

NEW CIVIL CODE IN SLOVAKIA AND COMPENSATION FOR DAMAGE UNDER THE NEW RULES

Apstrakt

The Civil Code valid in Slovakia is from 1964, thus still from the times of Czechoslovakia. Although it underwent a major change especially in 1991, many institutions including compensation for damage remained untouched and are obsolete today. The times already required an extensive change and the new Civil Code brings a major change. Therefore, a new Civil Code was prepared and approved in the first reading in the National Council of the Slovak Republic, which is to be promulgated in the collection of laws in the autumn of this year and is to enter into force on 1 July 2027. It is based, including the part concerning compensation for damage, on the DCFR.¹⁾ The basic principles of the new Civil Code are dispositiveness, autonomy of will, preference for validity and informality of acts. The dualism in the Slovak legal order is being removed and even commercial law relations, currently regulated by the Commercial Code, will be regulated by the new Civil Code. Compensation for damage is newly placed in the fifth part concerning obligation law, which is divided into contractual and non-contractual obligations. Obligations from caused damage will belong, together with unjust enrichment and acting without mandate, among non-contractual obligations.

Key words: *New Civil Code, Obligations from caused damage under the new rules as non-contractual obligations, DCFR Principles*

1. Obligations from caused damage as non-contractual obligations main differences compared to the current regulation

Slovakia as a country belonging to the European Union is one of the last countries to have a Civil Code more than 60 years old. Many provisions

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1) Draft Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law) Principles, definitions and rules of European private law drawn up by the European Commission, which aim to unify legal principles and rules for the entire European Union.

contained in it, including the regulation of compensation for damage, are considered obsolete by courts today. The Czech Republic, with which we had the 1964 Civil Code in common, recodified private law relations as early as 2012. Finally, Slovakia also approached the change, drawing from the DCFR as its basis.

In the currently valid Civil Code, its special sixth part regulates liability for damage and this regulation is outside the regulation of obligation law. The new Civil Code regulates obligation law in the fifth part and is divided into contractual and non-contractual obligations.

Obligations from caused damage are placed among non-contractual obligations because as an obligation they arise from a breach of duty, whether a duty arising from law or from a contract. A conceptual change therefore occurs here and compensation for damage will be classified among obligation relationships.

The very definition of damage is also changing. Until now, damage has been perceived as harm that occurred in the injured party's property sphere and its compensation consisted in paying actual damage as a real diminution of the injured party's assets and lost profit. Non-pecuniary harm was regulated in another part of the Civil Code and was not considered damage.

The new definition of damage, on the contrary, includes harm both in the property and non-property sphere. Harm to rights other than property rights will now fall under the definition of non-pecuniary damage.

General liability for damage will in the future be based on liability for damage caused by unlawful conduct or conduct contrary to good morals. Liability for damage caused by unlawful conduct consists in the violation of both the right to protection of personality and ownership or other right acting against everyone (*erga omnes*).

Liability for damage caused by conduct contrary to good morals will apply only to intentional conduct contrary to good morals by which any right of another was violated.

The new legal regulation will not work with the current division into conscious and unconscious negligence for negligent conduct, but introduces the concepts of slight and gross negligence according to the degree of neglect of due care. Slight negligence can be classified as the conduct of the tortfeasor of such a nature that even a careful person could commit it. In contrast, gross negligence will be classified as conduct of the tortfeasor of such a nature that a duly careful person would not commit it.

Another significant difference will be that the principle of Roman law currently applies, according to which no one can waive their rights in advance, hach the new regulation breaks.

In the future, it will be possible by agreement to exclude or limit liability for damage in advance, however this will not be possible in the case of intentional damage and it will not be possible by unilateral legal act. In the case of unintentional damage, however, it will be possible in accordance with the basic principle of autonomy of will for the tortfeasor and the injured party

to agree already before the breach of duty (ex ante) or even after the breach (ex post) on the exclusion or limitation of the tortfeasor's liability for damage.

The rules for the duty to protect against imminent damage are also changing, where the current Civil Code regulates the duty to intervene even for the protection of one's own assets (property). This concept is, however, in contradiction with the owner's right to freely dispose of their assets, provided that they do not endanger the rights of others. In the future, therefore, respect for the individual's right to freely dispose of their property is expected and the duty to intervene will concern only protection against damage to another's property.

The concept of chance (náhoda) is being reintroduced in connection with liability for chance. This concept was contained in the transitional Civil Code valid in Czechoslovakia in the years 1950/1964. Chance excludes liability for damage except in two cases. If someone gave rise to the chance by their fault, either by violating a legal regulation or by damaging a device intended to prevent accidental damage. In the case where chance, for which no one is liable, only contributed to the damage, then the tortfeasor is liable only for that part of the damage to which they contributed or to which circumstances attributable to the tortfeasor contributed.

New concepts of concurrent and cumulative liability are being introduced. Concurrent liability is a situation where damage arose as a result of several mutually independent (separate) causes, regardless of whether they occurred at the same time. The tortfeasors are then jointly and severally liable even if each of the causes by itself would have caused the entire damage. Cumulative liability means a situation where the accumulation of various causes caused the damage to arise, and here too the tortfeasors are jointly and severally liable.

Another new concept is so-called alternative liability. This concept was taken from the DCFR. It concerns a situation where the damage was caused by one of several possible causes and it is not possible to determine with certainty which cause it was. In such a case, the tortfeasors are also jointly and severally liable.

The mutual settlement of jointly and severally liable tortfeasors will also be regulated differently in the future in the case where it is not possible to determine the degree of participation. In such a case, the future approach will be based on the degree of probability of causing the damage, whereas previously each was liable in equal shares.

2. Circumstances excluding liability

In addition to the existing circumstances excluding liability, which remain and include extreme necessity and necessary defence, further circumstances excluding liability have been added, namely the consent of the injured party (which previously excluded only the criminal liability of the perpetrator) and so-called acting at one's own risk.

The consent of the injured party again stems from the basic principles of the new Civil Code, both from the principle of autonomy of will and from

the principle of dispositive freedom of the individual. The general rule of dispositiveness is derived from the German BGB,²⁾ which is considered one of the best in Europe. Consent must be given in advance and this consent is invalid if granting it is excluded by law or concerns interests of the injured party about which they cannot decide without restriction (e.g. their right to life). Acting at one's own risk as a new fact excluding liability is inspired by Article VI:5:101 paragraph 2 of the DCFR.³⁾ It concerns situations where the danger was known to the injured party in advance, before the damage occurred, and the injured party nevertheless exposed themselves to this danger and did so unnecessarily, i.e. it was not necessary or essential.

3. Factual elements of special liability for damage

In addition to the general liability for damage caused by unlawful conduct and conduct contrary to good morals, special liability for damage is also retained. In addition to the factual elements of liability in operating a business, liability of the operator of a means of transport, liability of the operator of accommodation services and liability for deposited items, new factual elements are added: liability for damage caused by an animal, liability for damage caused by neglect of supervision over a thing, liability for damage caused by a building and liability for damage caused by an assistant.

Liability for damage caused by an animal is regulated separately from liability for neglect of supervision over a thing, because according to § 25 of the new Civil Code a living animal is not a thing. It is a so-called other legal object.

This is a completely new factual element and a new conception of the animal as a legal object. The person who not only temporarily exercises factual power over the animal is liable for the damage, i.e. the holder or so-called master of the animal is liable. In addition to the person who has the animal only temporarily, the general rule also applies that the owner of the animal is liable if the breeder as the actual master of the animal cannot be identified. It will therefore be necessary in the future when selling a chipped animal to ensure that the original owner does not remain registered as the owner.

Liability here is based on the breeder being liable for the damage until they exonerate themselves. Exoneration is possible only by proving that the damage could not have been prevented even with due care. It is therefore up to the breeder to prove that they exercised such care. The scope of due care will differ for farm animals and companion animals and will also be distinguished between animals that pose a higher risk to their surroundings.

Instead of the breeder, the person who voluntarily takes the animal (thief) will be liable, and without the possibility of exoneration (liberation), because this liability cannot be waived.

2) Bürgerliches Gesetzbuch the German Civil Code, considered one of the best in Europe.

3) Acting at own risk injured party knowing the specific risk of damage voluntarily takes that risk

This is also a new factual element in the case of liability for damage caused by neglect of supervision over a thing. In this case, it concerns a thing that is not directly controlled by a person (such as a means of transport, for example) but a thing over which supervision needed to be exercised in order to prevent it from collapsing, falling, being thrown, spilling, etc. This is not about liability for the use of such a thing, which is regulated separately, but about a case where, for example, due to neglect of supervision, a thing is spilled from an elevated place created by a person and damage occurs. The user of the place is liable for the damage and if there is none, the owner of the place. As with liability for an animal, exoneration is possible only by proving due care.

Another new factual element is liability for damage caused by a building. In Slovakia we have many buildings, including in historic city centres, that their owners do not maintain and wait for them to collapse, because the reconstruction of a historic building under the supervision of the monument institute is more expensive than new construction. Effective protection of third parties does not exist. This is to change so that the owner of a building or a work connected with the land that is not a building will be liable for damage caused by its collapse. A work connected with the land includes, for example, statues placed on land, because they carry the same risk as a building but are not buildings. The owner will also be liable if there is no collapse but a part of the building or work detaches. To prevent the owner from evading liability by transferring the building or work to another person at a time when they know that collapse or detachment is imminent, the law also provides for the liability of the previous owner of the building or work. The previous owner is liable for damage if the cause of the damage is a defect that arose during the period of their ownership and the damaging event occurred within one year from the termination of their ownership. Together with the owner of the building, the person who assumed the obligation to maintain the building will also be liable. Here too, a stricter form of subjective liability applies, from which the owner can only exonerate themselves by proving due care for the building or work.

The last new factual element is liability for damage caused by an assistant. In the case of the relationship between the principal and their assistant, either only the assistant or the principal together with the assistant is liable for the damage. The law distinguishes, from the point of view of liability, between an independent and a dependent assistant. A dependent assistant is jointly liable with the principal, i.e. the person who authorized or entrusted them. The assistant is solely liable and is a so-called independent assistant if they undertook to perform the activity independently for another. Only in the case where the principal selected the independent assistant without due care or did not supervise them, is the principal liable together with the assistant.

If the assistant is an employee and the damage occurs in the performance of work duties, the assistant is liable only for damage caused intentionally or by gross negligence. In other cases, the employee is not liable for the damage, but the employer is, because the employee enjoys increased protection in labour law relations. In the case of intentional damage to a third party, the employee is liable to the third party in full, because intentional damage is

not limited in labour law regulations. In the case of gross negligence, the employee will be directly liable to the third party only to the extent that they would be liable to their employer under labour law regulations. In other cases, only the employer is liable for the damage. When asserting claims for damage caused in this way, it will therefore be necessary to pay special attention to the correct identification of the liable person according to the degree of the employee's fault.

4. Specific features of liability for damage caused by breach of contractual duty

The law will distinguish, as regards the content and especially the scope of compensation for damage, according to whether it concerns damage arising from breach of a contractual duty or damage arising from unlawful conduct and conduct contrary to good morals.

In the case of breach of a contractual duty by slight negligence, the contractual party will be liable only for so-called foreseeable damage. Foreseeable damage is damage that the party could have foreseen or did foresee at the time of concluding the contract as a probable consequence of non-performance.

The principle of reasonable substitute transaction will also apply, according to which if the creditor terminated the contract for non-performance and carried out a substitute transaction without expending significant effort or costs, they are entitled only to the difference between the contract price and the price of the substitute transaction. If they did not carry out a substitute transaction, they are entitled only to the difference between the contract price and the usual price of the subject of performance. These provisions aim to prevent situations in which the creditor would unreasonably insist on performance even if they knew it would not be possible and did not make a substitute transaction although they could have done so without significant effort, and precisely as a result of their insistence on performance by the debtor damage occurred.

In the event of breach of a contractual duty, the parties will have the right to stipulate in the contract a so-called contractual penalty. The old and currently valid Civil Code does not know this concept and regulates only a contractual fine. The difference is that a contractual fine is exclusively a monetary performance as a sanction for non-performance of a contractual duty, whereas any in-kind performance can be agreed as a contractual penalty. A contractual fine as monetary compensation will therefore be only one form of contractual penalty and other in-kind performances will also be permitted. If I am to deliver 100 sacks of flour, it will be possible to agree, for example, one extra sack for each month of delay as a penalty.

The contractual fine as a sanction will under the new rules have a direct connection with compensation for damage to the extent that according to § 538 of the Civil Code, if damage was intentionally caused by non-performance of a contractual duty secured by a contractual fine, the creditor will always have the right to compensation for damage in excess of the contractual fine. Otherwise, i.e. in the case of unintentional damage, the creditor will not

be entitled to claim compensation for damage caused by non-performance of the contractual duty, even if the damage exceeds the contractual fine.

5. Method and scope of compensation for damage

The method and scope of compensation for pecuniary damage are not fundamentally changing and, as in most European countries, continue to consist in providing pecuniary (monetary) compensation. However, the injured party may now also demand compensation for damage in another appropriate and suitable manner, in particular by restoration to the original state, transfer of a right or transfer of a contract. A new provision is also added for the case where the damage consists in the creation of a debt. In such a case, the injured party has the right to choose whether they want the tortfeasor to release them from the debt or to provide them with compensation.

Because non-pecuniary harm will be considered non-pecuniary damage, the institute of redress for non-pecuniary damage is introduced. Non-pecuniary damage will be compensated primarily by appropriate satisfaction. Such satisfaction may consist of an apology, including a public one, or in the publication of the judgment and is essentially moral satisfaction. Such satisfaction will also be provided in the case where interference with non-pecuniary rights occurred without fault. This distinguishes non-pecuniary damage from pecuniary damage, which requires fault. It is sufficient that interference with personality rights or unfair competition occurred even without fault and the injured party may, for example, demand an apology.

If non-pecuniary damage cannot be sufficiently redressed by satisfaction, it will be compensated in money beyond or instead of satisfaction. In such a case, however, one of the factual elements of liability for damage must also be fulfilled. If, therefore, the conditions of liability for damage were fulfilled by interference with personality rights, then it is possible to demand from the tortfeasor redress for non-pecuniary damage in money as well.

For moral satisfaction and redress, it is therefore sufficient that interference with rights occurred and non-pecuniary damage arose, but for the emergence of a claim to monetary compensation it is necessary to fulfil the conditions of delictual liability.

Compensation for non-pecuniary damage in the case of so-called reprehensible intent is regulated separately. In that case, the tortfeasor, in addition to the damage caused directly to the injured subject, will also have to redress the non-pecuniary damage caused to the secondary (indirect) injured party as so-called reflective damage.

In the compensation of non-pecuniary harm, a rule is introduced according to which comparable amounts should be awarded in similar cases. This rule is introduced directly into the law because in practice situations have arisen where courts awarded significantly different amounts in objectively similar cases. This provision aims to introduce legal certainty and predictability of court decisions into the relations.

The legal regulation for compensation for damage to a thing is only refined and supplemented, because in practice questions have arisen in compensation for actual damage as to whether the damage is the value of the thing on

the day the damage occurred or the amount the injured party had to expend to procure a similar thing. The new legal regulation is based on the usual price of the thing at the given place and time, with the essential point being to achieve the state of restoration or replacement of the function of the original thing. All purposefully expended costs for the restoration or replacement of the function of the damaged thing and the rate of inflation are therefore taken into account. The aim of compensation for damage is to bring the injured party to the same material position they were in before the damage occurred.

Compensation for damage in the case of injury to a non-economic animal is also specially regulated, reflecting a social change where people form emotional bonds with non-economic animals and invest significant financial resources in them. For economic animals, the general rules on compensation for damage will apply. For a non-economic animal, on the other hand, the tortfeasor will be obliged to compensate the costs purposefully expended on treatment and care of the injured animal to the person who expended them. Costs substantially exceeding the value of the animal are also considered purposefully expended if it can be assumed that an average reasonably developed person in the position of a keeper would have expended them. Simply put, the costs that any loving keeper would incur for treating the injury must be compensated by the tortfeasor even if they greatly exceed the market value of the animal. The emotional relationship with the animal is taken into account here, not its economic value.

Space is also created for courts in cases where it is impossible to determine the amount of damage or if it could be determined only with great difficulty. In such a case, the court may determine the amount according to its discretion. This provision aims to achieve compensation for the injured party even in cases where it cannot be determined otherwise.

Similarly, the court may also reasonably reduce the compensation for damage, but only for reasons worthy of special consideration, especially if it would be grossly unfair or manifestly disproportionate to the tortfeasor. Reduction will not, however, be possible in the case of intentional damage.

6. Compensation for damage in the case of injury to health and death

The current legal regulation is taken over as regards compensation for pain suffered and difficulty in social application. As regards the costs of treatment, this term is replaced by the term costs of care for the injured party, which supplements the compensation with costs for securing assistance to the injured party in life activities in which they are dependent on the help of another person and with costs for the household of the injured party if they are unable to take care of it as a result of the damage. These costs are reimbursed for the entire period for which the injured party needs them. In the event that injury to health results in a long-term increase in the needs of the injured party, it will be possible to award them a regular monetary pension against the tortfeasor.

Similarly, the tortfeasor will be obliged to compensate the injured party for loss of earnings during their incapacity for work, also by a monetary pension in the amount of the difference between their average earnings before the damage occurred and the compensation paid to them during the period of incapacity for work.

The tortfeasor will also have the obligation to compensate the injured party for loss of earnings even after the end of incapacity for work or in the case of invalidity, if after the end of incapacity for work the injured party will no longer be able to achieve the same earnings as before the damage or would achieve it only with greater effort. This difference will also be compensated by a monetary pension. Here, however, account will also be taken of the increase in earnings in the given field and the probable growth of the injured party's earnings, i.e. this pension will be determined also taking into account the expected career growth of the injured party that could reasonably have been expected if the injury to health had not occurred.

Finally, the tortfeasor will be obliged to compensate the injured party also for loss of pension, by a monetary pension in the amount of the difference between the pension to which the injured party would have been entitled if the basis from which it would have been calculated also included the compensation for loss of earnings after the end of incapacity for work.

In the case of death, under the new legal regulation the court may also award a monetary pension intended to cover the costs of maintenance to the survivors i.e. close relatives or another person to whom the deceased was obliged to provide maintenance at the time of their death.

A completely new institute called a lump-sum settlement (*odbytné*) is also introduced. A lump-sum settlement is a one-off sum that the court may award to the injured party upon their request instead of a regular monetary pension. It cannot be awarded at the request of the tortfeasor, only at the request of the injured party. Upon fulfilment of this one-off payment, the obligation to pay recurring pension benefits ceases. Since individual compensations belong to the injured party only *vis-à-vis* the tortfeasor and do not pass to heirs in the event of their death, the one-off compensation in the form of a lump-sum settlement will probably be lower than the sum of regular monetary pensions, but it eliminates the risk of the tortfeasor's death and at the same time enables the injured party to receive a larger sum of money at once.

7. Limitation of the claim for compensation for damage before and after

In the old Civil Code, the subjective limitation period was two years. The subjective period began to run at the moment when the injured party learned of the damage and of who was liable for it. In addition to the subjective two-year period from the day the damage occurred regardless of whether the injured party knew about it and knew who was liable for it a three-year objective period ran for unintentional damage and a ten-year objective period for intentional damage. These are the shortest subjective and objective periods within the countries of the European Union. Moreover, the objective period begins to run regardless of the injured party's knowledge of the damage and the tortfeasor. In most EU countries, the subjective period is five years and the objective period is twenty years (France, Belgium, the Netherlands) up to thirty years (Germany, Austria) regardless of the degree of fault. The length of the periods in EU countries stems from the fact that obligations

should simply be fulfilled and the injured parties should be given sufficient time to assert them.

In the new Civil Code, the subjective period is extended from two years to three years. A long discussion in the professional community preceded this as to whether a five-year period, typical in most EU states, would not be more appropriate; in the end, however, the argument prevailed that we are already accustomed to the three-year period, as it applies in Slovakia not only for compensation for damage but is the general limitation period for all claims.

The objective period will be ten years regardless of whether it concerns intentional or unintentional damage. For claims for redress of non-pecuniary harm, the objective period does not apply.

A complete novelty is also the possibility to agree on a shorter limitation period, but at least one year. If such a shorter limitation period is agreed in the contract and the damage arises from breach of the contract, the claim will be time-barred in the agreed period.

Resumé

The new Civil Code represents a major leap forward, similar to the change after the fall of communism in 1989. It introduces completely new institutions not only as regards compensation for damage. On the one hand, it will make it possible to regulate private law relations with institutions corresponding to the present time; on the other hand, we will not be able to rely on previous court decisions. We will not be able to rely on the decisions of Czech courts either, which we have used in Slovakia so far due to the similarity of our legal regulations, because the new Slovak Civil Code is similar to the Czech one only in the part concerning real rights. It will be a major challenge for everyone – lawyers and judges alike.

NOVI GRAĐANSKI ZAKONIK U SLOVAČKOJ I NAKNADA ŠTETE PO NOVOM

Apstrakt:

Građanski zakonik važeći u Slovačkoj je iz 1964. godine, dakle još iz vremena Čehoslovačke. Iako je prošao veliku promenu posebno 1991. godine, mnogi instituti uključujući naknadu štete ostali su netaknuti i danas su zastareli. Vreme je već zahtevalo opsežnu promenu i novi Građanski zakonik donosi veliku promenu. Zato je pripremljen i u Narodnoj skupštini Slovačke Republike u prvom čitanju i usvojen novi Građanski zakonik, koji treba da bude proglašen u zbirci zakona na jesen ove godine i da stupi na snagu od 1. jula 2027. godine. Polazi, uključujući deo koji se tiče naknade štete, iz DCFR. Osnovnim principima novog Građanskog zakonika su dispozitivnost, autonomija volje, preferencija važenja i neformalnost radnji. Uklanjanje dualizma u slovačkom pravnom poretku i čak trgovinskopravni odnosi, danas

uređeni Trgovinskim zakonikom, uređivaće novi Građanski zakonik. Naknada štete je po novom svrstana u peti deo koji se tiče obligacionog prava, koji je podeljen na ugovorne i mimougovorne obaveze. Obaveze iz pričinjene štete biće zajedno sa neosnovanim obogaćenjem i radnjom bez naloga među mimougovorne obaveze.

Ključne reči: *Novi Građanski zakonik, Obaveze iz pričinjene štete po novom kao mimougovorne obaveze, Principi DCFR*