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The Removal of Damage Caused by the Necessity: Theoretical Basis and Judicial Practice in Ukraine*

Abstract:

The article is devoted to various issues related to the removal of damage caused by the necessity. We have determined the place of removal due to lawful actions in the system of non-contractual obligations.

The history of the institution of necessity and the definition contained in the current Civil Code of Ukraine is given. The concepts provided in Ukrainian Civil and Criminal legislation are compared.

The article highlights the features of the emergence of necessity, in particular the mandatory presence of real and existing danger, as well as the special situation of committing actions. The question of what exactly can become a source of such danger is studied based on judicial examples.

It is specified that the actions causing harm are lawful if they have the following composition: special purpose, proactive behaviour, the object of harm, timeliness, and proportionality.

The subjects from which damage can be recovered in this case are allocated. It is determined that they can only be natural or legal persons. Examples of judicial practice for each of the cases are given, with examples of problematic issues that may arise during the appointment of the recovery.

In the end, there is a certain contradiction of views regarding the necessity and possibility of removal of moral damage in a situation when the guilty person acted because of necessity.

Key words: damage removal, lawful actions, necessity, subjects of recovery, judicial practice, moral damage.

Abstract (deutsch):

Der Artikel befasst sich mit verschiedenen Fragen im Zusammenhang mit der Beseitigung von Schäden, die durch die Notwendigkeit verursacht wurden. Wir haben den Platz der Beseitigung aufgrund von rechtmäßigen Handlungen im System der außervertraglichen Verpflichtungen bestimmt.

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Es wird die Geschichte der Institution des Notstands und die Definition im geltenden Zivilgesetzbuch der Ukraine dargestellt. Die im ukrainischen Zivil- und Strafrecht vorgesehenen Konzepte werden verglichen.
Der Artikel hebt die Merkmale der Entstehung des Notstands hervor, insbesondere das zwingende Vorhandensein einer realen und bestehenden Gefahr sowie die besondere Situation der Begehung von Handlungen. Die Frage, was genau zu einer solchen Gefahr führen kann, wird anhand von Beispielen aus der Rechtsprechung untersucht.
Es wird präzisiert, dass die schadensverursachenden Handlungen rechtmäßig sind, wenn sie die folgende Zusammensetzung aufweisen: besonderer Zweck, proaktives Verhalten, Schadensobjekt, Rechtzeitigkeit und Verhältnismäßigkeit.
Die Subjekte, von denen in diesem Fall Schadenersatz verlangt werden kann, werden bestimmt. Es wird festgelegt, dass es sich dabei nur um natürliche oder juristische Personen handeln kann. Es werden Beispiele aus der gerichtlichen Praxis für jeden der Fälle angeführt, mit Beispielen für problematische Fragen, die bei der Festsetzung der Rückforderung auftreten können.
Letztendlich gibt es einen gewissen Widerspruch zwischen den Ansichten über die Notwendigkeit und die Möglichkeit der Beseitigung des moralischen Schadens in einer Situation, in der die schuldige Person aus Notwendigkeit gehandelt hat.
Key words: Schadensbeseitigung, rechtmäßige Handlungen, Notwendigkeit, Rückforderungsgegenstände, Rechtspraxis, moralischer Schaden.

I. Brief outline of the problem

The removal of damage cases forms a prominent group among the most common civil proceedings, as evidenced, in particular, by the number of relevant decisions in the Unified State Register (Yedynyi Derzhavnyi Reiestr). Articles 1166-1211 of the Civil Code of Ukraine (Tsyvilnyi Kodeks Ukrainy), which constitutes a significant part of the legal act, regulate the institute of the removal of damage. The occurrence of such a thorough legislative definition is due, in particular, to the fact that there are a large number of issues in the legal field regarding the removal of damage, and one of them is the conditions under which such damage is caused. Article 1166 states that compensation for damage may be caused by unlawful or lawful actions of a person. While in the first case, the person generally compensates in full for all damages, in the second case, the compensation depends on the relevant legislative provisions, as well as, as judicial practice shows, the specific circumstances of the case, and therefore the study of this type is particularly interesting for further research. Thus, lawful actions include those committed in a state of emergency. A characteristic feature of this state is that it is regulated not only by Civil but also by Criminal and Administrative law, whereas the relevant provisions differ somewhat. The noted particularity causes the relevancy and importance of a study of the legal institute of extreme necessity from the perspective of Civil law, as well as actualises studies of the peculiarities of compensation for damage under this condition. Given that the Ukrainian legislature has not resolved certain issues concerning the institute of removal of damage, a thorough analysis of theoretical material and existing case law is also deemed important.

II. Analysis of recent research and publications

The issues relating to both removal of damage caused by lawful actions in general and due to the state of emergency, in particular, were covered in the works of such researchers as *O. A. Volkov, V. M. Samoilenko, T. S. Kivalova, T. A. Grebenshchikova, S. D. Hrynko, V. P. Nyshchuk, I. V. Burlaka, T. S. Kivalova, I. O. Dzer,* and others.

III. Purpose of this contribution

The purpose of the article is to study the peculiarities of actions in a state of emergency, the conditions for their recognition as lawful, and also to identify the sources of danger in connection with which such a state arises, and also to provide examples from specific court decisions to highlight the practical implementation of theoretical provisions.

IV. Summary of the main subject matter

The institute of compensation for damages is part of an extensive system of non-contractual obligations regulated by a separate sub-section of the Civil Code of Ukraine. According to *V. M. Samoilenko*, they are divided into two groups depending on the grounds for their occurrence: 1) those which arise as a unilateral will of the participants (performance of actions in the property interests of another person without their instructions and public promise of remuneration) and 2) those which arise as a result of certain legal facts (saving life and health of an individual, their property, acquisition, and preservation of property without sufficient legal basis, etc. The latter group includes the removal of damage. The grounds for this type of obligation, in turn, are also subject to classification. In particular, the classification is based on Article 1166 of the Civil Code of Ukraine, which contains a provision that property damage may be caused by unlawful or lawful actions of a person. It is the latter case that is particularly interesting for the study, since under described circumstances of property damage caused by the lawful actions of a person, the compensation is not provided in all cases, but only in those described by civil law.

Damage caused by lawful actions may arise as a result of events (i.e. force majeure), actions of the victim or another perso[1]. For the obligation to compensate to arise in this case, several circumstances must coincide: 1) the lawful nature of the actions of the person causing the damage; 2) the existence of a causal link between the lawful actions and the damage that occurred; 3) the existence of a legislative pro-

1 *T. S. Kivalova.* Zoboviazannia vidshkoduvannia shkody za tsyvilnym zakonodavstvom Ukrainy: teoretychni problemy (Obligations of compensation for damage under the civil legislation of Ukraine: theoretical problems). PhD thesis: 12.00.03. Odesa, 2008. 40 p.

vision providing for compensation in this case[2]. Such actions, if there are necessary grounds, are also recognised as those committed by a person in a state of emergency.

First of all, it should be noted that the origins of the institution of extreme necessity, including within the framework of Civil law, should be sought in Roman law. Thus, according to the law of those times, this state arose when a person, to protect their rights, harmed another person, provided that the threat was real (and its source did not matter) and caused the unconditional need to commit actions that cause harm[3]. Furthermore, these provisions were gradually developed, in particular, they received a more detailed interpretation in the German Civil Code, where paragraph 228 states that a person does not act unlawfully when damaging or destroying another's property, if they took such actions to eliminate the danger caused by this property, provided that the damage caused by their actions is less than the damage prevented[4].

In Ukraine, the institute of extreme necessity in civil law dates back to Soviet times. Thus, in the Civil Code of the Ukrainian SSR, adopted in 1963, Article 445 provided that damage caused in such a state should be compensated by the person who caused it, but, taking into account the circumstances of a particular case, the court may impose this obligation on a third party in whose interests the relevant actions were taken, or partially or fully release the person from liability.

The current Code, however, contains a more detailed provision on extreme necessity. Thus, Article 1171, which deals with the issue under study, defines the understanding of this state in the context of Civil law: the elimination of a danger that threatens the civil rights or interests of another individual or legal entity. In this case, it is necessary to ensure that such danger could not be eliminated by other means. The definition of extreme necessity in Civil law is very closely related to that in Criminal law. In particular, under Article 39 of the Criminal Code of Ukraine, a state of extreme necessity is the elimination of a danger that directly threatens a person, their or someone else's legally protected rights, public or state interests, provided that the danger, in this case, cannot be eliminated by other means, and if the limits established by law have not been exceeded. Thus, the definition under criminal law is somewhat more extensive, given the specifics of the area of law, but generally coincides with the one in the Civil Code. However, there is a significant difference in the regulation, and it lies in the legal consequences of acts of extreme necessity. Thus, while the Criminal Code provides that a person is not liable in such a case, the Civil Code states that a person, as a general rule, still has to compensate for the damage caused, even despite the existence of these special conditions.

2 *V. V. Melnyk.* Vidshkoduvannia shkody, zavdanoi pravomirnoiu povedinkoiu (Compensation for damage caused by lawful behaviour) p. 299-301. https://dspace.nlu.edu.ua/bitstream/123456789/12670/1/Melnyk.pdf, 3 May 2023.

3 *S. D. Hrynko.* Formuvannia kontseptsii pravomirnoi povedinky zavdavacha shkody v Starodavnomu Rymi (Formation of the concept of lawful behaviour of the tortfeasor in Ancient Rome. Private International Law). p. 166-171. http://www.ppp-journal.kiev.ua/archive/2016/15/43.pdf, 3 May 2023.

4 Bürgerliches Gesetzbuch. 1896. https://www.gesetze-im-internet.de/bgb/, 3 May 2023.

According to *O. A. Volkov*, the state of emergency arises based on two features[5]: 1) a danger that threatens the interests protected by law, which is real and present during the period when it arose, exists, and has not yet ended. The latter, in particular, means that if the danger has not yet appeared or has already disappeared, the state of extreme necessity is excluded; 2) a situation that indicates the impossibility of eliminating such danger by means other than those that cause harm.

This makes it important to thoroughly investigate the cause of the danger and its impact on the actions of the person causing the damage. The legislation does not provide specific guidance on what should be understood as a danger that triggers the occurrence of an emergency, and therefore it is advisable to refer to scientific doctrine and case law for thorough research. According to the Scientific and Practical Commentary to the Civil Code of Ukraine, such reasons may include: 1) natural phenomena (earthquakes, floods, blizzards, and other natural disasters); 2) actions or inaction of people; 3) technical factors (errors of technical devices or their malfunction, violation of technical systems, accidents, etc.); 4) physiological state of a person (in particular, the need for medical care) and 5) animal behaviour[6]. As for the court practice, one can follow that the most common factor is the second one: the actions or inaction of people. Thus, cases for removal of damage under such conditions often arise in connection with road accidents. In particular, according to the decision of the Shevchenkivskyi District Court of Chernivtsi in case No. 727/9126/16-c: "... according to the explanations of PERSON_1, who was a party to the accident, and other case materials, it was established that the cyclist PERSON_5 created an emergency and PERSON_2 was unable to avoid the collision ... the event occurred as a result of the creation of an emergency by the cyclist PERSON_5, and PERSON_2, trying to avoid serious consequences, accordingly, acted in a state of emergency"[7]. The cases where extreme necessity arises due to certain natural conditions are interesting for research. For example, in case No. 709/1932/2012: "...while driving on a dirt road in the forest, a landslide began and one side of the car tilted to the side, creating a threat of the car overturning. Therefore, to avoid the car overturning and damaging it, they were forced to cut down several trees to build a retaining wall for the road and safe passage of the car ..."[8].

As already mentioned, actions in a state of extreme necessity that caused damage are recognised as lawful. However, this requires the presence of the following features: 1) the purpose of the actions is to eliminate the danger; 2) the actions are

5 *O. A. Volkov.* Pro isnuvannia prototypu instytutu krainoi neobkhidnosti v rymskomu pravi (On the existence of a prototype of the institute of extreme necessity in Roman law). Actual Problems of State and Law. p. 158-162. http://www.apdp.in.ua/v31/33.pdf, 3 May 2023.

6 Tsyvilnyi kodeks Ukrainy: Komentar (Civil Code of Ukraine: Commentary) / edited by E.O. Kharytonov, O.M. Kalitenko. Odesa: Legal Literature, 2003. 1080 p.

7 Rishennia Shevchenkivskoho raionnoho sudu m. Chernivtsi, vid 26 hrudnia 2016 r., sudova sprava № 727/9126/16-ts (Decision of the Shevchenkivskyi District Court of Chernivtsi of 26 December 2016, court case No. 727/9126/16-c). https://reyestr.court.gov.ua/Review/63849737, 3 May 2023.

8 Rishennia Rakhivskoho raionnoho sudu Zakarpatskoi oblasti, vid 9 lypnia 2012 r., sudova sprava № 709/1932/2012 (Decision of the Rakhiv District Court of Zakarpattia region, 9 July 2012, court case No. 709/1932/2012). https://reyestr.court.gov.ua/Review/28350636, 3 May 2023.

expressed in proactive behaviour; 3) the object of harm is the interests of other individuals or legal entities; 4) the actions are timely, i.e., they are carried out during the state of emergency; 5) the harm is proportionate or less than the harm eliminated[9]. It should be noted here that the last point is recognised as somewhat controversial since it is not explicitly mentioned in Ukrainian legislation. Thus, *T. A. Grebenshchikova* notes that for Civil law regulation, the most important result is the elimination of the danger, while the amount of damage caused does not matter, unlike in Criminal law[10]. At the same time, the analysis of judicial practice makes it clear that this characteristic is still often taken into account when imposing a penalty.

Next, we studied the mechanism of removal of damage in the circumstances when it was caused by extreme necessity. Article 1171 of the Civil Code of Ukraine explicitly states which entities may be subject to the relevant obligation: 1) the person who directly caused the damage and 2) the person in whose interests the former acted when causing the damage.

In addition, the law allows for the case when compensation is imposed on these two entities simultaneously. It should be noted here that, based on the analysis of the provisions of the Civil Code of Ukraine, only individuals and legal entities can participate in such relations, i.e., only subjects of private law, and therefore the State of Ukraine or foreign states, territorial communities and other subjects of public law are out of the question[11]. *S. E. Vaselskyi* also notes the existence of a situation when a person who acted in a state of emergency is also a victim. In this case, they propose to impose liability for compensation on the offender whose actions caused the danger[12].

Let us now consider each of the cases in more detail. Both academic doctrine and court practice often focus on the fact that even if it is proved that a person actually acted in a state of extreme necessity, they are not relieved of the obligation to remove or compensate for the damage. However, it should be noted that Article 1171(2) of the Civil Code describes a case when a person may be fully or partially released from liability. In case No. 2-1081/11, the court dismissed the plaintiff's claim for damages

9 *O. A. Volkov.* Pro isnuvannia prototypu instytutu krainoi neobkhidnosti v rymskomu pravi (On the existence of a prototype of the institute of extreme necessity i. http://www.apdp.in.ua/v31/33.pdf, 3 May 2023.
T. A. Hrebenshchikova. Do pytannia pro osoblyvosti vidshkoduvannia n Roman law). Actual Problems of State and Law. p. 158-162. http://www.apdp.in.ua/v31/33.pdf, 3 May 2023.

10 *T. A. Hrebenshchikova.* Do pytannia pro osoblyvosti vidshkoduvannia mainovoi shkody v zalezhnosti vid zovnishnikh faktoriv (On the issue of peculiarities of compensation for property damage depending on external factors). Journal of Civilistics. Issue No. 14. p. 28-31.

11 *O. A. Volkov.* Zoboviazannia vidshkoduvannia shkody, zavdanoi v stani krainoi neobkhidnosti za tsyvilnym zakonodavstvom Ukrainy (Obligation to compensate for damage caused in a state of extreme necessity under the civil law of Ukraine). PhD thesis: 12.00.03. Odesa, 2009. 20 p.

12 *S.E. Veselskyi.* Zoboviazannia iz vidshkoduvannia shkody, zavdanoi pravomirnymy diiamy (Obligations to compensate for damage caused by lawful actions). Qualification work: speciality 081 "Law" / Polissia
National University, Department of Law; scientific adviser: L.P. Vasylenko Zhytomyr, 2022. 46 p.

from the defendant, as the latter's actions were recognised as committed in a state of emergency and proportionate and adequate to the damage caused[13]. Another case with a similar decision concerned a road traffic accident, where the court, in addition to the state of extreme necessity on the part of the defendant, also took into account the victim's intoxication[14]. It is also quite common for the court to reduce the amount of compensation, taking into account the circumstances of extreme necessity, i.e. to satisfy the claim in part[15]. In case No. 709/1932/2012, for example, the court stated the following: "Meanwhile, when deciding on the amount of compensation for the damage caused to the plaintiff, the court considers that the amount of UAH 3526.32, which the plaintiff requests to recover from the defendant, is somewhat overstated. In the court's opinion, compensation in the amount of UAH 800 will be fair and sufficient to cover the material losses caused by the defendant's guilty actions, committed in a state of emergency, and therefore the claim is subject to partial satisfaction."[16].

Further, the second entity that may be subject to the obligation to compensate is the person in whose interests the actions that caused the damage were committed, in particular by way of a reverse claim - this mechanism is regulated by Article 1191 of the Civil Code of Ukraine. In our opinion, this process is somewhat more complicated, in particular, because it is not always possible to identify the relevant person: "Given that in the course of drawing up the report on administrative offence ... against PERSON_2 and consideration of the case on administrative offence, the person in whose interests PERSON_2 acted in a state of emergency was not identified, it is impossible to impose the obligation to compensate for the damage caused on this person, as the defendant demanded in the court hearing."[17]. There may also be a problem in proving that a person acted in the interests of another person. Thus, in case No. 2218/19330/2012, the claimant, who acted in a state of emergency, was denied the claim because he could not prove that he acted in the defendant's interests and not in his own. Further, case No. 2-33/200 is quite interesting, where the person in whose interests the actions were taken caused the danger, which was also taken into account

13 Rishennia Nakhimivskoho raionnoho sudu m. Sevastopolia, vid 1 lypnia 2011 r., sudova sprava № 2-1081/11 (Decision of the Nakhimovsky District Court of Sevastopol, 1 July 2011, court case No. 2-1081/11). https://reyestr.court.gov.ua/Review/18619306, 3 May 2023.

14 Rishennia Tsentralnoho raionnoho sudu m. Mykolaieva, vid 21 liutoho 2014 r., sudova sprava № 490/12461/13-ts (Decision of the Central District Court of Mykolaiv, 21 February 2014, court case No. 490/12461/13-c). https://reyestr.court.gov.ua/Review/37479754, 3 May 2023.

15 Rishennia Izmailskoho miskraionnoho sudu Odeskoi oblasti, vid 11 hrudnia 2009 r., sudova sprava № 2-5161-09 (Decision of the Izmail City District Court of Odesa Region, 11 December 2009, court case No. 2-5161-09): https://reyestr.court.gov.ua/Review/8701193, 3 May 2023.

16 Rishennia Rakhivskoho raionnoho sudu Zakarpatskoi oblasti, vid 9 lypnia 2012 r., sudova sprava № 709/1932/2012 (Decision of the Rakhiv District Court of Zakarpattia region, 9 July 2012, court case No. 709/1932/2012). https://reyestr.court.gov.ua/Review/28350636, 3 May 2023.

17 Rishennia Novokakhivskoho miskoho sudu Khersonskoi oblasti, vid 9 kvitnia 2010 r., sudova sprava № 2-549/10 (Decision of the Novokakhovka City Court of Kherson Region, 9 April 2010, court case no. 2-549/10). https://reyestr.court.gov.ua/Review/9718505, 3 May 2023.

by the court: "As for the damage that the defendant caused to the plaintiff as a result of the flooding that occurred as a result of the fire ... the damage was caused in a state of emergency, since as a result of the violation of fire safety rules by PERSON_4, firefighters acted in a state of emergency in favor of the latter ... the court imposes the obligation to compensate for the damage caused by the fire on PERSON_4 since the fire service acted through his fault and in his interests."[18]. The issue was resolved similarly in case No. 2-107/2007, where the court found that, since the danger was caused by the actions of the plaintiff himself, the defendant could not be held liable for compensation[19].

Finally, such an obligation may be imposed both on the person who caused the damage by their actions and on the person in whose interests these actions were taken. However, this situation is quite rare in the practice we have analysed.

The topic of removal of non-pecuniary damage in the circumstances under study seems to be somewhat problematic. Thus, *S. D. Hrynko* notes that in the case when damage is caused by lawful actions (including in a state of emergency), only property damage and property costs are subject to recovery[20]. The same opinion is expressed by *V. V. Melnyk*, who states that in this case, only the material assets of the victim should be restored[21]. However, as the case law shows, the plaintiff's claims for non-pecuniary damage are still often satisfied[22] [20-22].

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18 Rishennia Umanskoho miskraionnoho sudu Cherkaskoi oblasti, vid 11 bereznia 2009 r., sudova sprava № 2-33/2009 (Decision of the Uman City District Court of Cherkasy Region, 11 March 2009, court case No. 2-33/2009). https://reyestr.court.gov.ua/Review/5204913, 3 May 2023.

19 Rishennia Shyshatskoho raionnoho sudu Poltavskoi oblasti, vid 28 liutoho 2007 r., sudova sprava № 2-107/2007 (Judgement of the Shyshaky District Court of Poltava Region, 28 February 2007, court case no. 2-107/2007). https://reyestr.court.gov.ua/Review/2217024, 3 May 2023.

20 *S. D. Hrynko.* Poniattia ta pidstavy vynyknennia zoboviazan iz vidshkoduvannia shkody, zavdanoi pravomirnymy diiamy (Concept and grounds for the emergence of obligations to compensate for damage caused by lawful actions). University Scientific Notes. 2008. Issue No. 3. p. 65-73.

21 *V. V. Melnyk.* Vidshkoduvannia shkody, zavdanoi pravomirnoiu povedinkoiu (Compensation for damage caused by lawful behaviour) p. 299-301. https://dspace.nlu.edu.ua/bitstream/123456789/12670/1/Melnyk.pdf, 3 May 2023.

22 Rishennia Kalininskoho raionnoho sudu m. Horlivky, vid 8 travnia 2009 r., sudova sprava № 2-13-09 (Decision of the Kalinin District Court of Horlivka, 8 May 2009, court case No. 2-13-09): https://reyestr.court.gov.ua/Review/14646421, 3 May 2023.
Rishennia Khmelnytskoho miskraionnoho sudu, vid 5 lypnia 2013 r., sudova sprava № 686/1913/13-ts (Decision of the Khmelnytskyi City District Court, 5 July 2013, court case no. 686/1913/13-c). https://reyestr.court.gov.ua/Review/32374023, 3 May 2023.
Rishennia Dolynskoho raionnoho sudu Ivano-Frankivskoi oblasti, vid 10 liutoho 2017 r., sudova sprava № 343/2372/15-ts (Decision of the Dolyna District Court of Ivano-Frankivsk region, 10 February 2017, court case No. 343/2372/15-c). https://reyestr.court.gov.ua/Review/64722799, 3 May 2023.

V. Conclusions

Summarising the above, we should note the following. The institute of compensation for damage is part of the system of non-contractual obligations, namely, the group of those arising from legal facts. Damage may be caused by both unlawful and lawful acts, the latter being those committed in the exercise of the right to self-defence or a state of extreme necessity. The state of extreme necessity has a long history dating back to Roman law. In Ukraine, the provision on compensation for damage in such a state is contained in Article 1171 of the Civil Code of Ukraine, which defines it as follows: elimination of a danger that threatens the civil rights or interests of another individual or legal entity. It should be noted that such an institution exists not only in Civil law but also in Criminal law, but the latter defines this concept somewhat more broadly and clearly states that liability, in this case, is excluded. Under the Civil Code of Ukraine, the guilty person, as a general rule, still has to compensate for the damage caused.

For the state of emergency to arise, there must be a danger that threatens the interests protected by law, which is credible and present, as well as a special situation that indicates that the former cannot be eliminated by actions other than those taken. Thus, as for the danger, its sources vary from natural phenomena to technical factors and others. However, as practice shows, the most common cause is the action or inaction of people. Also, to apply the provisions of Article 1171 of the Civil Code of Ukraine, it is necessary to recognise the actions taken as lawful, for which they must be characterised by such features as a special purpose, a special form of behaviour, a particular object of damage, clear timeliness and proportionality.

In this case, the subjects of compensation are the person who directly caused the damage, as well as the person whose actions were the first to act. The law also provides for the case of recovery from these two persons simultaneously, but such situations are rare.

Finally, the issue of removal of non-pecuniary damage in the case of emergency is controversial. And while some scholars insist that it is impossible to compensate, the court practice goes the way of recovery of moral damages, among others.