Czech University of Life Sciences Prague

Faculty of Economics and Management

Department of Law

Diploma Thesis

Alternative methods of counting a compensation of nonmaterial damages

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DIPLOMA THESIS ASSIGNMENT

Mgr. Bc. Jan Cholenský

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Thesis title

Alternative methods of counting a compensation of nonmaterial damages

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Objectives of thesis

There was a intention of the czech lawmaker to change a compensation of a nonmaterial damages from table values to better and more just way. After a change in a law the judges of the High Court prepared another table values which are mostly used in a civil cases. The author of this thesis has an intention to prepare better and more just way how to count the compensation.

Methodology

Comparation of an international case law and a czech case law using the outcomes of the European court for human rights. Comparation of a law of German, Swiss, French, Spanish and British approach in legislation. Economic analysis of law and legislation, cost benefit analysis. Case study.

The proposed extent of the thesis

60 – 80 stran

Keywords

nonmaterial damages, compensation of a nonmaterial damages, economic analysis of a legislation

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KOLBA, Jan a ŠULÁKOVÁ, Martina. Nemajetková újma způsobená protiprávním výkonem veřejné moci. Praha: Leges, 2014. ISBN 978-80-7502-027-7.

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Declaration

I declare that I have worked on my diploma thesis titled "Alternative methods of counting a compensation of nonmaterial damages" by myself and I have used only the sources mentioned at the end of the thesis. As the author of the diploma thesis, I declare that the thesis does not break copyrights of any their person.

In Prague on 30 November 2021 ____________________________

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Alternative methods of counting a compensation of nonmaterial damages

Abstract

In 2012, civil law experienced the biggest change in the modern history of the Czech Republic, which logically led to a change in the definition of damage and harm and consequently to changes in its compensation. According to the original assumptions, the update was supposed to result in more just compensation, which should take into account, especially in the case of non-pecuniary damages, the individual's perception of the individual and the facts under which the damage occurred.

The legal profession, particularly on the side of the courts, has essentially reverted to the methodology of some of the previous instruments. An example of the former was, in particular, the abolition of the tabular awards issued by ministerial decree which compensated for personal injury. The decree was replaced by the Supreme Court's methodology, which is very similar in principle to the original instruments. On less technical issues, decisions continue to be made on the basis of the method of comparison, and it is clear from the reasons for the judgments that there is insufficient statistical or econometric verification.

In this thesis, the development of the concept of harm, damages and non-pecuniary damages has been summarized, with an emphasis on non-pecuniary damages on health, as well as the previous and current legislation, including case law and comments from the professional community, also on compensation for harm. In addition, the practical part explains one of the options that could be used to develop a legislatively acceptable, more fair and flexible system of estimating damages in at least some areas. To do this, econometric modelling tools were used to quantify individually perceived harm.

The aim of the thesis is to attempt to verify and confirm that it is possible to develop a transparent, statistically defensible system of quantifying harm that is perceived as fairer and more predictable by the professional and the general public.

Keywords: harm, non-pecuniary damages, compensation, econometric modelling, civil code, individual perception of harm, written law, case law, predictability of legal decisions

Alternativní metody stanovení výpočtu nemajetkové újmy

Abstrakt

V roce 2012 došlo v oblasti občanského práva k největší změně v novodobé historii České republiky, což logicky vedlo i ke změně v podobě definice škody a újmy a v konečném důsledku i ke změnám v jejich kompenzaci. Dle původních předpokladů mělo v případě aktualizace docházet k více spravedlivým odškodněním, která měla zohledňovat zejména u nemajetkové újmy individuální vnímání jedince a skutečnosti, za jakých k újmě došlo.

Odborná právní veřejnost zejména na straně soudů se však plně v souladu s očekáváním vrátila k metodice některých předchozích nástrojů, proti kterým bylo v minulosti částečně zbrojeno. Příkladem předchozího bylo zejména zrušení tabulkových odškodnění vydaných ministerskou vyhláškou, kterými se odškodňovala újma na zdraví. Vyhláška byla nahrazena metodikou Nejvyššího soudu, která je ve svém principu velmi obdobná, jako původní nástroje. V otázkách méně odborných pak i nadále dochází k rozhodnutím na základě metody komparace, z odůvodnění rozsudků je pak zjevné, že bez dostatečné statistické, či ekonometrické verifikace.

V této práci byl shrnut vývoje pojmu újmy, škody a nemajetkové újmy, s akcentem na nemajetkovou újmu na zdraví, dále shrnuta předchozí a aktuální právní úprava, včetně judikatury a komentářů odborné veřejnosti, a to i k odškodňování újmy. Dále je v praktické části vysvětlena demonstrována jedna z variant, jakou by mohlo být dosaženo vypracování legislativně přijatelného, spravedlivějšího a pružnějšího systému odhadu újmy alespoň v některých oblastech. K tomu bylo užito nástrojů ekonometrického modelování pro určování vyčíslení individuálně vnímané újmy.

Cílem práci je snaha verifikovat a potvrdit, že je možno vytvořit transparentní, statisticky obhajitelný systém vyčíslení újmy, který bude vnímán jako spravedlivější a předvídatelnější pro odbornou i laickou veřejnost.

Klíčová slova: nemajetková újma, odškodnění, ekonometrické modelování, občanský zákoník, individuální vnímání újmy, psané právo, judikatura, předvídatelnost soudních rozhodnutí

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1. Introduction

There is a theory that there is an option to count and give price to almost anything imaginable, price of a human life included [1]. Any human being experienced at least temporarily loss of own ability, health or close person. No money/any other value can fix certain harms. Money or certain act might help to feel better or more comfortable but while people live in the world in which certain mistakes can't be fixed, certain harm can't be restored while every single person experience little bit different feelings of a certain harm.

People are able to give prices to almost anything, there are relevant markets for almost any good while in the case of non-pecuniary damages it is different. As it was described in the commentary literature: "In contrast, non-pecuniary damage is not capable of objective financial quantification with reference to the market (the differential theory cannot be applied). Thus, if the harm suffered consists in the disturbance of the victim's personal interest, which has no measurable monetary value and therefore does not lead to any reduction in his property, we are talking about non-pecuniary harm."[2]

The new Civil Code defines, as it will be described later in this thesis, a new term " harm". Harm is further divided into the terms "damages" and "non-pecuniary damages". The elementary difference between these two terms is based on the definition of both. While non-pecuniary damages are described above, damages can be described as follows, for example:

"As far as damages are concerned, one can basically follow the existing case law and define them as damages which are manifested in the property sphere of the damaged party, which are objectively expressible in a general equivalent, i.e. money, and which are therefore remediable by the provision of material compensation, whether in the form of natural restitution or money..."[3]

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[1] Abelson, P. (2021) *Establishing a Monetary Value for Lives Saved: Issues and Controversies* [Online]. Available at: https://obpr.pmc.gov.au/sites/default/files/2021-06/Working_paper_2_Peter_Abelson.rtf (Accessed 23 March 2021)

[2] Hulmák, M. et all, (2014) *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář.*. 1st edn. Prague: C.H.Beck, pp. 1496-1499

[3] Hulmák, M. et all, (2014) *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář.*. 1st edn. Prague: C.H.Beck, pp. 1496-1499

The main reason why precise compensation for non-pecuniary damage can never be determined emerges from the previous description. There will always be reasonable criticism of at least some aspects of compensation for non-pecuniary damages. A simple conclusion can then be reached by simple reasoning: in the matter of compensation for non-pecuniary damages, a solution will always be searched for which is the best solution possible according to the specific criteria specified.

In a comprehensive study of the topic of this thesis and an analysis of case law, it was found that 4 fundamental methods have been used in the past to determine the amount of non-pecuniary damages. In some cases, a combination of these methods has been used. All of these methods are described in this thesis and have been identified in a literature search of laws and case law. Thus, the determination of compensation for non-pecuniary damage was based on:

(a) by determining the exact amount of non-pecuniary damage for a particular case, while in some cases it was possible to adjust this amount by case law;

(b) by reference to a sub-legislative provision laying down the method by which the compensation for non-pecuniary damage is determined;

(c) by a court decision based on the internal methodology of the courts;

(d) by a decision of the court based on a comparison with other decisions and the idea of fairness.

Important to the topic of this thesis is point (c) and point (d), which are closely related to the new legislation, as described below, which is related to the topic of this thesis.

With the change in discourse of the non-pecuniary damages compensation the topic became even more interesting to study.

In view of the fact that under (c) one can imagine a fairly precise mathematical model, which the court can then modify to its discretion in a particular case, and (d) is based on a comparison of individual cases according to the judge's estimation, which is a very imperfect statistic, it is quite obvious that non-pecuniary damages are determined by creating certain models and econometric functions, which, however, were not perfect in some cases.

It is thus clear from all of the above that, regardless of how the courts decide to proceed, it is obvious that precise functions, taking into account previous decisions and their individual variables, could bring a greater degree of predictability.

Thus, in essence, it can be argued quite convincingly that the creation of econometric models for the various chapters of non-pecuniary damages would provide courts with a tool that has the potential to add an exact tool to create predictable decisions in general.

2. Objectives and Methodology

1.1 Objectives

The objectives were already briefly explained in the introduction part. The author of the thesis found out that case law in Czech Republic pointed out several issues about calculation of non-pecuniary damages.

This issue was not solved within recodification as it is explained in this thesis. The inconsistencies in calculations are not only experienced in non-pecuniary damages but rather in every area of law where there are human feelings and individual perception of the world.

The objectives of this thesis are to briefly describe the area of non-pecuniary damages in Czech codification, its history, development and case law. Author of this thesis will try to explain the issue mentioned above and below. After the explanation of the mentioned issues, the author of this thesis will try to develop a method which will be suitable for better calculation of above-mentioned non-pecuniary damages in the context of whole law system, with better perception of public. The method will be based on econometric modelling. The author will try to proof that the econometric models are able to achieve formulas that are more flexible than current compensation decisions and that those formulas are perceived as more just than current counting of non-pecuniary damages.

There are three main hypothesis that are examined by the author: 1) The econometric modelling is suitable to prepare flexible models with higher predictability of outcome. 2) Econometric modelling is able to develop public developed models which are able to incorporate public opinion on compensation for non-pecuniary damages. 3) The highest importance in assessing non-pecuniary damage in the model for compensation for defamation will be the nature of the defamation itself.

1.2 Methodology

First, there will be also part with qualitative method – focus group which will be discussing and brainstorm several categories of non-pecuniary damages in certain area of law and tries to find important variables which could be easily valuable and important to evaluate certain harms in these areas.

The author of the thesis first uses literature research on topic of calculation of non-pecuniary damages and econometry.

The next step is to prepare questionnaire with certain non-pecuniary bodily harm on bodily harm and let the respondents evaluate the intensity of the certain damages. The author of the thesis then valuates whether the respondents are able to evaluate the non-pecuniary damage.

If the respondents are able to evaluate the damage, then there is another questionnaire which divides the budget in between certain cases with different non-pecuniary damages.

If the respondents are not able to evaluate the effects of the injuries, while it is too much for non-professionals then there would be the change to topic of non-pecuniary damages caused by defamation and repetition of whole process.

With the data from the questionnaire the author would prepare simple linear econometric model to predict future cases compensation.

The respondents will be mix of university students and legal professionals with amount of approximately 100 valuated cases.

The outcome is an econometric model or function which will be then explained as an option or alternative to current methods of compensation.

Subsequently, both hypotheses will be verified. If it is possible to build a stable econometric model from the inputs, the hypotheses 1) will be valid. If the model is able to predict additional compensation for new cases, hypotheses 2) will also hold.

Above mentioned questionnaires will be prepared and valuated in the Qualtrics software on webpage https://www.qualtrics.com/, the data set will be processed by software GRETL to estimate and evaluate econometric function which will be prepared out of the collected data set.

The econometric function then will be then tested for the hypothesis 3) set above.

3. Non-pecuniary damages and its compensation

1.3 Historical excursion of damages in law systems

While the topic of this thesis is more concerned about the options, in the meaning of lawyers "de lege ferenda" or rather future praxis in decisions of courts there still shall be short description of the history of the damages and compensation for damages to understand the evolution of legal rules.

1.3.1 History before the Rome Empire

The reason why the author of this thesis added this part is simple. There are 2 main legally-philosophical approaches to the law. These philosophical approaches explain the reasons for existence of legal systems, the reasons why shall people act according to the rules, how to set certain rules, what is the purpose of the rules, its development, and essentially reasons to act according to these rules.

First one called ius naturalism is the philosophy that could be fundamentally expressed by the idea that the law is a product of nature, God or force majeure, depends on the belief of certain individual.[4] This means, that there is an essence of rules beyond all the rules, that the essence of the rules is there from nature of beings and there is a particular justice independent on any rules.

The opposite idea is expressed as ius positivism, which is opposite to the previous philosophy of law.[5] It explains that the rules are here to be abided no matter what is the naturally just, individuals and the society need rules to live long and prosper. The fundamental is to have an order not naturally just environment.

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[4] Leiter, B. and Etchemendy M. X., *Naturalism in Legal Philosophy*, The Stanford Encyclopedia of Philosophy, [Online]. Available at: https://plato.stanford.edu/archives/fall2021/entries/lawphil-naturalism (Accessed 28 March 2021)

[5] Barberis, M., *Legal positivism in the 20th century*, [Online]. Available at: https://link.springer.com/content/pdf/bfm%3A978-94-007-1479-3%2F7%2F1.pdf (Accessed 28 March 2021)

While there are these two ideas the reality is somewhere in between, depends on the law system, history, individual judges and so on, but the fact is that a good lawyer is using these ideas to increase an importance of certain social value while solving complicated cases.

The reason why author of this thesis explained this is simple – we have certain historical sources of knowledge of law which are more or less important, but these written sources are for sure not the first rules how to handle with harm. If any person hits a dog, the most common reaction would be a bite. If individual punishes or humiliate even less intelligent species, there will be mostly an instant answer.

What is the point of previous idea? It is very simple – any time in the history, even during the period when people or predecessors of people were not able to write, or speak (the acceptance of Darwinism is a prerequisite) there were certain harm caused, perceived and also punished as a logical reaction and partially as a compensation of perceiving no good.

Based on the previous text, the first rules were tribal[6] or basically even before – animal rules which were perceived and are easily detectable on animals these days. What is the first source of compensation for harm? Probably nature, instincts of beings, tribes, not a written law.

1.3.2 Roman legislation

Author of this thesis is aware of the fact that the Roman law is not the first written law, that there are certain written sources of law even before the Roman Empire was established, there are connections to harms (non-pecuniary damages), punishments and remedies[7], but none of those first codes or legal system is so sophisticated and as the Roman law which is the foundation stone of today's western world countries law systems. This is the true reason why there is a subchapter in this thesis on the topic.

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[6] Shucha, B. *Engaging the Third Sovereign: The Nature, Reach, and Sources of Tribal Law* [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2608077 (Accessed 28 March 2021)

[7] Kincl, J. and Urfus, V and Skřejpek, M. (1995) *Římské právo.* 1st edn. Prague: C.H.Beck, pp. 223-226, translation mine

Roman law counted with harm on certain levels, for the reason of this thesis, there are terms which are very important to understand fundaments of our law system. The harm – "damnum" was a general term for a harm caused by infringement.

There were two versions of the harm – "damnum emergens" – the real harm caused and the other option was "lucrum cessans" - which could be today explained as a revenue shortfall. The important fact is that at first the harm was compensated in the currency; other options were incorporated much later in the Justinian law edits.

The system of a law developed system of sanctions, then compensation and later in the period also punishment very similar to the harm caused, which in the end was terminated soon because of increasing violation in the society. The author of this thesis assumes first ideas in restitution connected rather to cure than financial rehabilitation.[8]

There is also a very important fact, that today's law systems use terms which were developed in this time period, those terms were connected to the law theory. Such terms are for example "vis mayor" as a liberating effect, and also "culpa" as an infliction.

1.3.3 Ages from medieval ages until modern civil codes

As the author of this thesis studied the law, there was not much to learn from a law theory after the Roman empire until the modern law, the fundamental fact is that after the Roman Empire fall, the law culture decreased rapidly and even though there are codes and rules in medieval ages, the main topic is restoration of the well-developed Roman law and the discontinuity of the development.

The author bases this idea on the generally accepted and known fact that the current legal environment and theory is not based on medieval legal culture, but on Roman law, which, unlike medieval law, is taught at all law faculties in the Czech Republic. Medieval law is then taught exclusively from a historical perspective, not from a theoretical perspective.[9]

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[8] Kincl, J. and Urfus, V and Skřejpek, M. (1995) *Římské právo.* 1st edn. Prague: C.H.Beck, pp. 223-226, translation mine

[9] Kincl, J. and Urfus, V and Skřejpek, M. (1995) *Římské právo.* 1st edn. Prague: C.H.Beck, pp. 1-53, translation mine

1.3.4 Modern codes era before Czechoslovakia and Czechia

In the beginning of 19th century connected with the wakening of nations, regress of constitutional monarchies and increase impact of republican ideas Europe experienced civil code recodification.

Among most important codes which affected our law system there is the French civil code (Code civil des Français) from 1804 with its 2281 articles, which was by the number of articles rather similar to our today's Civil code. [10]

Czech lands were under the influence of Austrian and later Austrian-Hungarian Empire., thus the greatest importance for our legal environment has the law number 946/1811 "Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie" (ABGB)[11] with its article 1293 et seq.

The importance of the ABGB is even greater than previous historical parts in the context of this thesis.

There are two certain reasons that makes this subchapter important. The first reason is the fact, that ABGB and its instruments were main code in the civil law for a first Czech state and came up with instruments which were received by many states in the Europe, Czech lands included. The second reason is the fact that ABGB developed habit which in the perception of the author of this thesis was highly progressive and its main idea is still the main idea of today's Civil code[12] – a subject which caused the harm shall try to restore into the previous state.

This fact could make this thesis partially less important than it might seem to be in the beginning, this still does not mean that the estimation of non-pecuniary damages is not an

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[10] Delage, I. *The French civil code or code civil, 21 march, 1804: an overview* [Online]. Available at: https://www.napoleon.org/en/history-of-the-two-empires/articles/the-french-civil-code-or-code-civil-21-march-1804-an-overview/ (Accessed 29 March 2021)

[11] Act No 948/1811 Coll, Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie, sec. 1293 et. seq.

[12] Act No 89/2012 Coll, The Civil Code of the Czech Republic, official translation

issue. The importance of restoration non-pecuniary damages still makes the importance in the areas where there is the only option how to compensate – with the money.

1.3.5 Modern codes era before Czechoslovakia and Czechia

There were major codes in the modern state before current legislation.

First one: code number 141/1950 [13] was issued after the communist revolution connected with development of criminal communist regime [14] which can explain the absence of development and rather deterioration of quality of codifications. The era was connected with theft of property, political trial and the very fast recodification with very little expertness.

On the other hand, the code number 40/1964 was developed in the times when society experienced release of pressure on society and sociological changes, that is probably the reason why the code sustained not only the rest of the regime but also a significant time period in new regime. The author of this thesis has never an intention to write purely legal thesis that is why there won't be detailed analyses of this code, the only detailed analyses will be provided in judicature part later.

1.3.6 Current legislation Act number 89/2012[15]

As it has been presented earlier in this thesis, the new Code Civil is the main and central code of private/civil law in Czech Republic.

The code was prepared for the many reasons, but there are few which are important for the topic in this thesis: 1) As the previous code was adopted in the completely different regime, during the time period which did not respect widely accepted legal standards[16], it was apparent that the code won't be able remained only with changes during longer period of time. 2) As the Czech Republic became more and more involved in the western world

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[13] Act No 141/1950 Coll, The Civil Code of the Czechoslovak Republic

[14] Act No 198/1993 Coll Act on the Illegality of the Communist Regime and on Resistance to it

[15] Act No 89/2012 Coll, The Civil Code of the Czech Republic

[16] Kopecký, J. *Je možné prakticky trestat popírání zločinů komunismu?* [Online]. Available at: https://www.iurium.cz/2019/12/03/trestani-popirani-zlocinu/ (Accessed 28 September 2021), translation mine

with its legal standards and as a part of international organisation, especially European Union, there has been excessive strain for harmonisation with EU standards.

As a result, Czech legal experienced large recodification and harm (non-pecuniary damages) received new main code.

The complex description of current law will be in the later part of the thesis

1.4 Term of damages and non-pecuniary damages

The topic of this thesis is uses term "nonmaterial damages" – which is not the correct professional term used in the Act No 89/2012 Coll, it is rather used as "**non-pecuniary damages**".

In this thesis, the author has focused in particular on the term non-pecuniary damages for bodily harm and non-pecuniary damages for defamation.

The explanation of the harm according to the Act No 89/2012 Coll is drawn bellow. More detailed explanation will be explained bellow. Fundamentally in the new Code Civil the "**harm**" is the main term used.

The general clause for harm and its compensation is set in § 2894 Act No 89/2012 Coll:

"(1) The duty to provide compensation to another for harm shall always involve the duty to provide compensation for harm to assets and liabilities (compensation for damages).

(2) If the duty to provide compensation to another for non-pecuniary harm has not been expressly stipulated, it affects the tortfeasor only where specifically provided by a statute. In such cases, the duty to provide compensation for non-pecuniary harm by providing satisfaction is assessed by analogy under the provision on the duty to provide compensation for damages."[17]

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[17] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2894, official translatation

1.4.1 Harm

As it is seen above, the harm is general term for damages and non-pecuniary damages. The harm is mostly connected with any loss that somebody can incur, in the legal system the loss which has its legal basis and shall be compensated.[18]

1.4.2 Damages

The term of damages is not hard to explain, the description "*harm to assets and liabilities"* is easy to understand and also not so hard to compensate in most of the cases. Assets are mostly paid while the economy has its price for anything buyable, or constructable so that people can buy the price of construction. There is always some market which gives the assets price. The compensation is the difference in between the price before and after the process which causes the damages.[19]

1.4.3 Non-pecuniary damages

The term of non-pecuniary damages is harder to explain, and it is not so automatically understood by the public. While the damages are mostly connected with the finance, price, costs, the compensation of non-pecuniary damages is based rather on fiction. There is not a relevant market where there are prices for the loss. Typical non-pecuniary harm is loss on health, loss caused by hurt feelings or just limitation on human rights. There is not a relevant market, where to buy human dignity or fix the feeling of physical pain. Individual is able to help itself with pain felt during the cause of non-pecuniary damages but this help is not able to fix the feelings the individual had to experience.[20]

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[18] Hulmák, M. et all, (2014) *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář.*. 1st edn. Prague: C.H.Beck, pp. 1496-1499, translation mine

[19] Hulmák, M. et all, (2014) *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář.*. 1st edn. Prague: C.H.Beck, pp. 1496-1499, translation mine

[20] Hulmák, M. et all, (2014) *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář.*. 1st edn. Prague: C.H.Beck, pp. 1496-1499, translation mine

Typically, kids receive stickers or candy after the vaccination, but the pain was still experienced. This pain is not legally compensated but the doctor or parent can still feel the obligation to compensate the pain to the kid. Therefor the lawmaker had to set the boarder for the pain which is hardly countable.

1.4.4 Limits of non-pecuniary damages compensation

As it is seen from the example above, people experience loss in feelings many times in a day and there has to be a rule which sets the limits of what shall be compensated. Such a rule shall explain, without the doubts when there is a legal claim for compensation. That rule : "…If the duty to provide compensation to another for non-pecuniary harm has not been expressly stipulated, it affects the tortfeasor only where specifically provided by a statute…".[21]

This boarder sets two fundamental situations where there is a legal claim for compensation for non-pecuniary damages. In the detail the compensation for non-pecuniary damages shall be stipulated by the parties or set by the lawmaker.

1.4.5 Areas of non-pecuniary damages in the thesis

1.4.5.1 Compensation for bodily harm and death

The author of this thesis has an experience in non-pecuniary damages in area of bodily harm and death. The fundamental provisions of compensation for non-pecuniary damages are set in §2958 and 2958 of civil code, as it follows.

The section 2958 follows: "In the case of bodily harm, the tortfeasor shall compensate the victim for such harm in money, fully compensating for the pain and other non-pecuniary harm suffered; if the bodily harm resulted in an impediment to a better future for the victim, the tortfeasor shall also compensate him for the deteriorated social position. Where the

[21] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2894, official translation.

amount of compensation cannot be determined in this manner, it is determined according to the principles of decency".[22]

There are few facts important for the topic of this thesis. The compensation in money at least compensated for the pain, other non-pecuniary harm suffered and also for the bodily harm resulted in an impediment to a better future for the victim. From the previous sentence there is self-explanatory that all the compensations are barely determinable from the price of health and relevant market, all the compensations are imaginary and not connected to a certain good, while the health is not buyable at all.

As it will be described later on, there are certain tables with values for damages from previous section. With the table values for compensations, there is an option to evaluate the quality of compensation and compare it to some other method. That is why the compensation for bodily harm and death was planned to be used in the practical part to evaluate the quality of the authors model and hypothesis. With the same reason the author of this thesis describes the compensation for bodily harm and death valuation later in this thesis.

The § 2959 is at follows:

"In the case of killing or particularly serious bodily harm, the tortfeasor shall compensate the spouse, parent, child or other close person for the mental suffering in money, fully compensating their suffering. Where the amount of compensation cannot be determined in this manner, it is determined according to the principles of decency."[23]

Previous section underscores the idea of construction of compensation for non-pecuniary damages. It also generates another point of view which has not been mentioned. The compensation for family is different than the compensation for victim. This is significant change to the damage as it has been explained above. If the tortfeasor destroys new car, the price of the car will be same for anybody, the feeling of one non-pecuniary damage to a certain person is different even if the damage is the same. There is not objective method, how to set a just compensation. There is only one method how to compensate the non-pecuniary damages – estimation.

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[22] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2984-2985, official translation.

[23] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2959, official translation.

1.5 Legislative changes and judicature for compensation of non-pecuniary damages – compensation for bodily harm and death

1.5.1 Legislation before recodification

1.5.1.1 Previous civil code[24]

Before the current civil code, the fundamental provision for damages has been in the section 444 of the civil code[25].

The provision of section § 444 of the civil code was as it follows:

"(1) In the case of bodily harm, there shall be compensation for the pain and deteriorated social position

(2) The Ministry of Health, in agreement with the Ministry of Labour and Social Affairs, shall determine by decree the amount up to which compensation may be provided for pain and deteriorated social position and the determination of the amount of compensation in individual cases.

(3) The survivors shall be entitled to a lump sum compensation for the damage caused by death, namely

a) to the spouse CZK 240 000,

(b) to each child, CZK 240 000,

(c) to each parent, CZK 240 000,

(d) to each parent in the event of the loss of an unborn child, CZK 85 000,

(e) to each sibling of the deceased, CZK 175 000,

(f) to each other person living in the same household as the deceased at the time of the event which caused the personal injury resulting in his death, CZK 240 000."[26]

As it seen above, the compensation for the bodily harm was set by the ministry decree. This means that the compensation for non-pecuniary damages was set by the fix value with

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[24] Act No 40/1964 Coll, The Civil Code of the Czech Republic, translation mine

[25] Act No 40/1964 Coll, The Civil Code of the Czech Republic, § 444, translation mine

[26] Act No 40/1964 Coll, The Civil Code of the Czech Republic, § 444, translation mine

certain correctives. The harm compensation for family when the family member dies is even more rigid. The lawmaker just set exact amount of money within the civil code. The option to update the compensation for death harm is connected only with the change of the law and consensus of the current lawmaker.

The previous paragraph shows that the lawmaker and ministries prepared simple standard for compensation without much of a flexibility and individuality of a human being perception. This is described later within judicature part.

1.5.1.2 Decree of ministry of health on compensation for pain and deteriorated social position[27]

Section 1 of the Decree defines scope of the norm as such:

"§ 1 This Statement establishes the amount up to which compensation for pain and deteriorated social position caused by an occupational accident, occupational disease or other damage to health (hereinafter referred to as "damage to health") is provided and the determination of the amount of such compensation in individual cases (hereinafter referred to as "compensation")."[28]

The decree of ministry of health on compensation for pain and deteriorated social position[29] was a general act for harm or damages on health. The decree of ministry of health on compensation for pain and deteriorated social position was repealed in the end of the year 2013 with recodification of civil law. In following paragraphs of the decree of ministry of health on compensation for pain and deteriorated social position[30], there are certain rules how the compensation is calculated. The general process of compensation is very simple.

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[27] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, translation mine

[28] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, § 1, translation mine

[29] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, translation mine

[30] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, translation mine

Expert in the field of bodily harm/health damages studies the health documentation of a damaged person, collects all the bodily harms from the documentation, pairs it with tables in appendix of the decree of ministry of health on compensation for pain and deteriorated social position[31] and multiplies the number of points from the appendix with the value of one point from section 7 (1) and (2) of the decree of ministry of health on compensation for pain and deteriorated social position:

"(1) The amount of the compensation for pain and impairment of social work shall be determined on the basis of the score established in the medical opinion.

(2) The value of 1 point is CZK 120." [32]. The final amount has several correctives but the fundamental calculation is as it was described. One of those correctives is mentioned in the § 7 (3) of the decree of ministry of health on compensation for pain and deteriorated social position:

"In particularly exceptional cases worthy of extraordinary consideration, the court may proportionately increase the amount of compensation determined under this Decree."[33]

As it has been described before the compensation was calculated by the medical experts as it is described in the § 8 of the decree of ministry of health on compensation for pain and deteriorated social position:

"(1) Medical opinion for the purpose of determining the amount of compensation in individual cases

(a) shall be prepared by the assessing physician who is the attending physician of the injured person; in the case of occupational disease, that physician shall be the attending physician of the medical institution authorised to assess occupational disease,

(b) shall be issued by the medical establishment whose assessing doctor has prepared the medical report and, in the case of occupational disease, by the medical establishment

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[31] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, translation mine

[32] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, § 7 (1) and (2), translation mine

[33] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, § 7 (3), translation mine

authorised to assess occupational diseases whose assessing doctor has prepared the medical report."[34]

From the previously quoted text that there are few fundamental facts which are important for this thesis.

First, compensation was rigidly determined from tables that were set by the Ministry of Health.

Secondly, there were certain corrective measures which made it possible to increase the compensation.

Thirdly, the compensation was determined, in particular, by a medical expert who was guided by a by-law, the genesis of which was not properly explained in the by-law.

Fourthly, the compensation tables were not regularly updated in line with inflation, which reduced the compensation.

Fifth, the court was, in the manner provided by statute, limited to its own determination of what was or was not just compensation, despite the manner in which the individual perceived the pain suffered or the way in which the individual was limited in the future. It can be reliably concluded that the manner in which compensation was determined by statute and regulation did not give much room for individual perception of pain, and the specificity of future limitations with respect to the individual.

1.5.2 Criticism of previous legislative

It is clear from the previous text that the statutory and sub-statutory provisions had certain imperfections, and this part will describe these imperfections and will also relate the relevant case law to these imperfections.

In the past, the Constitutional Court has expressed doubts about the rigidity of the provisions of previous legislation combined with the lack of consideration of certain aspects of individual cases in the courts' decision-making.

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[34] Decree No 440/2001 Coll, Decree of ministry of health on compensation for pain and deteriorated social position, § 8 (1), translation mine

Among the key judgments criticizing the above-mentioned are, for example, the Constitutional Court's ruling Pl. ÚS 50/05 of 16 October 2007, in which the Constitutional Court dealt in particular with extraordinary circumstances that should be taken into account by the courts beyond the scope of expert opinions under previous legislation.

In this decision, the Constitutional Court outlined certain aspects that should be taken into account in the decision-making of the courts in this case.

In the above decision, the Constitutional Court stated the following:

“The Constitutional Court proceeded on the basis of the following criteria, which were met or should have been taken into account in the given case:

* the severity of the damage to health, i.e. whether vital organs were affected (damaged),

* the possibility of curing or eliminating the damage caused, i.e. whether, as a result of the damage, the injured party is restricted in her way of life and is obliged to undergo regular medical check-ups, further surgery or has become at least to some extent dependent on equipment as a result of the damage to her health,

* the degree of fault (negligence) on the part of the surgeon, i.e. the extent to which there was a deviation from standard (proper) surgery procedure.”[35]

The Constitutional Court also examined proportionality in the context of the courts' decision-making, looking in particular at the relationship between compensation and the harm caused:

"In other words, the general courts have some discretion in assessing exceptional cases as to what multiplier to apply. However, from the point of view of the protection of constitutionality, they must ensure that the amount of compensation awarded for the impairment of social mobility is based on objective and reasonable grounds and that there is a relationship of proportionality between that amount (monetary amount) and the damage (injury) caused - the 'destruction' of one kidney."[36]

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[35] Constitutional Court's ruling Pl. ÚS 50/05 of 16 October 2007, translation mine

[36] Constitutional Court's ruling Pl. ÚS 50/05 of 16 October 2007, translation mine

In the above-mentioned judgment, the Constitutional Court completely avoided commenting on the specific amount of compensation, but emphasized several absolutely key facts.

Firstly, it addressed the inadequacy of a simple rigid application of the above legislation, as indicated earlier.

Second, the court addressed the reasons why it is appropriate for a court to approach modifications in which it will interfere with the plain interpretation of the legislation outlined above.

And thirdly, the court then outlined the criteria that a court should consider in going beyond the rigid legislation.

The Constitutional Court has also dealt with the limits set in the above-mentioned legislation for compensation of close relatives, which, as described above, were set at a relatively low lump sum, which, in the author's opinion, did not take into account the actual harm experienced by the individuals. In the case law cited below, the Constitutional Court dealt in particular with the inadequacy and severity of these limits and the possibility of exceeding them:

"It concluded that, even in view of the newly incorporated regulation of the compensation of survivors by the amended provision... which is so blanket that it cannot be regarded as an exhaustive solution to the problem at hand, it is not excluded, if the one-off compensation is not sufficient satisfaction for the injury to personality rights suffered, for the persons concerned to seek further satisfaction under the provisions for the protection of personality."[37]

Beyond all of the above, the Constitutional Court has already dealt with the compliance of the above legislation with the Constitutional Order, where it can be stated quite convincingly from the case law cited below that, although the Constitutional Court was not authorized to do so, it can be concluded quite convincingly from its findings that the above legislation, in particular the Decree of the Ministry of Health on compensation for pain and hardship of social employment, is not fully compatible with the Constitutional order of the

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[37] Constitutional Court's ruling I. ÚS 2844/14 of 22 December 2015, translation mine

Czech Republic, as quoted from the Decision Constitutional Court III.ÚS 350/03 of 29 September 2005:

"Furthermore, the Constitutional Court adds, beyond the complainant's allegations in her constitutional complaint, that... a judge is bound by the law and an international treaty which is part of the legal order when making a decision; he is entitled to assess the conformity of another legal regulation with the law or with such an international treaty... he is entitled to assess the conformity of another legal regulation with the law. Thus, if the judge(s) conclude that the subordinate legislation is contrary to the law, they do not apply it to the specific case, but only apply the provisions of the law. The above mentioned should be noted in relation to the argument of the Regional Court in Pilsen and the Supreme Court mentioned above regarding the shortcomings of the then applicable compensation legislation with regard to the current wage situation."[38]

The author of this thesis has come to the conclusion that it can be stated quite convincingly from the case law referred to above that the way the legislator and the Ministry of Health have dealt with compensation for certain types of non-pecuniary damages to bodily harm is not fully consistent with the Constitutional Order of the Czech Republic. The rigidity of the regulations, the insufficiency of the compensation and, last but not least, the limitation of the courts' decision-making, which adheres to the legislation described above, were also found to be inadequate. All of this led, as will be described below, to a change in the law and an attempt by the legislator to determine compensation in a different way, taking into account more of the individuality of each case and the decision-making power of the courts. The current situation in legislation and legislation developments will be described later in this thesis.

[38] Constitutional Court's ruling III. ÚS 350/03 of 29 September 2005, translation mine

1.5.3 Legislation after recodification

1.5.3.1 Government explanatory report

As it was described earlier in this thesis, in 2012 a new civil code was created, effective from 1 January 2014, which newly governs the civil law, replacing the original, many times amended originally communist legislation described in the previous paragraphs. The new law, as will be described below, introduced many new concepts, drawing on modern western codifications.

The legislator commented on the change in legislation in the explanatory memorandum as follows:

"The result of these pervasive changes was a total departure (in content and form) of the Civil Code of 1964 from the European continental convention. The theoretical conception of its institutes was Marxism-Leninism, and ideologically, the Code's modification was aimed at "living socialist relations", which, given this conception, the old legal forms did not suit. In terms of ideological consistency, the new regulation even sought to surpass the Soviet model."[39]

The inspiration of the new legislation is mentioned, inter alia, in the following explanatory memorandum:

"...a critical evaluation of the more important civil codes from the European continental culture (in particular, the Austrian, Swiss, German, Italian, Dutch, Polish codes; among the most modern adaptations, the civil codes of 18 Québec and Russia are taken into account; the French, Belgian, Spanish and Portuguese codes are also taken into account, as well as the civil law of Liechtenstein and some other adaptations) ..."[40]

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[39] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 5, translation mine

[40] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 17, translation mine

In the text of the explanatory memorandum to the new legislation, the method of determining non-pecuniary damage on the basis of any tariffs and tables, whether constructed by the legislator or even by sub-legislative regulations, is criticised quite extensively. In particular, the legislator has been concerned with the proportionality between legal certainty and simplification of the work of the courts and a genuinely fair decision in each individual case:

"With regard to non-pecuniary damages on bodily harm or death compensation, the concept of previous legislation and the idea that the compensation scale should be determined a priori by law or even by subordinate legislation in order to simplify the courts' decision-making is abandoned."[41]

The legislature further addressed the fact that the table values as constructed in the previous legislation have no basis in virtually any of the modern legislation, which is fully in line with the basic principles of the rule of law, where it is certainly not for the legislature to interfere with powers which are clearly within the influence of the judiciary. The courts alone, according to the legislature, should interpret the law, and the assessment of interference with individually perceived rights cannot be generalized:

"Notwithstanding the fact that the standard statutory provisions do not take a similar approach and offer the courts - if at all (e.g. the French Code civil or the Swiss Zivilgesetzbuch do not address these issues at all and give the judge a free hand) - it should be pointed out above all that the decision of an individual legal case belongs only to the judge and the legislative power, let alone the executive power, does not have the power to tell the court how to decide an individual case."[42]

The legislator further elaborated on the idea of individual perception in interference with individual rights and also stated the fact that one cannot generalize so much about

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[41] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 576, translation mine

[42] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 576, translation mine

individual interference with individual rights as each case is different and each individual perceives interference with his/her rights individually:

"Private life is infinitely variable, and the attempt to level it in matters as highly individual as pain, the consequences of personal injury for the future of the injured person, or the loss of a loved one is unwarranted."[43]

The legislator specifically questioned the lump-sum, statutory amounts that should be awarded for the death of a person in a familial relationship when the circumstances that affect individual perception are too numerous:

"There is, for example, no reason to create a right in the case of the death of a spouse or sibling to be paid the sum of CZK 240 000 or CZK 175 000, as is the case under the current legislation. In some circumstances this may be too little, in others too much."[44]

The legislator also paused to consider the reasons that might make a lump sum compensation for the death of a loved one absolutely essential, when it is quite obvious that the relationship of the family members, the intensity of the contact, the stage of the relationship and its quality are so different that it is absolutely impossible to generalise and leave a single amount for each individual case:

"It makes a clear difference, for example, whether the marriage lasted only a short time or several decades, what the relations between the spouses were during the marriage, whether divorce proceedings were initiated, whether the spouses lived together at all and for what reasons they lived apart, etc. These and other circumstances can and should be reflected positively or negatively in the amount of compensation."[45]

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[43] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 577, translation mine

[44] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 577, translation mine

[45] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 577, translation mine

The legislature further commented in particular on the fact that it was not tables that should decide for the judge in individual cases but all the individual aspects of each case so that fair compensation could be achieved:

"No one can take away the responsibility for a just decision in a particular case from the judge, and the attempt to level private life in its manifolds will produce nothing but rigor unmatched by the nature of the individual cases."[46]

The legislature then compared the matter also to the present state of compensation and fixing of amounts in other similar cases, where, in the opinion of the legislature, tabular values cannot be fixed well enough:

"Compensation for non-pecuniary damages in connection with other interferences with the personal sphere (name, honour, reputation, privacy) or, for example, compensation for injuries caused by unfair competition or offences against a trade name are not even specifically determined in the current legislation as to their amount, without this causing difficulties in decision-making practice. This is similar, for example, to the amount of maintenance and in many other cases."[47]

At the same time, the legislator, in an effort to preserve the principle of predictability of court decisions, expressed the possibility of courts, with the assistance of setting certain internal criteria, on the basis of which there will be at least partial predictability of court decisions, as such, but with full responsibility of courts for individual decisions:

"If some members of the judiciary feel the need for tables, formulae or keys specifically for these purposes, there is nothing to prevent the judiciary itself agreeing on the principles to be followed."[48]

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[46] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 577, translation mine

[47] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 577, translation mine

[48] Govt: Explanatory Report to Act No. 89/2012 Coll., Civil Code, No. 89/2012. [Online]. Available at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf (Accessed 1 November 2021), p. 577, translation mine

1.5.3.2 Act number 89/2012

As described earlier, the key provision describing the harm and also the non-pecuniary damage is, in general terms, the provision of Section 2894 of Act No. 89/2012:

"(1) The duty to provide compensation to another for harm shall always involve the duty to provide compensation for harm to assets and liabilities (compensation for damages).

(2) If the duty to provide compensation to another for non-pecuniary harm has not been expressly stipulated, it affects the tortfeasor only where specifically provided by a statute. In such cases, the duty to provide compensation for non-pecuniary harm by providing satisfaction is assessed by analogy under the provision on the duty to provide compensation for damages."[49]

In view of the fact that the previous legislation, including court decisions, has already been described in this thesis, it can be stated quite convincingly that the concept of compensation of harm under the new legislation has created a wider scope for the compensation of non-pecuniary damages and, above all, has unified the legal regime for the compensation of damages and non-pecuniary damages on the basis of the same or similar rules.

As previously described, the new term used is no longer simply 'damage' but 'harm', which covers both damages and non-pecuniary damages. The new regulation does not define what exactly can be considered as harm. In general, loss suffered may be considered as harm, but in order for that harm to be considered legally relevant from a private law perspective, it must be suffered to a right-protected asset.

The new legislation established that if the conditions for attributing the injury to someone other than the person in whose sphere the injury occurred are met, then the damage is always compensated. Non-pecuniary damage is to be compensated only if, in addition, the conditions of section 2894 (2) are met.

One of the basic definitional elements is that the non-pecuniary damage is not, at least to date, capable of objective determination in accordance with the market environment the instruments of the market.

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[49] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2894, official translatation

In general terms, non-pecuniary damage is defined as the disturbance of the individual feelings, interests or perceptions of the injured party, which cannot be objectively determined as a reduction in the value of property and cannot therefore be accurately and objectively determined in the form of money.

Non-pecuniary damages arise and are remedied in particular where a person's personality is disturbed.

It follows from the first subsection of section 2894 that, where non-pecuniary damage occurs, the injured party is not, as a rule, entitled to compensation for it; it is the second subsection of section 2894 which states when the non-pecuniary damage is actually compensated.

The current provision in the second subsection creates a rule for non-pecuniary damages. This rule states that the right to compensation must be either agreed between the parties or established by law.

On the merits, it could be said that such a rule is very restrictive of individually perceived non-pecuniary damage; on the other hand, it should be noted that the law is interwoven with individual provisions which set out in which cases non-pecuniary damage is compensated.[50]

These rules include in particular the rule under Section 2956 of Act No. 89/2012:

"Where a tortfeasor incurs a duty to compensate an individual for harm to his natural right protected by the provisions of first part of this Act, he shall compensate the damage as well as non-pecuniary harm thus caused; compensation of the non-pecuniary harm shall also include mental suffering. "[51]

This provision was necessary to establish the obligation to compensate for non-pecuniary damage and thus the harm to a person's natural rights was compensated to the full extent of the harm caused. The provision is also the basic rule for the compensation of non-pecuniary damage characteristic of this chapter and this thesis. At the same time, it is

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[50] Hulmák, M. et all, (2014) *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář.*. 1st edn. Prague: C.H.Beck, pp. 1496-1499, translation mine

[51] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2956, official translation

absolutely necessary to apply the provisions set out later in this thesis for a precise determination.

For a more precise explanation, it is also necessary to understand more precisely the provision determining the meaning of the natural rights of man as used above. According to the provisions of Section 81 of Act No. 89/2012 Coll., a person is protected in his/her natural rights, which are then listed demonstratively in the following provision:

"(1) Personality of an individual including all his natural rights are protected. Every person is obliged to respect the free choice of an individual to live as he pleases.

(2) Life and dignity of an individual, his health and the right to live in a favourable environment, his respect, honour, privacy and expressions of personal nature enjoy particular protection."[52]

The inclusion of this rule in the Civil Code may seem superfluous, since the obligation of constitutionally compliant interpretation arises from the constitutional order and is bound by the numerous case law of the Constitutional Court. However, the explanatory memorandum emphasises the concept that the natural rights of man constitute a limit to the law and not the other way around. This provision of the law thus seeks to avoid excessive legal formalism by emphasising the rule that the interpretation of the law can be correct only if it respects the legal principles arising from the constitutional order and the general principles of private law.[53]

"The manner and amount of adequate satisfaction must be determined so as to also compensate for the circumstances deserving special consideration. These circumstances shall mean causing intentional harm, including, without limitation, causing harm by trickery, threat, abuse of the victim's dependence on the tortfeasor, multiplying the effects of the interference by making it publicly known or as a result of discriminating the victim with regard to the victim's sex, health condition, ethnicity, creed, or other similarly serious

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[52] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 81, official translation

[53] Chaloupková, H., Holý, P., Urbánek, J., (2018) *Mediální právo*. 1st edn. Prague: C.H.Beck, pp.341 – 357, translation mine

reasons. Account is also taken of the victim’s concerns of loss of life or serious damage to health if such concerns were caused by the threat or other causes.”[54]

The provision sets out one of the criteria by which compensation is to be determined in general terms, the conduct of the tormentor. When interfering with a person's natural rights in the event of non-pecuniary damage, we take into account special circumstances when choosing the method and amount of appropriate compensation.

This provision builds on previous legislation, and this case has been decided by the courts repeatedly and therefore there has been a fairly extensive case-law on the matter in the past.

In view of the fact that case law has already been cited in this thesis, which has mentioned the effect of the circumstances on the side of the wrongdoer and in the individual case, the author of this thesis will not repeat the case law in view of the scope of this thesis. However, from the text already contained in this thesis, it is appropriate to highlight in particular some aspects that affect compensation. These include, for example, the manner in which the victim has been acted by the wrongdoer, the publicity of the harm, and, where appropriate, the victim's perception of the harm with regard to discriminatory and other elements.

The case has been repeatedly judged and stated by the Constitutional Court, one of these cases is the following:

"The non-pecuniary damage to the personality of the affected natural person is equally serious regardless of whether the author of the interference acted culpably or not. The subjective element of fault is relevant only in determining the amount of compensation for non-pecuniary damage..." [55]

Another fundamental provision for this thesis is the following provision, which sets out the elementary rules for compensation for non-pecuniary damage to health:

“In the case of bodily harm, the tortfeasor shall compensate the victim for such harm in money, fully compensating for the pain and other non-pecuniary harm suffered; if the

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[54] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2957, official translation

[55] Constitutional Court's ruling IV. ÚS 315/01 of 20 May 2001, translation mine

bodily harm resulted in an impediment to a better future for the victim, the tortfeasor shall also compensate him for the deteriorated social position. Where the amount of compensation cannot be determined in this manner, it is determined according to the principles of decency."[56]

As described earlier in this thesis, the previous legislation determined the amount of compensation by means of tabular values that were issued at the ministerial level. Compensation then depended on the injury score, and major deviations from this score were rather rare.

In contrast, the new legislation takes a different approach. The legislation gives the judge a considerably greater degree of autonomy to determine the amount of appropriate compensation for non-pecuniary damage to health.

The purpose of compensation under the following provision is to seek adequate compensation for all the hardship and suffering which the injured party has had to endure as a result of the personal injury. Accordingly, this provision includes a rule stating that, in addition to the physical pain suffered, the injured party should also be awarded pecuniary compensation which fully compensates for other non-pecuniary damage. Last but not least, it should be mentioned that, among other things, the law makes direct reference to the principles of decency. Thus, the law no longer refers directly to any tabular or other predetermined value, but on the contrary aims at a fair solution in each individual case, and it is quite clear that all legal principles, not only those of civil law (e.g. predictability in legal decisions), must be respected in such a solution.[57]

The last statutory provision of the Civil Code that is relevant to the content of this thesis is the following provision:

"In the case of killing or particularly serious bodily harm, the tortfeasor shall compensate the spouse, parent, child or other close person for the mental suffering in money,

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[56] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2958, official translation

[57] Hulmák, M. et all, (2014) *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář.*. 1st edn. Prague: C.H.Beck, pp. 1703-1716

fully compensating their suffering. Where the amount of compensation cannot be determined in this manner, it is determined according to the principles of decency."[58]

As discussed earlier in this thesis, prior legislation did not contain such a general and broad rule for redressing the pure mental harm of a qualified class of secondary victims.

The legislature has awarded fixed sums to some persons as compensation for the loss of a loved one, which has been discussed previously in this thesis, including criticism of such a provision that stated that fixed sums are not a sufficient solution because they do not sufficiently take into account the individuality of each case.

Again, the breadth with which the legislature has approached compensation is relevant to the assessment of individual cases, and the principles of decency are also relevant.

1.5.3.3 Methodology of the Supreme Court on Section 2958 of Act No. 89/2012 Coll.

Due to the fact that in the past it was common for courts to decide on non-pecuniary damage to bodily harm on the basis of a sub-legislative regulation, and that now they have no guidance by which to decide, the repeal of the previous legislation has created quite considerable legal uncertainty and a potential gap in decision-making.

Personal injury and its compensation is a normal part of people's lives, and it was therefore legitimate to expect that in the absence of guidance there would be a fairly wide variance in what could legitimately be expected in the case of compensation for non-pecuniary damage. Given that the Supreme Court is, by the nature of its position in the judicial system of the Czech Republic, the judicial instance that unifies the decisions of the individual courts, the Supreme Court issued the methodology guidelines in an attempt to unify the decisions of the courts.

In issuing the methodology, the Supreme Court also mentioned some important sub-theses in its summary. The first of these is directly related to the provisions of Section 2958 of Act No. 89/2012 Coll., where the Supreme Court states, "A fair and reasonable interpretation of such a regulation, which lacks any more detailed criteria for determining the amount of compensation, requires more detailed specification and setting of the basic

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[58] Act No 89/2012 Coll, The Civil Code of the Czech Republic, § 2959, official translation

premises so that judicial practice can arrive at mutually commensurate and at the same time predictable decisions..."[59]

The Supreme Court also described how the methodology was developed: "the Supreme Court, in cooperation with the Society of Medical Law, representatives of insurers and other legal and medical professions, developed the Methodology for Compensation for Non-Pecuniary Damages under Section 2958 of Act No. 89/2012 Coll. It is a material based on the foundations, principles and methods that were discussed by the wider legal community between November 2012 and March 2014, and whose professional basis is a comprehensive medically conceived systematics of medical injuries, describing the relative proportions in the context of compensation for pain and suffering and for impairment of social life..."[60]

The Supreme Court's methodology was divided into 4 parts, namely the preamble, which, in addition to the introduction, includes a method of general interpretation, and the other parts deal with pain, impairment of social work, and the way in which expert opinions shall be formed.

Considering the scope of this work, it can be stated quite convincingly that in principle, the methodology of the Supreme Court is essentially similar to the tools used previously, what distinguishes it is mainly the method and use on the basis of which this methodology can be applied. A deeper examination of the content of the methodology, including the preparation of expert reports, is, in the opinion of the author of this thesis, beyond the scope of this thesis.

Thus, several facts in particular are worth mentioning. First of all, it is the fact that the website https://www.nahradazsu.cz/ and https://www.datanu.cz/ was presented in the technical part, on the pages of which it is possible to draw up one's own opinions, or to

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[59] The Supreme Court of Czech Republic. (2014). *Metodika k § 2958 o.z.* [Online]. Available at: https://nsoud.cz/Judikatura/ns_web.nsf/Edit/Rozhodovacicinnost~Metodikak%3F2958o.z. (Accessed: 10 November 2021)., translation mine

[60] The Supreme Court of Czech Republic. (2014). *Metodika k § 2958 o.z.* [Online]. Available at: https://nsoud.cz/Judikatura/ns_web.nsf/Edit/Rozhodovacicinnost~Metodikak%3F2958o.z. (Accessed: 10 November 2021). translation mine

compare previous court decisions in which the amount of compensation in the case of non-pecuniary damage to health was assessed.

Another significant change is the fact that the point values have now been linked to a multiplication of the gross monthly wage, which has made it possible to take inflation sufficiently into account.[61]

Among other things, the Supreme Court justified its methodology on grounds not yet mentioned in this thesis: "The reasons for the elimination of the existing system of evaluation of pain and impairment of social work apparently aim only at the area of litigation, but completely overlook the fact that the criticized compensation decree made it possible to resolve most cases out of court, since the system of scoring of permanent consequences by medical opinion provided a fairly reliable basis for the calculation of compensation, which, with exceptions, could stand up even in a potential court case. If the Decree could no longer be relied upon, most cases would probably end up in court."[62]

The Supreme Court was also rather critical of the legislator's natural law approach to the repeal of the original legislation, noting the apparent complete absence of any guidance on the highly technical issue of what is unquestionably the determination of compensation for bodily harm, as set out below:

“The very exact concept of determining the basic amount of compensation according to an aetiologically conceived and detailed systematics of health problems in the decree is replaced by a statutory diction based on very vague concepts... This is a highly specialised area, since personal injuries cannot be described in any other way than by medical diagnosis, and the assessment of most of the effects of permanent health damage on the life of the

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[61] The Supreme Court of Czech Republic. (2014). *Metodika Nejvyššího soudu k náhradě nemajetkové újmy na zdraví (bolest a ztížení společenského uplatnění podle § 2958 občanského zákoníku) - Technická část* [Online]. Available at: https://nsoud.cz/judikatura/ns_web.nsf/0/16C82D4F0E714C0EC12586930037FED8/$file/D%20-%20Technick%C3%A1%20%C4%8D%C3%A1st%202021.pdf (Accessed: 15 November 2021), translation mine

[62] The Supreme Court of Czech Republic. (2014). *Metodika Nejvyššího soudu k náhradě nemajetkové újmy na zdraví (bolest a ztížení společenského uplatnění podle § 2958 občanského zákoníku) -Preambule* [Online]. Available at: https://nsoud.cz/Judikatura/ns_web.nsf/0/8517900DEC23DEA4C125807A004A24E3/$file/A%20-%20Preambule%20-%20Sbirka.pdf (Accessed: 15 November 2021), translation mine

injured party cannot be done without objectification based on medical methods... anyone seeking legal protection may reasonably expect that his or her legal case will be decided in a manner similar to another legal case that has already been decided and that is identical in essential features to his or her legal case...the courts will not be able to for objective reasons for many years..."[63]

1.5.4 Summary of the development of compensation for non-pecuniary damage to bodily harm

As it was described earlier, the previous legislation was generally predictable, but also rigid in the way it formed the grounds for calculating compensation for non-pecuniary damages to bodily harm. The legislator attempted to change this trend by completely breaking away from the previous legislation and replacing it with new legislation. However, this theoretical idea did not meet with practical acceptance in general terms, since even before the new legislation came into force, revised methodological tables were being drawn up with a view to reviving the original method of compensation, with the intention that such compensation would be based primarily on a decision of the judiciary and not on a decision of the executive.

In general terms, it can be seen from the developments and the way in which they have been responded to that the facts set out in the preceding text show that in the highly technical question of compensation for non-pecuniary damages to health there is a real need to take into account expert opinion. The assessment of a professional question cannot, by definition, be entrusted to persons who do not understand the problem professionally; such an opinion can only be a corrective to a highly professional assessment. Nevertheless, the transfer of the determination of the amount of compensation from the Ministerial Decree to the non-binding Methodology of the Supreme Court is, from a legislative and legal point of view, fully in line with the natural development of the law and thus gives the judiciary the

[63] The Supreme Court of Czech Republic. (2014). *Metodika Nejvyššího soudu k náhradě nemajetkové újmy na zdraví (bolest a ztížení společenského uplatnění podle § 2958 občanského zákoníku) -Preambule* [Online]. Available at: https://nsoud.cz/Judikatura/ns_web.nsf/0/8517900DEC23DEA4C125807A004A24E3/$file/A%20-%20Preambule%20-%20Sbirka.pdf (Accessed: 15 November 2021), translation mine

opportunity to respond in a flexible manner to the current development of knowledge of human perception and the latest scientific methods.

1.6 Non-pecuniary damage for defamation

The author of this thesis originally aimed to lay the foundations of a methodology for an alternative system of compensation for non-pecuniary damages for bodily harm.

During the practical part of the thesis, it was realised that there is a limit of expertise that cannot be overcome by the lay public. It was not possible to use the lay public to compare the case law with the author's results.

Therefore, the author decided to additionally create an econometric function in a different area that is more conceivable to the lay public. Therefore, the author of this thesis chose the area of non-pecuniary damage for defamation.

When studying the case law, the research then revealed that there is nothing analogous to the methodology of the Supreme Court and the courts determine their decisions based on individual considerations, when compared with previous final decisions in similar cases.[64]

Therefore, the author of this thesis, after the first part of the practical part was completed, added this subchapter to the theoretical part of the thesis.

In short, it can be stated that all the general provisions of Act No. 89/2012 Coll., which have already been described above, apply to non-pecuniary damage for defamation, with the exception of the provisions which were previously applicable only to non-pecuniary damages for personal injury.

The case-law of the Constitutional Court cited earlier is then applicable to this chapter as well, with the difference that there is no methodology for compensation, and the court therefore awards compensation solely on the basis of previous decisions.

Therefore, the econometric modelling method chosen by the author is essentially an upgrade of the current case law, as referred to, for example, in the Constitutional Court's ruling II. ÚS 474/19 of 5 November 2019.[65]

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[64] Constitutional Court's ruling II. ÚS 474/19 of 5 November 2019, translation mine

[65] Constitutional Court's ruling I. ÚS 668/21 of 2 November 2021, translation mine

Practical Part

1.7 Non-pecuniary damage to bodily harm

Non-pecuniary damage to bodily harm and its compensation has already been summarised in the theoretical part of this thesis. The ways in which the injury is compensated have also been summarised. In response to the current compensation, the author proposed incorporating social opinion into the determination of injury calculation by econometric modelling. Next, it will be described how the author of this thesis considered that compensation should occur and why the author of this thesis ultimately developed a model for calculating non-pecuniary damages caused by defamation.

1.7.1 Theoretical background

The author decided to use the econometric model of the least squares method, which is based on the assumption that each independent variable has a certain influence on the dependent variable.

“Econometrics is the quantitative application of statistical and mathematical models using data to develop theories or test existing hypotheses in economics and to forecast future trends from historical data. It subjects real-world data to statistical trials and then compares and contrasts the results against the theory or theories being tested.”[66]

“Ordinary least squares, or linear least squares, estimates the parameters in a regression model by minimizing the sum of the squared residuals. This method draws a line through the data points that minimizes the sum of the squared differences between the observed values and the corresponding fitted values.”[67]

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[66] Hayes, A. Econometrics [Online]. Available at: https://www.investopedia.com/terms/e/econometrics.asp (Accessed 25 November 2021)

[67] Frost, J. Ordinary least squares [OLS] [Online]. Available at: https://statisticsbyjim.com/glossary/ordinary-least-squares/ (Accessed 26 November 2021)

Thus, if the author creates a sufficiently comprehensive questionnaire with inputs that affect fair compensation, he can create a function that will subsequently allow him to infer the calculation of non-pecuniary damages from a new case in which the individual interventions on the chapters of injury are evaluated.

A necessary prerequisite was the ability of respondents to determine the degree of personal injury intervention. Based on this, respondents could then be asked to complete a questionnaire to determine their perceptions of fair compensation.

Since the author chose respondents with no professional background for his consideration, he concluded already in his initial testing that his respondents were not absolutely competent to assess the degree of interference with health. Given that the respondents were not professionally competent to estimate the degree of interference with health in the case of interference with health, it made no further sense to test whether these non-expert assessments would result in compensation of a fair and predictable amount.

1.7.2 The process of creating the model

In view of the above, then, no model was developed because no relevant data were collected.

1.8 Non-pecuniary damage caused by defamation

1.8.1 Theoretical background

The author has decided to use the econometric model of the least squares method, which is based on the assumption that each independent variable has a certain influence on the dependent variable.

The author of this thesis was fully aware of the fact that econometric models are primarily used to estimate time series, on the other hand, he did not possess from his study a sufficient method that could estimate in a better way the influence of each independent variable on the dependent variable - compensation.

1.8.2 The process of creating the questionnaire and model

The author of this thesis assumed that, unlike the previous case, respondents would be better able to rate individual cases and estimate the impact of defamation on the victim's life.

Based on this, he formed a group of eight people and presented three fictional defamation cases and had the group come up with individual influences that, in the opinion of the respondents, would affect the intensity of the negative perception of the victim's defamation, and would also appear in the amount of compensation for non-pecuniary damage. The respondents therefore created a system of evaluation criteria that would be used to determine the interference with the victim's personal rights. These criteria developed by the group are as follows:

a) Duration of the spread of defamation, b) Interference in professional life, c) Interference in personal life, d) Interference in family life, e) Health problems, f) Need for change, g) Public recognition, h) Overall income, i) Income interference, j) Defamatory intention, k) Degree to which victim has voluntarily allowed the defamation to interfere own life, l) Severity of the certain type of defamation, m) Other reasons not stated.

Subsequently, the author of this thesis developed a questionnaire that produced the following 3 stories of defamation damages:

First non-pecuniary damage agency

"*Before the rumour, Mr A was an ordinary 35 year old citizen who commuted to work in an office building of a multinational company where he took an average wage. He was fairly popular in his team, was raising 2 children at home with his wife and living a quiet life, and had started to build a house.*

A female work colleague accused Mr A of sexual harassment and attempted rape at a cultural event organised by the company. The rumour spread very quickly and soon Mr A was known as an undesirable person in the company, which led to mobbing at work. As Mr A lived next door to a colleague at work, the gossip spread to his neighbours and logically then to his children school.

Mr. A initially tried to continue his job, but after a month he voluntarily quit and also changed his field of work, after six months Mr. A lost his wife, who was subjected to higher levels of stress, and he was also forced to move out, the children at school suffered from

bullying. Mr A attends regular psychotherapy and lives alone away from his original home. Mr A now has 20% less income.

After a year, a leaked private conversation by a colleague revealed that she had made the matter up against Mr A because Mr A was, in the colleague's view, free-riding on her work performance. A third of the original colleagues still believe that the rumour has a real basis and continue to spread the rumour, even in places where Mr A originally attended, such as his favourite sport place."

Second non-pecuniary damage agency

"*Mr B was a 65 year old widower who lived alone with his two dogs on a retirement pension and never had children. He socialised with several neighbours in the neighbourhood, helping out with what he could on his own. Occasionally he frequented the local pub.*

A neighbour claimed Mr B had murdered his own brother 30 years ago, which led to Mr B being ostracised out of fear, and his rent being terminated, although he himself did not know, the reason for this and on the last day of his tenancy he committed suicide in the flat, saying in his suicide note that he felt lonely because he had not been spoken to for the last 3 months (since the rumour spread) and felt lonely."

Third non-pecuniary damage agency

"*Mr C is a man in his fifties, one of his country's most famous personalities, and has a highly superior income, many times higher than the social average. He was photographed at a train station by journalists hugging an unknown lady, whose face they blurred and identified as his mistress.*

Mr C defended himself that she was his stepsister, a well-known fact in the family, and documented everything to the newspaper asking for an apology, but the newspaper, strengthened by its high readership, spread this untruth for the next 3 months before the first lawsuits came.

Mr C felt the stress of the family but this led to the whole family bonding together even more, on the other hand Mr C lost 20% of his popularity, his children were bullied at school and Mr C lost part of his work. Paradoxically, the situation led to virtually no change on the income side. Although the matter turned out to be a rumour, Mr C is still repeatedly

questioned about his alleged infidelity and faces repeated taunting reactions on the street together with his wife."

In the questionnaire, the author then asked the respondents to rate the interference with rights and the consequences for victims in the criteria described above. There were a total of 1 specific criteria and one additional criterion that was intended to capture other influences that were forgotten in the design.

At the same time, the author asked respondents to answer what other variables might describe the interference with the rights of the aggrieved. These areas then more or less repeated the answers that were already, embedded in the evaluation criteria.

It was essential to obtain a minimum of 14 responses per case in order to estimate the pattern of compensation for harm. In the end, the author obtained 65 respondents, using 23 of these respondents' answers, as the others did not pass the filters set up by the author to flag poorly completed questionnaires. The criteria filters were based on time spent filling in the questionnaire, quality of answers, answers for all questions and rather expected values from people not from clicking robot.

The author considered whether to take into account and classify the respondents in some way (age, gender, …), but in this case, where a rather general model was being built, he decided not to take these criteria into account in any way, as they were irrelevant to the creation of the model.

In the last part of the questionnaire, the author then let the respondents decide how much of the imaginary 100% budget to allocate to each victim. In fact, the author of this thesis did not aim to create exact compensation for each case, but rather to set up a relationship between them, and assigning values to these relationships would then become the subject of further research. The setting of the budget value was as follows:

"Imagine that you rescued Mr B just before his death and had to divide the total compensation budget determined between Mr A, Mr B and Mr C, as fairly as possible. How would you divide this budget as a percentage (the total must be 100%)?

Mr A - defamation of rape : _______ (1)

Mr B - defamation of murder : _______ (2)

Mr C - defamation of a lover : _______ (3)

Total : ________"

After collecting a sufficient number of evaluated cases, totaling 69, the author then terminated the questionnaire and exported the data to excel, and then entered it into the GRETL software, using the ordinary least squares method, letting the software estimate the influence of each variable. At the same time, all significant control coefficients and calculations were checked by the GRETL software.

The amount of compensation due to the damaged party in each case according to the questionnaire respondents was entered as an explained variable in the software. The coefficients of the effect of each variable as outlined above and answered for a given amount of compensation by an individual respondent were then used as explaining variables.

As part of its processing, the software estimated the effect of each explanatory variable, which can be used to generate a function that can be used to determine compensation.

4. Results and Discussion

1.9 Results from the GRETL software

First, when describing the results, author of this thesis needs to name the variables again. **y1t** is the explained variable of the percentage of compensation from the budget.

The **x1t** is an explanatory variable describing the duration of the defamation. The **x2t** is an explanatory variable describing interference with professional life. **x3t** is an explanatory variable describing the interference with personal life. **x4t** is an explanatory variable describing the interference with family life.

x5t is an explanatory variable describing the health intervention. **x6t** is an explanatory variable describing how much the victim had to change his/her life habits and life in general. **x7t** is an explanatory variable describing how much the victim was known before the rumour was leaked. **x8t** is an explanatory variable describing how high the victim's income was before the rumour was leaked.

x9t is an explanatory variable describing the decrease in income as a result of the rumour. **x10t** is an explanatory variable describing the extent to which the person leaking the rumour intended to deliberately harm the victim. **x11t** is an explanatory variable describing the extent to which the victim voluntarily succumbed to the influence of the leaked rumour. **x12t** is an explanatory variable describing the dangerousness and intensity of the type of slander.

x13t is an explanatory variable describing other influences not included in the model that the author of this thesis did not include in the model estimation.

The function calculated by the GRETL software was then generated, as shown in the appendix of this paper, as follows:

y1t=6,43045 – 0,431641 * x1t – 0,769767 * x2t + 1,04664 * x3t – 0,640628 * x4t + 0,514642 * x5t + 0,574649 * x6t – 0,318648 * x7t + 0,890267 * x8t + 0,106849 * x9t + 0,612577 * x10t + 0,108266 * x11t + 2,30272 * x12t – 0,284512 * x13t + error

The function can be explained in the following way, and on this basis, it can be concluded quite convincingly that the way in which the estimate was determined failed to make the function absolutely universally applicable.

The first part of the equation is a constant which says that if the injured party is entitled to compensation on the basis of defamation, it will receive 6.43045% of the budget awarded even if there was virtually no defamation intervention. This is in direct contradiction to the way the courts have ruled and it can be fairly conclusively established that the constant at the beginning of the equation is certainly an error, even though it is the way compensation is generally determined.

The 0.431641 * x1t part can be used to explain how compensation would be based on the duration of the defamation by intensity, based on the responses of the respondents and the model used, and again it can be seen that this does not match reality.

This is because for each of the points on the 0-10 scale, the victim receives -0.431641 of the percentage budget. So, for example, if the defamation had the maximum possible duration, i.e. for the rest of the life, perhaps even beyond, 4.311641% of the budget would be subtracted from the constant. This makes virtually no sense in theory.

On the basis of the explanations, it can then be concluded quite convincingly that the estimate did not meet logical or other similar expectations for at least x1t, x2t, x4t, x7t and x13t. It is then against good morals to claim that if the defamation affects, for example, the professional life of the victim in isolation, the compensation will be less than in the isolated case of the constant.

The same is then true of the interference with the victim's family life, the victim's public knowledge before the defamation was leaked. In the case of a complementary variable, this cannot be argued.

On the contrary, this is countered by the fact that the greatest impact on the compensation should be the interference with the victim's personal life, how high the victim's income was and, above all, and this is essentially the main point, the nature of the defamation itself.

1.9.1 Criticism of the method and results from the GRETL software

It is perhaps not a practical surprise, then, when the author read from the p-values that the only truly descriptive indicator was indeed the intrusion into personal life and the nature of the rumour itself, the other variables being assessed as rather redundant and introducing more chaos into the matter.

The author of this thesis then, perhaps just for the sake of argument, calculated the sum of the estimated values and compared them with the actual values obtained from the questionnaire and, after the comparison, found that in about one-quarter of the cases the difference between the theoretical values and the observed values was more than 5% on the compensation scale, a rather high figure in terms of the calculated values.

The author then concluded that there were a number of errors in this method.

The main error was in the case of the use of the least squares method combined with the use of econometrics, which is primarily focused on time series, although it also has tools for estimating such functions. In general, linear estimation is also an error in the case of a function where the individual inputs need to be put into a larger context, not just added or subtracted.

Another very little recoverable error was the fact that, for individual cases, individuals considered individual inputs in a highly random pattern, and there were also random compensations for those inputs, thereby inherently introducing large statistical biases that can hardly be compared to something as precisely determinable as, for example, the market price of beef as a function of the variables that demonstrably affect it.

Last but not least, the idea that compensation can be solved by a linear function is also a mistake.

It should also be remembered that each of the variables entered into the system should have some effect on compensation; on the other hand, one or two inputs are more likely to be the main ones in a quick decision by the respondent to a questionnaire.

Thus, the author of this thesis found a whole line of errors in the thesis that could have been eliminated, on the other hand, the negative experience with the least squares method is also an experience that has its value and proved to be a dead end.

It is also important to note that, within the totally unpredictable patchwork of damages in this chapter, the individual deviations from the merits are still qualitatively higher than the common case law, where it has been possible to see from the case law cited above that the claimant and even the courts have deviated in their reasoning by thousands of percentages, while the higher courts have then been able to confirm that the lower court's view is insufficient as to compensations for damages.

1.10 Better determination of the function of non-pecuniary damage compensation

If the author of this thesis were to elaborate on this topic again in the future, he would probably pay more attention to statistical and mathematical methods that could better describe the randomly occurring unknowns explained.

At the same time, the author of this thesis would have done significantly more research on the areas that should influence the final decision on the amount of compensation.

Also, the author would have better addressed the interactions between these variables and the hypothetical situations that some variables drop out. It should be noted that it would be useful to think about functions that are more complex than linear, as some variables might have a different relationship in a fairer world, for example, it might be fairer to multiply them among themselves.

It would also be useful to change the scales on which some variables move. For example, income or income reduction should be in terms of currency or percentage.

Furthermore, it would be most appropriate for the future researcher to collect data in a completely different way.

In such a case, the entire imaginable range of defamations and their intensity should be devised, the effect of the individual variables should be examined in each case, and then compensation should be apportioned among these individual cases.

Only on the basis of the precise values of the defamation interventions would it then be possible to further develop some model where it would be clear that one type of intervention is one intensity. At the same time, the method of a single adjudicating body of experts could be combined with a mix of judges, lawyers and the general public.

Thus, in principle, one body would be responsible for multiple situations. Multiple respondents could then be replicated for control and the models compared. This could provide a response from an expert group of persons or the general public.

A whole range of such recommendations could be made, but essentially the point is that the respondent or respondents should know the effect of each variable on the compensation calculation.

However, despite all of the above, it is fair to say that within the respondents surveyed, there is a variable that has a direct impact on the amount of compensation, and that is actually the true nature of the defamation.

The author would like to revise the results in the future and find a more reliable method of estimating compensation, to better establish a group of people whose opinions should be more indicative of compensation.

It cannot be overlooked that, although the results of the practical part are mathematically and statistically quite controversial, it can still be stated that a model was produced which in most cases replicated the ideas of the questionnaire respondents about fair compensation, which can be considered rather exceptional in the context of common court practice.

Conclusion

The author of this thesis has studied the historical development in the case of harm and non-pecuniary damages as such. In this thesis it was further described what the concepts of harm, damages and non-pecuniary damages mean.

Furthermore, the author of this thesis explained in which areas non-pecuniary damages occur, what are its defining elements and defined harm and non-pecuniary damages in the context of current and previous legislation.

The author of this thesis dealt with the concept of non-pecuniary damage to health, as well as non-pecuniary damage from defamation. Four basic ways in which non-pecuniary damage has been or is being compensated have been identified and explained.

In particular, the author of this thesis has looked at compensation based on the methodology of the Supreme Court and by comparing individual court decisions.

From a jurisprudential point of view, the foundations of these methods have been summarized and the limits and advantages or disadvantages of these methods have been presented.

This was followed by a practical part in which the author described the concept of econometrics, its background and its practical impact on the determination of compensation, either based on previous decisions or determined on the basis of a wider survey of a selected number of respondents according to certain criteria.

The preparation and testing of a questionnaire on non-pecuniary personal injury, prior to finalising the questionnaire and sending it out to respondents, then revealed that the lay public is not in a position to determine highly professional interventions in the sphere of health in the cases outlined by the author.

This essentially established that econometric modelling is capable of estimating a function from inputs, but these inputs must be based on a different source of information.

The author was then able to resolve the matter in two ways. Firstly, the author of this thesis could have developed a simplified model of non-pecuniary damages to bodily harm, or secondly, the author of this thesis could have developed an econometric model in another area of non-pecuniary damages.

Since the first option seemed unnecessary, the author found an area in which there are no fixed benchmarks for compensation and judges determine their conclusions by feeling

and by comparison with previous case law. This area was compensation for non-pecuniary damage caused by defamation.

Thus, the author of this text first organized a discussion group of individuals to identify the key criteria for determining the amount of noneconomic damages in 3 different cases. Subsequently, the essential variables that should have a major impact on the compensation for non-pecuniary damage for defamation were determined.

A questionnaire was developed, this was pretested, and then data were collected using GRETL software to process the data. However, the function subsequently created to calculate non-pecuniary damages on a case-by-case basis proved to be an inadequate tool for making the determination, and criteria were established to proceed so that in another similar case the function would be more econometrically and statistically valuable.

The author then subsequently evaluated all 3 hypotheses he set out in his thesis.

Hypothesis 1) "*The econometric modelling is suitable to prepare flexible models with higher predictability of outcome.*" was confirmed, while it has been explained that some other methods would be better to use.

Hypothesis 2) "*Econometric modelling is able to develop public developed models which are able to incorporate public opinion on compensation for non-pecuniary damages.*" was confirmed, but again it has been explained that some other methods would be better to use.

Hypothesis 3) "*Of the highest importance in assessing non-pecuniary damage in the model, will be the nature of the defamation itself.*" was confirmed, while the impact was greatest in this category.

Thus, the author of this thesis has used research to identify the fact that there are areas of law where non-pecuniary damage compensations are highly unpredictable, although courts have attempted to issue decisions that would not be unpredictable within the overall justice system.

At the same time, there is a tool that can be used to make these decisions more uniform and thus more transparent for the ordinary citizen. This tool is capable of developing better calculations over time with new decisions.

To make some of the decisions more transparent, then, it would be necessary to use the process described earlier in this thesis, and a more unifiable list of areas affected by such determinations would be useful.

Under this method, it is then still possible for decisions to be modified on the basis of the courts' and judges' own deliberations. The econometric model would be only an approximate guide that could help the court to navigate the field of non-pecuniary damages compensation.

The author of this thesis subsequently performed an execution of this function and checked all the control coefficients to determine how appropriate it was to use the model as it is.

The author of this thesis reiterates at this point that he is fully aware of the fact that least squares methods econometric modelling is primarily designed for time series and that he has not studied mathematics and statistics to come with a method that is sufficient for very accurate estimation of individual effects, so he has chosen to use a method that is not sufficient for the case at hand, but which nevertheless demonstrates quite convincingly that a case-by-case compensation function can be modelled from the respondents' views.

Furthermore, the author of this thesis was fully aware that in the future, it would be more appropriate to proceed in a different way in the event of a more in-depth survey, by having, for example, 20 individual varied cases of non-economic harm caused by defamation prepared for respondents. For these individual cases, he would then primarily collect from a larger group of respondents the average values of the effects of each variable and the average compensation in each case.

Such data, far beyond the scope of this paper, would then have a chance of producing a sufficiently diverse range of cases to assess appropriate damages and develop an appropriate function.

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5. Appendix

1.11 English version of a questionnaire

1.12 Results from the questionnaire

1.13 Results from the GRETL