



Compensation of non-pecuniary damage to persons close to the deceased or to the aggrieved person [☆]



Janno Lahe ¹, Irene Kull ²

University of Tartu, Faculty of Law, Näituse 20, Tartu 50409, Estonia

ARTICLE INFO

Article history:

Received 1 February 2016

Accepted 3 March 2016

Available online 10 March 2016

Keywords:

Non-pecuniary damage

Tort law

Compensation

Persons close to the deceased

ABSTRACT

In the field of compensation of non-pecuniary damage, one of the most widely discussed issues is whether and based on which prerequisites those close to a person killed or injured ought to be able to claim compensation for non-pecuniary damage. This article attempts to find answers to these questions by comparing Estonian, German and English law as well as relevant European model laws. The article thoroughly examines Estonian case-law and investigates whether Estonian courts have reasonably substantiated the precondition for a claim for compensation of non-pecuniary damage of a close person under Estonian law, i.e. the occurrence of exceptional circumstances. The article shows the actual possibilities of a person close to the deceased or to an aggrieved person to obtain compensation for non-pecuniary damage under Estonian law.

© 2016. Mykolas Romeris University. Production and hosting by Elsevier B.V. All right reserved. This is an open access article under the CC BY-NC-ND license (<http://creativecommons.org/licenses/by-nc-nd/4.0/>).

1. Introduction

Non-pecuniary damage can be characterised as harm that, unlike pecuniary damage, does not lead to a decrease in property. Non-pecuniary damage cannot be measured in money or assessed in economic categories (Kozioł, 2012, p. 113).

Although, in general, compensation of non-pecuniary damage can be demanded, above all, by a person whose legal right has been harmed, it is in principle possible that a person close to the one whose life or health has been harmed becomes entitled to such a claim. Under the Article 134 (3) of the Estonian Law of Obligations Act (LOA, 2002),³ in the case of an obligation to compensate damage

arising from the death of a person or a serious personal injury or health damage caused to the person, persons close to the deceased or the aggrieved person may also claim compensation for non-pecuniary damage if payment of such compensation is justified by exceptional circumstances.

This article seeks an answer to the question of whether a person close to the deceased or aggrieved person⁴ ought to have a claim for the compensation of non-pecuniary damage against the tortfeasor. If the answer to the question is affirmative, we immediately come to the question of what the specific prerequisites are for such a claim by a close person. It has been argued that this is by no means

This article is prepared with the support of the Estonian Science Foundation Grant GOIE0930.

Peer review under responsibility of Mykolas Romeris University

E-mail addresses: janno.lahe@ut.ee (J. Lahe), irene.kull@ut.ee (I. Kull).

¹ Tel.: +372 737 5992.

² Tel.: +372 737 6050.

³ Law of Obligations Act, passed 26.09.2001, entry into force

(footnote continued)

01.07.2002. Available in English at <https://www.riigiteataja.ee/en/eli/526082015004/consolide>. Estonian laws are available in English at <https://www.riigiteataja.ee/en/>.

⁴ In this article, the person whose death or bodily injury results in a claim by a person close to the deceased or injured person for compensation of non-pecuniary damage is also called the victim.

an unambiguous matter (Rogers, 2005, p. 176; Rijnhout & Emaus, 2014, p. 92).

This article was inspired by the fact that a lively debate arose in Estonian society and the media over the Article 134 (3) of the LOA in 2011 and 2012, which is rather unusual for matters of compensation of damage. This debate was sparked by a case where a person who did not have the right to drive a vehicle unsupervised caused a traffic accident that resulted in the death of, among others, both parents of the claimant. The claimant sought the compensation of non-pecuniary damage by the person who caused the traffic accident, but the court dismissed the claim. The final outcome of the case seemed to conflict with society's sense of justice not so much because the claimant's claim was dismissed, but rather because the claimant was made to pay the defendant's procedural expenses due to the dismissal of the claim (Filippov, 2011a, 2011b).⁵

The article seeks answers to the aforementioned questions by way of comparative analysis. The reference material consists of the Estonian Law of Obligations Act, the law of delict provisions of the Draft Common Frame of Reference (DCFR, 2009),⁶ the Principles of European Tort Law (PETL, 2005)⁷ and the legislation of both the German Federal Republic and England. The authors decided to compare Estonian tort law with the DCFR and the PETL because these model laws represent the best reflection of contemporary approaches to the field of European tort law. The German and English approaches to law demonstrate how two large Member States of the European Union which belong to different legal families view the issue. German law is chosen for comparison also because of BGB being one of the most important source for Estonian legislation in the field of delictual liability and other fields of law (Varul, 2000). It should be added that in this article only Estonian case-law is analysed exhaustively.

Also, this article does not analyse aspects relating to the scale of non-pecuniary damage, which forms a complex field in its own right. It should also be borne in mind that one can speak of a claim for compensation of non-pecuniary damage of a person close to the direct victim only if the tortfeasor is liable for causing the death of or injury to the victim. The article does not discuss the respective general prerequisites of liability. The object of examination is the specific prerequisites for a claim by a person close to the direct victim. If the direct victim does not die immediately after the injuring event, the victim has a claim for compensation of non-pecuniary damage (Art.134 (2) of the LOA), which may transfer to the victim's successors. The article does not focus on this particular topic either.

⁵ The described compensation case was covered by all major Estonian newspapers and news portals. The topic was also covered, for instance, by the *Postimees* daily newspaper on 15 February 2012 and on 10 April 2012. The popular national current affairs and investigative journalism programme *Pealtnägija* also made an episode about the case.

⁶ The DCFR was prepared by the Study Group on a European Civil Code. The role of the DCFR is to serve as a model law that can be used in preparing national and EU legislation

⁷ The PETL was proposed as a comprehensive system for tortious liability. It also serves as a guideline for national and EU legislators.

2. On the possibility of compensation of non-pecuniary damage to a close person in general

R. Zimmermann has noted in a book on the practice of the law of delict in European countries that answers to the questions of whether and when persons close to the initial victim receive compensation for non-pecuniary damage differ considerably in European countries (Zimmermann, 2011, p. 712; von Bar, 2009a, 2009b, p. 395). In commentary to the PETL it has been noted that most European legal systems allow for such compensation of damage in the event of the death of the direct victim (Rogers, 2005).

The Article 2:202 (1) of the DCFR states that non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person. C. von Bar has argued that damage must be compensated to those especially close to the victim for their mental suffering even if the suffering does not lead to a medical condition (Zimmermann, 2011; von Bar, 2009a, 2009b, p. 390). The purpose of the rule is not to enrich those close to the victim, but stems from the realisation that a considerable reduction in a person's *joie de vivre* (due to the loss or injury of a person close to them) deserves compensation (von Bar, 2009a, 2009b, p. 391).

The third sentence of the PETL Article 10:301 (1) states that non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.

There are no provisions analogous to those given by the DCFR and the PETL in German law. It has been said that the death of a person does not constitute a violation of a legal right that leads to the obligation to compensate non-pecuniary damage. Thus, the BGB does not allow for compensation in the event of causing the death of a close person (Oetker, 2012, Rn 28). This is justified by the fact that the required elements of liability are not fully there for a close person, because their personal legal right has not been breached (Oetker, 2012, Rn 35).

At the same time, German law allows for a claim for the compensation of non-pecuniary damage of a family member (*Angehörige*) if the death of a close person has led to the harming of a legal right of the family member (Oetker, 2012, Rn 28; Spindler, Rn 12). Thus, it must be assessed whether the health of the close person has been damaged as a result of damage to the direct victim. If so, the liability of the tortfeasor for causing the damage must be assessed based on general rules (above all, based on § 823 (1) of the BGB) (Oetker, 2012, Rn 35). The prerequisite for the obligation to compensate damage is not that the tortfeasor has interfered with the legal rights of a family member as the claimant. The tortfeasor may be liable for the psychological reaction of a third party ('shock damage' or *Schockschaden*). The prerequisite for the compensation thereof is that the third party suffered medically identifiable health damage due to shock (Oetker, 2012, Rn 149–150; Mäsch, 2015, p. 748).

In England, close relatives are entitled to compensation in the event of the victim's death. Under Section 1A8(2) of the *Fatal Accidents Act (1976)*, those entitled to claim compensation include the spouse, the registered partner

and the parents of a minor if the minor had not married by the time of death. Compensation is awarded as a fixed sum (approximately 16 450 euros, 1 A(3)), which is divided if multiple persons are entitled to the compensation (van Dam, 2006, 329–330).⁸

Unlike in the German BGB, the Estonian LOA contains a provision similar to the aforementioned provisions of the DCFR and PETL. Under the Article 134(3) of the LOA, in the case of an obligation to compensate for damage arising from the death of a person or a serious bodily injury or health damage caused to the person, those close to the deceased or to the aggrieved person may also claim compensation for non-pecuniary damage if the payment of such compensation is justified by exceptional circumstances.

All in all, provided that the respective prerequisites are fulfilled, the compensation of non-pecuniary damage to persons close to the victim is, in principle, considered possible in all of the sources serving as the basis for the comparison bar the German BGB. Under German law, the realisation of a respective claim calls for the suffering of health damage by a person close to the direct victim. Thus, in the context of the BGB, it is not entirely correct to speak of compensation of non-pecuniary damage to persons close to the victim, because the compensation is not justified by the harming of the direct victim as such, i.e. non-pecuniary damage arising from health damage caused to a close person is compensated.

It should be added that there are considerable differences regarding the prerequisites of enforcing the claim even in the sources of comparison that in principle affirm a close person's claim for non-pecuniary compensation. Next, a closer look is taken at specific prerequisites⁹ whereby a close person can claim compensation of non-pecuniary damage from the tortfeasor.

3. Prerequisites for compensating a close person for non-pecuniary damage

3.1. Death or personal injury

The primary prerequisite for enforcing a close person's claim for compensation of non-pecuniary damage is that a legal right of the direct victim has been interfered with. Under Article 2:202 (1) of the DCFR the prerequisite is the direct victim's death or personal injury.

The PETL is stricter in this regard: under Article 10:301 (1), the victim's claim for compensation of non-pecuniary damage is possible in the event of the victim's death or very serious non-fatal injury. However, no attempts to define 'very serious non-fatal injury' have been made (Rogers, 2005, pp. 173,175).¹⁰

⁸ As of 1 April 2013, the amount of the bereavement claim award increased from £11,800 to £12,980.

⁹ As noted in the introduction, this article does not analyse the liability of the tortfeasor towards the direct victim, which is simultaneously nevertheless the primary general prerequisite for a non-pecuniary compensation claim by a person close to the direct victim.

¹⁰ It should be added that when drafting the PETL a close person's entitlement to compensation in the event of the death of the victim did

In Germany, compensation for *Schockschaden* is possible in the event of the death of or serious personal injury to a person (Oetker, 2012, Rn 154). W.V.H. Rogers finds that supporting the idea of compensating persons close to the victim for non-pecuniary damage is less disputable in the event of the victim's death (Rogers, 2001, p. 263). Thus, the English Fatal Accidents Act (1976) only allows for non-pecuniary damage claims by persons close to the victim in the event of the victim's death.

Under the Article 134 (3) of the LOA, the primary prerequisite for a close person's claim is the causing of the death of the person or the causing of a serious personal injury or health damage to a person for which the tortfeasor is liable.¹¹

As emerges from the aforementioned, the strictest legislation regarding the prerequisite can be found in English law where only the death of the victim entitles persons close to the victim to compensation. At the same time, a personal injury is sufficient for bringing a claim under the DCFR. The LOA is between the two in terms of strictness. It should be added that the characteristics of the deceased or injured person should not play any role as regards a claim of a close person. Thus, the Estonian Supreme Court has held with reason¹² that "the characteristics of the deceased are of no relevance from the point of view of application of the Article 134 (3) of the LOA. Therefore, discussions over whether the deceased was a person who spent most of their time on the Internet, whether the victims could expect to be maintained by the person in the future or whether such an expectation was unfounded, given the habits of the victim, are irrelevant. Upon the occurrence of exceptional circumstances, persons close to young and economically successful people as well as persons close to older and financially less well-off people can rely on the Article 134 (3) of the LOA".

It is not easy to answer the question of whether only the death of a direct victim or also their personal injury should justify a claim by a person close to the victim for compensation of non-proprietary damage. Several arguments can be made in support of both approaches. On the one hand, one could argue that the victim's non-lethal personal injury may cause even greater suffering to

(footnote continued)

not generate a great deal of debate. However, the matter that sparked a dispute was whether a close person should also be entitled to compensation in the case of a personal injury of the victim.

¹¹ It should be added that under the LOA the tortfeasor may be liable for the death or personal injury of a person based on the general delictual liability (Art. 1043 *et seq* of the LOA), strict liability (Art. 1056 *et seq* of the LOA) or product liability provisions (Art. 1060 *et seq* of the LOA). Liability under contract law is also an option. In the latter event one must take account of the Art. 134 (1) of the LOA, which states that compensation for non-pecuniary damage arising from non-performance of a contractual obligation may only be claimed if the purpose of the obligation was to pursue a non-pecuniary interest and, under the circumstances relating to the conclusion of the contract or to the non-performance, the obligor was aware or should have been aware that non-performance could cause non-pecuniary damage.

¹² Judgment of the Criminal Chamber of the Supreme Court of 27 October 2010 in case no. 3-1-1-57-10. In the given case, the parents of the deceased demanded that the persons who killed their son compensate non-pecuniary damage.

persons close to the victim and affect their family life even more than the death of the direct victim, which results in one-off suffering and grief (Rogers, 2001, p. 263).

However, the payment of compensation in the case of a personal injury to the direct victim conflicts with the fact that in the case of a non-lethal personal injury the direct victim has a claim for compensation of non-pecuniary damage (Rogers, 2001, 263). It can also be argued that if such claims by close persons were allowed, they would cause uncertainty and complicate even the simplest claims (Rogers, 2001, 264).

In spite of the aforementioned, the authors of this article do not consider it wise to preclude close persons' claims in the case of a serious personal injury to the direct victim. This allows for a case-by-case approach whereby the court can assess the severity of the personal injury to the direct victim in each individual case. Furthermore, it is relatively easy to formulate reasonable boundaries in case law in terms of when a personal injury is sufficiently serious to justify a close person's claim for non-pecuniary damage. From the point of view of legal certainty it is very important that subjects of law are aware of these boundaries. For instance, if the direct victim is in a coma for a long time, more flexible legislation would allow for responding thereto by awarding compensation to those close to the victim. Flexible legislation would also allow for not awarding compensation, for instance, in the case of a leg fracture, which is essentially also a serious personal injury.

3.2. Close relationship between the deceased or the aggrieved person and the person seeking compensation for non-pecuniary damage

In the event of the death of or personal injury to the direct victim, the circle of persons entitled to the compensation of non-pecuniary damage is and must be limited. Usually, there must be a close relationship between the victim and the claimant in order to enforce the claim. Thus, it follows from DCFR Article 2:202 (1) that only persons who had a particularly close personal relationship to the direct victim can be entitled subjects. Such a relationship may be based on formal criteria (spouse, children, parents), but there may also be a *de facto* close relationship (step-parent, cohabitee) (von Bar, 2009a, 2009b, p. 391). A person who was only close to the aggrieved person in terms of business (not personally) cannot usually claim compensation for non-pecuniary damage. A claim by such persons is only conceivable if the victim was killed for the very purpose of causing damage to the other person (von Bar, 2009a, 2009b, p. 389).

The PETL seems to be formally more lenient than the DCFR regarding this particular prerequisite: a person that had a close relationship to the victim can claim compensation for non-pecuniary damage (PETL Art 10:301 (1)). The PETL does not attempt to give a list of persons who could claim compensation for damage (Rogers, 2005, p. 175). In German case-law, the possibility of compensation for shock damage has also typically been denied in cases of persons other than close persons. At the same time, the term 'family members' (*Angehörige*) cannot be substantiated solely in the sense of family law and may

include, for instance, engaged persons (Oetker, 2012, Rn 153).

In England, closer relatives are also entitled to compensation. Under Section 1A8(2) of the *Fatal Accidents Act (1976)*, those entitled to claim compensation include the spouse, the registered partner and the parents of a minor if the minor had not married by the time of death.

Under the Article 134 (3) of the LOA, only persons close to the direct victim are entitled to compensation of non-pecuniary damage. Such a definition allows for flexibly delimiting the circle of persons entitled to compensation, but it may give rise to excessive legal uncertainty without sufficient case-law. In its first judgment¹³ on the application of the Article 134 (3) of the LOA, the Civil Chamber of the Supreme Court noted the following: "the Law of Obligations Act does not define 'close persons', which leaves the definition up to the courts. The Supreme Court takes the view that there is no common or uniform definition of 'close persons', but each case should be assessed individually, based (among other things) on the relations, family ties and living arrangements of the persons, as well as other circumstances. Certain persons, such as the spouse and children who lived with the deceased, are undoubtedly included in the circle of close persons". Also, the Criminal Chamber of the Supreme Court has held that parents, for instance, can usually be considered persons close to the child.¹⁴

On the whole, there is no doubt that the circle of persons entitled to compensation must somehow be limited. At first glance, the approach taken in English law – where persons entitled to compensation are specifically defined – may seem quite appealing: only the existence of a relationship (not the extent of, for instance, grief) is important. If we add the fact that compensation is only paid in the event of the death of the direct victim and as a fixed sum, the English system can be deemed elegantly simple and clear or, as Rogers (2001, p. 265) puts it, 'effective'.

Thus, one inevitably comes to the question of whether and to what extent we can give preference to legal certainty over justice arising from flexibility on the scale of values. According to the authors of the model laws discussed in this article and according to the Law of Obligations Act, flexibility certainly outweighs legal certainty in the given matter.

The PETL and the Law of Obligations Act try to achieve flexibility using the term 'close persons', while in the DCFR the prerequisite for a claim is a particularly close personal relationship. According to German law, *Angehörige* are entitled to damages for shock.

¹³ The judgment of the Civil Chamber of the Supreme Court of 9 April 2008 in case no. 3-2-1-19-08. According to the facts of the case: The defendant's employee (a coach driver) caused a road accident in which a coach collided with a van driven by the claimant's husband. The claimant's husband died of his injuries. The claimant argued that she suffered emotional and psychological distress as a result of her husband's death, and that her constitutional right to the inviolability of family life had been breached. She also argued that she was entitled to non-pecuniary damages under Article 134 (3) of the LOA. In the claim, she requested that the defendant be ordered to pay compensation of approximately 64 000 euros for the non-pecuniary damage suffered by her.

¹⁴ Judgment of the Criminal Chamber of the Supreme Court of 27 October 2010 in case no. 3-1-1-57-10.

The authors of this article find the term ‘close persons’ used in the LOA reasonable, but it nevertheless remains vague without relevant case law. For example, based on the case law generated in the more than 12-year period that the LOA has been in force, one can only say with certainty that the spouse and children qualify as close persons. Other persons can merely guess as to whether they qualify as close persons in the opinion of the courts. Drawing analogy with a contract of health care services, persons related to an aggrieved person may be understood also as parents, sisters and brothers, unmarried partner, as well as other persons close to the patient, if this arises from the patients living arrangements. The court has the discretion to identify the level of closeness and nature of a relationship in the case of each dispute (Kingisepp, 2003, p. 208; Zinnen et al., 2003).

By and large, one can agree with Cees van Dam’s position that formal family relationships should not be the unconditional prerequisite for compensation. From the point of view of the severity of loss there is no difference whether a married or a non-married person loses their partner (van Dam, 2006, p. 311).

3.3. Exceptional circumstances

While the prerequisites for a claim discussed so far are broadly similar in the DCFR, the PETL and the Law of Obligations Act (which cannot be said for the English and German approaches), the Article 134 (3) of the LOA sets out another prerequisite for the compensation of a close person’s non-pecuniary damage. In fact, a close person can only enforce their claim if the payment of compensation is justified by exceptional circumstances (Lahe, 2011, p. 283; Lahe & Kull 2009). This additional prerequisite makes the scope of application of the much narrower in comparison with Article 134 (3) of the LOA, Article 2:202 (1) of the DCFR and Article 10:301 (1) of the PETL.

For the first time, the Supreme Court explained the substance of the exceptional circumstances as a prerequisite for bringing a claim in its judgment in case no. 3-2-1-19-08 of April 9 2008. In the judgment, the court held that the causing of death or a serious bodily injury cannot constitute an ‘exceptional circumstance’ within the meaning of the Article 134 (3) of the LOA, but that there must be additional circumstances justifying pecuniary compensation. The loss of a close person in the abstract sense – mourning and the pain of loss which inevitably occur to a greater or lesser extent upon the death of every close person – do not constitute an exceptional circumstance. Neither can the loss of family and a decline in the quality of life, as argued by the claimant, constitute such a circumstance. These circumstances often accompany the loss of a close person.

In the given judgement, the Supreme Court also explained when the court finds that the criterion of exceptional circumstances has been fulfilled. According to the Civil Chamber, a claim for compensation of damage suffered by a close person under the Article 134 (3) of the LOA would be justified particularly by the spatial closeness of the close person to the deceased or seriously injured person at the time of the damage, e.g. being in the same car at

the time of the accident or immediately observing the accident or its consequences (being in the same ‘danger zone’), as well as subsequent suffering caused by witnessing the injury or the suffering of the deceased or seriously injured close person (Oetker, 2012, Rn 153).¹⁵ The court adds that such circumstances are constituted by an actual wish to attack or influence persons close to the aggrieved person, as well as the special circumstances of the damage, such as the tortfeasor’s intention to cause damage to the victim in combination with the subsequent suffering of the close persons. It should be noted that it in German law it is the person who directly witnesses the event that causes their shock rather than a person who experiences it for example by the media (tragic news reported in TV) is entitled to damages. However, these persons cannot be simply bystanders (BGH 22.05.2007, VI ZR 17/06, NJW 2007, 2764-2766). There shall be also closeness to the victim to justify the compensation (Wuensch, 2009, p. 21).

Since this judgment, Estonian civil courts have quite accurately followed the Supreme Court’s substantiation of exceptional circumstances. As a result thereof the claimants’ claims have usually been denied under the Article 134 (3) of the LOA due to the absence of exceptional circumstances. This conclusion does fully apply to the case-law of criminal courts. Based on an analysis of case-law (Vutt, 2012a, 2012b), one could draw the conclusion that criminal courts grant claimants’ claims under the Article 134 (3) of the LOA more readily than civil courts. For instance, in its judgment in criminal case no. 1-09-3573 of 17 March 2010, Harju County Court ordered the defendant to pay damages amounting to 25,564 euros in a case where the claimant suffered a serious injury and the claimant’s spouse died in a traffic accident. The claimant sat next to their spouse in the car involved in the traffic accident and witnessed the death of their spouse. Similarly, by the judgment of 16 November 2010 in criminal case no. 1-10-350, Tallinn Circuit Court awarded non-pecuniary damages to the claimants, more specifically 12,782 euros to each, in a case where the intoxicated defendant caused the death of two persons who had been riding a bike on the road. The authors note that while, given the circumstances of the judgment of Harju County Court of 17 March 2010, the claim would most probably have also been granted in a civil court, this would probably not have been so based on the circumstances of the judgment of Tallinn Circuit Court of 16 November 2010, because in the case of the latter accident there were no exceptional circumstances as described in Supreme Court judgment no. 3-2-1-19-08. Harju County Court refused to grant the claimants’ claim under the Article 134 (3) of the LOA in a situation where the defendant organised a kayaking marathon in which the claimant’s mother and father took part. Their kayak overturned in rough seas, they fell into the cold water and died. The court held that since the claimants were not spatially close to their parents at the time of their death,

¹⁵ It should be noted that it is the person who directly witnesses the event that causes their shock rather than a person who experiences it by way of mediation is entitled to damages under German law as well.

the conditions of awarding non-pecuniary damages to the claimants were not fulfilled.¹⁶

Likewise, the claimant's claim for non-pecuniary damages was denied under the Article 134 (3) of the LOA in the case¹⁷ highlighted in the introduction to the article, which sparked broad-ranging debate and involved a situation where the defendant, who did not have the right to drive a vehicle unsupervised, caused a traffic accident that resulted in the death of three people, including both parents of the claimant. The claimant argued that in the present case the causing of the death of both parents of the claimant by a criminal offence of the defendant, the inhuman distortion of the parents' appearance in a brutal manner and the direct and repeated witnessing of such a sight by the claimant (from photos in the file of the criminal case) and the consolidation thereof in the claimant's memory constitute exceptional circumstances for the purposes of the Article 134 (3) of the LOA. The circuit court took the view that the requirement of exceptional circumstances was not fulfilled in the given case. The court noted that the fact that the claimant's parents were killed due to the defendant's criminal act was not sufficient grounds for granting the claim for non-pecuniary damages. The Supreme Court rejected the claimant's appeal in cassation.

The two latter cases vividly illustrate that the condition of exceptional circumstances contained in the Article 134 (3) of the LOA and the substantiation of the condition by the Supreme Court have resulted in a situation where persons close to the direct victim cannot claim compensation for non-pecuniary damage. It is clear that cases considered exceptional by the Supreme Court occur extremely rarely in real life. Therefore, one could ask whether the Supreme Court has not excessively limited the possibilities of a claim by close persons (Kingisepp, 2003, p. 208). Keeping the aforementioned court cases in mind, it may even seem unfair that the claimants were even deprived of compensation in the event of the simultaneous death of both parents, because the courts did not find the cases to be exceptional.

Based on the aforementioned it can be argued that due to the narrow substantiation of exceptional circumstances by the Supreme Court the possibilities of a person close to the direct victim to obtain compensation for non-pecuniary damage are far more limited than under the PETL, the DCFR or English law. It cannot be precluded that, essentially, persons close to the direct victim are in quite a similar position in Estonia and Germany (as regards compensation of non-pecuniary damage): while under German law only *Schockschaden* is compensated, the aggrieved person usually cannot truly enforce their claim in Estonia either.¹⁸

The authors of this article find that the Supreme Court should consider the alleviation of exceptional circumstances as the criteria of the prerequisite for a claim for non-pecuniary damages. On the one hand, the Article 134 (3) of the LOA largely becomes meaningless if the prerequisites for the application thereof are only fulfilled in extremely rare events. On the other hand, broader substantiation of exceptional circumstances would help to make Article 134 (3) of the LOA closer to the DCFR and the PETL, where the given additional prerequisite does not exist for a close person's claim. Alternatively, the legislature could consider the elimination of the exceptional circumstances requirement from the Article 134 (3) of the LOA. This solution would obviously call for a conservative approach by Estonian courts upon deciding the amount of damages.

4. Conclusions

Issues pertaining to the compensation of a person close to the victim for non-pecuniary damage are multifaceted and disputable. Although based on the sources of comparison used in this article one can conclude that, in general, the awarding of non-pecuniary damages to a person close to the direct victim is upheld, the established prerequisites for a respective claim of a close person are quite different.

It can be argued that not only the death of the direct victim (as is the case of English law) should constitute the event following which there is reason to speak of a close person's claim for non-pecuniary damages. Under the PETL, the DCFR and the Law of Obligations Act, a (serious) personal injury to the direct victim is sufficient as well.

It is problematic to delimit the circle of persons who, in principle, could be entitled to compensation. With the exception of the English Fatal Accidents Act, the matter is not specifically defined in the instruments analysed. This solution can be supported, because it allows for flexibly assessing the close relationship between the direct victim and the claimant. However, describing the substance of the definition of close persons is important in case-law so that a potential claimant can assess, before filing a claim, whether they qualify as a close person.

In Estonia, the possibility of realisation of a claim for non-pecuniary damages by a close person is put in a different light by the additional prerequisite of exceptional circumstances arising from the Article 134 (3) of the LOA. Narrow substantiation of these exceptional circumstances by the Estonian Supreme Court has created a situation where a close person can only obtain real damages in rare individual events. In essence, this means that the Law of Obligations Act considerably differs from the PETL and the DCFR (a well as from English law) in this regard. It cannot be precluded that in reality it is as difficult for a person close to the victim to receive damages under the LOA as it is to receive damages for shock under German law.

(footnote continued)

See more on: http://www.justiz.bayern.de/media/pdf/gesetze/gesetzentwurf_angehoerigenschmerzengeld.pdf.

¹⁶ Judgment of Harju County Court of 10 October 2010 in case no. 2-10-55812.

¹⁷ Judgment of Tallinn Circuit Court of 22 March 2011 in civil case no. 2-10-779.

¹⁸ In Germany the draft law from 2.02.2015 was published for discussion concerning the classification of close persons. Proposal provides that BGB § 844 shall be amended by BGB § 844a. Under the new BGB § 844a Section 2 close persons are, under certain circumstances, spouses and registered life partners, and, under any circumstances, parents and children.

On the whole, one can take the view that, even though the English system may seem tempting as regards a claim of persons close to the victim for being so simple and clearly defined, flexibility and the chance of making a fair decision in an individual case still outweigh legal certainty in the matter at hand. The authors find that the Supreme Court should consider revising its position (in case no. 3–2–1–19–08) in substantiating exceptional circumstances. The declaration arising from Article 134 (3) of the LOA, according to which persons close to the direct victim have the right to claim non-pecuniary damages, is misleading, because the respective rule is almost never applied.

References

- von Bar, C. (2009b). *Principles of European law: non-contractual liability arising out of damage caused to another*. Bern: Stämpfli Publishers Ltd.
- von Bar, C. (Ed.). (2009). *Principles, definitions and model rules of European private law. draft common frame of reference (DCFR)*. Munich: Sellier European Law Publishers.
- van Dam, C. (2006). *European Tort Law*. New York: Oxford University Press.
- Filippov, J. (2011b). *A case of moral damage: judges revolt against supreme court judgment' (in Estonian: Moraalse kahju juhtum: kohtunikud tõstsid mässi Riigikohtu lahendi vastu)* (p. 13) *Eesti Ekspress* 13 October.
- Filippov, J. (2011a). *Killing causes moral damage to close relatives only if they witness the atrocity (in Estonian: Tapmine tekitab omastele moraalset kahju vaid siis, kui need roima pealt näevad)* (p. 6) *Eesti Ekspress* 6 October.
- Kingisepp, M. (2003). Scope of claim for consequential damage in delict law. *Juridica International*, 8, 203–210.
- Koziol, H. (2012). *Basic questions of Tort law from a germanic perspective*. Wien: Jan Sramek Verlag.
- Lahe, J., & Kull, I. (2009). Estonia. In *European Tort law*, 2008.
- Lahe, J. (2011). Punitive damages in Estonian Tort law? *Journal of European Tort Law*, 2(3), 280–293.
- Law of Obligations Act, passed 26.09.2001, entry into force 01.07.2002. Available in English at <https://www.riigiteataja.ee/en/eli/526082015004/consolide>).
- Mäsch, G. (2015). Schuldrecht BT: Ersatz sog. Schockschäden. *JuS*, 747–750.
- H. Oetker (2012). Münchener Kommentar zum BGB. 6. Auflage. § 253, Rn 28. Available at: <https://beck-online.beck.de/>).
- Principles of European Tort law. European Group on Tort Law. 2005. Available at <http://civil.udg.edu/tort/Principles>).
- Rogers, W. V. H. (2001). Comparative report of a project carried out by the European centre for tort and insurance law. In W. V. H. Rogers (Ed.), *Damages for non-pecuniary loss in a comparative perspective. Tort and insurance law*, Vol. 2). Wien: Springer-Verlag.
- Rogers, W. V. H. (2005). *Principles of European tort law: text and commentary*. Wien, New York: Springer-Verlag.
- Rijnhout, R., & Emaus, J. M. (2014). Damages in wrongful death cases in the light of European human rights law: towards a rights-based approach to the law of damages. *Utrecht Law Review*, 10, 98–99.
- Spindler, G. Beck'scher Online-Kommentar BGB, Bamberger/Roth, 37 Edition, § 253.
- The Fatal Accidents Act, 22 July 1976, available at <http://www.legislation.gov.uk/ukpga/1976/30/Section/1A>).
- M. Vutt (2012a). Lähedase isiku surma põhjustamisega tekitatud mittevahalise kahju hüvitamine. Supreme Court, Legal Information Department, Tartu, available in Estonian at: <http://www.riigikohus.ee>). Summary in English available at http://www.riigikohus.ee/vfs/1608/Abstract_Compensation%20for%20non-patrimonial%20damage_en_toim.pdf).
- Varul, P. (2000). Legal policy decisions and choices in the creation of new private law in Estonia. *Juridica International*, 1, 104–118.
- Vutt, M. (2012b). Lähedase isiku surma põhjustamisega tekitatud mittevahalise kahju hüvitamise kohtupraktika (Judicial practice on compensation for non-patrimonial damage due to causing the death of a close person). *Summary in English Juridica*, 6, 462–471.
- S. Wuensch (2009). Non-pecuniary damages in the age of personality rights: a search for a fair and reasonable framework comparing the German and Italian legal system. Available at SSRN: <http://ssrn.com/abstract=2368191>).
- Zinnen, H., et al. (2003). Hoge Raad, Judgment of 22 February 2002 – on compensation for psychiatric injury and emotional distress suffered by close relatives. *European Review of Private Law*, 11(3), 412–476.
- Zimmermann, R. (2011). Comparative report. In B. Winiger, H. Koziol, B. A. Koch, & R. Zimmermann (Eds.), *Digest of European Tort law. Volume 2: essential cases on damage*. Berlin: De Gruyter&Co.