

# THE COMPENSATION OF PECUNIARY AND NON-PECUNIARY DAMAGE UNDER TURKISH LAW THAT RESULT DUE TO VIOLATION OF BODILY INTEGRITY

*TÜRK HUKUKUNDA BEDENSEL BÜTÜNLÜĞÜNÜN İHLALİNDEN DOĞAN  
MADDİ VE MANEVİ ZARARLARIN TAZMİNİ*

Araştırma Makalesi

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## ABSTRACT

The violation of the right of bodily integrity constitutes the violation of personality rights as well. In case of violation of bodily integrity, tortfeasor must compensate the damages of the injured person's pecuniary and non-pecuniary compensation.

Pecuniary compensation can be claimed by the injured person himself/herself or by his/her heirs. This is because pecuniary damage endangers the succession rights and decrease the value of the heritage.

Non-pecuniary compensation can be claimed by the person whose personality rights or bodily integrity is violated in principle in Turkish Legal System. But in cases of serious personal injury or death, by the legal dependants of the injured/dead person due to the Turkish Code of Obligation Article 56. In the latter case, heirs do not enjoy right to claim non-pecuniary compensation on behalf of the injured person unless the injured person did not claim the non-pecuniary compensation when he/she was alive depending on Turkish Civil Code Article 25.

**Keywords** The violation of bodily integrity, pecuniary damage, non-pecuniary damage, personal injury, compensation

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**ÖZ**

Bedensel bütünlük ihlali, kişinin temel kişilik değerinin dolayısıyla kişilik hakkının ihlalidir. Bedensel bütünlük ihlalinde fail, zarar görenin maddi ve manevini zararını gidermekle yükümlü olacaktır.

Maddi zarar isteminde zarar gören ya da mirasçıları bulunabilecektir. Maddi zararı mirasçıların isteyebilmesinin nedeni, manevi zarardan farklı olarak onun mirasbırakanın (zarar görenin) terekesinde malvarlığı içinde ekonomik bir değerinin olmasıdır.

Bedensel bütünlük ihlalinde manevi zararın tazminini kural olarak Türk hukuku bakımından sadece zarar görenin kendisi isteyebilir. Ancak ölüm ya da ağır bedensel bütünlük ihlalinde, zarar görenin/ölenin yakınları da TBK madde 56 gereğince kendileri için manevi zarar isteminde bulunabilirler. Bunun dışında zarar görenin sağlığında manevi tazminat isteminde bulunması halinde TMK madde 25' e göre mirasçıları bu zararın tazminini de zarar verenden isteyebilirler.

**Anahtar Kelimeler** Bedensel bütünlüğünün ihlali, maddi zarar, manevi zarar, kişisel zarar, tazminat

**EXTENDED ABSTRACT**

The subject of the study is the compensation of damages in cases of personal injury and death which has been regulated under Articles 53, 54, 55 and 56 of the Turkish Code of Obligations No. 6098. Violation of personal injury (bodily integrity) or death may result either from a tortious act or from breach of contract. Tortfeasor must compensate the damages of the injured person's pecuniary and non-pecuniary compensation, since the violation of the right of bodily integrity constitutes the violation of personality rights as well.

Damage is, mainly, divided into two: pecuniary and non-pecuniary damage. Regarding subject of the article, the difference between pecuniary and non-pecuniary damage is essential. That is why, the other distinctions of damage are not covered. One of these distinctions is actual damage, loss of profit and normative damage. Actual damage refers to the decrease in the estate; loss of profit refers to the deprivation of future earnings; normative damage refers to the loss of opportunity to use a property or the deprivation of opportunity to take holiday irrespective of the existence of a decrease in the asset. According to the normative damage theory, a person who is deprived of an opportunity, who cannot make a replacement of the damaged property due to his/her economic incapacity, may seek for compensation<sup>1</sup>. Another distinction is made between positive and negative damages, in relation with the breach of contract. Positive damage refers to damage that arises due to the non-fulfilment of the contractual obligation, whereas, negative damage refers to damage that arise if the contract had not been formed<sup>2</sup>.

Pecuniary damage means the decrease in the assets, as a result of the tortious act or the non-increase of the expected values of asset. Non-pecuniary damage is related with the damage that occurs as a result of the pain suffered and the decrease in the desire to live and energy of life. The definition and function of the non-pecuniary damage is controversial in the Turkish law literature. In case of the occurrence of non-pecuniary

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<sup>1</sup> Kemal Oğuzman ve Turgut Öz, *Borçlar Hukuku Genel Hükümler Cilt 2* (14. Basım, Vedat Kitapçılık, 2011) 41.

<sup>2</sup> Oğuzman/Öz (n 1) 41.

damage because of the violation of personal injury (bodily integrity) (Article 56 of Turkish Code of Obligations) or violation of personality rights (Article 58 of Turkish Code of Obligations), non-pecuniary compensation can be claimed. Bodily integrity covers both the physical and mental integrity.

Although there are discussions under Turkish Law as to the definition of non-pecuniary damage and its function, an amalgamated opinion is dominant both in theory and practice. By examining the decisions of Turkish Supreme Court of Appeals regarding the non-pecuniary damages, the situation becomes clearer. In this respect, the idea that the non-pecuniary compensation has a punitive function is not supported in practice. Even such function of is accepted, the main aim of non-pecuniary compensation being the violation of personality rights, is different from the punitive damage that exist under English Law. Under Turkish liability law, compensation does not have a punitive aim. That is why, the concept of punitive or exemplary damages are inexistent as a rule, in Turkish Law. Although the primary aim of compensation law is to compensate the damage, in some cases under English Law, the judge may award compensation with punitive aims. The aim of punitive damages is not to compensate the damage, but, as a private law sanction, to punish the tortfeasor.

Pecuniary compensation can be claimed by the injured person himself/herself or by his/her heirs. This is because pecuniary damage endangers the succession rights and decrease the value of the heritage. Non-pecuniary compensation can be claimed by the person whose personality rights or bodily integrity is violated in principle in Turkish Legal System. But in cases of serious personal injury or death, by the legal dependants of the injured/dead person due to the Turkish Code of Obligation Article 56. In the latter case, heirs do not enjoy right to claim non-pecuniary compensation on behalf of the injured person unless the injured person did not claim the non-pecuniary compensation when he/she was alive depending on Turkish Civil Code Article 25. The Articles 23, 24, 25 and 26 of the Turkish Civil Code sets out personality rights and regulates their protection regime. Art. 25 of the Turkish Civil Code mentions the pecuniary and non-pecuniary damages claim in case personality rights have been violated.

As a result, the aim of compensation is to resolve the effect of the harmful result, if possible. Compensation shall not be used as a tool for enrichment. The compensation shall not serve as a way of enrichment and shall not lead to the economic ruin of the tortfeasor.

## **INTRODUCTION**

The subject of study is the compensation of damages in cases of bodily integrity and death which has been regulated under Articles 53, 54, 55 and 56 of the Turkish Code of Obligations No. 6098. Violation of bodily integrity or death may result either from a tortious act or from breach of contract. The obligations arising from tort are regulated under Article 49 etc. of the Turkish Code of Obligations. Under Art. 49, a general rule is provided and under Art. 114/2, provisions governing the breach of contract are applicable, by analogy, to obligations resulting from tort. The provisions regulating the compensation of damages in

case of the violation of bodily integrity and death are applicable both in the breach of contract and tort law cases.

Physical injuries and damages that occur in the case of death, belongs to personal damages. Such damages may stem from labour law, administrative law, or tort law due to the violation of a private law contract. Irrespective of its source, the occurred damage is the same. However, due to the differences between the principles and rules governing the procedure, the amount of compensation that is awarded may vary. Because of this reason, in Turkish Law literature, the idea of the creation of expert court for the resolution of disputes of damages irrespective of its legal ground, is currently discussed. However, this issue remains at discussion. In this study, firstly, general information will be provided about the concept of damage depending on personal injuries or death under Turkish Law of obligations. Afterwards, the compensation of pecuniary and non-pecuniary damages in case of the violation of bodily integrity and death will be covered.

## I. THE CONCEPT OF DAMAGE UNDER TURKISH LAW

Although there are several other distinctions, mainly, damage is divided into two: pecuniary and non-pecuniary damage. Pecuniary damage means the decrease in the assets of the injured person as a result of the tortious act or the non-increase of the expected values of asset<sup>3</sup>. Non-pecuniary damage is related with the damage that occurs as a result of the pain suffered and the decrease in the desire to live and energy of life.<sup>4</sup> The definition and function of the non-pecuniary damage is controversial in the Turkish law literature.<sup>5</sup> In case of the

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<sup>3</sup> Heinrich Honsell, *Schweizerisches Haftpflichtrecht* (Auflage 4, Zürich-Basel, 2005) 9.

<sup>4</sup> Oğuzman(Öz (n 1) 40; İrem Çakırca, “6098 Sayılı Türk Borçlar Kanunu’na Göre Ağır Bedensel Zararlarda Yakınlarının Manevi Tazminat Talebi” (2013) (Prof. Dr. Aydın Zevkliler Özel Sayı) *Yaşar Üniversitesi Hukuk Fakültesi Dergisi* 794.

<sup>5</sup> In addition, there are three different opinions under Turkish law regarding the non-pecuniary compensation. The subjective theory, objective theory and the amalgamated theory. According to the subjective theory, non-pecuniary damage means the decrease in the welfare (Heinz Rey, *Ausservedragliches Haftpflichtrecht*, (Auflage 3, Zurich-Basel, 2003) 105), according to the objective theory, objective decrease in the personality (Fikret Eren, *Borçlar Hukuku Genel Hükümler*, (18. Basım, Yetkin Yayınları, 2015) 532.), amalgamated theory combines both of these theories and thus, defines non-pecuniary damage as the awareness of the negative situation that occurs objectively in mental integrity by the injured party (Gökhan Antalya, *Borçlar Hukuku Genel Hükümler*, (1. Basım, Beta Yayınevi, 2012) 490). Based on these definitions, opinions as to the function of the non-pecuniary compensation also differentiate. Equalization, satisfaction, prevention and compensation functions. According to the satisfaction function theory, non-pecuniary damage aims to provide satisfaction of the injured person to a certain extent (Karl Oftinger ve Emil W. Stark, *Schweizerisches Haftpflichtrecht* (Band I, 1995) 419 f.); According to the equalization function, the aim of non-pecuniary compensation is to reduce the damage suffered by the injured party (Rona Serozan, “Manevi

occurrence of non-pecuniary damage because of the violation of bodily integrity (Article 56 of Turkish Code of Obligations)<sup>6</sup> or violation of personality rights (Article 58 of Turkish Code of Obligations)<sup>7</sup>, non-pecuniary compensation can be claimed. Bodily integrity covers both the physical and mental integrity.<sup>8</sup>

## II. The Possessors of the Right to Claim Pecuniary and Non-Pecuniary Compensation

The subject of the pecuniary compensation lawsuit is the compensation of pecuniary damages, whereas, the subject of the non-pecuniary compensation lawsuit is the compensation of non-pecuniary damage.

Pecuniary compensation can be claimed by the injured person himself/herself or by his/her heirs. This is because pecuniary damage endangers the succession rights and decrease the value of the heritage.

Non-pecuniary compensation can be claimed by the person whose personality rights or bodily integrity is violated or in cases of serious personal injury or death, by the legal dependants of the injured/dead person. In the latter case, heirs do not enjoy right to claim non-pecuniary compensation on behalf of the injured person. What law regulates is the non-pecuniary compensation claim of the legal dependants for the pain and distress they suffer. This is by nature, the compensation of a reflective damage<sup>9</sup> and thus, for such damage to be

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Tazminat İstemine Değişik Bir Yaklaşım”, Prof. Dr. Haluk Tandoğan'ın Hatırasına Armağan (Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1990) 83- 86; Antalya (n 5) 488); According to the compensatory function, damage is compensated either in kind or in cash (Hülya Atlan, “Beden Bütünlüğü İhlalinde Manevi Tazminat Miktarının Belirlenmesi” (2016) 4 *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 2663 ; Arzu Genç Arıdemir, *Sözleşmeye Aykırılıktan Doğan Manevi Tazminat* (On İki Levha Yayınları, 2008) 7-8.); Eren (n 5) 750 f.; Çakırca (n 4) 2013, p. 253); About the preventive function of non-pecuniary compensation (Yaşar Karayalçın, “Türk Hukukunda Şeref ve Haysiyetin Korunması”, (1962) 19(1) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 262 ).

<sup>6</sup> Art 56 of Turkish Code of Obligations “*In cases of damages to personal integrity, the judge may decide an amount of money as non-pecuniary damage, to be paid to injured party by considering circumstances of situation. In case of serious personal injury or death, the judge may award a reasonable compensation to be paid as non-pecuniary compensation to the legal dependants of the injured or dead party*”.

<sup>7</sup> Art 58 of Turkish Code of Obligations “*Any individual whose personality right is violated may request an amount of money as non-pecuniary damage. The judge may decide another compensation form instead of the payment of the damage or may attach both; he may particularly decide to condemn the attack and that the decision is published*”.

<sup>8</sup> Çakırca (n 4) 796.

<sup>9</sup> Under Turkish Law, one of the distinctions regarding damage is direct damage, indirect damage, and reflective damage. Direct damage refers to damage that occur in direct relation with the tortious act, without

compensated, in addition to the causal link between the tortious act and the damage, there needs to be unlawfulness link as well.<sup>10</sup> Here, the fact that whether the reflective damage originates from the violation of an absolute or relative right is of importance.

The Articles 23, 24, 25 and 26 of the Turkish Civil Code sets out personality rights and regulates their protection regime. Art. 25 of the Turkish Civil Code mentions the pecuniary and non-pecuniary damages claim in case personality rights have been violated.<sup>11</sup>

Art. 25 of the Turkish Civil Code also regulates that the right to claim can be transferred to a third person in case the non-pecuniary compensation claim is accepted by the liable person. In principle, legal heirs are deprived of the right to claim non-pecuniary compensation on behalf of the deceased person. However, under Art. 25 of the Turkish Civil Code, in case the deceased person has put forward non-pecuniary compensation claim during his/her life time, the claim can be made by his/her legal heirs as well.<sup>12</sup> What is important here is the initiation of the claim by the deceased person during his/her lifetime. On the other hand, their legal heirs are not obliged to put forward this claim. If it can be proven by the legal heirs that the deceased person has put forward his/her claim during his/her life time, they can put forward the non-pecuniary compensation claim of the deceased person.

The reason why the non-pecuniary compensation claim of the deceased person cannot be put forward by the legal heirs is because non-pecuniary damage occurs in relation with personality rights and by its nature, such a right is closely linked with personality. Since the

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intervention of any other cause. Indirect damage refers to the damages that occur due to a reason added to the direct damage. The causal link between the tortious act and damage can be easily determined; whereas, in the case of indirect damage, the existence of such a causal link needs to be examined. Reflective damage refers to damage of a third person in addition to the injured person who has suffered damaged as a result of the tortious act. The compensation of third part damages is exceptional (Oğuzman/Öz (n 1) 43; Honsell (n 3) 11, 12). In a traffic accident, the medical treatment expenses of the injured person constitute direct damage, the damage resulting from malpractice during the treatment constitutes indirect damage, the damage suffered by the dependants due to not being able to work in order to take care of the injured person constitutes reflective damage. In this case, the injured person can only claim the direct damages from the tortfeasor, indirect damage can be claimed from the doctor. The reflective damage, in this case, cannot be claimed from neither of them.

<sup>10</sup> Honsell (n 3) 12.

<sup>11</sup> Under Swiss Law, Art 27 and 28 ZGB regulates the protection regime for personality rights. The claim for non-pecuniary compensation in personality right violations is covered under Art. 28a/III ZGB. Also, among the provisions for tort under Swiss Code of Obligations, compensation claims for non-pecuniary damage in case of personality right violations (Art 49 OR) and in case of bodily integrity violations (Art 47 OR) are regulated. Art 49 OR is a general provision and Art 47 constitutes a special provision compared to Art 49.

<sup>12</sup> Art 35 of Turkish Civil Code “... *The claim for non-compensation may be transferred to a third person only if the claim is accepted by the other party and the claim cannot be put forward by the heirs only if the claim has been initiated by the deceased...*”

compensation claim for non-pecuniary damage that has not been put forward is not included in the heritage, it will not affect the hereditary share.<sup>13</sup>

### III. The Principles and the Method of Compensation

The aim of compensation is to resolve the effect of the harmful result, if possible. Compensation shall not be used as a tool for enrichment. The compensation shall not serve as a way of enrichment and shall not lead to the economic ruin of the tortfeasor.

As mentioned, the compensation has two types: pecuniary and non-pecuniary compensation. The subject of the pecuniary compensation lawsuit is the compensation of pecuniary damages; whereas, the subject of the non-pecuniary compensation lawsuit is the compensation of non-pecuniary damage. Pecuniary compensation can be either in kind or in cash. Compensation in cash means compensation by money to reinstate the assets. In Turkish law practice, compensation in cash is common. Non-pecuniary compensation can be either in cash, by pardon of the tortfeasor or by publishing the text of correction.<sup>14</sup>

Under Turkish Law, compensation is independent from the damage. Only the violation of a legally protected right does not suffice.<sup>15</sup> Damage must have occurred due to the violation of such right. The violation of bodily integrity itself does not lead to damage. The results that occur in relation to the violation of bodily integrity constitute damages. Damage is

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<sup>13</sup> Although the current situation has been explained under Turkish Law, *EREN* argues that the claim for non-pecuniary compensation constitutes a right to claim, belonging to assets. According to him what is closely linked is the value that has been violated; considering non-pecuniary compensation claim as closely related with personality is only in accordance with the subjective theory and the compensation function. He also states that the legal provision regarding the transfer of the claim to a third person only if the claim has been accepted by the other party in inconsistent with the aim of non-pecuniary compensation. (Eren (n 5) 789 f.). Similarly, *SEROZAN* also puts forward that the non-pecuniary compensation claim belongs to estate and at our time, it cannot be considered as closely linked with personality. He mentions that in practice, non-pecuniary compensation is regarded as complementary to pecuniary compensation and even the idea that lies beneath normative damage, which is seen as extension of pecuniary damage, is the compensation of non-pecuniary damage (Rona Serozan, “Kişiyeye Sıkı Biçimde Bağlı Manevi Hakların Geçebilirliği”, *Prof. Dr. Özer Seliçi’ye Armağan* (Seçkin Yayıncılık, 2006) 559 f.)

<sup>14</sup> However, non-pecuniary compensation in case of the termination of engagement, can only be claimed in cash. Art 121 of Turkish Civil Code: “*The party whose personality right has been violated due to the termination of engagement can only claim non-pecuniary compensation in cash from the faulty party*”.

<sup>15</sup> Art 70 Law on Intellectual Property: “*The person whose non-monetary rights have been infringed may file lawsuit to claim non-pecuniary compensation. The judge can, instead of or in addition to the payment of money, award other types of non-pecuniary compensation.*” When a lawsuit for the compensation of non-pecuniary damage is filed under this Article, in the case of infringement of non-monetary rights, the existence of damage is deemed to exist (İlhami Güneş, *Uygulamada Fikir ve Sanat Eserleri Hukuku* (2. Basım, Seçkin, 2015) 136)

fundamental as it lies in the centre of compensation law. Also, under Turkish law, compensation does not have a punitive aim.

#### **IV. The Damages in the Case of Violation of Bodily Integrity Under Turkish Law**

##### **A. In General**

When the conditions are met, compensating the damage through transferring it to the tortfeasor lies at the heart of liability law. The tortfeasor is obliged to compensate the damage that he/she has caused by his/her tortious act. It should be noted that the fault of the tortfeasor is required and only in exceptional cases laid down in the law, liability without fault is available. What is important is the existence of causal link between the tortious act that violates the legally protected value and the occurred damage.

Art. 54 of the Turkish Code of Obligations under the title “death and personal injuries”, regulates the items of pecuniary damage in case of death, Art. 55 regulates the determination of the non-pecuniary compensation. Art. 56 regulates the non-pecuniary damage claims in case of death and personal injury.

In that sense, the importance of damages resulting from the violation of personality rights or bodily integrity is undisputable. Such damages, due to their nature, are not comparable with material rights. The compensation of personal damages is regulated under Articles 53, 54 and 55. Also, among the lawsuits that can be initiated in case of the violation of personality rights, the lawsuits for pecuniary and non-pecuniary damage are regulated. Art. 58 regulates the lawsuit for compensation of the non-pecuniary damage in case the personality rights are violated.<sup>16</sup> Since the subject of this paper is restricted with the damages claim for personal injuries, the non-pecuniary damage claim in case of the violation of the personality rights will not be covered.

Personal injuries include both the pecuniary and non-pecuniary damages that occur as a result of the violation of bodily integrity other than death. Pecuniary and non-pecuniary damage may occur in the case of death as well. In that case, instead of the concept of personal

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<sup>16</sup> Art 49 OR (Injury to personality rights): “Any person whose personality rights are unlawfully infringed is entitled to sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made.”



injuries, more comprehensive concept of “personal damages” is preferred.<sup>17</sup> In the case of death, the life of a human being ends due to an external factor; whereas, in violation of bodily integrity, physical and mental health is damaged. Personal injury occurs also when a permanent prosthesis is damaged, since it is also covered by personality rights.<sup>18</sup>

## **B. Damages in Case of the Violation of Bodily Integrity**

### **1. The Violation of Bodily Integrity**

The violation of personal integrity covers the deterioration of both physical integrity and mental health as both form the bodily integrity. The material and non-material deficits that occur in the physical integrity or mental health constitute violations of bodily integrity.<sup>19</sup> The physical integrity violations may be visible from outside as they may also be directed at inner organs.<sup>20</sup> The deterioration of the mental health does not mean an ordinary, short distress. In case of a change in the intelligence, emotional status or will power, the mental health will be deemed to have been harmed. In such a case, the person cannot continue his/her life as it was before, experiences an emotional change and is deprived of living abilities that affect his/her will.<sup>21</sup>

Damage is composed of both material and immoral deficits when bodily integrity is violated.<sup>22</sup> If the conditions are satisfied, the injured person may ask for the items of pecuniary damage listed under Art. 54 and the non-pecuniary compensation under Art. 56. Also, the injured person may claim other pecuniary damages. Art. 54 and 56 are special provisions and they are applied in cases of both contractual and non-contractual liability.

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<sup>17</sup> Fikret Eren, “Türk Borçlar Hukukunda Kişiyeye İlişkin Zarar (Ölüm ve Bedensel Zarar)”, *Türkiye Barolar Birliği - Yeni Gelişmeler Işığında Bedensel Zararların Tazmini Uluslararası Kongre*, (TBB Yayını, 2016) 58.

<sup>18</sup> Oğuzman/Öz (n 1) 93.

<sup>19</sup> Honsell (n 3) 93 ff.; Oğuzman/Öz (n 1) 92 f.; Eren (n 5) 744.

<sup>20</sup> Oftinger/Stark (n 5) 275.

<sup>21</sup> Eren (n 17) 61.

<sup>22</sup> Eren (n 5) 745.

## 2. Pecuniary Damages in Case of the Violation of Bodily Integrity

According to Art. 54 of Turkish Code of Obligations, pecuniary damages that occur in case bodily integrity violations are medical treatment expenses, damages arising from the loss of future earnings and the loss of future earning capacity. The injured person may claim other items of pecuniary damage as well.

### a. Medical Treatment Expenses

Medical treatment expenses are the first item of damage that occur due to the violation of bodily integrity. Medical treatment expenses include all expenses made at the hospital for medical treatment and if necessary in the future, additional treatment expenses such as physiotherapy. Preferring a private hospital does not affect the right of the injured person to claim compensation.<sup>23</sup> In case a private hospital is preferred, all medical treatment expenses need to be covered.<sup>24</sup> On the other hand, the expenses need to be in accordance with the socio-economic status of the injured person. The decisive question that shall be asked is, had the injured person paid all expenses by himself/herself, she/he would have chosen a state or private hospital.<sup>25</sup> Unnecessary medical expenses cannot be recovered, even if they had been realized.

Medical treatment expenses include drug expenses or physiotherapy expenses if necessary. Not only the treatments with therapeutic aim but also compulsory preventive treatment expenses can be recovered as well.<sup>26</sup> Medical treatment expenses also cover post-operation treatment at home. Expenses for ambulance, travel and accommodation can be

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<sup>23</sup> Tekinay / Akman / Burcuoğlu et al. (n 5) 605 f.; “... *the plaintiff has paid the insured’s medical treatment expenses at the private hospital and thus the institution has unjustly enriched since it has avoided such expenses.*”(Decision of the Turkish Supreme Court of Appeals, Y.21.HD, 05.06.2007 T., 2006/10937E., 2007/9105 K. [www.kazanci.com.tr](http://www.kazanci.com.tr), Date of access: 18.01.2017); “... *The information in the case file demonstrates that the deceased person has received medical treatment at a private hospital with his own will. The right to be treated under best conditions is a natural right. The deceased person cannot be restricted to receive treatment at state hospitals*” (Y.13.HD, 06.05.2002 T., 2002/3343 E., 2002/ 5167 K. [www.kazanci.com.tr](http://www.kazanci.com.tr), Date of access: 18.01.2017).

<sup>24</sup> Tekinay / Akman / Burcuoğlu et al. (n 5) 695 “... *The information in the case file demonstrates that the plaintiff has received medical treatment both at a state and private hospital. The expert doctor has calculated the medical treatment expense by considering the official prices applied at state hospitals and the court has decided in accordance with this report. However, the compensation must be determined by taking into account both the written expenses and the private hospital invoice. For this reason, the judgement of the court of first instance need to be reversed.*” (The Decision of the Turkish Supreme Court of Appeals, Y.4. HD, 24.10.2005T., 2004/15003 E., 2005/11410 K., [www.kazanci.com.tr](http://www.kazanci.com.tr), Date of access: 18.01.2017).

<sup>25</sup> Eren (n 5) 746.

<sup>26</sup> Eren (n 5) 746.

recovered.<sup>27</sup> At-home treatment expenses are not fully covered in practice; only partial cover is possible.<sup>28</sup> Here, what is important is the emergence of necessity to care for the injured person; it is not necessary that at-home treatment is done by a caretaker.<sup>29</sup>

If the violation of bodily integrity has stemmed from breach of contract for the provision of medical services, which constitutes a consumer contract, the dispute shall be resolved under the Law on the Protection of Consumers, No. 6502.

The medical treatment expenses can be proven by any form of proof. If it cannot be proven with certainty, the judge may resort to his/her discretionary power. In such a case, “*the judge shall determine the amount of compensation in accordance with equity by considering the natural flow of life and the precautions taken by the injured person*” (Art. 50/2 Turkish Code of Obligations). The scope of the compensation and the mode of payment is decided by considering the necessities of the situation and especially, the degree of fault (Art. 51/1 Turkish Code of Obligations).

Art. 50 is guiding and at the same time, imposes a duty on the judge who is obliged to determine the actual amount of compensation. The plaintiff should be given the opportunity to prove the expenses (travel etc.) other than hospital expenses and in case the Plaintiff fails to prove these expenses; regarding possible expenses such as travel, companion etc. all treatment document should be ordered and period in accordance with the report prepared by an expert doctor considering the degree of the injury and recovery, in the light of Art. 50 of the Turkish Code of Obligations, the judgement needs to be made by considering all circumstances of the case.

For medical treatment expenses to be compensated, realization of such expenses is not necessary; it suffices if it is understood that they will be necessary in the future.<sup>30</sup> It is

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<sup>27</sup> Honsell (n 3) 94 f.; Oftinger/Stark (n 5) 282 ; Decisions of the Turkish Supreme Court of Appeals, Y17.HD, 06.11.2014 T., 2014/15291E., 2014/15197 K. ; Y. 4.HD, 19.01.2016 T., 2015/14870 E., 2016/601 K.; Y.4.HD, 05.10.2015 E., 2015/10733 K. ([www.kazanci.com.tr](http://www.kazanci.com.tr), Date of access: 18.01.2017); Mine Kaya, “Yargı Kararları Yönünden Bedensel Zararların Değerlendirilmesi”, *Türkiye Barolar Birliği - Yeni Gelişmeler Işığında Bedensel Zararların Tazmini Uluslararası Kongre*, (TBB Yayını, 2016) 156.

<sup>28</sup> “... *The amount of expense for the caretaker which is calculated in the expert’s report needs to be reduced by considering the in-house solidarity possibly benefited by the injured person. Disregarding this by the court of first instance constitutes a reason for reversal of the judgment*” (Decision of the Turkish Supreme Court of Appeals, Y21.HD, 26.12.2016 T., 2016/5097 E., 2016/15513 K. [www.kazanci.com.tr](http://www.kazanci.com.tr))

<sup>29</sup> Antalya (n 5) 460.

<sup>30</sup> Honsell (n 3) 95 f.; Tekinay / Akman / Burcuoğlu et al. (n 5) 603.

important to note that expenses need to be in accordance with the circumstances of the case. Unnecessary expenses cannot be compensated even if they had been realized.<sup>31</sup>

### **b. Loss of Future Earnings**

The loss of working power means because of bodily integrity violation, for a certain period or for permanently not being able to work or due to the changes in the physical or mental abilities the decrease in the working ability for a certain period or for permanently.<sup>32</sup> Whether the decrease or total loss of working power is temporary or permanent affects the amount of compensation.

In the case of temporary loss of the working power, damages occur in the form of loss of earnings until the time of recovery. However, in the case of permanent loss or decrease, the amount of damages is imputed and thus, requires a separate calculation.

When determining the compensation in the case of permanent loss of working power fully or partially, the earnings of the injured person, the ratio of loss and the remaining working time are considered. The income of the tortfeasor needs to be considered as well.

The earning that should be considered is the income at the time of the tortious act. Also, the increase of this earning in the future is also considered. When the earnings of the injured person are calculated, all earnings (earnings at the time of the harmful act + increase ratio+ additional earnings such as additional working time, premiums, public housing etc.) shall be considered. All earnings include salary, premiums, additional opportunities (public housing, providing car etc.), increase premiums etc.<sup>33</sup> If the injured person is minor, calculation is done in accordance with the possible future business line he/she would have worked. When determining the possible future business line, the professions of his/her parents, their income status, intellectual capacities as well as the conditions under which he/she was raised, the status of his/her siblings, if any, are taken into consideration. The physical status of the child, abilities and the level of intelligence are also important.<sup>34</sup>

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<sup>31</sup> Oğuzman / Öz (n 1) 93.

<sup>32</sup> Tekinay / Akman / Burcuoğlu et al. (n 5) 604 f.; Eren (n 17) 62.

<sup>33</sup> Oğuzman / Öz (n 1) 95 f.; Eren (n 17) 62.

<sup>34</sup> Tekinay / Akman / Burcuoğlu et al. (n 5) 605 f.; Oğuzman / Öz (n 1) 96; Eren (n 17) 64; Oftinger / Stark (n 5) 290.

The life expectancy and the average working time of the injured person are also taken into account.

Due to the incurrance of additional expenses, there may be decrease in the earnings. For example; in case a housewife who contributes to the family budget by taking of her child and doing domestic work loses her ability to work and since she becomes incapable of conducting these activities, someone is hired to work at home, the payments made to this person can be claimed as compensation.<sup>35</sup>

Regarding the ratio of the loss of working power, the profession of the injured person bears importance as well. The impact of the lost organ will vary depending on the type of profession. For this reason, the loss of working power is determined in accordance with the medical data.<sup>36</sup>

Another factor that should be considered for determining the amount of compensation is the possibility of the injured person to find a job in another business line. If the injured person can compensate the loss of future earnings, this should be considered.<sup>37</sup>

If there is high possibility to recover and the suffering required is not extraordinary, the medical treatment that would help to decrease the loss of work ability but for which the injured person had not consented, shall be considered.<sup>38</sup>

*“Annual loss of earning is determined by multiplying the annual earning of the injured person with the working power loss ratio. Multiplying this amount with the duration of the working power loss gives the future loss of earning that the full or partial loss of the working power would cause.”<sup>39</sup>*

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<sup>35</sup> Oğuzman / Öz (n 1) 95; In its decision 15. HD, 20.10.1975T., 1974/3787 E., 1975/4103 K. Turkish Supreme Court of Appeals, ruled that a housewife “... who, during the normal course of time, was conducting domestic work at home but due to the loss in her working capacity, had to perform more is entitled to compensation...” (Fatma T. Karakoç, "Bedensel Bütünlüğü İhlâl Edilen Ev Kadınının Çalışma Gücünün Kaybi Nedeniyle Tazmin Talebi", (2016) 55(2) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 152 ).

<sup>36</sup> Eren (n 17) 64; Oftinger / Stark (n 5) 288.

<sup>37</sup> Oğuzman / Öz (n 1) 96.

<sup>38</sup> Oğuzman / Öz (n 1) 96 F.; Eren (n 17) 65.

<sup>39</sup> Oğuzman / Öz (n 1) 95.

### c. Loss of Future Earning Capacity

Although the violation of personal integrity does not affect the ability to work, the person may have become disadvantaged compared to his/her colleagues or may have to change his/her workplace or could suffer difficulties in changing job or find a new job. The loss of future earning capacity occurs in such cases.<sup>40</sup> Damage arising from the loss of future earning capacity must be evaluated separately<sup>41</sup> and refers to the difference between the possible earning had the tortious act not occurred and the earning due to the physical situation after the tortious act.<sup>42</sup>

As is it in the case of a pianist whose fingers become dysfunctional, physical changes may affect the economic future due to particularities of the profession of the injured person.

The damage mentioned here is not the damage that occurs due to the loss of future earnings although the partially or fully loss of future earning capacity results in the loss of possible future earnings.<sup>43</sup> The loss of future earning capacity is listed as a separate item of damages under Art. 54/4 Turkish Code of Obligations.

### d. Other Expenses

The expenses occur in the case of compulsory moving to a flat with an elevator or change of flat since living in the previous apartment has become impossible due to the damage occurred because of the tortious act are examples for other expenses.<sup>44</sup>

Other expenses include attorneys fee if it has become necessary to file a lawsuit.<sup>45</sup>

### e. General Rules Regarding the Determination of Compensation

The plaintiff has the burden of proof to prove the existence and its amount (Art. 50/1 Turkish Code of Obligations). If the amount of compensation cannot be proven with certainty, *“the judge may determine the amount of compensation in accordance with equity by*

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<sup>40</sup> Tekinay / Akman / Burcuoğlu Et Al. (n 5) 612 F; Eren (n 5) 750.

<sup>41</sup> Eren (n 17) 66.

<sup>42</sup> Tekinay / Akman / Burcuoğlu Et Al. (n 5) 615 F; Eren (n 5) 66.

<sup>43</sup> Oğuzman / Öz (n 1) 98.

<sup>44</sup> Oftinger/Stark (n 5) 282.

<sup>45</sup> Eren (n 17) 62.

*considering the natural flow of life and the precautions taken by the injured person*” (Art. 50/2 Turkish Code of Obligations). This provision is important especially for additional medical expenses that cannot be proven and in cases of the permanent loss of the work ability.

The judge determines the amount of compensation by considering the circumstances of the case and the degree of the tortfeasor’s fault. The fault of the injured in the occurrence or increase of the damage will also be considered as well as the consent of the injured person to the damage. In any case, compensation shall not serve as a tool for enrichment of the injured person as also shall not ruin the tortfeasor economically.

Regarding the personal injuries, the date of the decision is decisive for the determination of the amount of compensation. *“In case the scope of compensation cannot be ascertained fully at the date of the decision, the judge may reserve his power to change the judgement in two years, starting from the date of the decision”* (Art. 75 Turkish Code of Obligations). Such reservation is limited with the amount of compensation that has been claimed. If the plaintiff has reserved his/her rights for surplus, a separate lawsuit can be brought within period of limitation.

A separate lawsuit can be brought for damages that has occurred in the future because of the tortious act; however, such damages must be new. Irrespective of whether the damages are new, the plaintiff has right to initiate a partial claim at the first lawsuit, by reserving his/her rights for surplus. Although partial claim is not possible for definite claim, by their nature, damages in cases of personal injury are mostly indefinite.<sup>46</sup>

### **3. Non-Pecuniary Damages in Case of the Violation of Bodily Integrity**

#### **a. In General**

Non-pecuniary damage refers to the physical pain and distress suffered as a result of the violation of bodily integrity.<sup>47</sup> It is in accordance with the natural flow of life that a person suffers mental pain in addition to the physical pain. That is why, the death or violation of bodily integrity may not be the subject of only pecuniary damage; it may also be the subject of non-pecuniary damage. Although the amount of money paid as non-pecuniary compensation is not enough to relieve the pain suffered, at least it helps the injured person to

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<sup>46</sup> Oğuzman / Öz (n 1) 97.

<sup>47</sup> R Brehm, in: H Hausheer/ H P Walter, Berner Kommentar, Kommentar zum schweizerischen Privatrecht, Das Obligationenrecht, Die Entstehung Durch unerlaubte Handlungen Art 41-61 OR, (2006) 511.

be satisfied to a certain extent. Such a monetary income channels the injured party to a different direction as it helps him/her to ease life.<sup>48</sup> Also, for non-pecuniary damage to be realized, it is not necessary that the decrease in the physical rights or the loss of amenity is felt by the injured person himself/herself. The awareness of the non-pecuniary damage is not required for non-pecuniary compensation.<sup>49</sup>

In relation to the violation of bodily integrity, physical or mental pain is required to claim compensation. Even if the pain occurs for a short period of time, compensation may be awarded; however, for a non-serious pain to be the subject of compensation, it needs to continue for a certain period.<sup>50</sup>

In case of the violation of the bodily integrity, the injured person and in cases of serious violations of bodily integrity, the legal descendants of the injured/dead person may claim non-pecuniary compensation. Such claims of the third parties constitute reflective damage and thus, it cannot be claimed in cases other than serious violation of bodily integrity or death.

In the absence of any reason that resolves unlawfulness, the tortious act that leads to the violation of bodily integrity is considered as unlawful. Such act may stem from a faulty behaviour of the tortfeasor as it may also stem from a liability without fault. Non-pecuniary damage is composed of the pain and mental distress that the injured person has suffered.

Personal injury, above all, constitutes the violation of personality rights and has a non-pecuniary damage aspect. Non-pecuniary damage is regulated from the perspective of violation of personality rights under Art. 58 of Turkish Code of Obligations and Art. 56 of Turkish Civil Code. However, in case of the violation of bodily integrity, Art. 56 of the Turkish Code of Obligations provides a special provision for non-pecuniary damage.

## **b. Determination of Compensation Resulting from the Violation of Bodily Integrity**

### **aa. In General**

To claim non-pecuniary compensation in the case of violation of bodily integrity, the existence of a serious violation is required such as the necessity for a long-term medical treatment at hospital. At the same time, mental distress that has occurred because of a

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<sup>48</sup> Hausheer/ Walter / Brehm (n 47) 511

<sup>49</sup> Eren (n 5) 790.

<sup>50</sup> Hausheer/ Walter / Brehm (n 47) 512; Rey (n 5) 102 f.; Antalya (n 5) 502.



physical pain or the violation of bodily integrity is required.<sup>51</sup> The duration of the treatment, the heaviness of the pain suffered, becoming dependant on other people to continue living, permanent health problems etc. will be considered when awarding compensation.<sup>52</sup>

The issue of the determination of the non-pecuniary compensation is regulated under Art. 57 of Turkish Code of Obligations. Art. 57 states that “*in cases of damages to personal integrity, the judge may decide an amount of money as non-pecuniary damage, to be paid to injured party by considering circumstances of situation. In case of serious personal injury or death, the judge may award a reasonable compensation to be paid as non-pecuniary compensation to the legal dependants of the injured or dead party*”. As seen, two situations are covered in this article: the non-pecuniary compensation claim of the injured person in case of violation of his/her bodily integrity and the non-pecuniary compensation claim of the legal dependants of the injured/dead person in case of serious violations of bodily integrity.

*“The amount of money that will be awarded under Articles 56 of the Turkish Code of Obligations as a non-pecuniary damage by taking into consideration circumstances of the case, needs to be fair and equitable. Non-pecuniary compensation has the function of the realization of mental tranquillity. Non-pecuniary compensation is neither punitive nor aims at the compensation of pecuniary loss. That is why, the function of the compensation determines its borders. The amount that will be awarded needs to be sufficient to bring the effect of the sensation of satisfaction. Since it does not aim at compensating a damage related to estate, it does not constitute a compensation in real sense. The non-pecuniary compensation needs to lead to a sensation of satisfaction in the injured person. This is the main idea that lies beneath the non-pecuniary compensation.”*<sup>53</sup> In addition to the discussions stated above, Turkish Supreme Court of Appeals considers non-pecuniary compensation as a tool for satisfaction.

### **bb. Determination of the Non-Pecuniary Damage of the Injured Person**

There are not general and objective criteria to be used in determining the amount of non-pecuniary damage. The judge will determine the amount by taking into consideration all circumstances of the case through exercising his/her discretionary power as well as

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<sup>51</sup> Honsell (n 3) 111 f.; Hausheer/ Walter / Brehm (n 48) 519.

<sup>52</sup> Oftinger / Stark (n 5) 444.

<sup>53</sup> Decision of the Supreme Court of Appeals, Y3. HD., 20.12.2014 T., 2014/ 17137 E., 2014/20262 K. (Kaya (n 27) 165).

considering the aim of the non-pecuniary compensation. However, socioeconomic situations of the parties are of importance. “...the amount of compensation awarded to the plaintiffs are law when considering the date of the act, the mode of the act and the socioeconomic situations of the parties. The ruling of the court of first instance need to be reversed since a higher amount of compensation should have been awarded.”<sup>54</sup>

The judge will exercise his/her discretionary power when determining the amount of compensation. “The amount of money that will be awarded as a non-pecuniary damage needs to be fair and equitable. Non-pecuniary compensation has the function of the realization of mental tranquillity. Non-pecuniary compensation is neither punitive nor aims at the compensation of pecuniary loss. That is why, the function of the compensation determines its borders. The amount that will be awarded needs to be sufficient to bring the effect of the sensation of satisfaction. In the Decision for Unification of the Decisions by the Supreme Court of Appeals dated 22.06.1966 and no.7/7<sup>55</sup>, special conditions that affect the amount of compensation are mentioned. Since these conditions may vary from case to case, the judge needs to exercise his/her discretionary power when assessing objectively the circumstances of the case at hand. The following factors need to also be considered when determining the amount of non-pecuniary compensation: economic conditions of the country, the socioeconomic situations of the parties, their degree of fault, date of the act etc.”<sup>56</sup>

The situations such as the degree of the pain suffered, and the loss of labour force need to be considered since these vary from case to case.<sup>57</sup>

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<sup>54</sup> Decision of the Supreme Court of Appeals, Y.4. HD 23.10.2008 T., 2008/2920 E., 2008/12633 K. (Yargıtay Kararları Dergisi, 2009(2), 1263)

<sup>55</sup> According to the mentioned Decision for Unification of Decisions, the fault of the tortfeasor is not required. Non-pecuniary compensation may be claimed in the liability cases without fault that are regulated in law. The person whose personality right is violated may claim non-pecuniary compensation. It is sufficient that a causal link exists between the tortious act and the damage. Also, the circumstances of the case will play an important role for determining the compensation in the cases of the violation of bodily integrity or death. ([www.turkhukuksitesi.com.tr](http://www.turkhukuksitesi.com.tr), Date of Access: 14.03.2017).

<sup>56</sup> Decision of the Turkish Supreme Court of Appeals, Y. 17. HD. 04.10.2016 T., 2014/9119E., 2016/8517 K. ([www.kazanci.com.tr](http://www.kazanci.com.tr), Date of access: 14.03.2017).

<sup>57</sup> Rey (n 5) 102.

### **cc. Determination of the Non-Pecuniary Damage Suffered by the Legal Dependants of the Injured/Dead Person in Case of Serious Personal Injury**

This issue is regulated under Art. 56 of the Turkish Code of Obligations. The compensation claim of the legal dependants of the injured person is a claim independent from the compensation claim of the injured person and constitutes reflective by its nature<sup>58</sup>. For reflective damage to be compensated, unlawfulness tie is required to exist between the damage and the tortious act. By stating “... *in case of serious personal injury or death, the judge may award a reasonable compensation to be paid as non-pecuniary compensation to the legal dependants of the injured or dead party*”, Art. 56 of the Turkish Code of Obligations clearly included the legal dependants of the injured person in the protective purpose of the legal norm. In the concrete case, the violation of the protective purpose of the legal norm and the unlawfulness tie will be deemed to exist.

The prerequisite for such non-pecuniary compensation claims of the legal dependants of the injured/dead person is either serious personal injury or death. In addition, there shall be causal relation between the non-pecuniary damage and the bodily integrity as well as unlawfulness relation. The unlawfulness relation means the violation of the legal norm aimed at the protection of bodily integrity. The protection of the bodily integrity and the right to live are of personality rights. Personality rights are absolute rights and thus, their violation leads unlawfulness. However, in case a reason exists that resolves unlawfulness<sup>59</sup>, compensation cannot be claimed due to the absence of unlawfulness.<sup>60</sup>

The cases of serious violation of bodily integrity are not covered. However, the importance of the harmed organs of the body, the loss of labour force of the injured person, becoming dependant on the other for care, loss of ability to communicate, major mental disorder may be considered as examples for serious violation of bodily integrity.<sup>61</sup>

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<sup>58</sup> Antalya (n 5) 512.

<sup>59</sup> The reasons that resolve unlawfulness are the reasons for lawfulness. In case one of such reasons exist in the case at hand, the tortfeasor may not be held responsible for his/her act. The consent of the injured person, self-defence, cases of necessity, superior private or public interest, protection of one’s right by himself in the lack of public authority intervention on time, acting based on the authority provided by law constitute circumstances resolving unlawfulness. However, if the consent constitutes the violation of personality rights, the act causing the damage cannot be accepted as lawful. For example, medical intervention is an act directed at bodily integrity. That is why, medical intervention is not allowed without the enlightened consent of the person concerned.

<sup>60</sup> Eren (n 5) 791.

<sup>61</sup> Çakırca (n 4) 796.

When determining the compensation of the legal dependants under Art. 56, the circumstances of the case needs to be considered. The degree of personal injury, the medical treatment process and its result, the seriousness of the mental pain, the duration of the violation, the age of the injured person, the fact that whether he/she can continue his/her life as it was before are all factors that need to be taken into consideration. The judge will determine the amount of compensation by exercising his discretionary power<sup>62</sup>. Objective criteria such as exemplary tables do not exist with respect to non-pecuniary compensation. Nevertheless, the judge may apply the general provisions in Art. 50, 51 and 52 when determining the compensation amount.

Before the entry into force the New Turkish Code of Obligations, non-pecuniary compensation claim of the legal dependants was accepted in practice. In contrast, a clear provision as to the pecuniary compensation of the legal dependants in case of serious personal injury in inexistent. It is hoped that the same rule will be applied by analogy in this case as well since the pecuniary damage of the legal dependants is also reflective damage and there is not any other way to compensate such damage.

In case of serious violation of bodily integrity, emotional relationship is ahead of blood relation. This emotional relationship needs to be of a real nature.

Due to the indivisibility principle of the non-pecuniary compensation, partial claim of such compensation is not possible. However, in case where the damage cannot be assessed with certainty at the beginning of the case, non-pecuniary compensation can be claimed due to the changes occurred in the bodily integrity in the course of time.

#### **4. Equalization of Damage (Turkish Code of Obligations Art. 55)**

The aim of pecuniary compensation is to compensate the decrease in the assets of the injured person. The compensation shall not serve as a way of enrichment and shall not lead to the economic ruin of the tortfeasor.

Before the compensation is determined, the real damage is reached through equalization. Equalization means the deduction of the economic benefits the injured person

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<sup>62</sup> Art 4 Turkish Code of Obligations - Judicial Discretion “Where the law confers discretion on the court or refers to an assessment of the circumstances or to good cause, the court must reach its decision in accordance with the principles of justice and equity.”

gained<sup>63</sup>. However, for this, causal link needs to exist between the economic benefit and the tortious act that caused the damage.<sup>64</sup> The benefits the injured person gained needs to be deducted from the compensation which the injured person will receive because of the violation of his/her bodily integrity. The reason behind this is the idea that compensation shall not serve as a tool for enrichment. For example, if a person who has become disabled because of the tortious act pays lower tax, such benefit shall be deducted from the compensation. Similarly, taxes which he/she will not pay during the non-worked period, non-contributory pensions, travel expenses for work shall be deducted as well.<sup>65</sup>

Contributory fault of the injured person, his/her consent, the occurrence of damage because of helping the injured person are reasons that are considered when determining the compensation. Such vary in each concrete case. Also, the degree of fault of the tortfeasor is also determinant on the compensation amount.

The plaintiff bears the burden to prove the existence of damage and its amount (Turkish Code of Obligations Art.50/1). However, for the equalization, it is defendant who bears the burden of proof. In cases where the defendant cannot prove the amount of economic benefits, the judge may exercise his/her discretionary power.<sup>66</sup>

Also, to make equalization, there should not be any legal provision that prevents the equalization. Under Article 55 Turkish Code of Obligations, two items are not allowed to be deducted as equalization. Social security payments that may not be recoured partially or fully and payments that are not intended to discharge an obligation cannot be deducted from the compensation. The reason for this is the fact that such social security payment is based on the premiums paid by the injured person by way of deducting from his/her own salary and the non-occurrence of any benefit to the injured person as such. Secondly, payments that are not intended to discharge an obligation cannot be deducted from the compensation. If such payments are deducted, the injured person would be deprived of compensation of such amount and this would mean, in a way, punishing the injured person when favouring the tortfeasor.

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<sup>63</sup> Oğuzman / Öz (n 1) 87 f.; Antalya (n 5) 515.

<sup>64</sup> Hasan Seçkin Ozanoğlu, “Türk Borçlar Hukuku ve Sorumluluk Hukuku Açısından TBK 55. Madde ve Bedensel Zararlar”, *Türkiye Barolar Birliği - Yeni Gelişmeler Işığında Bedensel Zararların Tazmini Uluslararası Kongre*, (TBB Yayını, 2016) 123.

<sup>65</sup> Tekinay / Akman / Burcuoğlu et al. (n 5) 614 f; Oğuzman / Öz (n 1) 89 f.

<sup>66</sup> Oğuzman / Öz (n 1) 84.

In any case, when the compensation amount is determined, the judge is not allowed to increase or decrease the amount of compensation on the ground of equity.

### **5. Temporary Payment: Application of Turkish Code of Obligations Art.76**

With the aim of protecting the injured person who is economically disadvantaged, the judge may, on the request and in case of necessity, may award temporary payment. Such temporary payments are deducted from the amount of compensation. In case compensation is not awarded at the end of the trial, such temporary payments are paid back with interest. Article 76<sup>67</sup> is rarely invoked in practice.

### **Conclusion**

The compensation of damage is possible when the value which is protected by a legal norm, is violated. This is because, in such a case, the unlawfulness link is deemed to exist. Because of this reason, except the exceptional cases regulated in the law, in principle, compensation of reflective damage is not accepted. The right of the legal dependants of the injured person, under Article 56 of Turkish Code of Obligations to claim compensation in case of the violation of bodily integrity or death due to the violation of their *own* personality rights is an example for such exceptional cases.

By examining the decisions of Turkish Supreme Court of Appeals regarding the non-pecuniary damages, the situation of it becomes clearer. In this respect, the idea that the non-pecuniary compensation has a punitive function is not supported in practice. Even such function of is accepted, the main aim of non-pecuniary compensation being the violation of personality rights, is different from the punitive damage that exist under English Law. Under Turkish liability law, compensation does not have a punitive aim. That is why, the concept of punitive or exemplary damages are inexistent in Turkish Law. Although the primary aim of compensation law is to compensate the damage, in some cases under English Law, the judge

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<sup>67</sup> Art 76 of Turkish Code of Obligations- Temporary Payment “*The judge may award temporary payments to be paid by the defendant to the injured party upon request, provided that the injurer puts forward persuasive evidence which demonstrates the rightness of his claim and that his economic situation requires such claim. Temporary payments made by the defendant are set off from the amount of compensation. Unless compensation is not awarded, the judge shall decide the payment to be made back to the tortfeasor with legal interest*”.

may award compensation with punitive aims.<sup>68</sup> The aim of punitive damages is not to compensate the damage, but, as a private law sanction, to punish the tortfeasor.<sup>69</sup>

Regarding the determination of non-pecuniary compensation, under Turkish Law, tables are not used to specify the amount of compensation. This results in the award of non-pecuniary compensation in different amounts. Still, the prior decisions of the courts are taken into consideration by the judges. The non-pecuniary damage is based on the violation of personality rights. In cases of mental disorders, pain due to the medical treatment leads to non-pecuniary damage. This non-pecuniary damage includes both the physical pain the person needs to suffer and the decrease in the desire to live. Pecuniary and non-pecuniary compensation payment is divided into two: lump sum payment and periodical payment. However, in practice, generally the courts award lump sum payment.

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<sup>68</sup> Edwin Peel ve James Goudkamp, *Winfield & Jolowicz on Tort*, 19th Edition, Sweet & Maxwell U.K, London, 2014, p. 692.

<sup>69</sup> Allan Beever, “The Structure of Aggravated and Exemplary Damages”, (2003) 23(1) *Oxford Journal of Legal Studies* 95.

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