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THE COMPENSATION FOR HARM: PROBLEMS AND PROSPECTS FOR FURTHER LEGISLATIVE REFORM

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Вовк М.З., Заяць О.С. Відшкодування шкоди: проблеми та перспективи подальшого реформування законодавства.

Відшкодування шкоди є одним із найважливіших правових способів захисту порушених цивільних прав та інтересів учасників цивільних відносин. У сучасних ринкових умовах цей спосіб захисту є основним для відновлення матеріального стану чи компенсації моральної шкоди потерпілій особі. У контексті оновлення цивільного законодавства, адаптації його до законодавства ЄС зумовлюється необхідність нових підходів до правового регулювання відшкодування шкоди.

У статті досліджуються загальні умови відшкодування шкоди: протиправність поведінки заподіювача шкоди, наявність шкоди, причинний зв'язок між протиправною поведінкою та шкодою, вина заподіювача шкоди.

Окрему увагу приділено питанню протиправності (протиправної поведінки) як умови відшкодування шкоди. Аналізуються теорії протиправності: об'єктивна (нормативістська) та об'єктивно-суб'єктивна.

Досліджується визначення поняття шкоди. Акцентується увага на співвідношенні понять «шкода» та «збитки». Звертається увага на проблеми правового регулювання поняття моральної шкоди. З'ясовано, що у практиці Європейського суду з прав людини зміст моральної (немайнової) шкоди визначається по-різному стосовно фізичних та юридичних осіб. Крім цього, аналізуються методики визначення розміру відшкодування моральної шкоди, зокрема атестована Мін'юстом в Україні та зареєстрована в Реєстрі методик проведення судових експертиз Методика психологічного дослідження у справах щодо заподіяння моральних страждань особі та відшкодування моральної шкоди (реєстраційний номер 14.1.75), яка введена в дію з 18.01.2019.

Проаналізовано правове регулювання причинного зв'язку між протиправною поведінкою та шкодою у Принципах європейського деліктного права (PETL).

За результатами дослідження зроблено висновок, що у подальшому доцільно й надалі здійснювати вивчення та удосконалення зобов'язань відшкодування шкоди, зокрема, перегляду підлягає система спеціальних деліктів, передбачених главою 82 ЦК України.

Ключові слова: відшкодування шкоди, делікт, зобов'язання, збитки, шкода, моральна шкода.

Vovk M.Z., Zaiats O.S. The compensation for harm: problems and prospects for further legislative reform.

The compensation for harm is one of the most important legal ways to protect the violated civil rights and interests of the participants in civil relations. In modern market conditions, this method of protection is the

main one for restoring the material condition or compensating for moral harm to the injured person. In the context of updating civil legislation and adapting it to EU legislation, there is a need for new approaches to the legal regulation of compensation for harm.

The article examines the general terms of compensation for harm: the illegality of the behaviour of the person who caused the harm, the presence of harm, the causal relationship between the illegal behaviour and the harm, and the fault of the person who caused the harm.

Special attention is paid to the issue of illegality (illegal behaviour) as a condition for compensation for damage. Here the theories of illegality are analysed: objective (normative) and objective-subjective.

The definition of harm is investigated. The attention is focused on the ratio of the concepts of "harm" and "damages". Attention is drawn to the problems of legal regulation of the concept of moral harm. It is established that according to the practice of European Court of Human Rights, the content of moral (non-property) harm is determined differently in relation to individuals and legal entities. In addition, the methods of determining the amount of compensation for moral harm are analysed, in particular, the method of psychological research certified by the Ministry of Justice in Ukraine and registered in the Methodology of Psychological Research in Cases Involving the Infliction of Moral Suffering on a Person and Compensation for Moral Harm (registration number 14.1.75), which was put into effect from 18.01.2019.

The article analyses the legal regulation of the causal relationship between illegal behaviour and harm in the Principles of European Tort Law (PETL).

Based on the results of the research, it was concluded that in the future it is advisable to continue studying and improving the obligations to compensate for harm, in particular, the system of special torts provided for by Chapter 82 of the Civil Code of Ukraine is subject to revision.

Key words: compensation for harm, tort, obligation, damages, harm, moral harm.

Statement of the Problem. The compensation for harm is one of the most important legal ways to protect the violated civil rights and interests of the participants in civil relations. In modern market conditions, this method of protection is the main one for restoring the material condition or compensating for moral harm to the injured person. The obligations to compensate for harm take a special place in the civil law system, which is due to the fact that they have a clearly defined human rights (security) orientation and are based on mandatory principles.

Analysis of Recent Researches and Publications The issue of compensation for harm has long been of interest to scientists. Among domestic scientists, Yu.Ye. Borysov, O.O. Boiarskyi, I.V. Burlaka, V.V. Vasyliev, O.A. Volkov, S.V. Halkevych, Yu.I. Halushka, M.K. Haliantych, S.D. Hrynko (Rusu), B.P. Karnaukh, T.S. Kivalova, S.V. Kulitska, A.V. Kutsyn, Yu.V. Lesko, O.O. Loviak, L.I. Liashevska, I.S. Nizhynska, A.O. Niemtseva, O.S. Onyshchenko, O.O. Otradnova, V.P. Paliiuk, D.F. Plachkov, V.D. Prymak, S.Ya. Remeniak, H.L. Pendiaha, I.B. Protas, O.I. Slipchenko, R.O. Stefanchuk, M.M. Florov, M.M. Khomenko, O.I. Chernilevska, Zh.L. Chorna and others devoted their works to the problems of compensation for harm. However, in the context of updating civil legislation and adapting it to EU legislation, there is a need for new approaches to the legal regulation of compensation for harm and relevant theoretical developments. After all, as M. M. Khomenko rightly notes, updating the normative array of non-contractual obligations, including compensation for harm, should be carried out carefully, using relevant legal tools: borrowing the relevant provisions of unification acts to national legislation should not be reduced to "blind copying" for the sake of the desire to "be in the European trend" [1, p. 167].

The purpose of the article is a theoretical analysis of certain issues of legal regulation of compensation for harm and the formulation of the author's vision of the prospects for legislative regulation of these relations.

Statement of Basic Materials. The Civil Code of Ukraine (hereinafter referred to as the Civil Code of Ukraine) is the main regulatory act that contains the norms on compensation for harm, in particular Chapter 82 Compensation for Harm. The obligation of compensation for harm regulated by Chapter 82 of the Civil Code of Ukraine can be divided into two groups: 1) the obligation of compensation for harm caused by lawful actions; 2) the obligation of compensation for harm caused by illegal (unlawful) actions. The latter are called tort (delictum means "offense" in Latin).

The question of the correlation between the concepts of "tort obligation" and "tort obligation" is debatable. It is worth paying attention to these two approaches. The proponents of the first approach claim that non-contractual (tort) liability is realized within the framework of the obligation to compensate for harm [2, p.157]. According to the representatives of the second position, causing harm is the basis for the emergence

of a civil obligation, but not a liability, since compensation is not a sanction for an offense, but a way to fulfil the obligation. Thus, Yu. Zhehulin notes that "the recovery of damage in its legal essence is an ordinary civil obligation (the same as any other contractual or non-contractual obligation), and not a sanction (punishment) for a civil offense [3, p. 88].

Given the fact that the names of general norms (art. 1166, 1167 of the Civil Code of Ukraine) use the term "liability", it is clear that the legislator fixed the first concept. This approach may be due to the fact that the conditions for compensation for harm coincide with the general conditions of civil liability [4, p. 578].

We believe that the problem of compensation for harm under obligation should be considered in conjunction with approaches to reforming the institution of civil liability.

As a general rule, the harm is subject to compensation if the following conditions are fulfilled: the illegality of the behaviour of the person who caused the harm, the presence of harm, the causal relationship between illegal behaviour and harm, and the fault of the causer of harm. In certain cases, established by law, the fault of the causer of harm has no legal significance.

There is no definition of illegality in civil legislation. In turn, in the doctrine of civil law, there are two positions on illegality (illegal behaviours) as a condition for compensation for harm. The representatives of the objective (normative) theory of illegality believe that illegal behaviour is understood exclusively as such behaviour that violates objective norms of law, which are aimed at protecting a certain interest of the victim. The proponents of the objective-subjective concept of illegality note that illegal behaviour is considered to violate subjective civil rights as a result of a person's violation of objective legal norms (legislative prescriptions) [5, p. 70-71].

However, it is obvious that if the subject of law violates the prohibition established by the rule of law, then the behaviour always becomes illegal. At the same time, it should be noted that the violation of objective norms by itself will not matter for the civil law. It is necessary for the illegality of the behaviour to be also accompanied by a violation of subjective personal non-property or property rights of a person protected by law.

The wrongfulness is based on the principle of a general tort: every fact of causing harm is recognized as illegal unless otherwise established by law.

In civil legislation, there is no normative definition that would fix the legal definition of the concept of "harm". However, the doctrine of civil law has a well-established approach, according to which harm is understood as any reduction in a particular material or non-material good [6, p. 231]. Depending on which benefit was reduced (material or non-material), there are two types of harm: property and moral (non-property).

The question of the correlation between the concepts of "harm" and "damages" is debatable. The following scientific approaches can be distinguished:

1) The term "harm" is used by civil law mainly in the field of tort law, and the term "damages" is primary in the field of contract law. The differentiation of the studied concepts depending on the type of legal relationship is due to the fact that the legislator mainly uses the concept of "damages" in Chapter 51 of the Civil Code of Ukraine (Legal Consequences for Violation of an Obligation. Liability for Violation of an Obligation"), while Chapter 82 of the Civil Code of Ukraine (Compensation for Harm) refers to compensation for harm. However, such a division is conditional and there are no clear distinctions in the legislation [7, p. 245];

2) The concepts under study are considered as synonyms. This approach is due to the historical development of these legal categories. After all, the legislation of the XIX–XX centuries did not provide for the possibility of compensation for moral (non-property) harm. Therefore, the dominant point of view was the inadmissibility of such compensation [8, p. 36-40]. Thus, due to the narrowing of the content and scope of the concept of "harm" due to the exclusion of moral (non-property) harm therefrom, it coincided with the concept of "damages";

3) The concept of "harm" is broader than the concept of "damages" since the first of them is used by the legislator when causing depreciation of property and non-property goods, and the second one is used only when causing property losses. The harm can be compensated both in cash and in kind, and the damages can only be compensated in cash. That is, the "harm" is a generic concept in relation to the concept of "damages" [9, p. 199].

Understanding the correlation of the studied legal categories is also complicated by the conflict of norms regarding the composition of losses under civil and economic legislation. In particular, according to Part 2 of Article 22 of the Civil Code of Ukraine, the composition of damages includes real losses and lost profits. But, according to Article 225 of the Economic Code of Ukraine, the damage to be compensated by a person who committed an economic offense also includes material compensation for moral harm.

It should be noted that the legislator should clearly and consistently distinguish between the categories of "harm" and "damages" and eliminate conflicts between the provisions of the Civil Code of Ukraine and the Economic Code of Ukraine regarding the latter.

Moral (non-property) harm is a component of the concept of "harm". The term "moral harm" is applied primarily to individuals, while "non-property harm" is applied to legal entities. It is advisable to pay attention to the fact that only Article 16 of the Civil Code of Ukraine contains an indication of moral (non-property) harm, but all other articles (Part 2 of Article 23, article 1166, article 1167 of the Civil Code of Ukraine) use the term "moral" and do not mention non-property harm. However, it is clear from their content that they also apply to legal entities.

There is no definition of the concept of moral (non-property) harm in the Civil Code of Ukraine. Part 2 of Article 23 of the Civil Code of Ukraine only outlines the manifestations of such a harm. In the scientific literature, the opinion is expressed that such an approach of the legislator is quite justified, since there is an objective impossibility of a clear definition of this evaluative concept [10]. After all, it is impossible to foresee all the cases of illegal actions or omissions that may cause moral (non-property) harm. But the definitions of the concept of moral (non-property) harm given in other normative legal acts are focused on their application in a narrowly defined scope of a particular law.

One cannot fail to pay attention to the peculiarity of resolving this issue in the practice of the European Court of Human Rights (hereinafter referred to as the ECHR), which is decisive for national legislation and judicial practice. In particular, Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides for the right to just satisfaction, which consists of compensation for both material and moral (non-property) harm.

It is worth noting that the content of moral (non-property) harm is determined differently in relation to individuals and legal entities. The practice of the European Court of Human Rights considers moral harm caused to an individual as moral and physical suffering, namely: physical pain and suffering, damage to health, psychological harm, stress, frustration and humiliation, anxiety and injustice, uncertainty, as well as distress and inconvenience. In addition, according to the practice of the European Court of Human Rights, the moral (non-property) harm caused to an individual includes loss of reputation, as well as a good name, loss of relationship, and disruption to lives [11, p. 37].

The ECHR includes the following moral harm that can be caused to a legal entity: 1) uncertainty of the legal entity's managers and shareholders in the management and planning of its activities as a result of the established offense; 2) harm caused to the reputation of a legal entity and its trademark; 3) emotional state of the management of the legal entity; 4) financial consequences of violation of the rights of a legal entity that cannot be accurately calculated [12, p. 67].

The concept of updating the civil legislation of Ukraine pays attention to the fact that the issue of methodology for calculating moral damage, the absence of which does not contribute to the formation of established judicial practice, is subject to a radical rethinking [13, p. 52, 106]. After all, today neither the law nor judicial practice provides an unconditional, unreserved, absolutely stable criterion by which it would be possible to determine the amount of compensation for moral harm. Attempts to resolve this issue and find a correct and reasonable monetary equivalent of the lost good are manifested by drawing up various methods.

The scientific literature describes a quite big variety of methods for determining the amount of compensation for moral (non-property) harm. Although, according to some scientists, the expediency of the existence of a single methodology is questionable, since the amount of compensation for moral harm should be determined in each specific case, taking into account the specifics of a particular legal relationship [14, p. 206].

In Ukraine, the Ministry of Justice has certified and registered in the Register the Methodology of Psychological Research in Cases Involving the Infliction of Moral Suffering on a Person and Compensation for Moral Harm (registration number 14.1.75), which was put into effect from 18.01.2019. This method is mandatory and should be used by forensic experts and psychologists during the forensic psychological examination. It is worth noting that we find on the internet a critical analysis of the relevant methodology and a number of reasons why it cannot be applied [15].

For compensation, it is necessary to establish a causal relationship between illegal behaviour and harm. It should be noted that the judicial practice of Ukraine on the need to analyze causal relationships is based on the concept of immediacy of cause and effect.

At the same time, the developers of the concept of updating the civil legislation of Ukraine proposed to study the European experience of determining cause-and-effect relationships, in particular the approaches used in the Principles of European Tort Law (PETL) [16, p. 119]. The general theory of causality on which

the relevant Principles are based is the condition sine quanon theory, or the indispensable condition theory, without which there would be no consequence. The definition of condition sine quanon theory is contained in Article 3:101 of the Principles of European Tort Law (PETL), according to which "activity or behaviour (hereinafter referred to as activity) is the cause of harm to the victim, if in the absence of this activity the harm would not have occurred". The following articles of the Principles of European Tort Law (PETL) provide recommendations on cases of harm caused by several violators. The principles contain provisions on equivalent causes, alternative causes, potential causes, and an indefinite partial causal relationship [17].

O. O. Otradnova notes that Ukrainian courts should take into account the recommendations of the Principles of European Tort Law (PETL) and apply the rules on causal relationships. After all, the practice of compensation for non-contractual harm has no isolated cases of complex causal relationships, when the harm is caused by several acts or it is not known which specific act caused the harm [18, p. 151]. While B. P. Karnauch believes that the "if not" test (as the scientist calls the conditio sine qua non theory) gives a false positive result in the case of excessive causality, since it is focused on identifying what is necessary for the effect, and does not take into account what is sufficient for the effect. Instead, the NESS test (a necessary condition for a sufficient set) more accurately reflects reality, subordinating the need for sufficiency. It takes into account the fact that in the real world several sets of circumstances can coexist at the same time, each of which is sufficient for the occurrence of the same consequence. This makes it possible to conceptually consistently resolve complex cases of the so-called excessive causality [19, P. 75].

The issue of legislative regulation of fault as a condition for compensation for damage is relevant to civil law.

Conclusions. Summing up the above, we believe that in the future it is advisable to continue to study and improve the obligations of compensation for harm. In particular, in terms of updating the regulatory framework devoted to the compensation for damage, it is necessary to review the system of special torts provided for in chapter 82 of the Civil Code of Ukraine.

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