**The Method of Determining Non-Material Damage to Health and the Principles of Fairness from the Perspective of Law and Economics Analysis**

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**Long Abstract:**

Nearly a decade ago, Czech private law underwent a significant transformation with the adoption of a new Civil Code. The Civil Code of 2014 marked a return to original legal concepts, particularly the theory of natural law, and re-embraced the approaches of the Austrian ABGB and the German BGB after the communist era. A crucial change and shift occurred in the determination of compensation for non-material damage in cases of injury and death. Czech private law operates on the understanding that non-material damage can be defined as the opposite of financial loss—that is, harm that does not result in a reduction of the injured party's assets, but rather damage that arises from the violation of human integrity and manifests in the personal sphere of the individual.[[1]](#footnote-1) A similar definition is found in § 253(2) of the BGB and is also adopted by Austrian legal doctrine.[[2]](#footnote-2) The fundamental provision regulating compensation for non-material damage in the Czech Civil Code is § 2958, which states that "*in cases of injury, the perpetrator shall compensate the victim for the damage with a monetary compensation that fully offsets the pain suffered and other non-material damages. If the injury results in an obstacle to the victim's better future, the perpetrator shall also compensate for the reduced ability to participate in society. If the amount of compensation cannot be determined in this manner, it shall be determined according to the principles of fairness*." After the Civil Code was adopted, the question arose as to what is meant by the principle of fairness and how the amount of compensation for non-material damage to health should be determined. Essentially, the issue became how to evaluate damage that is difficult to quantify in monetary terms using economic criteria. The challenge was particularly significant because, prior to 2014, the amount of compensation for non-material damage to health was determined almost exclusively based on a point system for individual illnesses, that is, more or less on a flat-rate basis with fixed amounts. According to Czech law, non-material damage to health includes so-called pain and suffering, reduced ability to participate in society, and other non-material damages; thus, it involves three components of compensation for non-material damage to health, or pain and suffering in a broader sense.[[3]](#footnote-3) A decision by the Czech Supreme Court indicates that pain can be both physical and psychological.[[4]](#footnote-4) As for the reduced ability to participate in society, it is determined by comparing the activities and lifestyle of the injured party before the injury and after their health condition has stabilized. [[5]](#footnote-5) According to § 2958 of the Civil Code, the injured party is entitled to compensation if the injury has created an obstacle to a better future. This primarily includes the inability or limitation to fulfil life and social needs, restrictions on work or study, and limitations or loss of involvement in family, political, or cultural life. [[6]](#footnote-6)

The aim of this paper is to address the question of how the amount of compensation for non-material damage to health is determined, particularly from the perspective of the significance of economic criteria—specifically, which criteria are considered and which are not. In European legal systems, there are two methods for determining the amount of compensation for non-material damage to health. The first method relies on the existence of a binding regulation (law or subordinate legislation) that dictates the amount of compensation, typically based on fixed amounts. [[7]](#footnote-7) The second method, which is more common, involves judicial discretion.[[8]](#footnote-8)

The Czech Supreme Court had concerns about how the practice would function, so it prepared the "Methodology for Compensation of Non-Material Damage to Health." The Methodology provides an overview of pain categories and point-based ratings (e.g., item no. S050—conjunctival injury and corneal abrasion without a foreign body is rated at 20 points). The value of each point is then determined based on the average wage in the year preceding the year in which the injury occurred. For example, the average wage in the Czech Republic for 2023 was 43,300 CZK (approximately 1,800 EUR), making the value of one point 430 CZK. In cases of compensation for reduced ability to participate in society, the International Classification of Functioning, Disability, and Health is used. The authors of the Methodology selected it as the best method of individualization to accurately capture (using a percentage expression) the impact of the injury on the victim's abilities, particularly the limitations on their functional abilities and the practical impact on all areas of their life. Its application is also suitable in cases where the victim had a pre-existing injury before the harm caused by the perpetrator; the ICF allows for an effective assessment of the victim's condition both before and after the injury. [[9]](#footnote-9) When determining compensation for reduced ability to participate in society using the ICF framework, the absolute exclusion from all spheres of social life, i.e., 100%, is a crucial value. The authors of the Methodology concluded that the starting reference amount should be set at 400 times the average gross monthly nominal wage (for 2023, the starting reference amount is 17,336,400 CZK, approximately 725,000 EUR). It is clear that the amount of compensation for non-material damage to health is determined primarily based on the average wage, which is a fundamental and dominant criterion, often at the expense of other relevant criteria, such as inflation. There is an extensive debate in the academic community regarding economic criteria, as discussed.[[10]](#footnote-10) The lack of consideration of additional macroeconomic criteria leads to violations of the injured party’s fundamental rights. This is one example of such an issue

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To determine the equivalent compensation amount in 2023 for an initial compensation of 1,000,000 CZK received in 2015, we can consider three different approaches: adjusting based on average wage changes, inflation, or both criteria combined. Based on Average Wage, the original compensation amount of 1,000,000 CZK in 2015, when adjusted according to the change in the average wage, amounts to approximately 1,461,000 CZK in 2023. This calculation considers the increase in average wages over the period and reflects how much the compensation would need to be to match the current wage levels. Based on inflation, if we adjust the original amount of 1,000,000 CZK from 2015 solely based on inflation, the equivalent amount in 2023 would be approximately 1,087,000 CZK. This adjustment considers the overall increase in the price level and the cost of living over the years. Based on Both Criteria (Average Wage and Inflation), when we adjust the original amount of 1,000,000 CZK from 2015 by considering both the changes in average wages and inflation, the equivalent compensation in 2023 is approximately 1,590,000 CZK. If the decision is made solely based on the average wage (compensation amount of 1,461,000 CZK), however, if inflation is also taken into account, the compensation amount increases to 1,590,000 CZK. The difference is almost 130,000 CZK, which is significant. For the purpose of non-material damage compensation, it would therefore be much more appropriate to use the real wage, including inflation, which is currently being overlooked. This combined approach accounts for both the increase in wages and the general rise in prices, providing a comprehensive adjustment to reflect the true value of the compensation in today's terms. These calculations highlight how the compensation amount can vary significantly depending on whether we adjust for average wage changes, inflation, or both factors simultaneously. Each approach provides a different perspective on how compensation should be updated to reflect current economic conditions.

The aim of this paper was to address how the amount of compensation for non-material damage to health is determined under Czech private law, particularly regarding the significance of economic criteria—specifically, which criteria are considered and which are not. The example of the dominance of the average wage, to the detriment of other criteria, illustrates that relying solely on this criterion leads to violations of the rights of the injured parties, as the compensation does not adhere to the principle of fairness. According to § 2958 of the Czech Civil Code, the principle of fairness must also encompass the consideration of relevant economic criteria, which is currently not being done. It would also be appropriate to highlight and test additional economic criteria that should be taken into account to assess non-material damage based on the principles of fairness

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9. Resolution of the Supreme Court dated December 18, 2013, file number 25 Cdo 2356/2013..
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1. For example, compare the judgment of the Czech Supreme Court dated January 26, 2011, file number 25 Cdo 5162/2008, published under number 85/2011 Collection of Judicial Decisions and Opinions, Civil and Commercial Section. [↑](#footnote-ref-1)
2. Pavelek, Ondřej. Compensation for Non-Pecuniary Harm to Health and in Cases of Death, C.H. Beck, 2020. [↑](#footnote-ref-2)
3. This differs from the Austrian ABGB or the German BGB, which encompass all these claims under a single term, "pain and suffering." [↑](#footnote-ref-3)
4. Resolution of the Supreme Court dated November 1, 2017, file number 25 Cdo 2245/2017, published under number 7/2019 Collection of Judicial Decisions and Opinions. [↑](#footnote-ref-4)
5. Resolution of the Supreme Court dated December 18, 2013, file number 25 Cdo 2356/2013.. [↑](#footnote-ref-5)
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7. Such lump-sum amounts are, for example, present in Slovakia (Act No. 437/2004 Coll., on Compensation for Pain and for Impairment of Social Integration). [↑](#footnote-ref-7)
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