

THE ROLE OF THE PSYCHIATRIC EXPERT IN TORT LITIGATION

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Abstract The paper analyses the evidentiary function of psychiatric expertise in tort proceedings, emphasizing its significance within Slovenian contractual and non-contractual liability regimes. Psychiatric experts are essential in establishing causation and assessing the extent of non-pecuniary damage, thereby shaping judicial determinations of fault and compensation. Effective adjudication requires reciprocal legal-medical literacy: judges should understand the basics of psychiatric evaluation, while experts must grasp fundamental tort and procedural principles. The study highlights the need for unified psychiatric assessment criteria consistent with established jurisprudential standards to enhance legal certainty, coherence, and fairness in the quantification of damages within tort law. Such harmonisation would strengthen the consistency and predictability of judicial practice.

Keywords

liability for damages,
litigation,
psychiatric expert
opinion,
physical pain,
mental pain,
fear

1 Introduction

Compensation disputes constitute a significant portion of the cases handled by Slovenian courts. In these cases, cognitive potential without medical expertise is often referenced. This is particularly true in litigation involving monetary compensation for non-pecuniary damages. While the substantive legal basis in Slovenian law is laid down in Article 179 *et seq.* of the Obligations Code,¹ establishing the occurrence and extent of non-pecuniary damage is contingent upon the procedural activity of the parties (Pavčnik, 2025, p. 1056 *et seq.*).² Medical expertise, including psychiatric expertise, is a procedural act in which medical concepts and principles are 'translated' into legal terms and categories (Gnjidić et al., 2008, p. 18). Thus, the psychiatric expert does not act as a medical therapist but as an individual who, by virtue of their professional knowledge and expertise, assists the court in ascertaining relevant facts and forming an opinion based on those findings. In providing their opinion, the expert essentially assumes certain tasks that would otherwise fall under the court's jurisdiction: they perform tasks that the judge would have had to perform personally, had they possessed the necessary expertise and experience (Triva & Dika, 2004, p. 527). The professionalism and impartiality ensured by the provisions on the exclusion of experts are the main factors that give this form of evidence particular importance in practice. The expert does not sit in judgment, but exerts a significant influence on the trial, either by assisting the court to assess the evidence or by shaping how the court applies legal standards (Triva & Dika, 2004, p. 527).

This paper explores the evidentiary and epistemological role of psychiatric expert evidence in tort litigation, focusing on its relevance to both contractual and non-contractual liability within the Slovenian legal system. It emphasises the cognitive

¹ Official Gazette of the Republic of Slovenia, No. 97/07 – officially consolidated text, 64/16 – decision of the Constitutional Court, and 20/18 – OROZ631 hereinafter referred to as OZ.

² According to Slovenian case law (Judgment of the Supreme Court of the Republic of Slovenia II Ips 155/2017, ECLI:SI:VSRS:2018:II.IPS.155.2017, 22 November 2018), the court may determine the amount of monetary compensation for non-pecuniary damage even in the absence of expert evidence, insofar as, having regard to the parties' pleadings and evidentiary submissions (first paragraph of Article 7 of the Civil Procedure Act, Official Gazette of the Republic of Slovenia, No. 73/07 – officially consolidated text, 45/08 – ZArbit, 45/08, 111/08 – CC, 57/09 – CC, 12/10 – CC, 50/10 – CC, 107/10 – CC, 75/12 – CC, 40/13 – CC, 92/13 – CC, 10/14 – CC, 48/15 – CC, 6/17 – CC, 10/17, 16/19 – ZNP-1, 70/19 – CC, 1/22 – CC, 3/22 – ZDeb and 92/24 – CC; hereinafter: ZPP) and applying the principle of free assessment of evidence (Article 8 of the ZPP), it can establish with sufficient certainty (Article 215 of the ZPP) the existence and extent of at least some forms of non-pecuniary damage. Where such certainty cannot be attained, the court shall decide the claim in accordance with the rules governing the burden of proof (Article 215 of the ZPP).

function of expert testimony in establishing legally relevant facts, particularly concerning the constitutive elements of tort liability and in assessing non-pecuniary damage. Owing to the scarcity of legal scholarship on this subject, the paper contributes to refining jurisprudence and further developing the procedural doctrine governing expert evidence. Employing descriptive, analytical, and synthetic methods, the research systematically examines doctrinal sources and case law to construct a coherent theoretical and practical framework for the admissibility and probative value of psychiatric expertise in tort adjudication.

2 General Principles on Expert Evidence in Civil Litigation

The normative basis for engaging an expert in litigation is Article 243 of the ZPP, which provides that the court shall take evidence from an expert if establishing or clarifying a fact requires expertise that the court does not possess. An expert witness is a person who is called before the court to give, based on their expertise, their current observations and opinions on facts that may be relevant to determining the truth of the assertions which are the subject of the evidence (Triva & Dika, 2004, p. 562). The decision of who qualifies as an expert rests with the court,³ and the court is not bound by the list of expert witnesses.⁴ The list of court experts⁵ is only a recommendation to assist in selecting an expert. In civil proceedings, the participation of a psychiatric expert is prescribed by law as mandatory only in narrowly defined non-contentious matters – specifically, in proceedings concerning an individual’s involuntary admission to a psychiatric institution without consent and in proceedings for the deprivation or restriction of legal capacity through the appointment of a guardian. In all other civil disputes,⁶ including those arising from tortious liability, the decision whether to engage a psychiatric expert depends on the court assessing whether the adjudication of the case requires the resolution of a factual or causal issue that lies beyond judicial knowledge and necessitates specialised expertise. Psychiatric expert evidence thus serves as an auxiliary instrument for

³ See paragraph 1 of Article 244 of the ZPP.

⁴ See paragraph 2 of Article 245 of the ZPP. The Judicial Experts, Judicial Appraisers, and Court Interpreters Act (Official Gazette of the Republic of Slovenia, No. 22/18, 3/22 – ZDeb and 102/24) governs the status of judicial experts, the conditions and procedure for their appointment and dismissal, the management of registers and records, disciplinary responsibility and procedures, professional development, proficiency exams, remuneration for services rendered, and other matters related to the field of judicial expertise.

⁵ In the registry of judicial experts, maintained by the Ministry of Justice of the Republic of Slovenia, there are 39 judicial experts in psychiatry as of 11 February 2025.

⁶ For an overview of the most common civil-law cases in which expert evidence in the field of psychiatry is required, see Voglar, 2025, pp. 217–218.

establishing legally relevant facts, particularly those related to assessing mental capacity, imputability, and the causal nexus between the harmful act and the resulting damage. Within the Slovenian procedural framework, such cases are predominantly adjudicated in civil litigation. Concurrently, adhesion proceedings within criminal trials remain an exceptional procedural avenue, applicable only when the alleged tortious conduct simultaneously constitutes a criminal offence giving rise to compensable harm.

The work performed by the expert consists of two phases. The first stage is to provide an opinion, which involves a finding of fact that requires special expertise not available to the court. The second stage is the expert's opinion on the facts defined in the report, based on their general, professional and specialist knowledge and experience (Zobec, 2006, p. 473; Čizmić, 2011, p. 491). In the structure of its decision, the court places the expert's opinion in the minor premise of the judicial syllogism, i.e. the factual basis or life situation.

3 Psychiatric Expertise in Tort Litigation

Compensation disputes may be classified according to the underlying legal basis of liability. They include, first, tortious disputes, in which the injured party seeks compensation from the tortfeasor (or their insurer) under statutory provisions governing non-contractual liability, and second, contractual disputes, in which the claimant alleges that the defendant caused harm through a breach of contractual obligations. Thus, the legal foundation of a claim for damages may arise either from statute or common law principles (tortious liability) or from contractual obligations (contractual liability). The following analysis addresses both forms of liability, highlighting their conceptual distinctions, normative frameworks, and the evidentiary role of psychiatric expert testimony in establishing causation, imputability, and the scope of non-pecuniary harm in such compensatory proceedings.

3.1 Non-Contractual Liability for Damages

In disputes between the injured party and the person who caused the damage, the first question to be decided is whether the defendant is liable for the damage or whether there is a cause of action. Only the person who causes the damage is liable to compensate for it, and only if they fail to prove that the damage was caused

without fault on their part (Koman Perenič, 2004, p. 32; Plavšak, 2009, p. 497). The defendant, that is, the person who caused the damage or their insurer, is liable for the damage only if all elements of tortious liability are fulfilled. These elements comprise tortious conduct, legally recognised damage – either pecuniary or non-pecuniary – a causal relationship between the defendant's conduct and the harm suffered by the injured party, and fault on the part of the defendant. The plaintiff bears the burden of alleging and proving the occurrence of damage, the unlawfulness of the conduct, and the causal link, while fault, expressed as intent or negligence, is presumed under tort law but may be rebutted by the defendant through appropriate evidence.⁷

Depending on the circumstances of each case, at the stage of deciding on the merits of the compensation claim the psychiatric expert may assist the court in clarifying how the damage was caused - in particular how the injured party's mental state was affected by the harmful conduct of the person who caused the damage. The expert's opinion will undoubtedly provide valuable insight into questions of causation, specifically whether the established harm is the result of the harmful event or whether it originates from another cause underlying the specific pathological condition. In assessing this element of the compensatory obligation, it is crucial for the psychiatric expert to carefully differentiate between cases in which there exists only a potential or probabilistic causal connection – indicating a greater or lesser degree of likelihood – and those in which the existence of such a causal nexus appears established beyond a reasonable doubt or attains a level of certainty. This distinction is essential for the court to not only properly evaluate causation as a constitutive element of tortious liability but also to accurately determine the defendant's responsibility for the resulting damage (Čizmić, 2011, p. 493).

Importantly, the court would be wrong to leave the final decision on the existence of a causal link, as a prerequisite for the obligation to pay damages, solely to the expert and to uncritically adopt their opinion in the judgment. In determining the existence of a special causal link, the court must apply rules of substantive and procedural law which may even alter the expert's conclusions. The substantive rules are reflected both in applying the relevant theory of causation (e.g., adequate, equivalent, ratio legis, etc.) and in identifying and assessing possible facts and

⁷ For more on the determination of the amount of compensation for non-property damage, see Berger Škrk, 2010, p. 66 *et seq.*

circumstances that break the causal link (e.g., force majeure, act of a third party, coincidence). All these conceptual devices limit the scope of substantive causation, defining its boundaries and tailoring it to human beings and their capacity to master nature and the material world. Even at this stage, the court may determine that there is no causal link or that it has been broken, even if the expert has confirmed its existence (Varanelli, 2024, p. 1446). In short, judges are not bound by the expert's opinions on these matters and must arrive at their own ultimate decision, which, however, is informed by the expert's work.

A psychiatric expert opinion may also be required to assess the potential fault element attributable to the tortfeasor, particularly in cases where it is necessary to determine their mental capacity or fitness to plead. Psychiatric expertise is likewise of central evidentiary relevance in disputes concerning the scope of the damage and whether causation exists. For instance, in cases involving the termination of an employment contract resulting in loss of income, contested issues may include whether the ensuing depression resulted from the loss of earnings (lost profits) and, if so, for what duration. The evidentiary significance of psychiatric expertise becomes even more pronounced when assessing non-pecuniary damage in both contractual and tortious liability contexts, as will be further elaborated below.

3.1.1 The Role of the Psychiatric Expert in Establishing Non-Contractual Non-Pecuniary Damage

The Slovenian legal system has a closed framework for legally recognised non-pecuniary damage to natural persons, which are compensated through monetary damages.⁸ These include the following forms: physical pain, mental pain resulting from a reduction in life activity, defilement, defamation, or impairment of liberty or personality rights; the death of a loved one; and fear (Ovčak Kos & Božič Penko, 2018a, 2, p. 10). The court may also award damages for future non-pecuniary harm if, in the ordinary course of events, it is certain that such harm will persist.⁹ For non-pecuniary damages, a subjective concept is applied to natural persons,¹⁰ which means that compensation is due to the injured party for the physical and mental suffering

⁸ The amount of compensation for non-property damage depends on the significance of the harmed interest and the purpose of the compensation, but it must not support claims that are incompatible with its nature and purpose. See Article 179 of the OZ.

⁹ See Article 182 of the OZ.

¹⁰ The OZ adopted the objective concept only for non-property damage to legal entities.

caused by an interference with their physical and mental integrity, but not for the interference itself or its objective consequences (Ovčak Kos, 2022, p. 175). For example, compensation is not awarded for a bone fracture, but is for the bodily pain resulting from that fracture. Similarly, compensation is not awarded for an insult, but is for the mental suffering resulting from it.¹¹

3.1.1.1 Physical Pain

As a distinct form of legally recognised non-pecuniary damage, bodily pain has been interpreted broadly in case-law. For instance, it is well-established that physical pain includes the inconvenience experienced during medical treatment, medical examinations, taking medication, etc. More recent case-law has awarded damages for the inconvenience of medical treatment to an injured person who, due to a permanent hormonal disorder due to a concussion, will need to undergo hormone therapy for the rest of their life, the absence of which would endanger their life (Božič Penko, 2017, p. 69-88).¹² While most personal injury claims are based on physical injury, claims are less frequently based on mental trauma, either as a stand-alone issue or in conjunction with physical injury, where the mental trauma contributes to the physical suffering (Ovčak Kos & Božič Penko, 2018a, 2, p. 10; Ovčak Kos, 2022, p. 176).¹³

In assessing this form of non-pecuniary damage, an expert medical opinion will be necessary to determine the duration and intensity of the pain and inconvenience already suffered, as well as what can, in the ordinary course of events, be expected to continue in the future. This assessment must consider the specific injured party's pain threshold (Čizmić, 2011, p. 492). The expert must determine the duration and intensity of the physical pain, as well as any discomfort or inconvenience experienced by the injured party throughout the course of medical treatment – for example, the number of medical examinations, hospitalisations, diagnostic procedures, and pharmacological interventions undertaken.¹⁴ Such factual findings and

¹¹ Judgment of the Supreme Court of the Republic of Slovenia, II Ips 251/2014, ECLI:SI:VSRS:2016:II.IPS.251.2014, 5 May 2016, item. 13.

¹² See the judgment of the Supreme Court of the Republic of Slovenia II Ips 133/2016, ECLI:SI:VSRS:2017:II.IPS.133.2016, 16 November 2017.

¹³ The OZ does not condition the right to compensation for physical pain on its origin, but solely on the fact of its occurrence.

¹⁴ See, for example, the judgments of the Supreme Court of the Republic of Slovenia VIII Ips 127/2018, ECLI:SI:VSRS:2019:VIII.IPS.127.2018, 2 April 2019; II Ips 10/2014, ECLI:SI:VSRS:2015:II.IPS.10.2014, 30

corresponding expert conclusions may also be provided by a medical expert other than a psychiatrist; consequently, establishing the legally relevant facts in relation to this form of damage does not necessarily require psychiatric expertise, as assessing this issue primarily concerns somatic rather than psychological or psychiatric impairment.

3.1.1.2 Mental Pain

In cases of mental anguish, the right to compensation is conditional upon the existence of one of several legally defined causes, namely: impairment of life activity, defilement, defamation, impairment of liberty, violation of a personality right, or the death of a loved one.¹⁵ These sources of mental pain, like physical pain, are defined in abstract terms or as legal standards (Možina, 2014, p. 41; Božič Penko, 2016, p. 69; Ovčak Kos, 2022, p. 176). Thus, the injured party is not automatically entitled to monetary compensation for mental pain resulting from a reduction in their life activities merely because those activities are reduced. In line with the subjective concept of compensation for non-pecuniary damage, such compensation is only granted on the additional condition that the injured party suffers mental anguish as a result of the reduction (Ovčak Kos & Božič Penko, 2018a, 2, p. 10). Life activities may be diminished as a consequence of an interference with either the physical or mental integrity of the injured party. In both instances, the court's determination of compensation for mental suffering arising from a reduction in life activities depends on the duration and intensity of that pain, encompassing both past suffering (up to the conclusion of the main hearing) and any reasonably foreseeable future pain. However, the method of establishing the extent and duration of mental distress may differ depending on whether the impairment concerns physical or mental integrity. Accordingly, the need to involve a psychiatric expert in the evidentiary process of damages proceedings may likewise vary.

If the impairment originates from a physical injury, the expert opinion is ordinarily provided by a specialist in the relevant medical field – such as a traumatologist, orthopaedic surgeon, internist, or another physician possessing expertise in the treatment of the affected body part. In their expert report, the specialist must specify the nature and extent of the impairment, indicating which life activities the injured

September 2021; II Ips 91/2017, ECLI:SI:VSRS:2018:ILIPS.91.2017, 4 October 2018; II Ips 135/2019, ECLI:SI:VSRS:2020:ILIPS.135.2019, 5 June 2020 et al.

¹⁵ See Article 179 of the OZ.

party is unable to perform as a result of the sustained trauma, as well as which activities remain possible but are subject to functional limitation and to what degree such limitation is manifested.¹⁶ In the vast majority of cases, the court, relying on the medical expert's findings together with the injured party's testimony and taking into account circumstances which, according to general experience, may affect the intensity and duration of mental suffering arising from physical impairment – such as the injured person's age, occupation, gender, and comparable personal factors – determines the appropriate amount of compensation for mental anguish resulting from the reduction or loss of life activities. This judicial assessment thus reflects both the objective medical evaluation of impairment and the subjective impact of the injury on the claimant's overall quality of life.

As a general rule, the appointment of a psychiatric expert in such cases is exceptional. Such involvement is warranted only where the injured party alleges mental suffering that is substantially more intense or prolonged than that typically observed in comparable cases, thereby indicating the existence of an additional, autonomous form of non-pecuniary damage. In these circumstances, psychiatric expertise becomes necessary to determine whether the mental distress exceeds the ordinary psychological reaction to physical impairment and constitutes a distinct reduction in life activity justifying separate compensation within the framework of non-pecuniary damages.¹⁷ Alternatively, the need for psychiatric expertise may arise when the tortfeasor entirely denies the existence of mental suffering or asserts that it was of a milder intensity and shorter duration. This situation may occur, for example, when the injured party, due to specific psychological characteristics or personality traits, is unable to perceive the reduction in their own life activities or does not experience the resulting mental distress to the extent ordinarily expected. In such circumstances, appointing a psychiatric expert is warranted to objectively assess the injured party's mental state and to determine the presence, nature, and degree of the alleged non-pecuniary harm.¹⁸ If the injured party asserts that the reduction in life activities was caused by mental trauma, a psychiatric expert shall provide an opinion on causation

¹⁶ See the rulings of the Supreme Court of the Republic of Slovenia II Ips 290/2017, ECLI:SI:VSRS:2018:II.IPS.290.2017, 17 May 2018; II DoR 295/2022, ECLI:SI:VSRS:2022:II.DOR.295.2022, 7 September 2022; II DoR 504/2022, ECLI:SI:VSRS:2022:II.DOR.504.2022, 22 February 2023; II DoR 506/2022, ECLI:SI:VSRS:2022:II.DOR.506.2022, 1 March 2023; II DoR 386/2022, ECLI:SI:VSRS:2022:II.DOR.386.2022, 7 December 2022; II DoR 17/2023, ECLI:SI:VSRS:2023:II.DOR.17.2023, 15 March 2023, et al.

¹⁷ For example: The victim would suffer severe bodily injuries in a traffic accident. The consequence of these injuries is paraplegia, which triggers such severe mental pain that it develops into a mental illness, further reducing his or her ability to engage in daily activities.

¹⁸ See the judgment of the Supreme Court II Ips 251/2014, ECLI:SI:VSRS:2016:II.IPS.251.2014, 5 May 2016.

(where disputed), as well as on the nature and extent of the reduction in life activities, identifying the specific areas and forms in which it appears, and on the intensity and duration of the mental suffering resulting from such reduction. Importantly, even a slight reduction in psychological life activities may be legally relevant; for instance, after treatment for post-traumatic stress disorder, residual symptoms such as anxiety triggered by recalling the traumatic event may persist and must be duly considered in assessing non-pecuniary damage.¹⁹

In certain expert reports, the reduction in life activity is quantified as a percentage. This approach to evaluating permanent consequences is methodologically problematic, as the Slovenian legal system lacks uniform and generally accepted criteria for determining such percentages. Furthermore, experts frequently fail to clarify the basis for their estimations – specifically, whether they relied on accident insurance tables provided by insurance companies or on the disability assessment tables of the Institute for Pension and Disability Insurance of the Republic of Slovenia. It must be emphasised that the use of either reference framework is legally inappropriate, since the notion of impairment of life activity is distinct from the concept of disability as defined in those tables. Likewise, the expert's reliance solely on subjective professional judgment, without a transparent methodological justification, is insufficient to satisfy the evidentiary standards required in damages proceedings.

In cases of compensation for mental anguish due to defamation, defamation of character, impairment of liberty, or violation of the right to personality, a similar conclusion can be drawn as with mental anguish caused by the loss of enjoyment of life. The court will appoint a psychiatric expert only in exceptional circumstances, particularly if the injured party claims significantly more severe and prolonged mental suffering, or if the person causing the harm alleges milder, shorter-term, or even non-existent mental suffering, compared to what would typically be expected based on common experience in comparable cases.

¹⁹ See, for example, the order of the Supreme Court of the Republic of Slovenia II DoR 432/2019, ECLI:SI:VSRS:2019:II.DOR.432.2019, 19 September 2019.

3.1.1.3 Fear

Legally recognised damage also encompasses fear, defined as a distressing emotional response to an immediate and real danger directly threatening the life, physical, or mental integrity of the injured party. Such fear constitutes a form of mental trauma, often accompanied by unpleasant or even painful physical manifestations. The legal relevance of fear as non-pecuniary damage is not contingent upon the actual materialisation of the danger; it suffices that the peril was objectively real and subjectively perceived by the injured party as imminent, thereby producing a recognisable psychological disturbance warranting compensation under the law of obligations (Božič Penko, 2003, p. 117). Fear may last in an intense form for an extended period or for a short time, but the injured party's mental equilibrium remains disturbed for a longer period and to such an extent that adaptation to the altered mental state through changes in behaviour and lifestyle is required, or it may persist in a somewhat milder but still significant form for a prolonged period (so-called primary fear). Alternatively, it may appear as fear for survival, relating to the measures necessary to eliminate or reduce harmful consequences, their side effects and complications, concern about the possible failure of treatment and its adverse outcomes, and uncertainty or fear that these consequences will negatively affect the individual's future life (so-called secondary fear). In none of these forms, which may occur simultaneously or consecutively, can fear be permanent; after a certain period, it subsides.²⁰

The court must therefore establish both the length of time the injured party actually suffered from fear and the intensity of the fear. These determinations inform the decision whether the injured party is entitled to compensation for fear and, if so, in what amount. However, as with all human emotions, each individual perceives, reacts, and experiences fear in their own particular way. Therefore, it cannot be assumed that a specific injured party's fear ceased at the moment when, in the expert's opinion, there was no longer an objective reason for it, nor can the expert's experience of fear suffered by other injured parties in similar cases be used as a criterion for assessing this issue. Instead, the critical question is the time when the

²⁰ See also the decisions of the Supreme Court of the Republic of Slovenia II DoR 504/2022, ECLI:SI:VSRS:2022:II.DOR.504.2022, 22 February 2023; II DoR 506/2022, ECLI:SI:VSRS:2022:II.DOR.506.2022, 1 March 2023; II DoR 386/2022, ECLI:SI:VSRS:2022:II.DOR.386.2022, 7 December 2022; II DoR 18/2023, ECLI:SI:VSRS:2023:II.DOR.18.2023, 15 March 2023; II DoR 488/2022, ECLI:SI:VSRS:2022:II.DOR.488.2022, 22 February 2023; II DoR 17/2023, ECLI:SI:VSRS:2023:II.DOR.17.2023, 15 March 2023; II DoR 219/2022, ECLI:SI:VSRS:2022:II.DOR.219.2022, 27 July 2022 et al.

injured party knew and was able to understand that the danger or uncertainty had ceased.

In light of this standard, the question arises whether there is even a need for a psychiatric expert to establish an evidentiary basis of fear as a form of non-pecuniary damage. Scholarly opinion on this issue is divided. One view maintains that appointing a psychiatrist is unnecessary, as scientific knowledge offers limited insight into the phenomenon of primary fear, and that the general life experience and psychological understanding of an average person, including that of the judge, suffice for drawing appropriate conclusions. It is further argued, under this view, that secondary fear is not determined by the objective severity of the injury but rather by the injured party's subjective perception and evaluation thereof (Kapamadija, 1972, pp. 157, 161–162). The opposing view contends that, given their specialised expertise in the relevant medical discipline, neuropsychiatrists should, whenever feasible, participate in assessing fear to ensure the accuracy and reliability of such determinations (Zečević & Škavić, 1996, p. 274).

In Slovenian judicial practice, the following case appears to have provided interpretative guidance to the courts. A six-year-old girl was bitten on the neck by a dog while on her way to school, sustaining injuries that caused severe bleeding and induced panic and extreme fear. During medical treatment, she experienced persistent anxiety related to medical procedures and, long after recovery, continued to suffer from an enduring fear of attending school as well as a generalized fear of animals, extending even to domestic species such as chickens. Upon the court's proposal to appoint an expert in a field appropriate to the nature of the injuries and their psychological consequences, the Chair of the Commission for Faculty Expertise at the Faculty of Medicine of the University of Ljubljana appointed a traumatologist and a psychiatrist to provide a joint expert opinion.²¹

Our view is that whether psychiatric expertise is necessary must be assessed on a case-by-case basis and that, in principle, every adjudication of damages for fear requires careful consideration of such evidence. Nonetheless, there are circumstances in which psychiatric expertise is indispensable – particularly where the injured party is incapable of accurately reporting the experience of fear or where such reporting lacks reliability (e.g., in the case of children or persons with mental

²¹ See the judgment of the Higher Court in Koper Cp 1119/93, ECLI:SI:VSKP:1994:CP.1119.93, 9 February 2014.

disabilities); where evaluating the future prognosis of fear is required; or where it is necessary to determine whether the fear has become permanent and thereby transformed into another legally recognised form of non-pecuniary harm, namely mental suffering resulting from the reduction of life activity.

If fear does not subside and becomes a permanent psychological state, it manifests as a limitation within the sphere of life activities, amounting to mental pain in the sense of tort law. The same applies to post-traumatic stress disorder: if left untreated or if it evolves into a chronic condition, it constitutes enduring mental anguish arising from diminished life activity. In such cases, it is essential to appoint a psychiatric expert in order to properly assess the nature, permanence, and intensity of the harm.

3.1.1.4 Mental Anguish Caused by the Death or Particularly Serious Disability of a Close Person

The right to monetary compensation for mental anguish resulting from the death or particularly severe disability of a close relative is accorded to indirect victims who experience their own non-pecuniary harm due to the death or grave impairment of a person with whom they share a close personal relationship. In such cases, the mental suffering of the indirect victim constitutes an independent legally recognised form of non-pecuniary damage, distinct from the harm suffered by the direct victim, and arises from the disruption of the emotional, familial, or affective bond between them (Ovčak Kos & Božič Penko, 2018a, 2, p. 10).²² Even in cases of such damages, the courts generally award compensation for mental pain without ascertaining the extent and intensity of the mental pain through a psychiatric expert.²³ Exceptions occur in situations where it is alleged that the intensity of the mental pain varies excessively compared to comparable cases²⁴ or that it has evolved into another form of harm (e.g., mental pain due to a reduction in life activity).

²² See Article 180 of the OZ.

²³ See the decisions of the Supreme Court of the Republic of Slovenia II DoR 246/2021, ECLI:SI:VSRS:2021:II.DOR.246.2021, 16 February 2022; II DoR 169/2019, ECLI:SI:VSRS:2019:II.DOR.169.2019, 23 May 2019; II DoR 249/2019, ECLI:SI:VSRS:2019:II.DOR.249.2019, 29 November 2017; II DoR 139/2018, ECLI:SI:VSRS:2018:II.DOR.139.2018, 7 June 2018; II Ips 187/2017, ECLI:SI:VSRS:2017:II.IPS.187.2017, 18 January 2018; II DoR 121/2015, ECLI:SI:VSRS:2015:II.DOR.121.2015, 13 October 2015; II DoR 335/2015, ECLI:SI:VSRS:2015:II.DOR.335.2015, 3 February 2015 et al.

²⁴ See, for example, the decision of the Higher Court in Ljubljana I Cp 3251/2016, ECLI:SI:VSLJ:2017:I.CP.3125.2016, 2 March 2016.

3.1.1.5 Mental Anguish Caused by a Violation of Dignity

A person who has been coerced into sexual intercourse or other sexual acts through deception, force, or the abuse of a relationship of subordination or dependence, as well as any person subjected to an offence against personal dignity or morality, is entitled to equitable pecuniary compensation for the mental anguish thereby sustained.²⁵ Accordingly, a victim who suffers psychological harm as a consequence of a criminal infringement of sexual integrity, dignity, or morals possesses a legally recognised right to compensation for non-pecuniary damage. Regarding psychiatric expert evidence, the same principles apply as outlined in the preceding subsection: as a rule, the expert's opinion is not required unless it is claimed that the intensity of mental suffering is disproportionate or that the harm has evolved into another distinct form of non-pecuniary damage.²⁶

3.1.2 The Role of the Psychiatric Expert in Establishing Non-contractual Pecuniary Damage

As a consequence of the harmful event, the injured party may suffer both non-pecuniary and pecuniary damage affecting their mental well-being. Pecuniary damage may arise in the form of ordinary losses, such as expenses related to medical treatment, care, assistance, lifestyle adjustments, or modifications to living conditions, as well as in the form of lost profits, including the loss of earnings resulting from a reduced capacity to perform prior activities or from total incapacity for work. In determining the existence and scope of non-contractual pecuniary damage, testimony by a psychiatric expert may be necessary to establish the causal nexus – particularly regarding whether the injured party is genuinely incapable of earning an income and to what extent. The expert may also assess the reasonableness of specific therapeutic interventions, the justification of associated costs, and the necessity, scope, and quality of assistance required from third parties.²⁷

²⁵ See Article 181 of the OZ.

²⁶ Compare the judgment of the Supreme Court of the Republic of Slovenia II Ips 64/2014, ECLI:SI:VSRS:2015:II.IPS.64.2014, 26 November 2015.

²⁷ Compare the judgment of the Supreme Court of the Republic of Slovenia II Ips 67/2022, ECLI:SI:VSRS:2023:II.IPS.67.2022, 22 February 2023.

3.2 Contractual Liability for Damages

In Slovenian legal doctrine and jurisprudence, the prevailing position holds that a contractual debtor may incur liability for both pecuniary and non-pecuniary damage arising from a breach of contract (Mežnar, 2013, p. 25-36, Božič Penko, 2016, p. 67–81, Možina, 2016, p. 260-289).²⁸ In establishing the relevant factual circumstances – both in relation to the basis of liability and the extent of the damage – no substantial divergences exist when compared with the regime of non-contractual (tortious) liability. Judicial practice indicates that courts have traditionally adjudicated primarily pecuniary damage claims, where the evidentiary nature of the case seldom necessitated expert testimony from medical professionals. However, in recent years, there has been a marked increase in claims for damages resulting from medical malpractice.²⁹

The ensuing harm is generally treated as contractual damage, subject to a recognised exception where a physician acts in an emergency situation. We submit that this exception should likewise extend to instances of involuntary hospitalisation and compulsory psychiatric treatment.³⁰ Establishing both the basis of liability – particularly whether the treatment was conducted *lege artis* or whether a complication occurred – and the extent of the damage requires expert medical testimony from various disciplines, including psychiatry, as warranted by the specific circumstances of the case. This determination must be evaluated in accordance with the previously outlined criteria governing the constituent elements of liability and the legally recognised forms of non-pecuniary harm.

4 Specific Features of Taking Evidence With a Psychiatric Expert

The constitutional requirement to respect the principle of adversarial proceedings is followed by legal provisions stipulating that the expert must, as a rule, present their report and opinion orally during the hearing together with the bases for their

²⁸ Compare Article 243 of the OZ. See the decisions of the Supreme Court of the Republic of Slovenia II Ips 765/2007 ECLI:SI:VRSR:2008:II.IPS.765.2007, 20 October 2008, II Ips 94/2013, ECLI:SI:VRSR:2014:II.IPS.94.2013, 15 May 2014 et al.

²⁹ Extensively on this see Ovčak Kos & Božič Penko, 2017, p. 11; Ovčak Kos & Božič Penko, 2018a, p. 10; Ovčak Kos & Božič Penko, 2018b, p. 15; Ovčak Kos, 2022, pp. 165-187.

³⁰ See, for example, the judgment of the Supreme Court of the Republic of Slovenia II Ips 22/2023, ECLI:SI:VRSR:2023:II.IPS.22.2023, 17 August 2023.

opinions. The parties have the right to ask the expert questions.³¹ When the expert has not presented their opinion orally, even though a party raised objections to the written expert opinion and its supplements, the party is deprived of the opportunity to clarify all disputed circumstances directly. Accordingly, we may conclude that in cases where the success of a damages claim depends solely on the expert's opinion, additional oral testimony from the psychiatric expert during the hearing is necessary to remove any doubt.³² In sum, a written expert report and opinion, even if complete and understandable, cannot fully replace oral communication and the requirements of the principle of immediacy.³³ The case-law reveals that the court may repeat the evidentiary process with a second expert (*inter alia*) when, due to the significance of the expert's opinion for the outcome of the case, and being aware of the specific scientific risks involved in more complex expert assessments, it considers that the correctness of the expert's otherwise clear and complete findings should be further verified by the opinion of a second expert.³⁴

Regarding the judicial assessment of expert opinion, it should be emphasised that the principle of free evaluation of evidence applies in Slovenian litigation. This means that the court decides which facts are considered proven based on its own belief, after conscientiously and carefully considering each piece of evidence individually and collectively, as well as the overall success of the proceedings.³⁵ Because the expert opinion is also an evidentiary tool, the court must evaluate it in light of those standards. The expert's opinions and conclusions are not binding on the court. Instead, the court can reject them if it believes they contradict the rules of logical reasoning or experiential rules. The extent to which the court relies on the expert's findings and opinions depends on the judge's ability to critically self-assess the expert's report and opinions (Triva & Dika, 2004, p. 527). Since determining legally relevant facts in compensation claims usually requires an interdisciplinary

³¹ See the decisions of the Constitutional Court of the Republic of Slovenia Up-39/95, ECLI:SI:USRS:1997:Up.39.95, 16 January 1997; Up-680/14, ECLI:SI:USRS:2016:Up.680.14, 5 May 2016, et al.

³² Compare the decision of the Supreme Court of the Republic of Slovenia II Ips 40/2016, ECLI:SI:VSRS:2016:II.IPS.40.2016, 17 February 2016.

³³ By having the expert provide their opinion orally at the hearing, the parties to the litigation are given the opportunity to engage in a live dialogue with the expert, which cannot be replaced by written communication. This allows them to verify the method and correctness of the process used to prepare the opinion. This ensures their right to full substantive control over the presentation of key evidence and influence the outcome of the evidentiary procedure. The decision of the Supreme Court of the Republic of Slovenia II Ips 40/2016, ECLI:SI:VSRS:2016:II.IPS.40.2016, 17 February 2016.

³⁴ For example, the order of the Higher Court in Ljubljana II Cp 1439/2016, ECLI:SI:VSLJ:2016:II.CP.1439.2016, 9 November 2016.

³⁵ See Article 8 of the ZPP.

approach, it would undoubtedly be necessary for judges to acquire certain specialized medical knowledge. On the other hand, experts in the medical field should be educated about the key concepts and rules of compensation and civil procedural law. Such specialization for judges would significantly enhance the court's ability to objectively and correctly assess the expert's findings and opinion, and it would also make it easier for the court to select an appropriate expert.

In our view, the absence of uniform guiding medical (psychiatric) criteria compatible with the legal standards developed by the case law on monetary compensation for non-pecuniary damage also appears to be a drawback. In practice, this results in significant differences in expert opinions,³⁶ which also manifests as inconsistent case law, creating legal uncertainty and violating the principles of legality and equality. This is especially true in court procedures where the fair compensation for non-pecuniary damage must be assessed, and where involving medical (psychiatric) experts is unavoidable (Čimžić, 2011, p. 507).

5 Conclusions

Psychiatric expert testimony performs a fundamental cognitive and evidentiary function in tort adjudication, particularly in proceedings concerning claims for monetary compensation for non-pecuniary damage. The expert opinion is of decisive importance in elucidating issues pertaining to the constitutive elements of compensatory liability – both contractual and non-contractual – such as the occurrence, nature, and extent of the damage, as well as the causal nexus between the harmful event and the resulting harm. Moreover, it serves as an essential basis for the judicial determination of the quantum of monetary compensation for non-pecuniary loss.

Psychiatric expertise may be required to assess the duration and intensity of physical and psychological pain and discomfort already suffered, as well as those expected to persist in the future. Where the reduction in life activity stems from a physical injury, appointing a psychiatric expert is typically exceptional, for instance when the claimant alleges disproportionately severe or prolonged mental suffering compared with analogous cases, or when the defendant disputes the existence or degree of such suffering. Comparable considerations apply to claims for compensation arising

³⁶ As an example, see the issue of expressing the reduction in life activity as a percentage presented in section 3.1.1.2.

from defamation, violation of liberty or personality rights, infringement of dignity, and the death or serious disability of a close relative. In these contexts, the court will generally appoint a psychiatric expert only when either party asserts substantially greater or lesser psychological distress than would ordinarily be anticipated in similar circumstances.

Conversely, where the reduction in life activity originates in psychological trauma, psychiatric expertise becomes indispensable. The expert must provide an opinion on causation, particularly if contested, as well as on the nature, scope, and manifestation of the reduction in life activity and the corresponding intensity and duration of the resulting mental suffering. Compensation for fear or emotional distress may, as a rule, be awarded without psychiatric assessment; however, exceptions arise in cases where the claimant is unable to communicate their experience of fear, where their account lacks reliability (e.g., in the case of minors or mentally impaired persons), where a prognosis of future fear is required, or where it must be determined whether fear has become permanent and thereby transformed into another legally recognised form of harm, such as mental anguish due to a reduction in life activity.

In the context of assessing non-contractual pecuniary damage, psychiatric expert opinion may likewise be necessary to establish the causal relationship between the injurious event and the claimant's incapacity for gainful employment, as well as to determine the extent of the pecuniary loss – particularly with respect to the justification of therapeutic expenses and the need for third-party assistance.

In Slovenian judicial practice, certain particularities have emerged regarding the evidentiary use of psychiatric expert testimony. Where the outcome of a compensation claim depends exclusively on the psychiatric expert's opinion, the court is obliged to summon the expert for oral examination at the main hearing to dispel any doubts concerning the reliability or completeness of the written findings. Case law has further established criteria determining when the accuracy of an expert's conclusions should be verified by appointing a second expert or an expert commission.

The evidentiary value of psychiatric expertise is maximised when it results from effective cooperation between the judge and the expert. The court must formulate clear, precise, and legally relevant questions, while the expert is expected to respond

by presenting well-reasoned findings, explicitly explaining the methodological principles, diagnostic criteria, and professional standards applied. It is only through such collaboration that the court can assure that all legally relevant facts are comprehensively and accurately established, thereby ensuring the material correctness and procedural legitimacy of the judgment.

This paradigm underscores the need for a close and structured relationship between the judiciary and medical experts – particularly psychiatrists – grounded in the principle that the judge remains *dominus litis* and thus retains ultimate control over the evidentiary process (Čimzić, 2011, p. 494). To ensure critical evaluation of expert evidence, it is essential that judges adjudicating such disputes possess at least a fundamental understanding of medical and psychiatric principles, while experts, conversely, should be familiarised with the essential concepts and procedural rules of tort and civil law. Furthermore, adopting harmonised psychiatric evaluation guidelines, aligned with legal standards and consistent with established jurisprudence on the quantification of non-pecuniary damages, would contribute significantly to the uniformity of expert opinions and enhance the coherence and predictability of judicial decision-making.

Legal Acts, Case law

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Povzetek v slovenskem jeziku

Članek analizira dokazno vlogo psihiatričnega izvedenskega mnenja v prekrškovnih postopkih, pri čemer poudarja njegov pomen v okviru slovenskih sistemov pogodbene in nepogodbene odgovornosti. Psihiatrični izvedenci so bistveni za ugotavljanje vzročne zveze in ocenjevanje obsega nepremoženjske škode, s čimer vplivajo na sodne odločitve o krivdi in odškodnini. Učinkovito sojenje zahteva vzajemno pravno-medicinsko pismenost: sodniki morajo razumeti osnove psihiatrične ocene, strokovnjaki pa morajo razumeti temeljna načela prekrškovnega prava in postopkovna načela. Študija poudarja potrebo po enotnih merilih za psihiatrično oceno, skladnih z uveljavljenimi sodnimi standardi, da se poveča pravna varnost, skladnost in pravičnost pri količinskem opredeljevanju škode v prekrškovnem pravu. Taka uskladitev bi okrepila konsistentnost in predvidljivost sodne prakse.