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Interaction of private and public law mechanisms of compensation for non-pecuniary damage

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The article establishes the interrelation of international and national, natural and private law, human rights and civil (personal non-proprietary and proprietary) rights in the context of interaction and specificity of functioning of international law and national mechanisms of compensation for non-pecuniary damage. The regulatory potential of compensation for non-pecuniary damage, which can emerge as an effective way of protecting civil rights and interests, both in private (personal non-proprietary and proprietary, contractual and non-contractual) and public legal relations, is revealed. Directions of interaction between international law and private mechanisms of compensation for non-pecuniary damage are outlined, with particular emphasis placed on the influence of the European Court of Human Rights practices on the development of national legal systems, connected with awarding just satisfaction for the non-pecuniary damage caused to the applicants. Attention is drawn to the tendency of expanding the scope of persons capable of obtaining, in various legal situations, the right to compensation for non-pecuniary damage, including private legal entities, virtually incapacitated individuals, close relatives, family members and dependents of perished or injured individuals. It is noted that the responsibility of the state in the form of compensation for non-pecuniary damage for violation of human rights and provisions of international humanitarian law, including its responsibility for offenses in the public law field, committed by its representatives (authorities, their officials) is based on the principles of justice. At the same time, in the absence of unlawfulness in the actions of the state and a causal link between the actions of its representatives and the harm to the victims, the compensation for non-pecuniary damage (caused, for example, to victims of violent crimes, acts of terrorism) is performed proceeding from humanistic considerations of social justice, aimed at affirming the primacy of human dignity.

Keywords: compensation for non-pecuniary damage, European Court of Human Rights, functions of civil liability, liable party, case law, victims of violent crime, life and health

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INTRODUCTION

Compensation for non-pecuniary damage in modern international law and in many national legal systems is considered as one of the effective remedies for the civil rights and interests of individuals and legal entities. It is a legal remedy which, being inherently a measure of civil liability, proves to be able to carry out preventive and compensatory functions in relation to almost any offenses that cause non-proprietary loss on the victim's side. This view is reflected, inter alia, in the case law of the European Court of Human Rights (hereinafter referred to as the ECHR) and similar international jurisdictions (Tinta 2008), Article III. – 3: 701 of the Principles, Definitions and Model Rules of European Private Law (Draft Common Frame of Reference; hereinafter referred to as the DCFR) (2008), Article 9: 501 of the Principles of European Contract Law (2002) and Article 10:301 of the Principles of European Tort Law (hereinafter referred to as the PETL) (2020).

With that, in the private law, the positive consolidation and enforcement of the right to compensation for non-pecuniary damage appears as a local embodiment of the fundamental principles of justice and security reflected in the DCFR. In this context, there is a so-called "horizontal" protection, which usually does not involve the participation of the state in the newly emerging protective legal relations (Principles, Definitions and Model Rules… 2008, Bulychev et al. 2019c).

At the same time, the state as a subject of public law can also have an obligation to compensate for the non-pecuniary damage caused to the victims. However, such a duty is sometimes based not on the offense committed by state representatives, but on certain humanistic considerations aimed at asserting the primacy of human dignity. However, in the end, this obligation is made possible by the widespread use of certain elements of the civil liability mechanism. As a result, there are numerous links between international and national, natural and private law, human and civil (personal non-proprietary and proprietary) rights. The regularities of the development of these relationships and the specifics of the functioning and interaction of the relevant mechanisms of compensation for non-pecuniary damage are precisely the subject matter that this paper investigates (Bulychev et al. 2019d).

PRACTICE OF INTERNATIONAL JURISDICTIONS

The importance of the subject matter is confirmed by the enormous contribution of the ECHR to the development of universal principles of compensation for non-pecuniary damage as a remedy, the practice of which on this issue serves as a benchmark for other international courts, various arbitration bodies for the settlement of commercial disputes and, of course, national jurisdictions. It is noteworthy that in one of the cases, the ECHR expressed astonishment at the refusal of the Ukrainian court to recover non-pecuniary damage caused to the victim by violation of its rights in the field of housing legal relations (Judjment in the case… 2005, Tyliszczak et al. 2010). In this way, the ECHR: (a) effectively legitimizes the possibility of using an appropriate remedy, considering it as a natural right that requires comprehensive assistance in its implementation regardless of the particular legal regulation of a given variety of protective civil relations in the legal system of a particular country, and (b) implicitly recognizes the compensation for non-

pecuniary damage as a universal guarantee of respect for a person's right to access a potential remedy effective in all legal situations characterized by a sufficiently significant breach of the victim's personal non-proprietary rights and interests (including those closely related to the originally violated subjective property rights).

However, the recognition of the universal protective nature of compensation for non-pecuniary damage by the ECHR and the aforementioned model acts of European law regarding a wide range of human rights and freedoms, civil interests of the parties to both absolute and binding relations does not lead to the hypertrophy of the role of the said civil liability measure (Tyliszczak et al. 2014, Utibayeva et al. 2019, Wichitsathian & Nakruang 2019, Antufev et al. 2019). After all, even in the event of breach of contractual obligation to compensate for non-pecuniary damage, it remains a form of material liability for the commission of a tort, albeit "incidental" to the breach of contract. Furthermore, even Article 10: 301 of the PETL severely restricts the application of the considered remedy to the relatively defined scope of the rights, interests and benefits protected by it. In general, the document stipulates the following: the need to ensure compensation for non-proprietary damage, first of all, in cases of endangering life and health, human dignity and freedom; the determination of the amount of appropriate compensation to the victim in view of the severity, duration and consequences of the damages sustained; the possibility of considering the extent of the offender's responsibility, if the said factor significantly contributed to the occurrence of damages, etc.

In recent years, the contribution to the improvement of the institution of compensation for non-pecuniary damage in arbitration practices concerning the settlement of international commercial (primarily investment) disputes have become increasingly noticeable. Among other things, we shall highlight the promotion of such approaches in arbitration, when, on the one hand, the damage inflicted on employees of the corporation in connection with the performance of their production duties is regarded as damage inflicted to the corporation as such (Sabahi 2011, Akbarov et al. 2018, Puryaev & Puryaev 2019, Sabirova et al. 2018a, 2018b; Sobczak-Kupiec et al. 2018, Rabinskii & Tushavina 2019, Rabinskiy & Kuznetsova 2018, Rabinskiy & Tushavina 2019a, 2019b), and on the other hand, interests of employees of the corporation are considered upon deciding on compensation for the non-proprietary losses caused to the latter.

Thus, in one of the arbitration cases, "despite the fact that part of the compensated moral damage was suffered by the claimant's executives, natural persons, the Tribunal awarded the whole of the compensation to the claimant, a legal entity. In adopting this approach, the Tribunal may have taken into account that the harassment of the executives affected the performance of the company and/or that the Tribunal was the only forum where the said executives could have (indirectly) obtain redress n for the harm suffered" (Ripinsky & Williams 2008, Burkitbaev et al. 2018, Egorova et al. 2019, Akhmadeev et al. 2019). In our opinion, it is necessary to recognize the reasonableness of the stated considerations, since they are based on factoring in the objective interrelation of the interests and activities of the specified individuals and the legal entity – the plaintiff, as well as directing the above argument to the affirmation of justice, which requires considering this

interrelation upon applying the remedy adequate to the nature of the committed offense (Rabinskiy 2019, Sobczak-Kupiec et al. 2012a, 2012b; Talaspayeva et al. 2017).

However, the foregoing does not imply neglecting the possibility of violating personal non-proprietary rights and interests of a legal entity that do not directly intersect with the interests of its employees and at the same time are not reduced to the right to respect for business reputation. From this standpoint, the experience of European countries appears positive, wherein judicial practice recognizes the possibility of providing legal entities with compensation for non-proprietary losses caused by interference in their “private sphere” or such an impact on their activities that is viewed through the lens of violation of the “right to privacy” (Belgium) (Von Bar 2009, Alheet 2019). In any case, the aforementioned makes one consider providing greater opportunities to compensate for non-proprietary losses inflicted primarily on certain types of entrepreneurial organizations that pursue clearly expressed ideal goals and are not entitled to carry out any entrepreneurial activity (for instance, religious organizations (Von Bar 2009), political parties, etc.).

Justice (along with freedom, security, and efficiency) is considered as one of the fundamental principles on which DCFR is built, and the content of the concepts of good faith, honest conduct, and reasonableness is disclosed in this document in separate articles specially dedicated to them (Principles, Definitions and Model Rules… 2008). However, the importance of factoring in the determining influence of the mentioned moral and legal imperatives on the regulation of civil liability relations is perhaps most clearly manifested in the mechanism of compensation for non-pecuniary damage, since justice, reasonableness and good faith appear here as key criteria for determining the amount of appropriate compensation to the victim, and judicial practice – as the main tool for ensuring legal certainty in the matter of the amount of compensation awarded for the same type of property losses incurred under comparable circumstances (Van Dam 2013, Alekseev et al. 2019, Baudouin & Linden 2013). There is good reason behind the popularity of opinion in foreign literature that, upon determining the amount of due compensation to the victim for non-pecuniary damage, the courts enjoy almost complete discretion and their own understanding of “justice, reasonableness, and proportionality” due to the circumstances of a particular case (Ripinsky & Williams 2008).

From this standpoint, the practice of the ECHR itself is of primary interest, since this international judicial body, upon awarding the applicants with compensation for non-pecuniary damage, usually: (a) considers its moral character and the impossibility, in many cases, of reliable evidence of its existence, scope, and nature; (b) exhibits a certain procedural activity in determining the validity of the applicant’s claims, proceeding form a reasonable idea of negative consequences usually expected to arise in the non-proprietary sphere of the victim under similar circumstances; (c) evidently considers the essence and civilizational value of the violated human right, and in some cases, sometimes purely presumably, the circumstances of the commission of a specific offense, its duration, and dishonesty shown by representatives of the respondent government; (d) upon determining the specific amounts of compensation awarded, it is guided by considerations of

justice and its own practice in similar cases, allowing the possibility of its flexible adjustment, given the likelihood of discovering significant circumstances that individualize a particular case; (e) correlates the amount of compensation for non-pecuniary damage inflicted on the applicants with the standard of living characteristic of a particular country, and (f) considers the possible impact of the offense on the "human substrate" of the injured legal entity under private law (Fedulova et al. 2019).

Thus, relying mainly on the principles of justice, reasonableness, and good faith (adherence to the last two is manifested mainly substantially, and not terminologically), in the absence of any details at the convention level for compensation for non-pecuniary damage caused to individuals and legal entities as a result of violation of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 by respondent governments, the ECHR has created a very effective mechanism of compensatory and proprietary protection of rights and interests of applicants. With that, the elements of this mechanism are effective both in "vertical" (with the participation of the state as a subject of public law) and in "horizontal" security relations (Antufiev et al. 2018).

It is noteworthy that the approaches implemented in the practice of the ECHR are increasingly being used by other international judicial bodies (Bulychev & Kuznetsova 2019, Rabinskiy et al. 2019, Bulychev et al. 2018, Lazarenko et al. 2018, 2019). In the most concentrated form, in their approaches to problems are manifested in the following: a) proof of the fact of inflicting non-pecuniary damage; b) determination of the amount of appropriate compensation to the victim. Thus, upon considering the claims of compensation for non-pecuniary damage inflicted on A.S. Diallo, the UN International Court of Justice in its decision of 19.06.2012 was quite logical to: a) note the possibility of establishing the fact of such damage even without considering any special evidence (Paragraph 21); b) point out that the determination of the amount of appropriate compensation is based on equity considerations (Paragraph 24).

At the same time, the International Court of Justice quite fairly referred to the decision of the European Court of Human Rights of 07.07.2011 in the case of Al-Jedda *vs*. The United Kingdom, which states that upon establishing (non-proprietary) damage, "[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred" (Ahmadou Sadio Diallo… 1998). In turn, the application of this approach implies, in our opinion, a) the widespread use of the standard of reasonable expectations to establish the existence of a legally significant causal relationship between the behaviour of the offender and the victim who suffered non-pecuniary damage, including the specification of the forms of its manifestation, assumed in circumstances characterizing a specific case; b) the need to entrust the task of establishing boundaries and criteria for determining the amount of compensation for non-pecuniary damage that should be awarded in typical life situations of a certain kind, primarily directly to case law (Bulychev & Rabinskiy 2019, Bulychev et al. 2019a, 2019b).

JUSTICE AND REASONABLENESS

In the context of the statement of justice, Giovanni Comande identifies horizontal and vertical measurements of the fair size of the amounts awarded in order to compensate for non-proprietary losses caused by damage to health or death of an individual. Thus, "horizontal justice" provides that victims with the same degree of damage should receive compensation similar in size due to the loss of pleasures of life. With that, "vertical justice" means awarding larger sums to victims with more severe injuries (Ward & Thornton 2009, Formalev & Kolesnik 2019, Formalev et al. 2018a).

The idea outlined by Giovanni Comande receives an immediate response in paragraph 3 of Article 10: 301 of the PETL, according to which the amount of compensation for non-pecuniary damage inflicted on an individual must correspond to the suffering of the victim and the deterioration of its physical or mental health; at the same time, similar amounts should be awarded for objectively similar losses. At the same time, in our opinion, the general approach to building a probable scheme of fair amounts of compensation for non-pecuniary damage should primarily consider the requirement of paragraph 1 of Article 2: 102 of the PETL stating that the level of protection of certain interests depends on their value, and the provisions of paragraph 2 of Article 2: 102 of the PETL, according to which life, bodily and mental health, human dignity and freedom shall receive the most intensive protection.

It is noteworthy that in a somewhat similar way, at the level of international law, the range of special tort, or factual grounds for imposing the obligation on the state to compensate the damage caused to victims of crime, is limited. After all, the European Convention on Compensation of Victims of Violent Crimes of 11.24.1983 (Article 2) (1983) proceeds from the fact that the state should take on compensation for damage inflicted on victims of the aforementioned category, whose health was seriously damaged by intentional violent crimes, and also on those who were kept by victims that died as a result of the commission of such crimes; furthermore, the corresponding obligation arises in the absence of the ability to provide compensation from other sources (Formalev et al. 2018b).

In unison with this conventional approach, Ben Emmerson, in his report to the UN Human Rights Council on the fundamental principles for ensuring the protection of the humanitarian rights of victims of terrorism, reasonably proposes that the state be obliged to fully compensate for the damage caused to victims of this category in two specifically defined cases: when in the context of a terrorist act or a threat of its commission the representatives of the state are directly or indirectly responsible for violating a human right to life; when it comes to causing death or serious damage to health (Emmerson 2012). We believe that, given the nature of the violated (personal non-proprietary) rights in these cases, national legislation should also provide for the payment of certain compensation to victims for non-pecuniary damage – despite the fact that the European Convention on Compensation of Victims of Violent Crime of 11.24.1983 avoids mentioning this type of compensation payments (Formalev et al. 2018c, Kuznetsova & Makarenko 2018).

In general, if justice is an essential feature of law, then it should permeate all elements of the mechanism of compensation for non-pecuniary damage without exception, being ultimately reflected in a specific amount of liability of a certain debtor. With this in mind, justice in the context of legal regulation of compensation for non-pecuniary damage relations should arise in at least several interrelated dimensions:

- (1) As a general requirement to ensure a certain balance of conflicting interests, addressed to the legislator, subjects of law enforcement, and in cases specially defined by law (for example, in relation to producers of goods, performers of works and services as dominant participants in relations with consumers) – to participants of certain types of regulatory civil relations, the violation of which can cause the emergence of the right to compensation for non-pecuniary damage;
- (2) As an indicator of the need to use special means to coordinate the interests of parties, private and public interests with subsequent legislative establishment of the proper legal status of participants in civil relations (including due to the exclusion of guilt from the composition of the conditions for compensation for non-pecuniary damage in some cases or legislative consolidation of: a certain degree of guilt as subjective conditions for the application of this measure of civil liability; minimum or maximum amounts of compensation for non-pecuniary damage, etc.) and detailing the elements of a newly arising obligation to compensate for non-pecuniary damage in a court decision;
- (3) As a moral and legal foundation for assigning the abstract possibility of acquiring a subjective right to compensation for non-pecuniary damage in certain cases to a certain scope of potentially vulnerable persons (this primarily refers to protecting the life and health of an individual, the rights and freedoms of "dependent" participants in public law relations, consumers, employees, creators of intellectual property), and
- (4) As a criterion for determining the amount of compensation due to the victim for non-pecuniary losses (the total amount of compensation for non-pecuniary damage should be as large as the social value of the violated good, the materiality of its violation, the gross guilt of the offender).

In turn, upon determining the essence of the principle of reasonableness, it is advisable to consider the provisions of Article I-1: 104 DCFR, according to which reasonable is that which can be objectively established, factoring in the essence and purpose of what should be done in accordance with the circumstances of the case and good customs and practice. Commitment to this approach is acceptable at all stages of legal regulation of relations for compensation for non-pecuniary damage, including when determining the proper means of performing the obligation of the debtor in a tort obligation to indemnify non-pecuniary damage (Formalev et al. 2019a, 2019b). Thus, in the commentary on the DCFR, the possibility of combining one-time compensation and periodic payments to compensate for non-proprietary losses is noted, especially in cases of personal injury. However, in the event of a violation of "incorporeal" property rights, sometimes there are reasons not to apply a one-time penalty (Principles, Definitions and Model Rules… 2008).

Reasonableness indicates the materiality of a factor, the need to consider it upon deciding on the rights and obligations of the interested parties. From this standpoint, of expedience is the conviction demonstrated in Article 10: 301 of the PETL, according to which, upon determining the amount of compensation for non-pecuniary damage, it is necessary to factor in all the circumstances of the case, including the depth, duration of existence and consequences of the losses suffered by the victim (Golovina 2017, 2019; Hnatiuk et al. 2019, Kuznetsova & Makarenko 2019).

Finally, in cases of compensation for non-pecuniary damage, reasonableness requires a derogation from the adversarial system inherent in the modern civil procedure so as to stimulate judicial activity both in evaluating the circumstances of the case and examining the relevant evidence, and in determining the amount of compensation due to the victim. This kind of approach is consistent with Article 2: 105 PETL, the provisions of which stipulate the following: the inflicted damage must be proved in accordance with the usual procedural standards; the court can independently evaluate the extent of the damage if proving its exact extent would be too difficult or excessively costly.

SOCIAL SOLIDARITY

In contrast to the conventional approaches of private law, the requirements of international law on the creation of various types of compensation mechanisms within the framework of national legal systems, including those aimed at compensation for non-pecuniary damage caused to victims of violent crimes, terrorist acts (Good Practices… 2015), human rights violations and international humanitarian law (Basic Principles and Guidelines… 2005, Housing and property restitution… 2005, Solving property issues… 2010), underlie not only the requirements of justice (Zegveld 2003), but also the ideas of social solidarity (Bottillero 2007, Islam et al. 2019, Banchuk et al. 2015, Ilyushin & Golovina 2020). This kind of interaction of the principles of justice and solidarity, on which the European Convention on Compensation of Victims of Violent Crimes of 11.24.1983 is based in its preamble, largely determines the meaningful originality of the corresponding regulatory provisions that are enshrined in the national civil legislation of individual states (Kuprikov et al. 2019a).

Understanding of this approach determines the impossibility of using certain principles inherent in conventional tort law within the framework of the corresponding legal mechanism. This primarily refers to the absence of unlawfulness in the actions of state representatives and the determining causal relationship between their actions and the damage inflicted on injured persons. Therefore, this also does not refer to the principle of guilt – instead, a peculiar presumption of the innocence of the state arises (Kasornbua & Pinsame 2019, Kumaraswamy et al. 2019).

Furthermore, the aforementioned Convention does not in any way mention the compensation for non-pecuniary losses of victims of crime. At the same time, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), adopted by the UN General Assembly on 29.11.1985, covers,

through the definition of victims provided therein, the persons subjected to certain manifestations of non-pecuniary damage. Thus, their right to compensation for personal non-proprietary losses that they sustained is implicitly recognized. Therefore, the question of the grounds and amount of compensation for the non-pecuniary damage inflicted on them must also be regulated in special legislation, establishing compensatory mechanisms of recovering damage inflicted on victims of crimes, in particular on victims of terrorist acts, at the expense of the government (including the law to be adopted by The Verkhovna Rada of Ukraine, pursuant to the provisions of Article 19 of the Law of Ukraine No. 638-IV of March 20, 2003 "On Fight against Terrorism" (2003)).

The opinion on the necessity of securing the right to compensation for non-pecuniary damage to victims of crime is also reflected in the report to the President of the European Commission "Strengthening victims' rights: from compensation to reparation" prepared by Joëlle Milquet. At the same time, despite the fact that the specified document indicates a certain shift of emphasis towards the most comprehensive use of various forms of restoration of the violated rights of victims of crimes, the aforementioned report indicates the relevance of the search for the public law dimension of the problems of determining the scope of subjects of law entitled to pecuniary compensation, its size (the introduction of fair compensation schemes), the grounds, conditions or criteria for the right to receive compensation from the government, the terms and source of such payments (Milquet 2019).

Such state of affairs is quite natural, since it is originally a matter of tort liability, which is a consequence of violation of absolute property and personal non-proprietary rights – a question is only in the specification of the person guilty of inflicting damage and the subject of liability. Firstly, it can be directly the offender – a criminal or the government whose law enforcement agencies have been unable to prevent the commission of a terrorist act. Secondly, an appropriate compensatory obligation may be imposed on another subject of law who becomes a liability subject despite the fact that it did not commit any unlawful acts capable of inflicting the damage it is obliged to compensate – this may be the government in whose territory the act of terrorism occurred, or certain international or national compensation funds (the latter – as specially authorized legal entities under public law). Accordingly, the first case refers to responsibility on the basis of justice, in accordance with the principles and requirements of tort law, while the second case refers to a compensatory obligation arising on the basis of solidarity and detailed as part of the declaration of will (implementation of "discretionary powers") of a certain national government as a subject of international law (Kuprikov et al. 2019b).

Therefore, in contrast to the mechanism for protecting victims of terrorist acts, in cases of violation of human rights and international humanitarian law, the dominant imperative method of legal regulation inherent in tort law is observed. Therefore, Article 2.101 of the PETL emphasizes the necessity of compensation for pecuniary and non-pecuniary damage inflicted as a consequence of violation of a legally protected interest, and in accordance with paragraph 20 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims

of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, "c*ompensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: *(a)* Physical or mental harm; (*b*) Lost opportunities, including employment, education and social benefits; … (*d*) Moral damage;".

However, the specified provisions of conventional international law concern only "reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law " (Paragraph 15, Section IX "Reparation for harm suffered" of the above Fundamental Principles and Guidelines). In other words, a government violating international law bears pecuniary responsibility for its illegal actions. However, in the event of committing legitimate actions to repel external aggression and combating terrorism (and in the absence of dishonesty or disproportionality in the actions of state representatives), the determination of specific forms and limits for the implementation of compensatory protection for persons affected by hostilities, including victims of terrorist acts is the exclusive prerogative of the national legislator (Kuznetsova et al. 2018).

PERSONS ENTITLED TO COMPENSATION

Problematic aspects of any legal regulation mechanism are most concentrated on the background of the analysis of legal relations modelled with the help of this legal construction. In the context of the structure of civil law relations in general and tort obligations in particular, the corresponding problems objectively arise in connection with the determination of mainly two elements of the obligation to compensate non-pecuniary damage – its subjective composition and object (in the latter case – primarily in terms of determining the amount of liability). Taking this into account, it appears only natural that Bernhard A. Koch (2006) noted the main tendency in the modern development of European tort law regarding the award of compensation for non-pecuniary damage sustained by victims, which can be described by a combination of two slogans – "more plaintiffs" and "larger sums" (Koch 2006, Makarenko & Kuznetsova 2019, Mayorova 2019).

For example, significant shifts in determining the list of entities entitled to compensation for non-pecuniary damage are evidenced by the fact that a number of countries (in France, Germany, and England in particular) recognizes the possibility of applying this method of protection in the interests of persons in the unconscious ("vegetative", coma or similar) state (Van Dam 2013).

In the same way, the possibility of obtaining compensation for non-proprietary losses inflicted on an individual, in a certain meaning, indirectly, that is, as a result of inflicting harm on the original victim who was or is in close relationship with the plaintiff, is enshrined in many national systems of justice. With that, on the one hand, the judicial authorities of individual European states recognize the right to compensation for non-pecuniary damage inflicted on "secondary" victims who are not formally in family relations with the "primary" victim, and on the other hand,

even if provided their existence, some jurisdictions attach crucial importance to the quality of such relations, that is, the true closeness of the plaintiff with the "primary" victim. It is noted, for example, that in the absence of truly close emotional ties, the courts of Austria and Finland refuse to satisfy such claims.

In some cases, the right to appropriate compensation is recognized solely for those close to the immediate victim of the emergency who turned out to be its witnesses, or special demands are made regarding a certain degree of mental suffering caused to the "secondary" victim – this can be not only the so-called nervous shock, but also the feeling of grief or bereavement (Moldagozhieva et al. 2017, Pechancová et al. 2019). In addition, two distinct approaches to determining the nature of the offense can be distinguished, in connection with which a lawsuit may be filed to compensate the family member of the original victim for the non-pecuniary losses caused to them – in most countries this refers only to deaths, while in some – to various degrees of bodily injuries (France, Belgium, Switzerland) (Koch 2006). We believe that this experience can be deemed exemplary – it will justifiably determine the occurrence of a right to compensation for non-pecuniary damage inflicted on close family members or relatives of the victim as a result of unlawful behaviour regarding them, primarily by two interrelated criteria: (1) the severity of mental suffering of the "secondary" victim, and (2) caused by the severity of damage inflicted on the life or health of a loved one.

THE FUNCTIONS OF COMPENSATION FOR NON-PECUNIARY DAMAGE

A reliable methodological foundation for identifying the laws of construction and proper functioning of any special (inherent in a certain kind of social relations) mechanism of compensation for non-pecuniary damage is the method of functional analysis. Its application prompts to ensure the effective implementation of not only compensatory, but also the preventive function of civil (tort in particular (Fleming 2011)) liability.

There is a reason behind Article 10: 101 of the PETL emphasizing that compensation for damage is not only a pecuniary punishment aimed (as much as the money is capable of) to restore the victim to the state in which it should be in the absence of an offense, but also serves the purpose of preventing damage. Perhaps, it is precisely because of the expressive connection of guilt as a subjective condition of civil liability with the preventive effect of compensation for non-pecuniary damage that the legislation of certain states (Horton Rogers 2001, Hartkamp et al. 2011) extends the effect of this remedy primarily to cases related to manifestation of gross guilt by the offender.

Stephen D. Sugarman (2013) originally emphasized the preventive potential of compensation for non-pecuniary damage, according to which, due to the too low level of compensation awarded, the "price" of harming others may not be sufficient to encourage measures to prevent risky behaviour, and therefore the scale of accidents and damage may become unacceptable to society. With that, the collection of excessive rewards for the damage inflicted on victims can lead to the

diversion of public resources from their productive use (Sugarman 2013, Polyakova et al. 2019).

Therefore, a functional analysis should be accompanied by a systematic approach, an important element of which is modelling the economic consequences of choosing a certain model of legal regulation – in particular, in terms of paying too much insurance premiums (Privalko et al. 2005). Finally, the European Court of Human Rights, upon determining the amount of just satisfaction for the violation of human rights and fundamental freedoms, pays attention, inter alia, to local economic circumstances (Just satisfaction claims 2007).

Thus, an economic analysis of the problems of permissible amounts of compensation for personal non-pecuniary damage inflicted on the victim should provide for the establishment of a certain correlation between these compensations and the amount of acceptable (feasible) insurance premiums for various categories of debtors that could be paid by these participants in civil relations within a period statistically equal to the normal period of occurrence of the relevant insured event causing the right to claim compensation for non-pecuniary damage. Therefore, effective (including from the standpoint of the possibility of payment of really significant compensations if necessary) insurance of this type of civil liability in a number of legal relations objectively acts as the optimal mechanism for ensuring effective protection of personal non-pecuniary rights and interests of subjects of civil law.

CONCLUSION

Given the natural law nature of absolute civil rights, which, in their essence, detail human rights and fundamental freedoms, there is a kind of interaction between international and private law mechanisms of compensation for non-pecuniary damage. In particular, this refers to the influence of the European Court of Human Rights practices on the development of national legal systems, connected with awarding just satisfaction for the non-pecuniary damage caused to the applicants. At the same time, this civil liability measure acts as an effective remedy and a component of the legal regulation mechanisms for the corresponding range of protective legal relations arising from violation of the requirements of both private and public law.

In the legal regulation of relations regarding compensation for non-pecuniary damage inflicted on victims of violent crimes, terrorist acts, violations of human rights and international humanitarian law, fundamentally different compensation mechanisms are used depending on the legal status of the person responsible for damage. Some of them are based on peremptory requirements of international law, while others are primarily based on the dispositive principles of the free will of the national legislator.

The first of certain mechanisms is based on the idea of affirming the principle of justice and is focused on the implementation of not only compensatory, but also protective (preventive) functions of compensation for non-pecuniary damage. And the second has a subsidiary nature regarding the responsibility of the direct offenders, has mainly arguments of social solidarity as its basis and is not associated with any

expressive preventive impact on the state as the subject of the compensation debt it has assumed.

This involves determining the grounds, the scope of subjects of the right to compensation for non-pecuniary damage, the size and procedure for compensation payments provided to the injured persons at the discretion of the national legislator, who is guided by humanistic considerations to ensure the primacy of human dignity. In this case, the most important social values should receive priority protection – human life and health (for example, victims of violent crimes, terrorist acts in particular). Therefore, the corresponding legislative acts should consolidate reasonable restrictions on the actions in the relevant field of civil relations of the principles of guilt and full compensation of damage inherent in tort law, including the specifics of the interaction of substantive and procedural guarantees to protect the interests of the victim and the state in legal relations with the direct inflictors (persons responsible) of damage.

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