XVI. Lithuania

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A. Legislation

1. Nesąžiningos komercinės veiklos vartotojams draudimo įstatymas (Law on Prohibition of the Unfair Business-to-Consumers Commercial Practices)[1]

1 The Law on Prohibition of the Unfair Business-to-Consumers Commercial Practices (hereinafter – the Law) was passed while implementing the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (hereinafter – the Unfair Practices Directive)[2]. The Law prohibits unfair commercial practices by enumerating the types and the cases of the unfair commercial practices as well as by setting the framework of institutions empowered to follow the implementation and application of this legislation. Although the Unfair Practices Directive was to be transposed into national law by 12 December 2007, this national legislation only came into force on 1 February 2008. As a result of its recent enforcement, the practice and the actual impetus of the mentioned legislation is not entirely clear yet.

2 One of the novelties of the Law is the establishment of the concept of the "average consumer", i.e. the consumer, who, when sufficiently informed, is reasonably careful and cautious with regard to his social, cultural and the linguistic features. Due to this concept, the unfair commercial practice and its effect shall be measured now according to the entrenched standard of the average consumer. The Law also prohibits such commercial practices that materially distort the economic behaviour of consumers, i.e. appreciably impairs a consumer's ability to make an informed decision thereby causing a consumer to take a transactional decision that he/she would not have taken otherwise.

[1] Valstybės žinios (Parliamentary Record, VŽ) 2008, No. 6-212, 15 January 2008. Lithuanian legislation can be found at: http://www.lrs.lt.

[2] Official Journal (OJ) L 149, 11.6.2005, 22–39.

Deceptive business activity or misleading omission of information to the consumer may also be treated as an unfair commercial practice that is prohibited by the Law.

The State Consumer Rights Protection Authority and the Competition Council are the extra-judicial institutions which are in charge of supervision and implementation of the Law. Consumers, state and municipal authorities and consumers associations may apply to the State Consumer Rights Protection Authority asking it to initiate an investigation of the case of a potential unfair business practice. After conducting the investigation, the State Consumer Rights Protection Authority may impose fines up to LTL 1,000–30,000 (€ 290–€ 8.670) or, if any aggravating circumstances occur, up to LTL 100,000 (€ 28,962) to those commercial subjects which have breached the Law. The Law also highlights the judicial procedure for appealing the decision of the State Consumer Rights Protection Authority to the competent administrative court of Lithuania. 3

2. Vartotojų teisių gynimo įstatymo pakeitimo įstatymas (Law Amending the Law on the Protection of Consumer Rights)[3]

The new wording of the Law on the Protection of Consumer Rights (hereinafter – the New Law) significantly improved the legal regulation on the protection of consumer rights. The previous wording of the law (valid until 1 March, 2007[4]) had regulated the protection of consumer rights by merely enumerating the consumers' rights, some basic requirements for the quality of products or services rendered as well as by setting up the framework of competent extra-judicial institutions. 4

In contrast to previous regulation, the New Law is more specific and advanced. It entrenches some new concepts in consumer protection law, such as "financial services", "durable medium", "standard unit price of goods", "means of communication", "information to the consumer", "consumer consulting", "consumer awareness" and "consumer education". The New Law is based on the principle of fair business practice as the main criterion of valuation of behaviour of retailers and service providers. It emphasizes the importance of consumer consultation as well as the provision of information to consumers about their existing rights. The retailer's obligation to inform consumers about the goods and the services offered must be given in the national (i.e. Lithuanian) language; furthermore, the obligation to provide all the guarantees and specifications in the state language, together with the proper labelling of the goods and products, is expected to keep consumers well-informed. 5

Finally, the Law clearly states the right of a consumer to claim for pecuniary and non-pecuniary damages incurred due to the breach of his/her rights enshrined in the Law. The proclamation of a consumer's right to claim non-pe- 6

[3] VŽ 2007, No. 12-488, 30 January 2007. Lithuanian legislation can be found at: http://www.lrs.lt.

[4] The text in Lithuanian can be found at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=110345&p_query=&p_tr2=

cuniary damages is very important because under Lithuanian legislation non-pecuniary damages may be awarded to a claimant only if the law specifically provides for such a possibility[5].

B. Cases

1. Lithuanian Supreme Court, 6 February 2007, No. 3K-7-7/2007: No-Fault Liability of Public Bodies; Non-Pecuniary Damages for Excessively Long Pretrial Investigation

a) Brief Summary of the Facts

7 The plaintiff was working as an inspector in one of the posts of the territorial customs office. In 1998 she was accused in a criminal case of the forgery of official documents while performing her official duties. The plaintiff was suspended from her official duties as an inspector; a search was performed in her house; all her ownership rights to the property were restricted and she was ordered by the court not to leave her residence while the case was under investigation. In 2004 the plaintiff was informed that the criminal case was closed due to the expiry of the statutory limitation term for the criminal liability. The criminal case was rather complicated: criminal acts had been committed in several different states, there were more than 250 indictees in the case. During the six year term several episodes of the case were divided into separate cases and the indictees were put to trial, but this was not the case with the plaintiff.

8 The plaintiff argued that there was no proof of any procedural investigation measures to be performed with respect to the plaintiff from 1999 to 2004 when the criminal case was closed. The plaintiff believed that the pretrial investigation was protracted, continuing for an excessively long period of time, thereby violating her right to a quick trial, her right to work and the freedom to posses her property. Due to these violations the plaintiff could not find any proper job and her social insurance contributions were not paid. As a result, she suffered severely over a long period of time with depression, humiliation, deterioration of her reputation, diminution of possibilities to associate with others, i.e., the plaintiff suffered non-pecuniary damage. As a result, the plaintiff claimed LTL 43,323 (€ 12,547) in pecuniary and LTL 50,000 (€ 14,490) in non-pecuniary damages from the Lithuanian Republic, represented by the Department of the Customs Office and the Prosecutor's General's Office.

9 The court of first instance dismissed the claim and noted that, according to the data of the pretrial investigation, there was a legal basis for the accusation made against the plaintiff and her suspension from official duties. The court did not consider the pretrial investigation to have continued over an excessively long period of time and to be protracted; the criminal case was voluminous and complicated, and there were no possibilities to finish the investigation sooner.

[5] Part 2 of art. 6.250 of the Lithuanian Civil Code. The Lithuanian Civil Code can be found at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=162435.

The upper court, on the contrary, upheld the claim and awarded the plaintiff LTL 43,323 (€ 12,547) in pecuniary and LTL 15,000 (€ 4,344) in non-pecuniary damages. The court agreed with the plaintiff that the last procedural measures in the mentioned case were performed in 1998, and there was no proof that any investigation with respect to the plaintiff had been carried out from 1999 up to 2004, when the case was closed. The court emphasized that the case ought to have been sent to trial as soon as it was possible after the accusation and that the suspension measures should have been justified for the entire period of the pretrial investigation. The court's reasoning was based on the fundamental right to hearing within reasonable time (art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms), the presumption of innocence (art. 31 of the Constitution of the Republic of Lithuania) and no-fault liability of public bodies (art. 6.272 of the Lithuanian Civil Code). The court agreed that the excessively long pretrial investigation and the application of the suspension measures caused the plaintiff long-term hardship, inconveniences, emotional depression, humiliation, deterioration of her reputation and the diminution of possibilities to associate with others. 10

b) Judgment of the Court

The Supreme Court of Lithuania (hereinafter – the Court) partly approved the decision of the appeal court. The Court ascertained that the length of the pretrial investigation (which lasted for 5 years, 10 months and 18 days) was excessively long and not proportionate to the complexity of the case. The defendant was found liable based on the concept of no-fault liability. Notwithstanding the fact that no-fault liability of pretrial investigation officers arises under part 1 of art. 6.272 of the Lithuanian Civil Code only as a result of illegal actions which are expressly listed in the aforesaid law (e.g., due to illegal custody, illegal sentencing, etc.), and that an excessively long pretrial investigation has not been treated (as per wording of the Civil Code) as an omission giving right to claim non-pecuniary damages, the Court nevertheless considered that an excessively long pretrial investigation has a similar effect to those illegal actions which allow a claim for non-pecuniary damages. According to the Court, the remedy available under part 1 of art. 6.272 of the Lithuanian Civil Code (i.e. compensation of non-pecuniary damage) may therefore also be available in cases of omission of pretrial investigation officers. The plaintiff was consequently awarded LTL 15,000 (€ 4,344) in non-pecuniary damages. The amount of pecuniary damages (the amount of non-received income) was reduced from LTL 43,323 (€ 12,547) to LTL 15,000 (€ 4,344) by the Court due to the fact that the pretrial investigation and the consequential suspension from her work were legal. 11

The Court noted that national Lithuanian law is not limited to the national legal acts (in this case – the Civil Code), and that international legislation forms an integral part of it. As a result, the legality of the procedural measure according to national law does not necessarily mean the legality of it according to the European Convention on the Protection of Human Rights and Fundamental Freedoms. The Court referred to the practice of the European Court of Human 12

Rights stating that the pretrial investigation must be executed as soon as it is possible and that the time period from the charges being brought up to the trial in court must be limited in time. The Court recognized the period in which no procedural measures were executed or were executed for an excessively long period of time, to be an unreasonable protraction of the case.

13 The Court recognised that the prosecution institutions had not duly performed their duty to ensure the right to a quick trial. It was noted that no procedural measures were taken from 1999 and that the prosecutors and the lower court had not reacted to the requests of the plaintiff to accelerate the investigation. Furthermore, the prosecution office did not implement its right to separate the case of the plaintiff into a separate criminal case, which would have prevented the unreasonable delay of the investigation against the plaintiff. While being the accused for almost six years, the plaintiff suffered from the uncertainty of not knowing when the criminal investigation against her would be ended. Furthermore, her rights to move freely, to posses her property and her right to work were substantially limited.

c) Commentary

14 To the best of the authors' knowledge, in this case the Lithuanian court for the first time awarded non-pecuniary damages for an unreasonably long period of criminal investigation. The Court followed the practice of the European Court of Human Rights and its decisions against the Republic of Lithuania – *Šleževičius vs. Republic of Lithuania*[6], *Girdauskas vs. Lithuania*[7], *Meilus vs. Lithuania*[8] and some other important cases of the Court (*Wejrup vs. Denmark*[9]; *Schumacher vs. Louxembourg*[10]). The novelty of this decision is that an excessively long pretrial investigation may give rise to no-fault liability under part 1 of art. 6.272 of the Lithuanian Civil Code, even though the wording of the said law, in its strictest sense, does not expressly provide for such a possibility.

15 This decision was taken by a broadened panel of seven judges (usually, only three judges sit on the panel), and it could form a great impulse for following such a broad interpretation of Lithuanian law in other similar cases. As was noted by the Court, there is even no need for the pretrial investigation to be complete – non-pecuniary damages may be claimed due to the omission of pretrial investigation officers at any time during the investigation. As a result, similar civil cases could appear in future in Lithuanian courts.

16 On the other hand, the Court's reasoning regarding the pecuniary damage (non-received income of the plaintiff) was quite contradictory in this case. On the one hand, the Court recognized that the questions of the suspension from the work and the accusation of the plaintiff had been resolved in other administra-

[6] European Court of Human Rights case (ECHR) No. 55479/00, 13 November 2001.
[7] ECHR No. 70661/01, 11 December 2003.
[8] ECHR No. 53161/99, 6 November 2003.
[9] ECHR No. 49126/99, 7 March 2002.
[10] ECHR No. 63286/00, 25 November 2003.

tive proceedings in 2002 and that the suspension from work was considered to be legal. Thus, following the principle of *res judicata*, the Court was bound by the findings of the administrative court that the plaintiff's suspension from her work was legitimate. The Court nevertheless still awarded the plaintiff pecuniary damages for being forced to leave her job, equal to LTL 15,000 (€ 4,344). It is therefore not clear from the Court's reasoning when (at which exact time during the period of investigation) the plaintiff's suspension from work became unjustified.

2. Lithuanian Supreme Court, 26 September 2007, No. 3K-3-351/2007: Evaluation of Non-Pecuniary Damages; Family Connections

a) Brief Summary of the Facts

A woman working in a factory died during a huge fire at the factory. The accident happened because the legal entity owning the factory (i.e. the defendant) failed to fulfil its duty to provide safe working conditions for its workers. The defendant compensated the pecuniary losses suffered by the family of the dead woman: it compensated the burial expenses and also paid an allowance, equal to the average salary of the dead woman for one year. However, her two children (the plaintiffs) sued the defendant for non-pecuniary damages, claiming from the defendant LTL 40,000 (€ 11,590) each, because they felt great emotional stress, mental shock and suffered from depression due to the death of their mother. 17

The lower court and the court of appeal dismissed the claim of the plaintiffs, and noted that the legal acts of Lithuania do not allow adult children to claim non-pecuniary damages for the death of their parent. Both courts interpreted part 1 of art. 6.284 of the Civil Code of Lithuania as allowing the children of the dead person to be awarded non-pecuniary damages for the death of their parent only in the case they were dependants of the deceased. The plaintiffs in this case were adults, they had their own families and they were not dependant on their mother at the time of her accidental death. The court dismissed the plaintiffs' claim that the resolution of 15 March, 1975 of the European Council of Ministers No. (75)7 established the right of children (even adults) to be awarded non-pecuniary damages for the death of their parent. 18

b) Judgment of the Court

The Supreme Court of the Republic of Lithuania (hereinafter the Court) did not approve the decisions of the two lower courts. The Court referred to the constitutional principle of compensation for the non-pecuniary damage suffered by the plaintiffs. The Court interpreted national law in the light of relevant international law – the European Convention for Protection of Human Rights and Fundamental Freedoms, the above mentioned resolution of 15 March, 1975 of the European Council of Ministers No. (75)7 and the practice of the European Court of Human Rights. The Court stressed that, according to the above mentioned international law, a plaintiff is entitled to non-pecuniary damages in case of a victim's death only in the case of the existence of a close, tight, 19

sincere and emotionally firm family relationship between the victim and the plaintiffs. According to the Court, art. 6.284 of the Civil Code of Lithuania does not limit the scope of persons who can claim non-pecuniary damages for the death of their close family member.

20 The Court listed the persons who are entitled to claim non-pecuniary damages for the death of their family member: firstly, the dependants, whose rights are set by law; and secondly, other family members (e.g. the adult children irrespective of their dependency) if they had a close, tight, sincere and emotionally firm relationship with the deceased prior to the accident (e.g. the decision of the European Court of Human Rights, 12 January 2007 No. 60272/00). The Court stressed that, while arguing this relationship, it must be considered that the blood relation usually corresponds to the fulfillment of the criterion of "a tight and close relationship".

21 Considering the fact that the lower courts did not investigate the above mentioned criteria and having no rights to solve the questions of fact according to the law of Lithuania[11], the Court annulled the decisions of the first two courts and transferred the case to the court of first instance to be resolved.

c) Commentary

22 The case at hand can be considered as a landmark case in Lithuanian jurisprudence regarding the award of non-pecuniary damages for relatives of victims who suffered physical injury or even died. Until this case the Court's practice on this issue was rather contradictory[12]. In its famous case from 2005[13] the Court awarded non-pecuniary damages to parents due to the severe bodily injuries suffered by their new-born babies. However, just a week later the Court issued its new ruling in another case[14], in which a parent's claim for non-pecuniary damages due to the health impairment of a child was dismissed. In its other rulings[15] the Court awarded the relatives of a victim non-pecuniary damages but did not establish the sound and unquestionable criteria for awarding non-pecuniary damages in case of the physical injury of a family member. Finally, the case at hand introduced some clarity of the said issue and established clear guidelines in application of the criterion of the close, tight, sincere and emotionally firm relationship of the family member with a victim.

[11] The Law of the Republic of Lithuania on Courts (http://www.teismai.lt/english/Documents/The_Law_on_Courts.pdf, the access date 19 January 2008).

[12] For comparison see the contradictory cases of the Lithuanian Supreme Court e.g., No. 3K-7-255/2005 and 3K-3-225/2005. For further comments, see *H. Gabartas/M. Laučienė* in: H. Koziol/B.C. Steininger (eds.) European Tort Law 2005 (2006) 402–405.

[13] Lithuanian Supreme Court, Judgment No. 3K-3-255/2005, www.lat.litlex.lat.

[14] Lithuanian Supreme Court, 25 April 2005, No. 3K-3-222/2005, www.lat.litlex.lat.

[15] Lithuanian Supreme Court, No. 3K-3-86/2005, No. 2K-174/2007, No. 2K-201/2007, www.lat.litlex.lat.

3. Lithuanian Supreme Court, 6 February 2007, No. 3K-3-38/2007: Evaluation of Damages; Future Damages

a) Brief Summary of the Facts

The plaintiff was severely injured in a traffic accident in 1978. At the time of the accident, the plaintiff was a student and was attending classes to become a technician of machine engineering. The plaintiff lost 100% of his working capacity and became permanently disabled. In a previous case the court had recognized the other party in the accident – the driver of the public bus – to be responsible for the accident. On the other hand, the court did not award the plaintiff any kind of damages. Although, a public transport company was paying him monthly allowances, at the time of this case such allowances were not sufficient to pay for the medication required by the plaintiff. After the accident the plaintiff completed his studies and became a technician of machine engineering. In his application to the court, the plaintiff sought a monthly allowance equal to the average monthly salary of a fully capable worker in the same profession and a monthly allowance for nursing expenses, necessary for a person who has lost 100% of his working capacity. 23

The lower court agreed with the plaintiff's argument that, if the injured person was not working but he was a student at the time of the accident, he has a right to claim an increase in the amount of damages, connected with the injury to his health, up to the amount of the average salary of an individual with a qualification similar to the one the plaintiff has gained. As a result, the court of first instance awarded the plaintiff a monthly allowance equal to the average salary of a technician of machine engineering. The court also acknowledged the plaintiff's right to receive a monthly allowance to cover his nursing expenses, stating that this allowance should not be lower than a minimal salary set by law. 24

The court of appeal partly changed the decision of the lower court. The upper court confirmed the plaintiff's right to a monthly allowance, equal to the average salary of fully capable workers. The court stressed that the plaintiff was studying at the time of the accident in the hope of gaining employment in his field of study. The accident deprived the plaintiff of the possibility to earn an income and, as a result, the plaintiff lost his future income. The panel of judges agreed that the defendant has to pay the plaintiff damages, equal to the average income of workers with a qualification similar to that which the plaintiff had gained. On the other hand, the court dismissed the plaintiff's claim for the monthly nursing allowance. It has been recognized that nursing expenses are to be evaluated according to the fact of the expenses actually incurred. The court based its conclusions on art. 6.283 of the Lithuanian Civil Code which describes nursing expenses as the "expenses, connected with the restoration of one's health"[16]. 25

[16] The Civil Code of Lithuania can be found at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=162435.

b) Judgment of the Court

26 The Supreme Court of Lithuania (hereinafter – the Court) upheld the decision of the upper court. The Court based its decision on art. 6.283 of the Lithuanian Civil Code, according to which the injured person shall be compensated for all his damage incurred because of the injury, including the expenses connected with the restoration of his health. Such expenses are normally awarded to the injured person as the factual expenses incurred by the aggrieved party. The amount of such expenses shall be evaluated according to the real expenses the plaintiff proved he had truly and reasonably incurred. The Court stressed that the amount of nursing expenses can vary over longer periods of time – it can increase or decrease accordingly. If a fixed amount is set for these damages, this could be contrary to the principle of full compensation for a tort. On the other hand, it could also lead to the unreasonable enrichment of the injured person. The Court also emphasized the necessity to prove that the victim reasonably and truly needed the nursing services. In this case, the plaintiff failed to prove his incurred nursing expenses and the Court was not even convinced of the necessity for the plaintiff to engage a caregiver because of his ability to take care of himself (to drive a car, to do sports and to work as a consultant in a company).

27 The Court also agreed with the argumentation of both lower courts concerning the monthly allowances for the non-received income. The Court declared that if the plaintiff had finished his studies and had qualified as a technician of machine engineering remaining healthy and fully capable, he would have gained a possibility to work in this profession and would have gained the respective income. In such a case, both courts reasonably and legitimately awarded the plaintiff non-received income, equal to the average salary of fully capable workers in a similar profession.

c) Commentary

28 In this case, the plaintiff was claiming for the future expenses that are probable and known to be incurred. The possibility of such damages is entrenched in art. 6.249 of the Lithuanian Civil Code[17]. Lithuanian courts broadly use this way of compensation in the cases of traffic accidents, for example, while evaluating the future expenses of damaged cars, etc. On the other hand, the nursing expenses for a person who was recognized to be 100% disabled were not considered by the court to be "expenses, connected with the recovery of one's health". Regrettably, in this case, the Court distinguished only direct expenses and non-received income to form the damages of the plaintiff.

29 By taking such a position the Court was not entirely consistent in following the principle of full compensation for the damage related to an injury. In such situation a victim, who wants to be fully compensated, may not claim his fu-

[17] In case of future damage the court can set the concrete amount of damages, periodical allowances or it can oblige the debtor to secure the compensation for the harm incurred, – art. 6.249 par. 3 of the Civil Code of Lithuania.

ture expenses for expected nursing; instead he may do so only after he in fact suffers them and has sufficient proof of such expenses. Such a requirement obviously hinders a victim's right to compensation by imposing additional difficulties upon him.

4. Lithuanian Supreme Court, 2 May 2007, No. 3K-3-177/2007: Determination of Non-Pecuniary Damage in the Family Relationship

a) Brief Summary of the Facts

The plaintiff (a husband) filed a lawsuit in court for divorce stating the fault of both partners. He claimed that the main reasons for the divorce suit being filed were the different characters of both partners and their different approaches to solving problems in the family. In parallel, the defendant (a wife) filed a counter-claim against the plaintiff claiming the fault of one partner – the plaintiff. The defendant indicated that the plaintiff had abused her, had been disloyal and had not contributed to the family needs. Therefore, the marriage broke up because of the fault of the plaintiff. Apart from the other requests, the defendant sought compensation for the non-pecuniary damage she suffered for more than eight years of marriage, equal to LTL 10,000 (€ 2,896). 30

The lower courts recognized that the plaintiff was responsible for the break up of the family and the divorce. The court of first instance pointed out that the plaintiff had been prosecuted for committing the criminal act, set in art. 140 of Lithuanian Criminal Code[18]. In the previous criminal case against him, the plaintiff admitted committing the illegal acts against the defendant. He apologized and paid the defendant compensation equal to LTL 2,000 (€ 580). Relying on such a notorious reputation of the plaintiff, the court of first instance awarded the defendant non-pecuniary damages in the amount of LTL 5,000 (€ 1,450). The court of appeal reduced the amount of the damages awarded because of the fact that there was no other significant proof in the case that the defendant had been injured by the plaintiff on any other occasion. Further, the court noted that the plaintiff had compensated his spouse for the damage he had inflicted and the fact that he was the one to file for the divorce in court. 31

b) Judgment of the Court

The Supreme Court of Lithuania upheld the decisions of the lower courts. The Court followed the presumption, set in the Civil Code of Lithuania[19] and recognized the plaintiff as responsible for the breakdown of the family. The Court took into consideration the fact that the plaintiff had abused his spouse and his 32

[18] Art. 140 establishes liability for causing physical pain and a deterioration to one's health. The Criminal Code of Lithuania can be found at: http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=163482.

[19] Par. 3 of art. 3.60 of the Lithuanian Civil Code sets the presumption of fault for the breakdown of the family, when one of the family members (i) was charged for an intentional criminal act (ii) was unfaithful to his/her spouse (iii) abused his/her spouse and other family members or (iv) left the family and did not take care of the family for more than one year. The Civil Code of Lithuania can be found at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=162435.

family as well as used physical and emotional violence against them (this was proved by the above mentioned criminal case and the written promise of the plaintiff not to hurt the defendant any more, which was given as evidence in the civil case).

33 The Court emphasized that the non-pecuniary damage connected to the divorce can be the mental experiences of the spouse, the physical and emotional pain the spouse had suffered, the inconveniences, humiliation, and diminution of reputation connected to the illegal and immoral acts of the other spouse. The Court noted that the defendant had ill-treated the plaintiff over a long period of time and, as a result, caused the defendant emotional pain and suffering. By evaluating the previous compensation to the defendant of LTL 2,000 (€ 580), the Court presumed the compensation assigned by the court of appeal, equal to LTL 5,000 (€ 1,450) to be sufficient and reasonable.

c) Commentary

34 Par. 2 of art. 3.70 of the Civil Code of Lithuania has established one's right to claim non-pecuniary damages in case of divorce due to the fault of the other spouse since 2001[20]. This case is very important for awarding the spouse non-pecuniary damages in the event of divorce. The presumption of fault set in art. 3.60 of the Civil Code promoted such an outcome in the case. With regard to the fact that the acts of violence within a family case are quite hard to prove and it is subsequently difficult to evaluate the amount of the damage to be compensated, this case could form a very important precedent for the further development of compensating non-pecuniary damage in family law cases.

C. Literature

1. *Solveiga Cirtautienė*, Trečiųjų asmenų teisės į neturtinės žalos atlyginimą sutrikdžius nukentėjusiojo sveikatą arba atėmus gyvybę (An Analysis of Lithuanian Legal Regulation and Court Practice on Compensation for Non-Pecuniary Damage Suffered by Third Persons in Cases of Health and Fatal Injuries) Jurisprudencija, No. 2(92), 2007, 84–92

35 In this article the author analyses the right to compensation for non-pecuniary damage suffered by third persons who are connected to a victim in a family relationship in case of damage to health or the death of a victim. The author discuss the main principles in European countries for compensating non-pecuniary damage to family members of victims, the rules of the European Principles of Private Law and the main problems of Lithuanian law and court practice when compensating non-pecuniary damage suffered by persons who experienced substantial mental stress or shock following the death or injury of their family members.

[20] The new Civil Code of Lithuania entered into force on 1 July 2001, and replaced the old Civil Code of Lithuania (1964).

The author stresses the need of contemporary society not only to secure the life and physical health of a person, but also stresses the aim of securing the spiritual and psychological comfort of individuals. Such an approach would conform to European practice and would widen the limits for awarding non-pecuniary damages to third parties in case of health and fatal injuries. 36

The German, Dutch, Austrian, British and Italian law limits the right of third parties to claim non-pecuniary damages only to cases when the emotional distress suffered can be medically recognized as a mental illness. On the other hand, French, Belgian and Portuguese law regulates such situations notably liberally – there is no need for the third person to prove the emotional distress or the existence of a close relationship to the victim. This results in a number of plaintiffs claiming and being awarded non-pecuniary damages in cases of physical injury or death. The author arrives at the conclusion that the Principles of European Tort Law[21] also regulate compensation for non-pecuniary damage quite liberally. 37

The author reviews the Lithuanian court practice in awarding non-pecuniary damages to third persons in case of injury or death of their family members and shows the inconsistency of such cases in the Lithuanian Supreme Court. On the one hand, the Court awarded compensation to the parents of the babies severely burnt in a state hospital[22], on the other hand it rejected the claims in several similar cases by alleging the non-pecuniary damage to be purely personal[23]. Consequently, the author argues that there is a need to define the model for compensation of non-pecuniary damage to third persons in Lithuania. The author suggests acknowledging the right to compensating third persons for non-pecuniary damage only in case of injury to health or death. When determining the amount of non-pecuniary damages, the form and the level of guilt of the defendant should be established. Finally, the criteria for persons, who are entitled to non-pecuniary damages in case of injury or death of their close relatives, should also be clarified. 38

2. *Pavelas Ravluševičius*, Neturtinės žalos atlyginimo klausimai Europos Bendrijos ir Lietuvos darbo teisėje (Issues Relating to Non-Material Damage in European and Lithuanian Labour Law) Jurisprudencija, No. 5(95), 2007, 32–38

In this article the author examines non-pecuniary damage and the compensation for it in the legal relationship regulated by labour law. The author reviews the law of the European Union and the national Lithuanian law, discusses the 39

[21] *European Group on Tort Law* (ed.), Principles of European Tort Law: Text and Commentary (2003).

[22] Lithuanian Supreme Court, 18 April 2005. For further comments of the case see: *H. Gabartas/M. Laučienė*, Lithuanian Supreme Court, 18 April 2005: Medical Negligence; Determination of Non-Pecuniary Damages, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 402 ff.

[23] See cases: Lithuanian Supreme Court, 25 April 2005, No. 3K-3-222/2005 and Kaunas Regional Court, 19 April 2006, No. 2-251-230/2006.

necessary conditions for compensating non-pecuniary damage and finally, examines the practice of the European Court of Justice and the national courts of Lithuania.

40 Firstly, the author comes to the conclusion that the law of the European Union does not regulate the compensation of non-pecuniary damage. A person who suffers non-pecuniary damage for the breach of Union law can claim damages in national court applying national rules for compensating this damage. On the other hand, art. 250 of the Lithuanian Labour Code[24] entrenches one's right to be awarded compensation for non-pecuniary damage in labour relationships. Although the Labour Code of Lithuania does not provide the further terms and conditions for non-pecuniary damages, the common principles of law and the Code Civil are applied in such cases, upon the condition that both parties are in a labour relationship.

41 The author emphasizes the general conditions for applying liability for non-pecuniary damage incurred. Unlawful actions are described as the breach of the Labour Code of Lithuania, secondary laws, acts of the local government, labour contract or the collective agreement. Causality must be established between the unlawful actions and the damage incurred, which can be asserted as direct and indirect. The fault that forms a subjective condition for the liability may be realised in the form of intention or negligence.

42 The non-pecuniary damage shall not be presumed under the laws of Lithuania. The victim and third parties claiming non-pecuniary damages have to prove the damage incurred. Furthermore, a third party shall be awarded non-pecuniary damages only in exceptional cases. The author states the basic criteria used when determining the amount of damages, i.e. the length of time in which the parties have been in a labour relationship, the disciplinary penalties imposed on the employee, the circumstances of infringement of rights of the employee, the fault of the offender, the consequences incurred, as well as the main principles of justice, reasonableness and good faith as per Lithuanian civil law.

43 By referring to the concrete cases of the European Court of Justice regarding non-pecuniary damages, when the amounts of non-pecuniary damages determined by the Court were relatively small or even symbolic[25], the author stresses the choice of the European regulation to designate this important and exclusive question for the national jurisdiction.

[24] VŽ, 26 June 2002, No. 64-2569. The Lithuanian text can also be found at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=169334.

[25] See judgments of the European Court of Justice 11 April 2006, No. T-394/03 and Cwik/European Commission.

3. *Vitalija Tamavičiūtė*, Valstybių narių atsakomybė privatiems asmenims dėl nacionalinių teismų veiksmais padarytos žalos (State Liability for Individuals for the Damage Incurred by Acts of National Courts) Jurisprudencija, No. 7(97), 2007, 74–81

The author of the article examines the principle of state liability of individuals for the damage incurred as a result of acts of national courts, elaborated by the precedent of the European Court of Justice in the *Francovich*[26] case. The mentioned principle filled the loophole in the Treaty of the European Union regarding protection of individuals. The author accentuates the exceptional role of the national courts in protecting rights of individuals – the national courts are obliged to apply the European law and to ensure that the rights of individuals shall be ensured. 44

Up to the *Francovich* case, state liability for the breach of European law was limited by two principles: non-discrimination and adequacy. Since *Francovich*, the national courts and the European Court of Justice base their decisions on the international principle for state liability for the breach of international agreements and art. 10 of the European Community Treaty, entrenching the obligation for the Member States to introduce all possible common and special measures in order to secure the fulfillment of the obligations under European law. 45

Three conditions for establishing state liability were distinguished: (i) the breached legal norm was intended to entrench rights of individuals; (ii) the breach can be considered to be sufficiently intense, and (iii) the incurred damage was determined and assessed. Furthermore, the author analyses the concept of "evident breach" that tightened the application of the state liability principle. While determining the evident breach, the courts should evaluate the clarity and exactitude of the breached legal norm, the fault of the offender and especially the fact of the court intention to apply to the European Court of Justice. 46

By pointing out the main features of the institution of state liability for breaching the European law, the author stresses its suitability as a tool for filling the loophole in the system of protecting individual rights under European law. 47

4. *Renata Volodko*, Neturtinės žalos dydžio nustatymo sveikatos sužalojimo bylose ypatumai remiantis Lietuvos teismų praktika (The Peculiarities of Determining Non-Pecuniary Damages in Cases of Health Injury) Teisė 2007, No. 63, 116–131

The article investigates and analyses the peculiarities of the assessment of the extent of non-pecuniary damages in cases of health injury of a person on the basis of valid legislation, the practice of Supreme Court of Lithuania and other courts as well as legal doctrine. 48

The author emphasizes that the institute of non-pecuniary damage is quite a novelty in Lithuanian legislature and court practice as a result of the long 49

[26] ECJ C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357.

and strict Soviet legal regulation. The concept of non-pecuniary damage was introduced after the old civil code of Lithuania was changed and later, the new one was adopted. As a result, there are no concrete and direct guidelines for determining the concrete amounts of non-pecuniary damages, awarded by courts to persons who suffered a health injury. Furthermore, the author notes the inequality of various values whose breach results in the payment of non-pecuniary damages (e.g., on the one hand, the law recognizes the right of political parties to be awarded non-pecuniary damages for a breach to its reputation and, on the other hand, it does not recognize an individual's right to be compensated for suffering stress and emotional disturbance in case of injury to his close relative. The New Civil Code considered the problems caused by inconsistency and incompleteness of the internal law, the experience of foreign countries in awarding non-pecuniary damages and the international recommendations in the above mentioned sphere of regulation (e.g. Resolution No. (75) 7 adopted by Committee of Ministers of the Council of Europe on 14 March 1975 on compensation for physical injury of death).

50 By reviewing the Lithuanian court practice, which is at the moment in an ongoing developmental process, the author distinguishes and discusses the main criteria for determining the amount of non-pecuniary damages set by Lithuanian courts and legal acts. The extent and the nature of the injuries suffered were distinguished as the first and the main criteria for determining the limit for compensation. The more pain and suffering a person experiences, the greater the amount of compensation which is determined by the court. The second common criterion is the percentage of the lost working capacity. The greater this percentage, the greater the amount of compensation. The form and the degree of fault of the defendant (that is, in some cases, e.g. in medical negligence cases, very strict) are also usually very important criteria, which determine the amount of compensation. The author also disputes the criterion of evaluating the material situation of the defendant, which is commonly used by the courts of Lithuania and which, in the author's opinion, breaches the two constitutional principles as well as the original principle of corrective justice determined since the times of Aristotle. Finally, the author stresses the importance of principles of justice, reasonableness and good faith while evaluating the totality of all the above mentioned criteria and converting the pain and suffering of the plaintiff into monetary compensation.

5. *Romualdas Drakšas/Regina Valutytė*, Valstybės atsakomybės pagal privataus asmens ieškinį principo samprata ir įgyvendinimo sąlygos (The Concept of State Liability upon the Claim of the Private Individual and Conditions for Implementing it) Justitia 2007, No. 2(64), 67–76

51 Up to the *Francovich*[27] case, the European Court of Justice ("the Court") had usually stressed the importance of seeking compensation in case the state breaches its obligations under the law of the European Union. However, the

[27] ECJ C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357.

Court had pointed out that the compensation always had to be sought according to the national measures, since the European legislation did not offer any mechanism in case of the above mentioned breach. On the contrary, in *Francovich,* the Court recognized an additional method of protecting individuals' rights – it is the right of an individual to apply to a national court with a claim directly based on the EC Treaty in case the Member State had breached its obligations under EU law. The authors of this article discuss the outcomes and the reasons for this recognition and also argue if the principle of state liability for the breach of EU law can be called a "constitutional" principle. The authors distinguish three constitutional bases for the above mentioned principle to be recognized as "constitutional". Firstly, this principle derives from the "spirit", aims and the whole structure of the EC Treaty, as a document, granting rights and obligations not only to the Member States, but also to their nationals. Secondly, the principle also originates from art. 10 of the EC Treaty, and the principle of effectiveness, entrenched thereto. And thirdly, the principle of state liability also derives from the national principles of one's right to be compensated for the damage incurred – the key element of any constitutional state.

52 The conditions that lead to state liability towards an individual who suffered damage, are: (i) the breach can be contributed to the state; (ii) the breach of EC law can be considered to be material enough; (iii) the legal norm that was breached was meant to ensure a right to the private individual, and (iv) a direct causal relationship between the breach and the damage occurred exists. By distinguishing the conditions for the state liability principle, the authors widely discuss its application in the *Francovich* case and the further cases of the Court, and provide further guidelines for the Lithuanian courts to follow in future cases regarding the non-implementation of EU law (if this occurs).