

## Legal-Civil aspect of types of Immaterial Damage

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### Abstract

Causing of damage is accompanied with causing of responsibility for its compensation. Human being in the daily life is often threatened by various risks which along with the causing of bodily injuries in some cases may bring also causes of death.

From the legal doctrine, in Kosovo and in the region, related to nomination of material and immaterial damage, in addition there may also be found other nominations including the property damage and non-property damage or as differently called moral damage,<sup>1</sup> but the basic distinction in this division stands at its compensation.

Subject of analysis of this work shall be focused with particular emphasis in Kosovo with some superficial comparisons to the neighbour countries.

The only formula of indemnification for the immaterial damage according to insurance coverage remains the satisfaction<sup>2</sup> expressed in monetary value which according to LMTPI<sup>3</sup> and the Directive of the Council of European Parliament underwent positive amendments in viewpoint of increase of amounts of insurance.<sup>4</sup>

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1 Law on obligational relations of Kosovo, Law No. 04/L-077 Article 183, Civil Code of Albania 1994, Mariana Semini "The law on obligations and contracts", Tirana 1998 pg. 250

2 Nerxhivane Dauti "The law on obligations - general and specific part" Prishtina 2004

3 Law on Mandatory Third Party Liability Insurance, Law no. 04/L/018 in 2011

4 Central Bank of the Republic of Kosovo, DIRECTIVE 2005/14/EC OF THE

In context of this work, only some types of immaterial damage shall be reviewed, including:

- Damage in form of physical distress,
- Damage in form of fear and
- Damage in form of spiritual distress because of reduction of life activities.

**Key words:** Insurer, the insured, material damage, immaterial damage

## 1. Introduction

In general, human life and health are in continuous risk, and the damage caused to such goods can be reflected in two basic ways of causing of damage, which in themselves contain other subdivisions. When the damage against life and health of persons is treated, then the material – property damage and immaterial, non-property or moral damage should be taken into consideration.

In the legal literature, and broader, the institute of property damage and non-property or moral damage causing we may also find other names like material damage and immaterial damage. But in essence diametrically contradictory changes cannot be noticed. And as regards to use of expression “*damage compensation*”<sup>5</sup> we notice distinctions regarding the nomination, including the following expressions: compensation, indemnification etc., but, in essence they have the only intention, that of returning into earlier condition when speaking about causing the property damage, whereas when speaking of causing non-property damage, considering that return into previous state is not possible, then this is realised through the satisfaction.

These and other matters related to causing the damage and its types shall be subject of discussion at this work, not leaving aside the compensation of the material damage from a superficial viewpoint.

## 2. Damage in form of physical distress

Despite the fact that human being is not subject of legal relationships of the character of obligations, this does not mean that in the case of risking its attributes such as freedom, physical and bodily integrity etc. not to have such a status.<sup>6</sup> In other words this indicates that human being having in consideration

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EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005, Magazine - Osiguranje Zagreb no. 2006/5, pg. 42-46, Zdravko Petrovic, Vladimir Colovic, Natasa Mrvic-Petrovic “Obavezna osiguranja u saobraćaju i naknad štete” Belgrade 2010 pg. 172 175

5 Law on obligation relations (LOR) from 1978 OG of SFRY no. 29/1978 uses the expression damage compensation while the Law on obligation relations of Kosovo from 2012 Law No. 04/L-077 uses the expression of damage reward.

6 Kiro Zadrevčev “Nadomest na nematerijalna šteta za preterpena fizička bolka” Ohrid 2006, pg. 51

the environment where he/she lives and works, during the life he/she may be exposed to many risks manifested with causing of damage to life and health in form of physical distress.

Non-property damages (so called moral damages)<sup>7</sup>, consisting of physical or psychological sufferings, the damaged persons are indemnified only in cases foreseen by law and their level is determined by the judge pursuant to the principle of justice.<sup>8</sup>

Seen from the physiological aspect, distress is a protective mechanism of human body which appears in any case when any body part is damaged, thus causing reaction of reflexes...<sup>9</sup>

From this it derives that the physical distress is reflected in human body in form of distress and injuries associated with emotional and mental distress of different types which are determined by the medical expert through his opinion and findings.<sup>10</sup>

The physical distress is often manifested also with different forms of depression from the person who has sustained the damage.

Immaterial, non-property damage in form of physical distress represents a direct damage to the damaged personality which he suffers from harmful act. Having in consideration the time criterion, physical distress can be classified into instant physical distress and continuous physical distress.<sup>11</sup>

In any case of causing immaterial damage including also the physical distress, the issue of damage reimbursement is raised, but in this case we will not discuss the damage reimbursement for physical distress letting it to be discussed in other works. In this case it is worth being mentioned that at this type of immaterial, non-property damage, the courts at deliberation for deciding on the respective matter, the two following factors must be taken into account: duration and intensity of distress, because it will not be the same when a person from the suffered damage has physical distress which lasts one or more days with that when distress lasts for weeks or months. Moreover, persons will not be at the same position when he/she has physical distress of low intensity as the person who has physical distress of medium or high intensity. Therefore, in any case the court must have in consideration these circumstances before deciding for a respective matter.<sup>12</sup>

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7 We find this nomination in the Civil Code of Albania regarding the non-material damage as contained in the Law on obligation relations of Kosovo from 2012

8 Francesk.Galgano Private Law, Tirana 1999 pg. 371

9 Dusan Zecevic "Sudska medicina" Zagreb 1980 pg. 257.

10 Gavriilo Scepanovic, Zoran Stankovic & Zdravko Petrovic; "Sudskomedicinsko Vestacenje nematerilane stete" Belgrade 2011 pg. 65-69

11 Segasna, Idna Summary of presentations in the symposium of the Bureau of insurance in Ohrid, November 2006 pg. 53

12 See Decision of the Municipal Court in Gjakova C. no. 426/10

Always having in consideration the legal regulation of immaterial - non-property damage in form of physical distress in case law there are also many other issues raised when reviewing this type of immaterial - non-property damage in correlation with two decisive factors, being the time duration and the intensity of physical distress.

Of course, all these assessments for the level of intensity of physical distress remain as a task of forensic medicine expert of the field of orthopaedics - trauma specialist and neuropsychiatric specialist and they will be assessed as such, and the expert shall submit them to the court as evidence in form of professional opinion, respectively expertise upon request from the latter as proposed by the litigating parties in accordance with the legal provisions.<sup>13</sup>

In some regional countries, including the FRY of Macedonia, Croatia etc. In the recent years, efforts have been made that through the Supreme Court some criteria are provided in form of tables for the types of damages, including that of physical distress, and depending on the duration and intensity thereof, the court must have in consideration a previous orientation in the case of deciding on the cases of such nature.

### 3. Damage in form of fear

In the general aspect of immaterial, non-property (moral) damage in form of fear, it is caused from the consequences from bodily injury, or the possibility of causing death.

Immaterial, non-property (moral) damage in form of fear is a type of immaterial damage which by the major part of the legislations<sup>14</sup> and judicial practice, it now has acquired as one of the types of immaterial, non-property damage. Naturally, as the time passes, these provisions related to causing of immaterial, non-property damage have suffered certain changes.

When talking of immaterial, non-property damage caused in form of fear, in this case an issue remains sustainable to be treated, such as: intensity and duration of the fear, which serves as basis when determining the height of damage compensation.<sup>15</sup>

As mentioned above, in regard to immaterial, non-property damage in form of physical distress, even when in question is the damage in form of fear, some countries of the region<sup>16</sup> in cooperation with the supreme courts have published some orientating criteria in form of tables which shall be used by courts when deciding in such matters, but they do not have obligatory character.<sup>17</sup>

<sup>13</sup> Article 356-372 Law on Contested Procedure of Kosovo (LCP) Law No. 03/L-006

<sup>14</sup> It is thought that in CC of Albania 1994, Law on obligation relations of Kosovo 1978, 2012, Law on obligation relations of FRY of Macedonia etc.

<sup>15</sup> See: Prishtina Municipal Court C. no. 1571/10

<sup>16</sup> It is thought of the Republic of Kosovo and FRY of Macedonia

<sup>17</sup> In the Republic of Kosovo, insurance companies in 2001 drafted criteria and measures for definition of the height of non-material damages and of some types of material damages

In the general sense, fear is a psychological condition which may appear or may be caused to a damaged person.<sup>18</sup> Human as a conscious social being in the case of sustaining fear reacts in different manners, respectively there are external manifestations appearing which in some cases may have serious consequences to the life and health of persons.

As a result of external actions, it derives that the damaged suffers psychological disorders, psychic distress which from the legal aspect is and can be a relevant circumstance which enables realisation of the immaterial (moral) damage compensation because of caused fear.

In addition, it may be emphasised that causing of fear to human under certain conditions is a relevant and an important circumstance for immaterial (moral) damage compensation in cash.

LOR applicable in Kosovo has obvious similarities to the known civil codes including in particular the Austrian one regarding the regulating of the matter of reimbursement to immaterial (moral) damage, in particular related to causing the damage in form of fear and its compensation.

According to LOR from 1978<sup>19</sup> immaterial, non-property damage compensation, for damage caused in form of fear is sanctioned as a special type of damage compensation. Whereas the Article 155 of LOR is determined as understanding of damage envisaging fear as a special type of immaterial, non-property damage. In Article 200.1 of the same law, it is expressively emphasised the fair compensation in cash for the immaterial, non-property damage because of the sustained fear, where a special form of immaterial, non-property damage is reviewed. In Article 204 of the same law in addition stresses the notion of fear for non-property (moral) damage compensation in the future from the suffered fear.

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which are not obligatory for the courts, but the latter are given the opportunity that based on their free convincing to decide from case to case according to judicial practice, which also has differences based on the region. Currently efforts are being made from relevant entities for amendment and supplementation of the criteria in question in harmony with covering amounts of insurance according to LMTPLI.

18 Alajdin Alishani "Models of contracts of the right on obligations, of the industrial property rights, of the copyright and related rights, right to heritage, trade right, and some contracts of Pro-Credit Bank and insurance policies of insurance companies, Joint Stock Company " Kosova e Re", Prishtina 2006 pg. 220

19 Articles 199 and 200 of LOR, the latter contains:

(1) 1. Just monetary compensation independent of the reimbursement of material damage shall pertain to the injured party for physical distress suffered, for mental distress suffered owing to a reduction in life activities, disfigurement, the defamation of good name or reputation, the truncation of freedom or a personal right, or the death of a close associate, and for fear, if the circumstances of the case, particularly the level and duration of distress and fear, so justify, even if there was no material damage.

2. Upon the decision on the request for the compensation of immaterial damage, as well as for the amount of the compensation, the court shall evaluate the importance of the violation of goods and the purpose to which this compensation shall serve, also in order not to support the tendencies that are not compatible with the nature and the social purpose thereof. See also articles 201, 202, 203, 204 and 205.

In Albanian CC<sup>20</sup> the liability is sanctioned for the non-property damage, but the notion of fear or causing of damage because of fear is not decisively mentioned, nor the fair reimbursement in money for the non-material (moral) damage.

However, like other forms of non-material (moral) damage compensation, also when in question is the reimbursement for non-material (moral) damage, the following conditions must be met, including:

- Causing non-material (moral) damage,
- The damage caused by suffered fear,
- Damage to have been caused by guilt or guilty behaviour of the damaged,
- Existence of connection of causes between the undertaken action and the consequences caused to the damaged,
- Submission of the application for reimbursement of the damage reimbursement for non-material (moral) damage suffered by the caused fear.<sup>21</sup>

The abovementioned conditions are required to be met in cumulative manner in order to successful reimbursement for the application for damage compensation. In this case, as usually, we are not going to discuss in detail all the above mentioned conditions one by one, but it must be mentioned how for other forms of immaterial (moral) damage even when in question is realisation of the right to compensation for immaterial (moral) damage, a difficult legal route must be pursued which also applies for the party and also for the court in the litigating matter.

Having in consideration that the fear may be caused in different forms and manners as a result of different events, including the traffic accidents, accidents at work, unfair privation from freedom etc. it results that the fear can be subject of study of different fields, including sociology, psychology, law etc. even within the field of legal field fear as an occurrence of discussion can also be encountered in different branches be it criminal or civil etc.

All this shows for the challenges with which the judiciary faces when taking the meritorious decision. The decision first of all depends on cooperation with the forensic medicine expert which based on the circumstances of the case determines the duration and intensity of the fear. Hence, it derives that the fear can be of high degree and intensity, medium and low too.<sup>22</sup>

When fear has high intensity, then it represents relevant circumstances for reimbursement of the damage compensation, criteria and measures for determining the height of immaterial (moral) damage in money, because the damaged has obvious psychic disorders, even the high intensity fear may be

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20 Article 625.1. a and b , 2 of Civil Code of Albania of 1994

21 Alajdin Alishani abovementioned work. Page 218

22 See Criteria and measures for determining the height of damages of the insurance companies in Kosovo. Prishtina 2001

reflected also in form of psychic trauma and certain psychic distress of “shock” in which the damaged is found because of the harmful event.

Moreover, when determining the immaterial (moral) damage compensation related to fear, care must be given to its duration and consequences it leaves to the injured because even if fear is of high intensity, but it is for a moment and it has not left consequences to the damaged, then there is no possibility of damage compensation.<sup>23</sup>

If the damaged has contributed to the cause of damage, then based on assessment of the court it may result to application of shared liability respectively to reducing of damage compensation in proportion with the degree of contribution of the injured in causing the damage.<sup>24</sup>

#### **4. Damage in form of psychological distress because of reduction of life activities**

In general sense, psychological distress because of reduction of life activities is one of the types of immaterial (moral) damage which most frequently is caused as a result of bodily injuries. Bodily injuries as such cannot be legal basis for damage compensation of this type, but there are consequences which are felt by the injured in the psychological field.

This feeling most frequently is reflected in the fact that the damaged heavily experiences such a condition created as a result of causing damage in the field of his psychological aspect.

Psychological distress can be experienced by the injured because of having lost the ability to work or the working ability he/she has had has been reduced or progress in profession is disabled or there are harmful consequences caused outside the profession.

According to judicial practice, reduction of life activity, as a special basis for damage compensation, because of psychological distress, includes all limitations of life activities of the injured which he has realised or would have realised according to the normal occurring of the events in the future or probably would have realised.

The expression “limitation” carrying out of additional activities must be implied, or under special conditions including sports, recreation etc.<sup>25</sup>

Limitation of carrying out activities may often have permanent character, but the compensation in money can be determined also when reduction of life activities is temporary, if there is a high intensity and has long duration or if that is justified by special circumstances.

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23 Alajdin Alishani abovementioned work. Page 200

24 Dragoljub Simonovic Naknada stete Belgrade 2009 pg 263

25 See: Supreme Court Decision in Croatia Rev.2654/90 dated 06. 06. 1991.

Immaterial, non-property damage in form of psychological distress because of reduction of life activities implies also the increase of other needs for life, such as in cases of consequences from bodily injury, when determining the degree of reduction of life activity, these consequences are calculated in cumulative manner and are expressed in percentage, that a certain person has suffered reduction of life activity for example for 20 %, 30 % etc.<sup>26</sup>

When determining the percentage of reduction of life activity, always the nature and weight of psychological distress must be taken into account because of reduction of life activity. In any case, court must seek the professional opinion from respective expert, which reflects what reduction of life activity consists of.

Determining the height of damage compensation for immaterial, non-property damage because of reduction of life activity should depend also on the fact that such distress has been of momentum character, or they are going to be reflected in the future.

Moreover, important in this case is also taking into consideration the exact moment of reduction of life activity, force of exposure, duration of consequences, occupation of the injured etc. all these should be taken into consideration in cumulative form in order to serve the court to decide on the matter in the meritorious manner by not leaving aside the opinion of the medical forensic expert as well.

Also for this type of immaterial (moral) damage, some countries of the region, including FRY of Macedonia, Croatia etc. have made some efforts that through the supreme courts issue some criteria in table form for calculation of damage, including it also because of reduction of life activity. Taking into consideration the aforementioned, reduction of life activity is expressed in percentage as follows: to 25 %, from 25 % - 40 %, from 40 % - 60 %, from 60 % - 80 %, from 80 % - 100 % in respective amounts.

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26 Sokrat Meksi & Flamur Blakaj "Forensic medicine" Prishtina 2010 pg. 124-140



## 5. Conclusion

Life and health of persons constitute two of the most important goods the human has, therefore, any threat to them, will undoubtedly implicate the need to restoring such a condition created as a result of damage causing.

Modalities by which such threatening of these goods are reflected, make up a comprehensive and diverse conglomerate, including violation of honour, dignity, name and a series of other goods which have causing of damage against life and health of persons as a denominator.

Causing of damage brings up the liability for the damage, and the latter depends on determining the base of liability.

When observing the cause of damage of life and health of persons, respectively reimbursement for the damage in question in the aspect of "*de lege lata and de lege ferenda*" we have reached to some conclusions which shall be reflected below.

- First, we fully agree with the finding that the caused damage must be reimbursed as it is provided by majority of civil legislations of countries of the region and further, but we are of the opinion that every damage compensation must be adequate to the degree of causing such damage, respectively with the level of the violated right despite the fact that there is no "formula" or "magical weight scale" which would be used for the case of determining the degree of the caused damage.
- Secondly, we consider that the types of damage, be it material or immaterial (moral) they should be named in concrete manner, respectively in decisive manner to be numbered by Law, respectively in CC, just as the regional countries at least act on their legislation, especially when forms of immaterial or moral damage are in question.
- Thirdly, expressions which we find in the legal literature and in legislation, including compensation, reimbursement for the damage etc., we are of the opinion that it is advisable to replace them with the expression of indemnification which represents negation of expression damage.
- Fourth, we consider that in Kosovo, with entering into force of the Law on mandatory insurance from third party liability in August 2011, a step forward has been made towards harmonisation of amounts of insurance – insurance coverage from € 100.000 which was foreseen by Rule 3 of CBK<sup>27</sup> - into € 1.000.000 for insured case, regardless the number of injured persons.

There is no doubt that achievement of these goals presents a significant challenge for the society in general, and in particular for legal community, but realisation of such goals is unavoidable, just as the journey toward structures of European integration as an unavoidable way ahead.

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27 Central Bank of the Republic of Kosovo; Rule 3 on amendment of Rule on Mandatory Third Party Liability Insurance 01/10/2008

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