was forced to change their lifestyle and everyday behaviour [25].

Reflecting on the most reasonable approach to compensation for non-pecuniary damage in the event of violation of contractual obligations, we pay attention to the compensation model that is most often applied by the practice of the European Court of Human Rights (hereinafter referred to as the ECHR). Thus, the practice of the ECHR is based mainly on the fairness and reasonableness of the awarded compensation. That is, attention is drawn to the moral justification of compensation, and not to a certain kind of "calculated" component, while factoring in the most diverse circumstances of the case, in particular the nature of the offense and non-material expenses of the victim, as well as the duration of their experiences, suffering, etc. In this aspect, we consider it fair that the ECHR in many decisions relating to compensation for non-pecuniary damage does not lead to a single algorithm for this compensation and does not specify the applicant's non-material losses. At the same time, it reserves the right to resolve the issue of compensation for non-pecuniary damage at its discretion within the limits of justice and reasonableness [26]. Therefore, as noted by V. D. Prymak: "moral damage appears not only as non-material (when it is important to establish the nature of those expenses that an offense in the creditor's non-material field could objectively cause), but also as essentially moral, that is, a legal phenomenon caused by non-pecuniary factors" [9].

In accordance with Art. 16 of the Civil Code of Ukraine [1], the right to compensation for non-pecuniary damage refers to universal methods of protecting civil rights. Consequently, any participant in civil relations on the basis of this article of the Civil Code of Ukraine can apply to the court with a claim for compensation for non-pecuniary damage. And in the position, which was contained in paragraph 5 of part 1 of Art. 4 of the Law of Ukraine "On Protection of Consumer Rights" [2] it was said that a consumer can demand compensation for non-pecuniary damage only if it is caused by products that are dangerous to human life and health. Without a doubt, such an imperative interpretation is a restrictive right of the consumer. Therefore, it is completely justified to amend this Article by the Law of Ukraine "On Liability for Damage Caused by a Product Defect" dated May 19, 2011 [3], which reiterated this paragraph as follows: the con-

[1] Civil Code of Ukraine, op. cit.

[2] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[3] Law of Ukraine "On Liability for Damage Caused by a Product Defect". (2011, May). Retrieved from https://zakon.rada.gov.ua/laws/show/3390-17.

sumer shall have the right "to compensation for property and non-pecuniary damage, caused due to product shortocmings (product defect), in accordance with the law" [27].

However, in the legal literature there are other opinions on this matter. Thus, V. P. Paliyuk notes that the provisions of Art. 16, 23 of the Civil Code of Ukraine[1], consolidate the general provisions for compensation for non-pecuniary damage as a way of protecting subjective civil rights, have the highest legal force in relation to Part 5 of Art. 4 of the Law of Ukraine "On Protection of Consumer Rights"[2], which provides for such a right only if there is any damage to the life or health of the consumer [28]. Disagreeing with the given position, we note that in the ratio of general and special norms, priority is given to special norms. Moreover, the proposed V. P. Paliyuk's approach is impossible due to the problem of compensation for non-pecuniary damage as a result of violation of civil contracts, including as a result of violation of contracts for the provision of travel services lying in a different plane, as against the hierarchy of regulation. Indeed, sometimes the very fact of violation of a civil law contract can pose a threat to human life and health, for example, non-observance of safety procedures during blasting operations, etc. In this case, the lack of legislative provision for the possibility of compensation for non-pecuniary damage for violation of obligations that pose a threat to life or health of the customer or other persons leads to a decrease in the degree of implementation of the compensatory function of contractual liability [28].

However, the legislative consolidation in para. 2 of part 3 of Art. 23 of the Civil Code of Ukraine[3] of an inexhaustible list of possible criteria for "other circumstances" for determining the amount of compensation for non-pecuniary damage enables the assertion of the existence of any methodology for determining this size. After all, situations are not excluded when in a court case a certain circumstance acquires an independent legal significance, which, as a significant circumstance, will be significant for determining the size of compensation for non-pecuniary damage. In comparison with it, other, usually significant circumstances, will play a secondary role. Factoring this in, we support the opinion of V. D. Prymak, that in Art. 23 of the Civil Code of Ukraine[4] a model of fair, morally justified compensation is specified [9]. We are convinced that such a compensation model should be applied in contractual obligations should they be violated.

Thus, proceeding from the analysis of the above models of approaches to compensation for non-pecuniary damage, in our opinion, the first is the most successful and consistent with the principle of good faith, justice and reasonableness. Indeed, it is precisely the ratio of damage and the amount of recovery on a morally verified basis

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/ed20060220/stru.

[2] Law of Ukraine "On Consumer Protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023-12.

[3] Civil Code of Ukraine, op. cit.

[4] *Ibidem*, 2003.

that will guarantee compliance with the legal equality of the parties to the contractual relationship.

CONCLUSIONS

In summary, it should be noted that the considered aspects of non-pecuniary damage compensation under the treaties evidence to the great similarity of the legislative approaches of Ukraine and the approaches of foreign legislators, including the problems that arise when applying the provisions of this institution. First of all, it draws attention to the lack of detailed legislative regulation of the institution of non-pecuniary (non-material) damage not only in the countries of the Anglo-American system of law, where this is determined by the peculiarities of the legal system of these states, but also in the countries of the Romano-German legal system, including in Ukraine.

At the same time, it should be noted that judicial and doctrinal interpretations, in particular ECHR practices, play a major role in the development and improvement of this legal institution. Compensation for non-pecuniary (non-material) damages arising from breach of contractual obligations is used by the courts as a remedy for violations of essentially personal non-material rights and goods. It should be added that the list of goods protected by non-pecuniary damage has a constant tendency to increase through judicial interpretation. It is also important to note that the issue of the admissibility of non-pecuniary damage caused by the improper performance of contractual obligations has in principle been resolved in favour of certain types of contracts and, moreover, the list of such contracts is constantly growing. Therefore, the legislative fixing of compensation (compensation) for non-pecuniary damage for the sole purpose of causing the life or health of the parties to a contractual legal relationship does not ensure the protection of their non-pecuniary rights. This can be avoided by introducing appropriate changes to the civil legislation of Ukraine, according to which the legal consequence of violation of rights (including the rights of consumers of services) that endanger their life or health, will be compensation for material and compensation for non-pecuniary damage.

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