



Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2018



უნივერსიტეტის
ბანოშტელოზა

UDC(ყოფილ) 34(051.2)

ბ-216

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ISSN 2233-3746

Nino Katamadze*

Impact of Non-Property (Moral) Damage Functions on the Sum for Determining Compensation Criteria

The article relates to compensation of non-property damage, which serves as one of the key areas of the Civilistics in an angle of arguing on recognition and protection of personal non-property rights. For the sake of having a comprehensive insight into legal problem, one shall carry out systematic analyses of various conceptual matters related to the topic and determine how the Georgian model ensures protection of non-property rights in line with standard of trust, which has been cultivated by the progressive rule of laws that implies all the characteristics of the information époque.

Doctrinal analysis uncovers numerous problematic issues, which are twofold, caused by limited and vague legislative base and on the other hand, resulted from the difficulty of assigning non-property damage to an objective category that limits establishment of uniform legal practice on the matter.

The research is founded on the analyses of both, legislative doctrine and judicial practice. It features the conceptual approaches elaborated by various legislative systems and drawbacks of improvement of Georgian legislation from an angle of comparative legal analyses.

Keywords: *Personal Non-Property Rights, Compensation Criteria, Compensation, Satisfaction, Prevention, Nominal Damages.*

1. Introduction

One of the key targets of the legislation with regard to protection of personal non-property rights is civil law's institution of high importance, such as compensation of non-property (moral) damage. As an integral part of civil system, protection of the rights related to a person is the highest value system, which sets legal scale of freedom that is human dignity. Society of free humans is a priority of those states, where human dignity is a fundament for values' system.¹ Out of various mechanisms of non-property rights protection as set forth by the civil code, the most twisted, complexed and diverse is compensation of non-property (moral) rights; and, analyses of the latter has uncovered numerous major drawbacks.

Aim of the research is to identify correlation between the functions of non-property damage and determining criteria for compensation's sum; also, to shed light on legal or practical connotations from an angle of dimensions of private law, while bearing in mind legal stylistics and judicial practice and scholar discourse analysis.

The respective research reviews a notion of non-property rights and practical issues of compensation of non-property damage with a property upon gradual transformation of attitudes. Afterwards,

* PhD Student at the Ivane Javakhishvili Tbilisi State University, Invited Lecturer at the Black Sea International University, Ilia State University and Caucasus University.

¹ Decision № 1/4/592 of the Constitutional Court of Georgia on October 24, 2015, on the Case "Beka Tsikarishvili, citizen of Georgia against the Parliament of Georgia", II-1.

the paper features detailed characteristics of damage compensation objectives and functions within a prism of the most progressive legislative orders, and compliance of these principles with the Georgian legislation; as well as influence of the criminal law punishment for compensation of non-property damage caused by crime on the function of satisfaction. The final part of the research entails specific recommendations on the key matters discussed in the paper.

2. A Notion of Non-Property Damage

Non-material goods of a person protected by an institute of non-property damage are part to universal rights and freedoms². Causing a moral damage implies harm to moral emotions and relationships, which, besides material expenditure can also result into infringement/psychological struggle (moral damage) of non-material rights.

A notion of non-property rights in contemporary tendencies are discussed in an angle of negative human sufferings³ and harm to mental health, hence it offers a different solution of featuring a problem in financial forms. For example, the French law differentiates mental, psychological and aesthetic damages (*souffrances moral ou physiques, pretius doloris*), which determine grounds for different amount of compensation⁴. The English law differentiates notions of pain and suffering and loss of amenities (*Pain and suffering, loss of amenities*), which infringes and damages a right of a person to enjoy life⁵. The German law specifically does not differentiate legal aspects of moral damage; however, the legal doctrine could not bypass an issue of highlighting every interest within value system and it didn't succeed in underlining double function⁶ of moral damage in compensation's⁷ and satisfaction's⁸ elements⁹.

Analyses performed on intersystem differences makes it possible to learn on which specific aspect of personal values are stressed out in the respective legislative orders.¹⁰ By all means, it shall be noted that each and every case is unique due to factual content, hence, subject to a law in this context as an every other system's target is core to determining sum of non-property damage.

² Decision of 02 November 2016 # 2/32168-16 of the Civil Cases Panel of Tbilisi City Court (can be accessed at Court's archive).

³ „Human suffering”.

⁴ *Le Tourneau* (2004), nr. 1583-1587, which also implies a term - *Le prejudice sexuel*. Indicated: *Dam C. V.*, European Tort Law, Oxford University Press, 2013, 322.

⁵ Indication of ground is „Expectation of life”, which was suspended by an act of 1982. Indicated: *Dam C. V.*, European Tort Law, Oxford University Press, 2013, 322.

⁶ BGH GrZS NJW 55, 1675, 95, 781; BGHZ 128, 117 [119 f.] = NJW 1995, 781 f. mwN; OLG Celle NJW 2004, 1185; OLG München BeckRS 2016, 06809.

⁷ „Ausgleich”.

⁸ „Genugtuung”.

⁹ *Dam C. V.*, European Tort Law, Oxford University Press, 2013, 322.

¹⁰ *Ibid.*

3. General Principles of Non-Material Damage Compensation

The rights of a human to name, dignity, honor, reputation and to be protected from defamation are extremely personal. Upon infringement of such rights (subject to defamation), one shall imagine emotional condition of a victim, however, determining adequate sanction for the latter infringement is difficult due to numerous characteristics related to non-property (moral) damage; such difficulties are linked to individual perception of feelings, consideration of emotions and objective measurement of these.

Georgian civil law did consider a general rule¹¹ established within the continental Europe and set forth reasonable and fair as measures for determining compensation for non-property damage in article 413 (1) of the Civil Code of Georgia (later to be referred as CCG), which we can refer to as legislative restriction for a party to demand artificially boosted compensation.

Absence of boundaries for damage compensation, trends of utilizing personal space for commercial reasons and prevention of such actions from the judiciary branch harms the process of establishment of rational and effective mechanisms for protection. Upon selection of compensation criteria, judiciary faces enormous challenge, which is twofold, as it shall ensure reasonable balance between effective protection of personal space set forth by the CCG's rules and threat of encouraging unsystematic usage of non-property damage.

Due to absence of binding circumstances for damage compensation, the anticipated legal circumstances are strengthened within article 408 of the CCG and article 249 (1)¹² of the German Civil Code (later to be referred to as GCC), whose normative goal entails that for compensation of damage, it shall be crucial to determine environment that would have existed prior to occurrence of binding circumstances for damage compensation. However, peculiarities for non-property damage compensation shall be underlined within a general system of damage compensation; the difference of the latter type from the rest is that consequences cannot be reversed and no matter what the compensation is, it will never restore initial state of an injured party¹³. The latter peculiarity is the one, which makes it difficult to determine compensation of non-property (non-material) damage, since unlike property damage, so called hypothesis of differentiation¹⁴ is not applicable in the respective case. Non-property damage is prominent due to the fact while contrasting incumbent and hypothetical (excluding binding circumstances for

¹¹ *Bichia M.*, The Georgian Model of Compensation of Non-property Damage for Violating Personal Rights in Line with European Standards, "Journal of Law", №1, 2017 5.

¹² *Chitashvili N.*, General Legal Preconditions for Moral Damage Compensation, in the collection: Fundamentals of the Georgian Civil Law in the Georgian Judiciary Practice, TSU, Tb., 2018, 196; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of July 1, 2016 on the case #ac-167-163-2016.

¹³ Decision of the Supreme Court of Georgia of April 3, 2012 on the case #ac-1477-1489-2011.

¹⁴ *Rusiashvili G.*, New commentary on the Civil Code, article 408, 4, < www.gccc.ge >, indicates: *Grüneberg*, in Palandt, BGB Komm., 73. Aufl., 2014, Vorbem., §249, Rn. 10; on the Decision of the Supreme Court of Georgia of October 7, 2015 on the case #ac-12-459-438-2015; Decision of the Supreme Court of Georgia of July 1, 2016 on the case #ac-167-163-2016; Decision of the Supreme Court of Georgia of June 10, 2016 on the case #ac-301-286-2016: Court of Appeal has explained that damage is compensatory difference between "shall be" and "is within circumstance" (hypothesis of difference).

compensation) property state, monetary loss is not determined¹⁵; especially in the course of the subjective perceptions, which are related to social and professional status of a person and there is no direct counterweight material equivalent for these¹⁶.

Practical need for functional essence of non-property damage becomes especially visible during determining amount of compensation, which simplifies legal interpretation of general clauses and notions that remain open. In such circumstances, one shall argue on whether or not the Georgian legislation and judiciary practice ensure the same standard of trust, which is set forth by an international practice; also, whether or not there is consistency in judiciary practice while perceiving functional essence of non-property damage for the sake of determining amount of compensation. In this regard, it will be worthy to study judiciary practice and identify specifically which circumstances have caused legal consequence and whether or not there are grounds, which could have constituted to ensuring effective outcome within evaluation of the norm.

4. Objectives of Non-Material Damage Compensation

Upon deviating from an established norms of conduct, which will result into infringement of rights and interests, a victim has an opportunity to demand compensation caused by damage and restitution of the infringed rights¹⁷. The right to demand compensation is a legal mean for restoring imbalance caused by damage, aiming at eradicating negative consequences toward victim and is imposed on a party, which is a target of the respective civil circulation regarding realization of the specific risk¹⁸. The latter clearly indicates that the primary function of the law is to compensate damage¹⁹. Besides, the law also has a preventive influence effect on a potential perpetrator and it can also fully ensure that he/she will not cause any damage at all (preventive function)²⁰. Threat of being imposed with an obligation to compensate damage has preventive influence on behavior of civil circulation's actors and forces them to have an empathy toward others' rights and interests²¹. Non-economic damage is positioned separately as it is different from other types of damage²². Compensation of non-property damage does not aim at full

¹⁵ *Rusiashvili G.*, New Comment on the Civil Code of Georgia, article 408, 6, <www.gccc.ge>.

¹⁶ *Jager L., Luckey J.*, Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.

¹⁷ *Batlidze G.*, Liability imposed due to offensive action within the delictive law, Journal "Georgian Business Law Overview", # 4, 2015, 18.

¹⁸ Ibid. indicates: *Looschelders*, Schuldrecht, AT, 9, Aufl. , 2011, Rn. 1167.

¹⁹ *Batlidze G.*, Liability imposed due to offensive action within the delictive law, Journal "Georgian Business Law Overview", #4, 2015, 18.

²⁰ *Rusiashvili G.*, New Comment on the Civil Code of Georgia, article 408, 2-3, <www.gccc.ge>.

²¹ For further information, please, see *Turava M.*, Criminal Law, Review of General Part, Tb., 2010, 287; *Vardzelashvili S.*, Objectives of Liability, Ivane Javakhishvili Tbilisi State University, Tbilisi, 2016.

²² *Chitashvili N.*, General Legal Preconditions for Moral Damage Compensation, in the collection: Fundamentals of the Georgian Civil Law in the Georgian Judiciary Practice, TSU, Tb., 2018, 196. It indicates: *Hondius E., Janssen A.*, Disgorgement of Profits, Gain-based Remedies throughout the World, International Academy of Comparative Law, Springer Cham Heidelberg New York Dordrecht London, Springer International Publishing Switzerland, 2015, 258.

restitution of damage, due to the fact that caused damage has no monetary equivalent and it is impossible to fully compensate it²³.

It is a well-known fact that the Georgian Civil Code was developed following an example of the German Civil Code, therefore, combination of three functions - satisfaction, compensation and prevention, have been set as uniform objective for compensation of moral damage²⁴.

4.1. Compensation

Functional objective of compensation of damage is stressed out within any legal order, as it constitutes to improvement of negative consequences and replacing sufferings with positive emotions²⁵. Besides, the criteria for restitution are intensity and lengthy duration of interference in the protected area²⁶.

4.1.1. Function of Compensation in German Legislation

An intense legal discussion over the functional essence of moral damage burst out in Germany in the last third of the 19th century²⁷, as before that there was a well-cemented idea within the legal doctrine, which had a skeptical idea on monetary compensation of suffering and did refer to such type of sanction as penalty under private law²⁸. The argument behind the latter approach was the concept that an individual is made of elements defining a person, which excludes an opportunity to utilize human dignity for commercial purposes²⁹. Historical understanding of the latter function was that compensation of moral damage caused upon infringement of the right and by bearing into consideration intensity and duration, such compensation should have caused easing of suffering³⁰, rival of mental peace and positive emotions³¹, as much as the quality of damage and sufferings would allow in an objective perspective³². Later, judiciary practice reasonable focused attention on the circumstance that due to complexity of psychological

²³ Decision of the Supreme Court of Georgia of November 5, 2015 on the Case # ac-594-562-2015; Decision of the Supreme Court of Georgia of April 3, 2012 on the Case # ac-1477-1489-2011; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of January 6, 2017 on the Case # 2b-7243-15.

²⁴ *Chitashvili N.*, General Legal Preconditions for Moral Damage Compensation – on the Case *Daduli Kavteldaze vs. LLC “Travel Safe”*, #ac-979-940-2014, *Fundamentals of the Georgian Civil Law in the Georgian Judiciary Practice*, TSU, Tb., 2018, 200. Functional essence of non-property damage in the judicial practice is formulated in the following way: satisfy the victim, make an influence on the causer of damage; refrain from infringement of personal rights by other parties.

²⁵ BGH NJW 2007, 2475.

²⁶ *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 194.

²⁷ *Staudinger J., Schiemann G.*, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2., 2005, §253, 28.

²⁸ *Windscheid B.*, Lehrbuch des Pandektenrechts, Bd II, [1865], §455, 31.

²⁹ *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 194.

³⁰ BGHZ 7, 223, 226, 229; Luckey J., in: *Pütting/Wegen/Weinreich/Medicus*, §253, Rz.11; RG, Urt. v. 14.06.1934 – VI 126/34.

³¹ BGH NJW, 2007, 2475. in: *Soergel W., Ekkenga J., Kuntz S.*, Inhalt des Schuldverhältnisses, Immaterialer Schaden, 7 Auflage, 2016, §253, 10.

³² *Jager L., Luckey J.*, Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.

suffering, not every subjective aspect of an individual can be “balanced” with positive emotions³³. For example, upon complete loss of consciousness, crucial precondition for compensation of damage would be feeling of damage felt by a victim³⁴, if considered purely from an angle of compensatory function, which would serve as an unjust restriction for the scope of compensation of moral damage.

Revalue of the essence of compensation as mentioned above was caused by the judiciary practice of the following years³⁵, which resulted into legal admissibility to allow compensation of moral damage in cases of minor or major loss of consciences. One may assert that lawmakers did cause systematization of protected rights and interests, however, it also imposed a positive obligation upon court to ensure, upon infringement of the rights set forth in the legislation, adequate restoration of the victim’s rights while fully considering objectives and functions of moral damage.

4.1.2. Function of Compensation in English Law

Function of compensation is a well-known matter in England, however there is no difference between compensation of non-material and material damages³⁶. Due to the full reparation of non-property damage being objectively impossible, the priority falls on recognition of the right upon discussing functional essence of the damage³⁷. In fact, English law was the one, which developed peculiar form of compensation, such as nominal compensation (*nominal damages*³⁸), which has a function of symbolic compensation upon minor damage³⁹. The same context is applied in the article 41 of the European Convention on Human Rights (ECHR) with regard to just satisfaction to the injured party by the court⁴⁰.

In England, upon cases of physical damage, the Jury acts based on recommendatory indications, which sets forth that such type of harm may go up to maximum of 200, 000 pounds in non-property damage⁴¹. It shall be noted that in early 1990-ies, there was a tendency among English courts to raise compensation amount to the maximum⁴², which was later on restricted upon the spirit of the article 10 (freedom of expression) of the European Convention on Human Rights (ECHR)⁴³.

³³ BGHZ 18, 149; Pütting/Wegen/Weinreich/Medicus, §253, Rz.13.

³⁴ *Jager L., Luckey J.*, Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.

³⁵ BGH, Ur. v. 13.10.1992 – VI ZR 201/91, BGHZ 120, 1 = VersR 1993, 327 = NJW 1993, 781; მოთხოვნა ბუღლის: *Jager L., Luckey J.*, Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 996.

³⁶ *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 194.

³⁷ *Dam C. V.*, European Tort Law, Oxford University Press, 2013, 302.

³⁸ Nominal damage was defined by the Earl of Halsbury in the following way: „... technical phrase which means that you are negated anything like real damage, but that are affirming by your nominal damages that there is an infraction of a legal right which, through it gives you no right to any real damages at all, yet gives you a right to the verdict of judgment because your legal rights has been infringed.” The Mediana, [1900], AC 113, 116 (HL); *Dam C. V.*, European Tort Law, Oxford University Press, 2013, 302.

³⁹ Equivalent of nominal damage in the French legislation is - *franc symbolic*.

⁴⁰ European Convention of Human Rights, Council of Europe Secretary General, 1950, 41.

⁴¹ *Dam C. V.*, European Tort Law, Oxford University Press, 2013, 303.

⁴² *Sutcliffe v Pressdram Ltd* [1991], 1 QB 153. Amount of compensation was up to 600, 000 pounds.

⁴³ Sec. 8 of the Courts and Legal Services Act 1990; *John v Mirror Group Newspaper Ltd* [1997] QB 586 in the case where court decreased sum of 350, 000 pounds to 50, 000 pounds as a compensation for defamatory statements published against singer Elton John.

4.1.3. Function of Compensation in Georgian Legislation

In Georgia, which is a country whose legal order follows the Romano-Germanic law traditions, one shall discuss compensation of damage caused as a primary objective of non-material damage. It is a fact that it is impossible to ensure complete restitution of infringed rights⁴⁴, and there is no amount of compensation, which can restore injured party's state prior to infringement⁴⁵. The doctrine also speaks about "restitutive" nature of non-property damage⁴⁶. Besides, due to the fact that there are times when an injured party is unable to achieve easing of his/her suffering, often, compensation for infringement of personal rights is additional component⁴⁷ for balancing non-material damage, which shall not exceed the quality of caused damage's intensity, otherwise it will turn into a punitive institution and by its nature it would fall out of civil law liability system. Such approach was stated by the Supreme Court of Georgia in one of the cases, where it stressed out that amount of compensation for moral damage shall not exceed moral damage's legal category's objective – that is to ease mental state of an injured party⁴⁸.

4.2. Prevention

In Civil Law, the primary objective of the damage is the function of improvement of loss⁴⁹; it shall be noted that besides initial idea of the latter function, there is also so called "secondary" – "desired side effect⁵⁰" function, which serves the purpose to prevent the offence through warning and raising awareness⁵¹. In Civil Law, there is no definition of a notion of prevention function; the latter derives from the criminal law, which entails positive and negative aspects of offence's general prevention⁵². Besides remuneration, compensation also anticipates warning or preventative measures, and mainly it is associated with temporary legal protection⁵³ during damage of those legal goods protected by personal rights, when restoration of the original state of affairs aka restitution of non-material damage of an injured party is impossible⁵⁴ and complete compensation cannot be ensured.

⁴⁴ *Jorbenadze S.*, Commentary on Civil Code, article 18, Book I, Tb., 2017, 35. Indicates decision of the Chamber of Civil Cases of the Supreme Court of Georgia of April 24, 2003 on the case # 3k-1240-02..

⁴⁵ *Ibid*, indicates decision of the Chamber of Civil Cases of the Supreme Court of Georgia of December 27, 2012 on the Case # bs-78 (3-12).

⁴⁶ *Bamberger/Roth*, §253 Immaterieller Schaden, 42. Auflage, 2017, Rn. 14.

⁴⁷ *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 196.

⁴⁸ Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of September 10, 2015 on the Case # ac-979-940-2014.

⁴⁹ *Rusiashvili G.*, New Commentary on the Civil Code, article 408, 2-3. Indicates: *Looschelders, Schuldrecht*, AT, 9, Aufl., 2011, S. 299.

⁵⁰ "Erwünschte Nebenprodukt".

⁵¹ *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 192.

⁵² For further information on objectives for liability, please, see *Vardzelashvili S.*, Objectives of Liability, Ivane Javakhishvili Tbilisi State University, Tb., 2016.

⁵³ *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 190.

⁵⁴ OLG Köln VersR 2003, 602 [603]; OLG Celle NJW 2004, 1185; OLG Düsseldorf VersR 2003, 601; ; *Grüneberg C.*, in: *Palandt*, Rn. 4; *Bamberger P., Roth C.*, §253 Immaterieller Schaden, 42. Auflage, 2017, 14.

General objective for prevention within Civil Law is mainly utilized for encouraging voluntary protection of the norm⁵⁵. We shall discuss general wording of the article 413 of the CCG in the same angle when it relates to the criteria of reasonable and fair compensation that shall be used for judiciary⁵⁶. We shall regard the latter as somewhat hint for lawmaker and that practice shall ensure development of the just system, which will, one on hand, guarantee prevention of disproportional liability of a respondent, and on the other hand, pose a leverage for cultivating fear among potential perpetrators. Due to the fact that the Georgian judiciary remains on the positions of the Romano-Germanic law, in its justification and upon calculation of amount, it often refers to general thesis of preventive influence leverage from an angle of threat to repeat⁵⁷ and possible benefit⁵⁸ of the legal offence.

4.2.1. Prevention Function in the GGerman Law

Upon enforcing the GCC, the higher courts were spotted to having attempted to ground non-property compensation on the most general just principle, which became especially visible with regard to moral damage that had occurred due to infringement of personal non-property rights. Such deliberate continues attempt served as grounds⁵⁹ for elaborating an idea of prevention along with compensation and satisfaction functions within an independent legal institute⁶⁰ of non-property damage.

The first time that the Federal Court of Justice in Germany directly underlined the preventive function of non-property rights was with regard to Princess Caroline of Monaco⁶¹, which also related to the articles 1(1) and 2 (1) of the Basic Law for the Federal Republic of Germany on protection of right to be depicted in an angle of personal freedoms. In the ruling the Court stressed out that upon compensation of moral damage, it is important to restrict perpetrator from committing similar offences in the future, especially when it related to gaining commercial benefit as a result of deliberate damage of a person's personal non-property space. Supreme Constitutional Court for the Federal Republic of Germany shared the same logic with regard to Princess Soraya's case⁶², when the Court had to verify non-material damage's regulatory norm's methodological grounds in a constitutional-judiciary angle. The Court

⁵⁵ *Vardzelashvili S.*, Objectives of Liability, Ivane Javakhishvili Tbilisi State University, Tb., 2016, 75.

⁵⁶ *Chikvashvili Sh.*, Moral Damage in Civil Law, 1998, 88.

⁵⁷ Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of October 23, 2015 on the case # ac-547-519-2015; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of April 3, 2011 on the Case # ac-1477-1489-2011; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of November 22, 2010 on the Case # ac-868-817-2010; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of November 9, 2009 on the Case # ac-823-1109-09; Decision of the Chamber of Civil Cases of the Supreme Court of Georgia of July 30, 2002 on the Case # ac-423-03.

⁵⁸ Decision of the Supreme Court of Georgia of November 8, 2013 on the Case # ac-370-352-2013.

⁵⁹ *Ibid.*

⁶⁰ *Zafer Z.*, Zur Problematik des Schmerzengeldes: Feststellung und Ersatz des entschädigungspflichtigen immateriellen Schadens und die Doppelfunktion des Schmerzengeldes, Berlin, 2001, 213.

⁶¹ BGH 1994, BGHZ 128, 1= NJW 1995, 861. Respondent party was LTD "Burda", which published journals *Freizeitrevue* and *„Burda“*.

⁶² *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 191; BVerfGE 34, 269 (280 ff.), Soraya.

stressed out that civil law protection without adequate sanction upon infringement of personal rights is not sufficient⁶³.

Upon arguing on the necessity of restriction of intrusion into protected area of non-property rights within the German doctrine, there is an argument that the factor of calculation of compensation amount shall serve so called “deterrent effect” with regard to governing objective of unjust benefit with monetary compensation⁶⁴. It shall also be noted that infringement of general personal freedoms and upon calculation of moral damage resulted into suffering and damage of non-property rights, there was a major contrast while calculation and that was a challenge; however, the Supreme Constitutional Court for the Federal Republic of Germany⁶⁵, ruled out that 70, 000 German Marks to the mother and 40, 000 German Marks to the father was not an adequate compensation to the suffering caused due to loss of three underage children in a car accident, while the parties were asking for twice of an amount. The respective ruling is important in a perspective of preventive function, since in the motivation part of the ruling, the Court stressed out reasonability of increasing compensation amount for achieving desired side effect. The Court fully approved that in affairs when there is no deliberate commercialization of a person, car accident committed solely by unprotecting the relevant quality of sympathy does not pose grounds for restricting the sanction, since increase of monetary amount would not ensure prevention of legal offence committed due to carelessness. With such a precedent, the Court established a practice, which justifies restriction of responsibility upon contrasting motive of an offence and the respective interest for protection.

4.2.2. Prevention Function in the French Law

The preventive impact effect is not a strange matter for the French legislation⁶⁶. Despite of the fact that core clause of damage remuneration within the delictive law⁶⁷ is compensation, nevertheless, the legal literature refers to the principle of liability within private law (*peine privée*) with regard to moral damage, and it certainly constitutes to preventive impact effect of the civil law sanction⁶⁸. The French scholars indicate that upon increasing compensation for defamation of dignity, religion or honor, the Court intends to merge away from the fact of infringement of persona non-property rights⁶⁹ and therefore, play a corrective judiciary role.

⁶³ BVerfG NJW 2000, 2187 [2188].

⁶⁴ *Bamberger P., Roth C.*, §253 Immaterieller Schaden, 42. Auflage, 2017, 17; BGHZ 128, 1 [16] = NJW 1995, 861 – Caroline von Monaco I; BGH NJW 1996, 984 [985] – Caroline von Monaco II; BGHZ 160, 298 = NJW 2005, 215; BGH NJW 2014, 2029 Rn. 38; OLG Hamm NJWRR 2004, 919; OLG Köln NJWRR 2000, 470 [471].

⁶⁵ BVerfG 8 March 2000, NJW 2000, 2187.

⁶⁶ *Dam C. V.*,, European Tort Law, Oxford University Press, 2013, 305.

⁶⁷ In France, the Court does not have a right to utilize previous actions of perpetrator as a criteria for calculation of compensation amount. Indicated: *Dam C. V.*,, European Tort Law, Oxford University Press, 2013, 305.

⁶⁸ *Viney-Jourdain* (1998), nr. 254. *Suzanne Carval*, La responsabilite civile dans sa fonction de peine privée (Paris: LGDJ, 1995). Indicated: *Dam C. V.*,, European Tort Law, Oxford University Press, 2013, 305.

⁶⁹ *Ibid.*

4.2.3. Correlation of Preventive Function of Non-Property Damage to the Principle of Nominal Damage

In the Georgian judiciary practice, despite of attempts to stress out the preventative function, one comes across rulings favoring the applicants, where respondents had been imposed with symbolic amount (1 GEL) to be paid as compensation⁷⁰. Based on the article 3 (1) of the Civil Procedure Code of Georgia, the parties themselves determine subject of litigation; also, the very same Code's article 248 restricts a judge to assign to an applicant something that the latter has not asked for, however, it is doubted whether such symbolic compensation can be applicable or adequate mean for ensuring any objective of moral damage. Undoubtedly, an affair that for the preventive function to have an effective enforcement objective, there shall be public perception that perpetrator had been imposed with a sanction that is not a symbolic sum, but the latter's property will be severely affected proportionally with a damage. Enhancement of the judiciary practice in this direction will contradict not only well-established postulate⁷¹ of compensation of moral damage of minor nature within the German doctrine, but will also contradict essence of the norm, which primarily aims at ensuring protection of the parties' space and restriction for free use of the prohibited space. An element of nominal damage principle of the English law has entered the Georgian judiciary practice without any conceptual argument, with regard to determining practice of symbolic compensation; it shall be noted that the latter element, within an incumbent legal order, cannot ensure complete realization of the listed objectives and it will turn the system of leverages as set forth by the norm into illusion and ineffective.

4.3. Satisfaction

Upon infringement of general personal rights, the function of non-material damage's moral satisfaction is especially important, which is featured in Latin term as „*Satisfactio*“;⁷² one of the definitions of the term, besides other important aspects, implies mechanisms perceived internally and physically while being insulted upon infringement of personal space, so that pain can be “healed”⁷³. The Administrative Chamber of the Federal Court of Justice in Germany was the one, which endorsed the function of satisfaction with German legal order⁷⁴, which caused various attitudes within the doctrine. Upon the critical assumptions expressed, satisfaction assigns an effect of denied criminal law penalty to

⁷⁰ Decision of the Supreme Court of Georgia of June 16, 2017 on the Case #ac-291-275-2017.

⁷¹ “Bagatellklausel”.

⁷² *Bichia M.*, Protection of Personal Life, in Accordance with the Civil Law of Georgia, Tb., 2012, 192.

⁷³ Deutsches Rechts-Lexikon, 2 Bd., 2. Aufl., Beck: München, 1992; Upon the definition voiced by the Stoll during the conference dedicated to the 45th Day of Law: “Muting an injured party for the purpose of compensating a damage - Genugtuung ist die Besänftigung des Verletzten durch Sühnung der Tat“: Deutsches Wörterbuch 5. Bd. Deutscher Taschenbuch Verlag. München, 1984.

⁷⁴ BGH, Beschl. v. 06.07.1955 – GSZ 1/55 , BGHZ 18, 149 = VersR 1955, 615 = NJW 1955, 1675 = MDR 1956, 19 m. Anm. Pohle-“Es soll aber zugleich dem Gedanken Rechnung tragen, dass der Schädiger dem Geschädigten für das, was es ihm getan hat, Genugtuung schuldet“.

moral damage by the German doctrine⁷⁵; especially when calculation of non-property damage does not depend on an offence committed by perpetrator⁷⁶. In such affairs, objective reality is not being considered, but satisfaction of subjective requirements of an injured party⁷⁷. In other words, moral damage serves a purpose to neutralize suffering caused of an injured party and freeing the latter from the feelings of hate and revenge⁷⁸. Obviously, non-material damage compensation cannot restore original state of affairs, it can ease physical and moral sufferings caused by infringement of non-material goods, as well as decrease negative pressure and intensity⁷⁹.

4.3.1. Negative Sides of Satisfaction Function

Opponents of the satisfaction function often talk about its contra productive effect in those circumstances, when perpetrator and injured party have a close emotional connection⁸⁰ and complete sanctioning of the respective person will not neutralize mental suffering of an injured party. There are categories in the German judiciary practice when satisfaction occurred after compensation does not play an important role, these are: cases of medical delict⁸¹, mostly due to absence of a doctor's deliberate action to cause damage in medical mistake⁸², cases of severe damage of brain and car accident that resulted into loss of consciousness of an injured party and it is deprived of an opportunity to enjoy positive emotions after compensation⁸³. In such circumstances, moral damage mostly serves as a compensation function, however, the contemporary practice aims at changing the respective attitude in favor of an injured

⁷⁵ Jager L., Luckey J., Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1003; Bamberger P., Roth C., §253 Immaterialer Schaden, 42. Auflage, 2017, 16; Staudinger J., Schiemann G., Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2., 2005, §253, 29.

⁷⁶ Implies a delict that entails threat, where liability does not depend on offence: *MünchKomm* zum BGB, Immaterialer Schaden, 7. Aufl., 2016, §253 12; OLG Brandenburg BeckRS 2012, 04236; Staudinger J., Schiemann G., Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2., 2005, §253, 16; *Grüneberg*, in Palandt, BGB Komm., 73. Aufl., 2014, Vorbem., §249, 4.

⁷⁷ Staudinger J., Schiemann G., Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2., 2005, 30.

⁷⁸ Jager L., Luckey J., Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1003.

⁷⁹ Decision of the Supreme Court of Georgia of August 4, 2009 on the Case #bs-972-936 (33-08).

⁸⁰ Bamberger P., Roth C., §253 Immaterialer Schaden, 42. Auflage, 2017, 16. Indicates: OLG Hamm VersR 1998, 1392 [1393]-relations between a father and mother.

⁸¹ OLG Köln, Urt. v. 08.12.2014 – 5 U 122/14-is not published, indicated: Jager L., Luckey J., Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1012.

⁸² OLG Oldenburg, Urt. v. 16.09.2008 – 5 U 3/07, NJW-RR 2009, 1110, where, upon arguing on the satisfaction function, Court paid attention to the fact that after brain surgery and leaving small metal peace inside the body, the damage caused and resulted into psychological suffering could have only been compensated through monetary means; OLG Koblenz, Urt. v. 13.07.2006 – 5 U 290/06, VersR 2007, 796 = MedR 2009, 93-contradicting the latter, the doctor, without the patient's consent, performed sterilization with the judgement and the patient already had many children, and such circumstances didn't serve as unconditional exclusion of satisfaction function.

⁸³ In such circumstances, moral damage compensation varies from 614 000 Euros to 619 000 Euros: LG Kiel, Urt. v. 11.07.2003 – 6 O 13/03, VersR 2006, 279 = E 2181. Indicated: Jager/Luckey, Schmerzengeld, 8. Auflage, Jurion, 2016, Rn. 1010.

party⁸⁴. A question arises in the respective matter on how just is correlation between moral damage and calculation of its amount with regard to perception by an injured party of a damage caused?

Based on one of the positions⁸⁵, it is reasonable to make a comparison between potential requirements for property and non-property damage compensation of an injured parties', where decreasing demand for damage compensation or exclusion solely due to that fact that a subject protected by the norm is unable to perceive damage causes; and the latter case is considered as unjust outcome. Such outcome contradicts standards set forth with regard to parties willing to receive material damage compensation in the same circumstance, and it creates unequal affairs for the parties that are essentially equal. Based on another position, due to the fact that moral damage is suffering or physical pain, which is solely felt by an injured party, perception of sufferings and understanding of the latter is purely based on an injured party's subjective assessment.⁸⁶

As for the matter, on whether or not, the guarantees set forth by the Civil Code can be applicable to a person, who no longer has a capacity to subjectively perceive caused damage, decision of the matter will depend on the nature of the law, its purpose and essence, as well as balance set forth by the legislation of interests' coexistence.

Personified nature of the laws, primarily, imply that it belongs to a specific individual and, therefore, not and cannot belong to someone else. Therefore, the rights of a specific individual cannot be exercised by someone else⁸⁷. Admissibility of such possibilities would contradict the nature of personal rights, which implies that personal rights are related to consciousness and perception of a specific individual. Due to the latter general rule, there is a reasonably fixed exception upon which – when there is no possibility for a holder of a right to demonstrate will, in the least cases, there will be an obligation to replace his/her need (for example, people in coma, persons with disabilities)⁸⁸. Therefore, referring to a person's right as a subject does not always and not unconditionally depends on a person's will (perception of a right, exercising of rights or expressing will for its protection) authenticity, possibility to express will⁸⁹. Obviously, it does not invalidate the need for a person's will to exercise rights, however, there is an objective need for exceptions from this general approach.

4.3.2. Effect of the Imposed Criminal Penalty over the Satisfaction Function in Terms of the Compensation of Nonpecuniary Damage Caused by a Crime

Studying the satisfaction function for non-property damage raised an issue in German doctrine as to how the criminal sanctions imposed against the perpetrator of the crime affect the satisfaction of the

⁸⁴ *Jager L., Luckey J., Schmerzengeld*, 8. Auflage, Jurion, 2016, 6.

⁸⁵ *Ibid.*

⁸⁶ Decision of the Supreme Court of Georgia of August 4, 2009 on the Case #bs-972-936 (3k-08).

⁸⁷ Decision # 1/6/561,568 of the Supreme Court of Georgia of September 30, 2016, Iuri Vazagashvili vs. the Parliament of Georgia.

⁸⁸ *Ibid.*

⁸⁹ Decision # 1/6/561,568 of the Supreme Court of Georgia of September 30, 2016, Iuri Vazagashvili vs. the Parliament of Georgia.

victim in cases where the damage is caused by that crime.⁹⁰ It should be noted that this approach was largely accepted in German judiciary practice until the landmark decision of the Supreme Court issued in 1994⁹¹, which changed the previous practice and marked a strict boundary between criminal and civil law methods⁹². This finding echoes the undoubtedly positive content of the current edition of Article 92 of the Criminal Code (adopted in 2009), which unlike the previous edition of the Criminal Procedure Code,⁹³ enables the victim to file a claim for the compensation of damage relying solely on the civil proceedings.⁹⁴ New edition⁹⁵ does not differentiate the damage and no longer contains detailed description of the damage compensation mechanisms, which is a clear indicator of the legislator's intention to place the damage compensation mechanism entirely in the civil law realm.

Herewith, differentiation of the notion of damage should be deemed as the circumstance hindering the moral damage caused by a crime. Even in the teleological reduction of Article 413 of the Criminal Code, if any of the legal benefits secured by the provision is damaged in result of a crime, the opportunities for compensation of nonpecuniary damage will not be based on relevant provision of Article 92 of the Criminal Procedure Code, but rather on the concept envisaged by Article 413 of the Criminal Code. Stemming from the aforesaid, the emphasis on “compensation of damage” in Article 92 of the Criminal Procedure Code remains unaffected by the position expressed in relevant literature according to which the reference to “compensation of damage” in any provision implies the compensation of property damages, unless the possibilities of compensating non-property damage is clearly indicated therein.⁹⁶ The latter, in the given case, is only a reference provision. It does not create an independent ground for a claim, nor does it fulfill the function of a guarantee for civil turnover stability. Herewith, qualitatively new rules for civil claims in the Criminal Procedure Code converges with the pathos of the decision of 1994 by the Supreme Court of Germany and is a clear indicative of the

⁹⁰ BGH, Urt. v. 29.11.1994 – VI ZR 93/94 , VersR 1995, 351 = NJW 1995, 781- 29.11.

OLG Saarbrücken, Urt. v. 27.11.2007 – 4 U 276/07 , NJW 2008, 1166 = SP 2008, 257.

⁹¹ According to which the victim was deemed to be satisfied by the mere fact of imposing criminal liability upon the perpetrator - *Jager L., Luckey J.*, Schmerzengeld, 8. Auflage, Jurion, 2016, 1004.

⁹² *Jager L., Luckey J.*, Schmerzengeld, 8. Auflage, Jurion, 2016, 1004.

⁹³ Article 30 of the Criminal Procedure Code: “(1) person, who suffered property, physical or moral damage directly in result of a crime, shall have the right to demand the compensation of damage in the course of criminal case proceedings and file a civil claim to this end”, Bulletin of the Parliament, 13-14, 20/03/1998, registration code: 090.000.000.05.001.000.327.

⁹⁴ *G. Dadashkeliani.*, Comments to the Criminal Procedure Code of Georgia, Tb., 2015, 319.

⁹⁵ Article 30 of the Criminal Procedure Code: “(5) moral damage shall be compensated in monetary or other pecuniary form for the damage inflicted to the victim in result of a crime, including physical mutilation, distortion, disrupt or deterioration of biological and moral functions, as well as other ordeals caused by physical of moral damage. The amount of monetary compensation for the moral damage caused by a crime shall be determined by the court in consideration of the graveness of damage and property conditions of the defendant (civil respondent)”, Bulletin of the Parliament, 13-14, 20/03/1998, registration code: 090.000.000.05.001.000.327.

⁹⁶ *M. Tsiskadze*, Problem of Compensating Nonpecuniary Damage for Bodily Injury in the Legislation of Georgia, Justice and Law Journal, #2, 2008, 17; *M. Bichia*, Compatibility of Georgian Model of Nonpecuniary Damage Compensation for the Violation of Personal Rights with the European Standards, Law Journal, #1, 2017, 17.

legislator's aspiration to completely level the legal outcome of the criminal proceedings for the perpetrator in the context of satisfaction function of the moral damage.

Grand Senate of Civil Cases in Germany has held that while assessing the satisfaction function it is desirably to consider the level of culpability of the perpetrator as one of the relevant circumstances and modify the "all-or-none" principle applicable in the property damage through a flexible system for calculating the compensation amount.⁹⁷ Expanding this concept, the second package of legislative amendment in 2002, modernizing the provisions that regulate the compensation of damage, somewhat reduced the satisfaction function and fully separated it from the endangering delicts or the cases of negligent breach of obligation.⁹⁸

Despite the fact that the prevention function is largely recognized, bringing forward the predominant role of the subjective aspects of satisfaction creates the risk of incorporating the punitive element in civil law. In order to identify and minimize the mentioned risk, it is crucial to consider the connection and relation of the prevention function with other objectives, to assess the personality and relevant level of culpability of the perpetrator and bring forward those factors especially when the restitution is impossible due to the intensity of the damage of the interest.⁹⁹

4.4. Punitive Damages

Punitive functions of the compensation of non-property damage is intensively applied in US law and is known as the so-called "punitive damages".¹⁰⁰ In certain circumstances, illegal action of the debtor triggers the right of the victim to claim additional monetary compensation exceeding the actual damage inflicted, which (generally) largely exceeds the inflicted damage.¹⁰¹ Jurors determine the amount of monetary compensation.¹⁰² In US court practice, compared to the cases of physical damage, the amount of damage is even higher in case of claims concerning the violation of personal rights. In such case, the punitive function is aimed at preventing further actions of the perpetrator and warning a third person to refrain from similar actions.¹⁰³

In European jurisdictions, there is a certain level of doubt in relation to this peculiarity of the US law. German lawyers, rightly so, indicate that by imposing the amount several times exceeding the

⁹⁷ *Jager L., Luckey J.*, Schmerzengeld, 8. Auflage, Jurion, 2016, 1034.

⁹⁸ Ibidem .

⁹⁹ *MünchKomm* zum BGB, Immaterialer Schaden, 7. Auflage, 2016, §253 Rn. 13.; IdS auch 3. Aufl. § 847 Rn. 4 ff.; See similar position in *Soergel W., Ekkenga J., Kuntz S.*, Inhalt des Schuldverhältnisses, Immaterialer Schaden, 7. Auflage, 2016, §253 12 – Satisfaction if the Recovery of the Damaged Self-esteem of the Victim - „Genugtuung ist einer Wiederherstellung des beeinträchtigten Selbstgefühls des Geschädigten“.

¹⁰⁰ Ibid.

¹⁰¹ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contractual Law, Tb., 2014, 674.

¹⁰² *Dam C. V.*, European Tort Law, Oxford University Press, 2013, 303.

¹⁰³ *Shapo S. M.*, Principles of Tort Law, Thompson West, Chicago, 2003, 494.

amount of actual damage, the US law incorporates the criminal fine elements into the private law, which generally is unacceptable for the states with continental Europe law traditions.¹⁰⁴

In Georgia, it is also less probable and possible to apply this specific form of damage compensation. This attitude is echoed in the fact that Article 413 of the Criminal Code defines the criteria (reasonability, fairness) for the compensation of non-property damage, which reflects the intention of the legislator to strengthen the compensative function of the non-property damage. Interpretation by the Supreme Court of Georgia, concerning the necessity of correctly establishing the objective of the provision, bears the same pathos, which – in contrast with the approach applied in English and US laws – is much careful in considering the compensation of moral damage.¹⁰⁵ In Result, teleological reduction of the provision attempts to reduce and restrict the unsubstantiated expansion of the legal consequence in the name of securing the stability of civil turnover.

5. Conclusion

The respective paper would greatly benefit if we summarize grounds for imposing non-property damage compensation in a judiciary practice's angle. Due to the fact that the matter relates to protection of an absolute rights of a subject, and whose rights become subject as clearly and unequivocally set forth by the Constitution of Georgia, the Law is obliged to somehow ensure protection of these rights through the best possible perspective; and upon hope and attitude that rights of a person, even during absence of subjective perception of violation, shall be recognized and prospected from an unjust intrusion.

Upon analyses of the doctrine and judicial practice, the key shortcoming identified is incorrect interpretation of normative grounds unbalanced through legislation and absence of uniform judiciary practice. Obviously, the latter does not imply that the law shall entail detailed formulation of functions and criteria for non-property damage compensation, which would be adapted to every type of different case despite of factual circumstances and subjective perceptions. While determining non-property damage compensation, judges shall preferably consider factors, besides other circumstances, such as motivation to exercise protected rights due to social, economic and political objectives. After concentrating on such type of details, it is desirable to feature every function entailed within non-property damage notion in an uniform perspective; so that the latter detailing can be utilized as grounds for determining different amounts of compensation in those circumstances, when an individual's personal space is being used for commercial benefit, and quality of interference in a protected space is especially intensive. Such approach of somewhat manipulating with compensation's amount will constitute to ensuring every function within non-property damage's essence.

It is important that judiciary shall pay special attention to satisfaction effect only in those cases, which relate to deliberate delicts or damage of personal space in a higher intensity. In every other case, an objective of a law shall not be punishment of a party who caused damage while bearing every single

¹⁰⁴ *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L*, Contractual Law, Tb., 2014, 676.

¹⁰⁵ Decision of the Chamber of Civil Cases of the Supreme Court of Georgia, 20 January 2012, Case #ac-1156-1176-2011.

subjective concern of an injured party. From a legal perspective, it will be wise to assess correction of injustice with the highest possible measure.

As an antipode of non-property damage prevention effect can be considered establishment of symbolic compensation within the Georgian judiciary practice. It is highly doubtful that such practice will be effective and perspectives for complete realization of the objectives discussed.

While discussing preventive function, it is crucial not to exclude the importance of freedom of expression for the country striving for democratic and pluralistic societies, and which is counterweight to personal rights. Upon assessment of factual circumstances of the case, and upon researching subjective deliberation of an offence, it became obvious that causing damage has different motives, such as promotion of one's production¹⁰⁶, getting material profit, increase of ranking, and discretion of a partner in public or professional networks. Upon empirical research, it became evident that courts try not to restrict freedom of press through their rulings¹⁰⁷ and upon considering cases of compensation for moral damage, they are being guided with simple schemes and automatically decrease demanded amount, which does not ensure the standard of trust established in developed legal orders with regard to personal space protection.

For the purpose of elaboration of clear and foreseeable protection mechanisms, courts shall ensure development of uniform and balanced practice; the latter will constitute to existence of leverages and guarantees that are effective, efficient, exhaustive, sufficient and most importantly transparent, which will not only exclude threats of unjust judiciary law, but will make protection of personal space of each and every member of the society trustworthy.

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¹⁰⁶ BGH, 14.02.1958- I ZR 151/56, BGHZ 26, 349=NJW 1958, 827 (mit Anm. *Larenz*)= GRUR 1958m 408 (mit Anm. *Bussmann*)-Herrenreiter.

¹⁰⁷ *Sajaia L.*, Press and Moral Damage, journal "Georgia Law Review, 8/2005-1/2, 2005, 178.

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