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Damages for Non-Pecuniary Loss in Dutch Legislation and Jurisdiction

How should loss, which cannot be expressed in money, be compensated? How should pain be financially assessed? These questions are increasingly gaining significance. In our age it is general that human rights and personality rights are codified in the Constitutions of almost every nation.¹ Legal systems have special instruments to protect personality against the injury of another person. Usually there are two opportunities to reply to the *injuria* with the language of law: enforcing the penal right of state there are sanctions from the perspective of criminal law and we can find special protections in the area of civil law. The most significant difference between the two legal fields is the aim of their functions. Criminal law punishes the aggressor, but does not give any compensation to the victim. The proposal of the sanction suits to the personality of the misdoer. Civil law has its function to give amend to the injured party of the obligation.² The problem is that damages for non-pecuniary loss cannot be examined from the traditional view of liability. To solve a problem in connection with compensation the judge has to analyze four essential lemmas: damage, wrongfulness, causality and imputation.³ If any of the conditions mentioned previously is missing, there is no chance to adjudge damages to the plaintiff during a legal procedure. Damages for non-pecuniary loss are special cases where the most important lemma – damage – is uncertain. In case of a personal injury, a physical stress or an infringement of

¹ In this study, author distinguishes human rights and personality rights. According to this distinction, personality rights are a special field of human rights that can be found in international treaties. Most of the European countries use general rules for protecting these rights in the Constitution, and special instruments of protection are mentioned in details in criminal and civil law acts.

² This amend can reveal through objective and subjective sanctions. The aim of the objective ones is to forbid the aggressor to continue the invasion. Subjective sanction is the compensation itself, which can be pain award, damages for non-pecuniary loss or solatium up to the legal system of a country.

³ These lemmas are well known from the Roman age. To say in Europe it is the only fundamental base of compensatory law.

reputation there are no manifested disadvantages. Only the injured person can feel the strength and heaviness of the injury. In the continental legal systems legislators do not want to give the power to the hand of a judge to calculate and adjudicate amounts without strict regulations. This approach is because of the old theory of checks and balances of power. It is obvious that solving a personal injury problem from a pure compensatory law aspect means the fall of the constitutional aim: to protect individuality and personality with every possible legal instrument.

In Hungary it is a most mentioned dilemma because of the re-codification of the Civil Code. The first draft of re-codification contained two institutions in connection with protecting personality: one is among the regulations of compensatory law, and the second one is pain award in the chapter for personality rights. In the year 2003 the Committee Responsible for the Civil Law Codification published their new solution: pain award. Pain award (*solatium*) is a sanction for violation of privacy without proving manifested harms or damages.⁴ There is no need to demonstrate any loss or damage to claim damages from the aggressor, the only important lemma is the personal injury itself. Attributes of pain award are similar to the rules of compensatory law and damages. This theory is well known in European civil law. The only fear of pain award is the lack of strict regulations. A judge will not find any further guidelines in the Civil Code how to calculate the concrete amount or what kind of features he has to discover during a legal procedure. Because of the fact that the Hungarian re-codification of civil law uses some achievements of the young Dutch Civil Code⁵, I try to describe the working of damages for non-pecuniary loss and pain award in the legislation and jurisdiction⁶ of the Netherlands. As I mentioned above this legal institution has to be analyzed through not only statutory law but the living and developing work of courts.

General rules of the Dutch Civil Code⁶

The private law in the Netherlands has its roots from the Roman law. The first codification of civil law, dated from 1809, came into being by the order of King Louis Napoleon. The life of this act was extremely short because of the incorporation of the Netherlands into the French Empire in 1811. The result

⁴ VÉKÁS Lajos, *Az új Polgári Törvénykönyv koncepciója és tematikája* [Conception and topics of the new Hungarian Civil Code], Magyar Közlöny 2003/II.

⁵ Burgerlijk Wetboek, BW.

⁶ With using the English translation of the *New Netherlands Civil Code* by P.P.C. HAANAPPEL, Deventer, Kluwer, 1990.

was that the Dutch had to adopt the legal masterpiece of Napoleon, the Code Civil. This historical event determined the development of compensatory law in the Netherlands. Although the Dutch achieved their independent Civil Code in 1838, it wore remarkable effect from Code Civil. By the middle of the 20th century many regulations of the Civil Code became outdated, and despite the trial of the legislator, the regulations in connection with obligatory law were neglected to adapt to the needs of modern society. The strengthening judge made law replaced this ensuing gap. In the field of tort law it resulted that not only a violation of a right or an act violating a statutory duty constituted an “unlawful act” but also any act or omission, violating a rule of unwritten law pertaining to proper social conduct. With this interpretation judge had the opportunity to sanction every imaginable kind of torts independently whether it is written in any act or not. The situation was very similar to the French development, where there was only one general rule for compensatory law and jurisdiction defined the personality rights from case to case. In the Netherlands time had come to incorporate the achievements of judge made law into a new Civil Code. In 1947 Professor Meijers of Leiden University got a mandatory to start the codification process. After so many years, Book 6 (General Law of Obligations) of the new Civil Code came into force in 1992.⁷ The huge act contains almost all the parts of civil law except for the law of intellectual and industrial property. The aim of this process was to combine and incorporate judge made achievements into a unified code to strengthen the traditional continental law theory: rights are in statutory law not in the hand of courts. One of the most important factors took effect to the new Code was the unifying European tort law.⁸

The Dutch Civil Code (from now: BW) contains the rules pertaining to damages in the general rules of obligations.⁹ These rules deal with statutory obligations to pay damages. In every case a legal base has to be found in any of the statutory rules to claim for compensation. It means that there is no power for the judge to enlarge or restrict certain cases. Similar to the valid Hungarian Civil Code damages for breach of a contract and damages for tortious liability and strict liability have the same rules. BW contains those cases when damages for non-pecuniary loss can be claimed:

⁷ Book 1 (Law of Persons and Family) came into force in 1970; Book 2 (Legal persons including companies, associations and foundations) came into force in 1976; Book 8 (Law of Transport) came into force in 1991; Book 3 (Patrimonial Law), Book 5 (Real Rights) and some parts of Book 7 (Special Contracts) also came into force in 1992; Book 4 (Law of Succession) came into force in 1998.

⁸ *Unification of Tort Law: Damages*, ed. Ulrich MAGNUS, New York, Wien, 2001. 89.

⁹ Book 6, art. 95-110.

- in case of physical personal injury (death, scars, pain and suffering, loss of enjoyment of life, etc.),
- if the liable party had the intention to inflict non-pecuniary harm,
- if the damage is the infringement of one's reputation whether he or she is living or deceased,
- in case of harm to a person in any other way.¹⁰

The last category entails several injuries such as infringement of intellectual property and copyright, invasion of privacy, unlawful interference with freedom of movement. There are several other cases when non-pecuniary loss can be claimed in other statutory provisions outside the rules of tort and contract law:

- unlawful detention in the Code of Criminal Procedure¹¹,
- unlawful registration of personal data¹²,
- in case of unlawful seizure of the driving licence, identity card by an authority¹³,
- breach of a collective bargaining agreement.¹⁴

Non-pecuniary loss is in tight connection with a special and subsidiary legal institution: equity.¹⁵ It is very important to construct the rules of damages for immaterial loss flexible in healthy frames. During a legal procedure relevant factors are: the nature, seriousness and the permanency of the harm; the extent and duration of necessary medical treatment; the extent to which the claimant will be able to adjust to the new circumstances, the ground for liability and the degree of fault on the part of the liable party. We can find considerations from the aspect of the harm, the injured person and the liable party. The most essential considerations are those in connection with the harm itself. These rules and relevant factors can help the judge a lot when the damage is caused by a personal injury, where usually there are scars, wounds or other manifested hurts. The other helping hand is the rule, which allows the court to look at the similar cases in the practice of other Dutch courts to determinate the amount to be awarded. There is a legal possibility to examine the decisions of similar cases from foreign courts, but there are lots of bound to live with this opportunity in the civil procedure.¹⁶ The Dutch legal experts¹⁷ often argue

¹⁰ art. 6:106 BW.

¹¹ art. 89 et seq.

¹² art. 9 Wet Persoonsregistraties (Act of Registering Personal Data).

¹³ art. 164 Wegenverkeerswet (Act of Transport).

¹⁴ art. 16 Wet op de CAO (Act of Collective Bargaining Agreements).

¹⁵ art. 6:106 BW.

¹⁶ HR 8.7.1992, [1992] NJ, 714 (Decision of Dutch Supreme Court from 1992)

about a reform to encourage the Dutch courts analysing to decisions from foreign countries. To increase the amount of the examined foreign cases the Supreme Court¹⁸ has to create decisions, which authorize lower courts to take into consideration some significant decisions of foreign colleagues. This development has its reason for the existence (*raison d'être*) because of the harmonization and standardization of European legal systems. By the help of using the unified money – Euro – in most of the European countries, it is not an added burden for a judge to compare the amount to a foreign decision.

Reviewing the regulations of BW it is clear that the statutory basis of damages for non-pecuniary loss is really flexible and the legislator confides in courts. Enumerating some typical cases of personal injury, BW oriented the judge but leaves the door open to appreciate other injuries too. Only two serious limits can be found in the Dutch Civil Code: factors that play important role during the probation and a very slight flavour of precedent law, *i.e.* the possibility to consider other decisions in similar cases. Tort law according to the Dutch Supreme Court is not a matter of drawing lines, but of a delicate balancing of interests on a case to case basis.¹⁹

Personal injures: statutory law and jurisdiction

The Dutch Civil Code allows damages for non-pecuniary loss in case of personal injuries.²⁰ It is written in the explicit statutory law that personal injures are the main bases for these kinds of damages. There are no further restrictions how to calculate the concrete amount for each injury. An equitable amount is required which suits the exact situation, the importance of the injury itself. Although no official thresholds exist in the Civil Code, there are several bounds for the jurisdiction. It is often argued that personal injuries with a superficial nature do not exist any claim for compensation and satisfaction. Interpretation of statutory law shows that these superficial injuries are outside the obligation to adjudge the situation from an equitable perspective. It means that the text of the Civil Code gives the right to make a distinct between injuries whether they are serious enough or not to award. How to know if the

¹⁷ M. H. Wissink and W. H. van Boom (mentioned in Ministry of Justice in the Netherlands: The Court System in the Netherlands; http://www.justitie.nl/english/Images/23_35613.pdf) 9.)

¹⁸ Hoge Raad (HR). Decisions of Hoge Raad appeared in periodical *Nederlandse Jurisprudentie* can be marked with the number NJ.

¹⁹ J. M. BARENDRECHT, *Pure economic loss in the Netherlands* (www.library.uu.nl/publarchief/jb/congres/01809180/15/b7.pdf) pp 116.

²⁰ art 6:95 BW and 6:106 (1) BW.

injury is serious or not? The Civil Code does not contain provisions and guidelines how to answer this question. It is a decent way of regulation, because any written distinction can kill the original nature of this strange institution called damages for non-pecuniary loss. The legislator trusts in courts that they are capable to find healthy thresholds during their work and push out every groundless claim.

An interesting provision can be found in the Civil Code, which is used for mental traumas. It is no matter if mental trauma results from physical injury or from an independent source. In the latter case, the trauma is usually referred to as being the result of psychical harm or injury to the person. Whenever a claim based on mental trauma is made without connection with a physical injury, a special legal threshold can be found: seriousness requirement.²¹ The trauma must be serious enough to be awarded with damages for non-pecuniary loss. It is an obvious question under what circumstances we can say that the trauma may qualify as mental injury. Without a strict statutory basis we can examine only the case law of Supreme Court. It is a unified opinion in legal practice that simple annoyance and distress is not enough for a substantiated claim. These feelings are insufficient in this respect. For example in a case where an employee suffered severe indignation from the fact that his employer had not stated his reasons for dismissal, the Supreme Court of the Netherlands found that this did not qualify as harm or injury to the person. If we take a closer look at other decisions we can find that the situation is not as strict as it seems. Lower courts often follow a little bit liberal approach to this question. It is a significant easement if the trauma is recognisable as a psychiatric illness. This circumstance can be helpful, but not decisive in the meaning of the Civil Code. In a case happened in 1977 a young married couple claimed damages from a bank that financed their new enterprise. Due to the unlawful – but not malicious – termination of the credit facilities supplied by the bank, the new enterprise and business collapsed. Plaintiffs suffered not only usual financial loss, but this happening allegedly devastated their common life. According to their account, they are unable to recuperate again and they placed themselves under medical treatment. Supreme Court awarded non-pecuniary damages for the reason that medical treatment can verify the seriousness of the trauma caused by the bank. So, it is stated that medical treatment makes apparent the non-pecuniary loss and helps deciding if the mental injury is serious enough. It is important to say that this kind of interpretation is not included in the Code, so it is not decisive for courts.

The evaluation of damages for non-pecuniary loss feeds from two different approaches: compensation and satisfaction. These purposes of the

²¹ art. 6:106 BW

legal institution are not strange in Europe. First of all, these considerations appeared in the German case law of the Federal High Court²² in 1955. Compensation is absolutely impossible, because non-pecuniary loss cannot be expressed in money, so the principle of full compensation – which is the base of compensatory law – cannot be applied. Satisfaction is a problematic purpose because of its criminal roots. In civil law, satisfaction seems to refer to an ethical rather than a legal requirement of ‘seeing justice to be done’.²³ Satisfaction is not applicable when the injured person dies in connection with the injury. In this case he cannot experience the jurisdiction, which ends with adjudging damages to the relatives. The purpose of satisfaction is often used in sexual abuse and harassment cases. Although non-pecuniary losses cannot be compensated with monetary instrument, money – like it is often said – better than nothing. It enables the injured party to embark on activities that might somehow compensate the loss of enjoyment of life. We can say that damages for non-pecuniary loss are serving necessary function in the Dutch legal system, as well as in most of the European countries. If there is a right codified in the Civil Code, due to the requirement of constitutionalism, it is necessary to have its guarantee to succeed.

Full compensation is concerned to personal injures too. The injured party is not supposed to be compensated twice for the same damage. The plaintiff has to choose in those cases when pecuniary and non-pecuniary damages exist from the same injury. In an ideal situation the plaintiff has the right to claim a sum in pecuniary damages for reasonable expenses (e.g. cosmetic surgery) or a sum for non-pecuniary loss resulting from not making these reasonable expenses (e.g. loss of enjoyment of life as a result of facial scarring). In principle, the injured party is free to choose between these opportunities and find the suitable alternative. It is a particular interpretation of full compensation. Theoretically I have misgiving if this approach serves the aim of damages for non-pecuniary loss: protection personality with the instruments of civil law. If we decide to judge these losses from a compensatory view, I do not think that it means that pecuniary losses can extinguish the claim for non-pecuniary damages or contrary. Both claims have their own legal ground on their own rights. I feel this interpretation is the most neuralgic point of the Dutch compensatory law.

²² Bürgerliches Gerichtshof (BGH).

²³ *Damages for non-pecuniary loss in a comparative perspective*, ed. W. V. Horton ROGERS, Wien, New York, 2001. 158.

Statutory law and case law concerning with special personal injuries

In this chapter I would like to show some typical cases from the Dutch jurisdiction concerning with personal injuries. The most common approach of this question is the pre-death fear and pain. It means that a claim for non-pecuniary loss resulting from a fear or pain of impending death is possible, but the seriousness test is a requirement as well, just as in case of mental traumas. A weird regulation can be found among the provisions of BW.²⁴ A person who suffers non-pecuniary loss before dying is in principle entitled to claim damages. This claim is strictly personal and cannot be conveyed. The only exception to the rule is when the claim can be passed on to the heirs, but only if the injured party has informed the liable party that he will claim for non-pecuniary loss. If the injured person dies before this revelation, the right to claim evaporates. Instant death deceases every claim for non-pecuniary damages by the estate. I think there is no need to explain how unfair this regulation is. First, it is unknown for a layman that he has to inform his aggressor to give the right to his heirs, secondly, because a personal injury remains without sanction of civil law. The meaning of this approach is the strictly personality view of personality rights. Personal injuries are no special kinds of the heir's income; these are exclusive right to the injured person. We can find such interesting provisions in connection with third parties *infra*. Relatives have no claim for non-pecuniary loss in their own right. To demonstrate the incapability of this rule in practice let's see a hypothetical air crash. Even passengers with legal education would not contemplate on calling the captain and informing him of their intention to claim for non-pecuniary loss. And what is more, if they did it, there is no proof that this statement would survive. Leaving aside this weird rule of BW, we can state that in a pre-death fear situation it is unimportant whether this fear rises before or after the personal injury or death follows this injury or not. This situation is similar to the judge of mental trauma; the most important thing is to demonstrate that the fear was serious and established enough.

Another interesting situation is the problem of comatose plaintiffs. Exact case does not exist, but in legal doctrine it is a most-mentioned debate. The first question is whether a comatose person can suffer any non-pecuniary loss. Is it a real personal injury if the nurse, e.g. kick him or hit him? Most of the Dutch authors found that there is no legal base to these kinds of claims. The first reason is that a comatose plaintiff cannot suffer any kind of non-pecuniary loss because he is incapable to feel them. The second reason is in connection

²⁴ art 6:106 (2) BW.

with the purpose of non-pecuniary damages, i.e. there is no use for the money and therefore he cannot experience satisfaction either. It can be another interesting approach because it is general that all persons have personality rights in their lives and sometimes after death (see infringement of the reputation of a deceased person). The root of the problem is the same again: Dutch law does not want to give the right to the relatives to claim for non-pecuniary damages.

Non-personal injures

As we have seen previously, the Dutch Civil Code enumerates some exact injuries, which evoke claim for non-pecuniary damages. Most of these injuries were in tight connection with personal injuries, attacks. Non-personal injuries are a little bit more complicated. Although it is general in the Dutch legislation and jurisdiction that personality rights contain several angles of the private sphere, it is impossible to define all the bunch of rights, which is the component part of individuality.

There is only one non-personal injury is mentioned in the Dutch Civil Code: *infringement of reputation*. This is the most common case that happens almost every day. The award for non-pecuniary loss is based on the moral damage to the self-esteem from one hand, and the moral loss to the self-esteem of the plaintiff in the eyes of others. This means that there is no need to commit the unlawful act in front of a big crowd or in the society of other people, because if the assertion is suitable for hurting personality, damages for non-pecuniary loss are required. The assertion can be in connection with the social, cultural level of the plaintiff, or it can apply to his profession. The intention is not required on the part of the defendant. The other case of infringement of the reputation is when the injurious statement concerns to a deceased person. BW allows a claim to certain close relatives of this person, if, the infringement would have amounted to impair the reputation of him, he had still been alive.

In all other cases the Dutch Civil Code does not contain certain provisions. Courts have to adjudge these non-personal injuries using the flexible rule: a case of harm to the person in any other way.²⁵ *Interference of liberty or unlawful discrimination and any other constitutional rights* are also recurrent cases. The most important circumstance during a legal procedure is the nature of the right involved. There is a special manifestation of the seriousness test, because all injuries against these rights must be sufficiently serious to claim damages for

²⁵ art. 6:106 (1) (b) BW.

non-pecuniary loss. Other relevant infringements of lawful rights are invasion of privacy, assault and sexual misconduct. In the latter case it is usual that assault and sexual misconduct accompany mental traumas and physical injuries, but these criteria are not decisive. Any physical injury can only help to demonstrate the seriousness of the unlawful act, and usually it can be seen in the higher amounts of compensation.

Use of a person's portrait without permission in an unlawful way may constitute a sufficiently serious infringement of his personality. Infringement of copyright is against the moral rights of the author and can be more serious in the case when it is the first product of the author. Courts usually examine all the circumstances of the unlawful act, and without any statutory bounds they can make their decisions.

Tangible property is an interesting situation in this field. Interference with, damage to or loss of tangible property as such does not entitle the injured party to recover any non-pecuniary loss suffered as a consequence thereof. To claim damages for non-pecuniary loss other conditions are required. For example, if there was a special emotional contact between the owner and his property, and the defendant had to know about it or this connection was the reason itself of the injury, a claim can be established. The unlawful seizure of property on behalf of a creditor may amount to harm to the person, as the Dutch Supreme Court has recognized it.²⁶ This predilection value of a property is a most argued problem in continental legal systems. This is one of those problematic cases, which warn legislators to leave too much freedom for the courts adjudging non-pecuniary losses. Predilection value is an absolutely subjective circumstance, which is up only to the owner's mentality. That is why when this is taken into consideration in the Netherlands as well jurisdiction is very thorough.

It is difficult to adjudge which infringement of a right can cause greater loss to the plaintiff. We can say that in case of non-personal injuries the award for damages is generally based on the severity or extent of the infringement itself. It means that the greater the infringement of the right, the greater the loss suffered that should be compensated for. Although the full compensation is absolutely impossible in these cases, but the compensation for monetary damages are still available to any injured person. The problem is that in some decisions courts were looking for manifested damages, which are no pre-conditions to the claim for damages for non-pecuniary loss. The most problematic area is discrimination of an employee. In several cases judges have been reluctant to award amount for non-pecuniary harm, because they did not find any loss. In my opinion infringement of any of the personality rights is a

²⁶ HR 26.6.1998, [1998] NJ, 778.

serious loss to the injured person. If we tried to examine the exact loss, it will result that there is no other accepted claim than personal injuries, closely bodily harms. It cannot be denied that there are situations when non-pecuniary loss involves the prospect of monetary loss as well (e.g. infringement of reputation or copyright, invasion of privacy, sexual abuse, etc), because these harms can be harmful to the injured party's earning capacity, but these are loss of income and no pre-conditions of non-pecuniary losses.

If we take a closer look at the amounts the courts adjudge, it is seen that there is a clear distinction between the private non-personal injuries and those using the mass media. Infringement of reputation in smaller cases was awarded between 450 and 5,000 Euros, in serious cases 9,000 and 25,000 Euros. In a case when a country-wide daily paper published a defamatory article on a well know actor, the court took into account that the publisher's intent was to increase circulation and damage to the performer's goodwill, and awarded 15,750 Euros.²⁷ One of the highest recorded amounts was 55,000 Euros when two mass media (press and television) had published a story about a city alderman, accusing him of having received bribes. Later it came to light that the statement was false. The court took into account the extraordinary media attention and the intent of the defendant to make extra profit.²⁸ We can see that intention is relevant, but not decisive to adjudge non-pecuniary damages. The way of the injury and the intention are always examined circumstances during a legal procedure. These elements can be found as punitive features in compensatory law. I think it is necessary to appreciate these circumstances, because these are inseparable of the injury itself, and help to find out how much loss was created to the injured party.

The courts recognise that the availability of other sanctions may influence the award of damages for non-pecuniary loss. Cases in which other remedies influence the award for non-pecuniary loss seem to be only exceptions rather than general unwritten rules. The most problematic point of taking into consideration alternative sanctions is the criminal verdict. In some cases courts found rectification a sufficient remedy for infringement of reputation, because in the criminal procedure the defendant was found guilty and got a kind of punishment. It is clear that rectification can only serve the function of satisfaction, which can be less than using compensation and satisfaction together. In the Netherlands it is a general rule that a judge can consider evidences free, without any statutory obligation. The sentence in a criminal process can only be one of the evidences, but not as stressed to change the way of the civil law sanction from damages for non-pecuniary loss to rectification.

²⁷ Rb. (District Court) Haarlem, 12.4.1983, [1987] NJ, 339.

²⁸ Hof Amsterdam, 13.9.1990, [1991] Mediaforum, B1.

To summarize the jurisdiction of non-personal injuries we can say that there are not many differences between them and the personal injuries. The flexible statutory base allows the courts to consider those injuries which worthy of award. The sums are not too high and not too low, and the furthest points are explained with decent reasons, such as the intention to make profit, using mass media to commit the injury.

The problem of the position of 'third parties'

Although we have seen that both statutory law and judicial practice are working in a coherent system in the Netherlands, but there are some problems, which have not been solved yet. One of the most interesting anomalies is the position of what can be called 'secondary victims' or 'third parties'. Dutch Civil Code limits the possibility of 'third parties' to claim damages for non-pecuniary loss as a result of the injury or death of another person.²⁹ In typical cases the plaintiff would like to claim compensation because he suffered mental illness from witnessing the death of another person, namely a relative. This claim is not awarded by Dutch courts because of the prohibition of Civil Code, but the interpretation of the mentioned provision lives restrictively in jurisdiction. We can find two situations when the claim of third parties can be awarded. First of all, the claimant can only claim for damages, caused by a mental trauma because of being witness of an injury against another person, if he can establish that the aggressor (*defendant*) also committed an unlawful act *vis-à-vis* the claimant himself, which resulted in the trauma. It is really difficult to be demonstrated because of the causation required by BW. The process to verify that the aggressor, who committed an unlawful act against another person, causes the trauma is almost impossible in some cases. The second chance of the secondary victim to claim for compensation is if he verifies that the trauma amounts to physical or non-physical injury. If this is the case, the claimant can get compensation of his pecuniary loss (such as cost of medical treatment) and non-pecuniary loss on the basis of his non-physical personal injury.³⁰

To see how these rules are working in practice I would like to show three cases³¹ from the case law of the Supreme Court of the Netherlands.

²⁹ BW art. 6:107-108

³⁰ In Hungary there are no exact rules and provisions for the non-pecuniary damages of third parties, but since a decision of the Hungarian Supreme Court in 1987, these claims can be accepted not only if a close relative died in connection with the injury, but in every situation when verified disadvantages can be demonstrated.

³¹ These cases are mentioned in the presentation of Siewert D. LINDENBERGH at POPIL Conference Roma, 24-25th May 2002.: A Comparison of European Redress Systems: Common

An 8-year old boy lost his parents in a terrible car accident caused by a culpable person. His grandparents decided to raise him up and take him into their house. The grandparents did not only claim the costs of raising a child, but they also filed a claim for the time and effort they spent with upbringing him. The Supreme Court denied the claim because according to Dutch law, an act is – in principle – only regarded tortuous towards the victim himself. Third parties and secondary victims only have a claim if they can find a specific ground in the Dutch Civil Code, or when they successfully argue that the act was, under the specific circumstances, also tortuous towards them. This means that the grandparents had to demonstrate they were primary victims of the injury. In case of death, the Dutch law and legal practice grants a right to compensation of loss of financial or non-pecuniary support only to certain relatives. It is interesting but certain relatives do not contain parents of the deceased person, unless the deceased used to provide their costs of living. In this case the child had the opportunity to claim for the extra efforts of his grandparents.

To perform the other side of the story, there is another situation, where pecuniary (financial) damages are in the centre of the case but from the view of third parties. The second case is in connection with an 11-year old girl, who had a duty in school. She had to serve coffee and tea to her teachers. To discharge her obligation she had the right to leave the classroom 10 minutes earlier than her classmates. Once her T-shirt caught on fire she suffered severe burning. Her parents spent much time visiting her in the hospital and they also spent a lot of time taking care of her wounds at home. In this situation the parents claimed in the name of their daughter, so the Supreme Court decided that the girl indeed had a right to compensation for the time spent by her parents on her nursing, because if they had not, she could have claimed for the costs of professional nursing. It is a pecuniary loss. The Court dismissed the other part of the claim, compensation for the visiting in the hospital, because there is no professional equivalent for 'visiting'.

The last selected case is a famous one in Dutch case law, called 'Taxi bus case'. A 5-year old little girl was riding her bike close to her home, when a taxi bus overruns her. The bus actually rides over the girl's head. The mother was immediately warned by one of the neighbours and found her daughter with her face turned to the ground. First, the mother called the ambulance hoping that the girl was still alive. When the mother tried to turn her daughter's head to look her in the face, she experienced that her hand disappeared into the skull of the girl. The mother noticed that the substance next to her girl's head was

not, as she considered, her vomit, but appeared to be the girl's brain itself. The mother suffered severe mental illness because of the shock of this sight and the realization. Dutch law is consequent in the question that there is no claim for non-pecuniary damages subsequent to death of a relative. Taxi bus case was the first when Dutch Supreme Court awarded the right to compensation of non-pecuniary damages to somebody who lost his relative. The decision contained that the act committed towards the child, must also be regarded as tortuous towards the mother. The Court emphasized that there was a distinction between the consequences of the child's death, for which no non-pecuniary damages may be awarded, and the consequences of the confrontation with the accident, for which damages may indeed be awarded. The mother received 14,000 Euros for non-pecuniary damages. This case shows that although in principle the plaintiff has a right to claim compensation for the exact damages he suffered, the courts are free to assess the damage in a more abstract way, if that corresponds better to its nature.³²

Examining these cases it is obvious that extra conditions are demanded to claim for non-pecuniary damages because of the loss of a relative. Only the fact of losing a close relative is not enough for a successful action. There have to be special circumstances, which demonstrate that the unlawful act made a direct effect to the plaintiff, who became the primary victim. Legislators are presently working on a proposal that grant certain relatives a fixed amount of non-pecuniary damages of at about 10,000 Euros without any further condition.³³ It means that in the 'Taxi bus case' the mother could have received 10,000 Euros for her girl's death and another 14,000 Euro for the mental illness and psychological shock she had to suffer because of the specially cruel circumstances (such as she could see her girl just after the injury, she had to experience the death and the brutality of the accident).

Intention and financial resources of the parties: the right to reduce

Damages for non-pecuniary loss are independent from the conduct or fault of the liable party. The traditional lemmas of compensatory law have changed in this point. To increase the effectiveness of protecting the personality against external injuries, it is necessary to exempt the plaintiff from demonstrating the

³² S. Arthur HARTKAMP, *Judicial discretion under the New Civil Code of the Netherlands*, (w3.uniroma1.it/idc/centro/publications/04hartkamp.pdf) 13.

³³ This is a living rule in art. 1382 of the Belgian Civil Code. The difference is that in Belgium it is impossible to receive extra amount because of non-pecuniary damages. 10,000 Euro is a standard amount for losing a close relative.

intention of the defendant. Of course the intention or the lack of it may influence the amount of the compensation, but it is not in the centre of the questions. If there is a personal or non-personal injury which makes harm to another person, and this is not allowed by statutory law (e.g. extreme necessity), the defendant has to pay damages for non-pecuniary loss unless the loss is not suitable for the requirement of seriousness test (in case of psychical or mental traumas). The negligence of intention during the examination of the injury makes it certain that this civil law institution is free from punitive effects.

The financial resources of the plaintiff do not play a significant role in the assessment of damages, but sometimes they might, particularly when the victim's financial strength throws the resources of the liable party into the shade. It may result the reduction of the adjudged amount. The Dutch Civil Code gives the right to the courts to reduce the amount of damages when the nature of liability, the respective financial resources of the parties or the legal relationship between the plaintiff and the defendant account for it. BW says that this right to reduce is particularly expedient when full compensation may cause unacceptable results.³⁴ This provision is used seldom, because the judge has to explain the cause of reducing the amount with these non-defined unacceptable results. Another bound of reducing is that the reduced amount may not exceed the amount for which the debtor has covered his liability by insurance or was obliged to maintain such a cover.

Sums

Although there are theories in connection with the function of damages for non-pecuniary loss, courts decide cases with using the provision of the Civil Code: awarding equitable amounts to the injured person. We cannot say that amounts are too high or too low compared to other European nations. It is felt that amounts are quite modest as compared to certain – firstly common law based - legal systems. Over the last decades these amounts have been increasing. The highest amount recorded until now is 135,000 Euro in the case when a middle-aged man attracted AIDS because a nurse in the hospital accidentally used a HIV-contaminated syringe.³⁵ In legal doctrine it is a heated argument for abolition of damages for non-pecuniary loss. It is true that higher sums can help avoiding aggressors and estimating personality, but there is a lot of fear from this abolition. Most of the writers are by the side of modifying the amounts. They are afraid of the reaction of insurances. It is a living fear that

³⁴ art. 6:109 BW.

³⁵ HR 8.7.1992, [1992] NJ, 714.

higher awards might even lead to the withdrawal of insurance companies from certain areas of liability insurance, e. g. medical insurances. I don't think that a judge has to consider the weight of his decision to an insurance company. In Hungary and in most of the European countries it can be seen that whenever an insurance company is on the side of the defendant, judges are more confident in calculating the exact amounts. It is an understandable reaction, because examining the productivity of the defendant is on the plaintiff's behalf. Adjudged amounts can be high if there can be no chance to recover.

In Dutch law we cannot find any damage chart based on medical classification like in France. In the decisions of the Dutch Supreme Court no exact limits have appeared. Supreme Court only tries to describe those circumstances, which can influence the concrete sums in similar cases. The circumstances are in the first place: the nature, the seriousness and permanency of the harm; the extent and duration of necessary medical treatment; the extent to which the claimant will be able to adjust the new circumstances; the ground for liability and the degree of fault on the part of the defendant. The evidence of good working system is the difference between bottom and upper amounts in typical cases. The difference shows that not only the end result (the type of the harm) influences the adjudged amounts but several other circumstances. Statutory law on the basis of equity and the obligation of considering every relevant circumstance permits these differences.

Summary

Damages for non-pecuniary loss in Dutch legislation and jurisdiction show a very sympathetic way of the evaluation of this legal institution. The new Civil Code uses the achievements and experiences of the jurisdiction during a long period in the 20th century. Civil Code contains a general clause awarding non-pecuniary losses and only defines some typical injuries permitting courts to find other situations worthy for damages. There are no explicit thresholds how to calculate sums in concrete cases and the judicial practice has the ability to form this institution in healthy frames. In case of personal and non-personal injuries not only the manifested or medically recognisable situations are awarded but mental traumas and psychological injuries are granted too. To filter out bagatelle injuries there is a special requirement: seriousness test. The ambition to disbar punitive elements from passing of judgement is successful and judges are partners in realizing this aim. The only strange approach can be found in connection with third parties or secondary victims. Dutch law approaches personality rights as absolutely private rights, which are not hereditary to close

relatives. There are endeavours in legal doctrines and jurisdiction as well to reduce this strict provision. Jurisdiction described several circumstances that help turning the third party status into primary victim situation, and legal doctrine is working on a solution which is working in other foreign countries: exact amount when losing a close relative.

From the aspect of the preparing new Hungarian Civil Code there are plenty of useful experiences that can be found in Dutch legal system. The most important is the trust the legislator has in courts and the importance of the Supreme Court in developing and unifying legal practice. Damages for non-pecuniary loss are a special legal formation that claim the significant rules of jurisdiction and need only general rules in statutory law.

Rezümé

Nem vagyoni kártérítés a holland jogalkotásban és jogalkalmazásban

A magyar polgári jogi rekodifikáció során az egyes jogintézmények kapcsán különösen hangsúlyos szerephez jutnak az európai jogi megoldások az egységesülő európai magánjog megvalósítása irányába való törekvésből kifolyólag. A nem vagyoni kártérítés kapcsán az új polgári törvénykönyv koncepciója és tematikája a korábbi álláspontot feladva új alapokra kívánja helyezni a személyiségvédelem általános eszközét. A sérelemdíj bevezetésével egyelőre bizonytalan, hogy mennyire sikerül a jelenleg széttagolt joggyakorlatot egységesebb irányba terelni, és az ítélkező bírákat a szabad mérlegelés egészséges, törvény által nem szabályozható korlátainak megtalálására sarkallni. A holland polgári törvénykönyv kötelmi jogi könyve 1992-ben lépett hatályba, több mint 50 éves kodifikációs folyamat eredményeként. Európában az egyik legmodernebb és legelőkészítettebb törvénytűnek tartják a holland polgári kódexet, amely a nem vagyoni (erkölcsi) károk megtérítéséhez kapcsolódó rendelkezéseiben számos esetben szakít a tisztán felelősségtani megítéléssel, és a jogalkotók kezébe adja a védelem részletszabályainak kimunkálását.

A holland törvénykönyv külön nevesíti a nem vagyoni kártérítést, és néhány – egyrészt magában a polgári kódexben, másrészt egyéb jogterületet szabályozó törvényben nevesített – eset mellett szélesre tárja a kapukat a befogadható igények meghatározásánál azzal, hogy a bíróságok szabad belátására bízva annak eldöntését, hogy mely személy- és személyiségsértések alapozhatják meg a nem vagyoni kártérítés iránti igényt. A holland bírósági esetjog liberális, ám összegek tekintetében némiképp visszafogott szemléletét csupán néhány írott ítélkezési elv korlátozza. A mentális sérülésekkel járó

személyisértések esetében a bagatell igények elterjedésének megakadályozása érdekében a holland törvénykönyv felállítja az érdeksérelem fokának komolyságára vonatkozó vizsgálat követelményét. Ez az előírás azonban nem jelenti, hogy a kártérítésre érdemesnek talált esetek köréből kikerülnének az orvosilag nem diagnosztizálható vagy a külvilág számára nem nyilvánvaló, elsősorban pszichés sérelmek. A holland bíróságok a tanulmányban bemutatott példák alapján a társadalom erkölcsi felfogásának megfelelően döntenek el az egyes esetekről, hogy valóban komoly sérelmekről van-e szó.

A holland jog sajátja az a felfogás, hogy a tulajdonos dolgának jogtalan elvétele esetén is felmerülhetnek nem vagyoni hátrányként értékelhető károk. Amennyiben a jogsértőnek tudomása volt a tulajdonos eltulajdonított dologhoz fűződő különleges emocionális kapcsolatáról, vagy az elvétel kifejezetten az ilyen érzelmi kötődés okozta lelki gyötrelmek kiváltása céljából történt, a vagyoni kártérítés iránti igény mellett – az előszereteti érték figyelembevételével – helye van nem vagyoni károk megtérítésének is.

A holland bíróságok a felek személyi körülményeit is a vizsgált szempontok körébe vonhatják. Ha a felek közötti jogi kapcsolatra, bármelyik fél vagyoni viszonyaira és a jogsértés természetére tekintettel a teljes kompenzáció szem előtt tartásával megvalósuló összegkalkuláció méltánytalan eredményre vezetne, törvényi felhatalmazás alapján a bíróságoknak – szigorú indokolási kötelezettségük teljesítése mellett – lehetőségük van a kártérítési összeg mérséklésére is.

A holland kártérítési jogot talán egyetlen, a teljes – vagyoni és nem vagyoni – felelősségi jogot átható szemléletmód korlátozza. A személyiségi jogok abszolút egyénhez tapadó voltát hirdető jogrendszer nem engedi meg a sérelmet szenvedett fél mellett senki másnak – sem rokonoknak, sem a jogsértések közvetlen szemtanúinak –, hogy pert indítsanak. Ahhoz, hogy egy közeli hozzátartozó halála miatt nem vagyoni kártérítés megítélésére legyen lehetőség, a leendő felperesnek azt kell bizonyítania, hogy a jogsérelem olyan fokú volt, amely őt közvetlen áldozattá, a jogsértés elsődleges elszenvedőjének egyikévé tette. Ennek bizonyítása azokban az esetekben lehet célravezető, ahol a hozzátartozó halálát végignéző személy elsőként és közvetlenül szembesül a jogsértés eredményével, és ez olyan mentális traumát vált ki belőle, mely súlyosságára tekintettel akár a rokont ért támadás elsődleges következményének is tekinthető.

A holland jog nagyon szűk körben ad arra lehetőséget a bíróságok számára, hogy más országok ítéseinek döntéseit is felhasználják ügyeik megoldása során. Az azonban általános követelmény, hogy az egyéniesítés és a típusos esetek egységes elbírálásának egyensúlyát a holland bíróságok relációjában mindig fellelhetővé tegyék. Ezzel az amúgy kontinentális polgári

jogi felfogásba illeszthető jogrendszer a nem vagyoni kártérítés jogintézménye kapcsán enyhe precedensjogi töltettel vegyítik, amely újabb példája annak, hogy e nehezen kezelhető jogintézmény megfelelő működéséhez a törvényalkotó jogalkalmazókba vetett bizalma elengedhetetlen követelmény.