

The Urgency of Arrangement Regarding Immaterial Compensation in Civil Law in Indonesia

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Abstrak

Tulisan ini bertujuan menganalisis lingkup ganti rugi immateriil dalam putusan pengadilan serta perbandingan ganti rugi dalam KUHPerdata dan NBW. Metode penelitian yang digunakan yaitu metode yuridis normatif, yang bersifat analitis preskriptif, dengan pendekatan undang-undang, kasus, dan perbandingan hukum. Tulisan ini tidak hanya membahas ganti rugi immateriil menurut KUHPerdata atas dasar tanggung jawab perbuatan melawan hukum saja, tetapi juga akan dibahas ganti rugi immateriil atas dasar tanggung jawab kontraktual, serta perbandingannya dengan ketentuan dalam NBW. Berdasarkan putusan yang dianalisis, lingkup ganti rugi immateriil adalah adanya rasa trauma, tercederainya psikologis, tercemarnya nama baik. Lingkup lainnya menurut Arrest Hooge Raad dan yurisprudensi yaitu kehilangan kenikmatan atas suatu ketenangan yang disebabkan tetangganya atau berkurangnya kenikmatan orang atas hak-haknya atas kekayaannya, penderitaan akibat kecelakaan dan hilangnya kebahagiaan hidup. Perbandingan terkait ganti rugi dalam KUHPerdata dan NBW yaitu, mengenai persamaan, bahwa sifat pengaturan ganti rugi yang merupakan hukum pelengkap, prinsip ganti rugi mengembalikan keadaan seakan tidak terjadi wanprestasi/PMH, adanya hubungan kausal antara kerugian dan kesalahan/ wanprestasi, serta adanya kebebasan hakim dalam menilai besaran ganti rugi. Perbedaannya, bahwa NBW mengatur ganti rugi secara umum yang dapat diterapkan terhadap jenis pertanggungjawaban dalam NBW, ganti rugi dalam NBW terdiri dari materiil dan immateriil (termasuk penjelasan lingkungannya), NBW mengatur bentuk ganti rugi, adanya wewenang hakim dalam menilai nominal ganti rugi yang disepakati para pihak, kerugian yang mungkin timbul dikemudian hari termasuk jika ada klaim asuransi, pihak ketiga yang ikut dirugikan, serta pihak yang dapat mengajukan ganti rugi.

Kata kunci: ganti rugi; immateriil; pengaturan

Abstract

This paper aims to analyze the scope of immaterial compensation in court decisions as well as a comparison of compensation in the Civil Code and NBW. The research method used is normative juridical method, prescriptive analytical, with statutory, case and comparative law approaches. This paper does not only discuss immaterial compensation according to the Civil Code based on unlawful acts responsibility, but also discusses immaterial compensation based on contractual responsibility, as well as its comparison with the provisions in the NBW. Based on the court decisions analyzed, the scope of immaterial compensation is the existence of trauma, psychological injury, and defamation of reputation. Another scope according to Arrest Hooge Raad and jurisprudence is losing the enjoyment of a peace caused by neighbors or reduced enjoyment of people over their rights of their wealth, suffering due to accidents and loss of happiness in life. Comparisons related to compensation in the Civil Code and NBW are, regarding similarities, that the nature of compensation arrangements is a complementary law, the principle of compensation is to return the situation as if there was no default/tort, there is a causal relationship between losses and mistakes/defaults, and the freedom of judges in assess the amount of compensation. The difference are that NBW regulates compensation in general that can be applied to types of responsibility in NBW, compensation in NBW consists of material and immaterial (including an explanation of the scope), NBW regulates the form of compensation, there is the authority of the judge to assess the nominal compensation agreed by the parties, possible losses that may arise in the future including if there is insurance claim, third parties who are also harmed, and parties who can apply for compensation.

Keywords: arrangement; compensation; immaterial

Introduction

Compensation known in civil law is compensation based on an unlawful act and compensation based on default. The two concepts of compensation are set by different arrangements. Compensation based on default is regulated in Article 1243 - 1252 of the Civil Code, while compensation based on unlawful acts is not strictly regulated as compensation for default, but instructions can be found in Article 1365 of the Civil Code, Article 1371 paragraph (2) of the Civil Code and Article 1372 paragraph (2) of the Civil Code (Agustina and others 2012).

Compensation for default is one of the legal consequences that can be demanded by creditors if the debtor is in default condition. In the event of a default, the claim for compensation filed by the creditor aims to place the creditor in a position if the agreement is implemented, the compensation given is the loss of the expected profit or expectation loss (Agustina 2003). Subekti explained that compensation for default consists of three elements, namely: costs, damages and interest (Subekti 2002).

The existence of losses in accountability due to unlawful acts is one of the elements or conditions of the occurrence of unlawful acts. In contrast to default where compensation is not an element of default, but as a legal consequence that can be prosecuted in the event of default. Regarding the scope of compensation in unlawful acts, Wirjono Prodjodikoro, say that compensation includes the unreceiving an advantage that was originally expected by the victim as stipulated in Article 1246 of the Civil Code (Prodjodikoro 2000), so that the scope is in the form of material compensation. Instructions regarding immaterial compensation based on unlawful acts can be found in Article 1372 of the Civil Code, which is in the form of restoration of honor and restoration of good name (Satrio 2005; Prodjodikoro 2000).

It can be seen that immaterial damages is not regulated in compensation based on contractual responsibility, and is only implicitly regulated in compensation based on liability for unlawful acts. In practice, many claims for immaterial compensation are made by plaintiffs, however, claims for immaterial compensation are not always granted by judges. This paper discusses how to implement immaterial compensation claims in court by analyzing civil court decisions that grant immaterial compensation claims. Civil decisions that grant immaterial compensation claims based on contractual liability, are in 1) Court Decision Nr. 1096/Pdt.G/2021/PNJKT.SEL, 2) Court Decision Nr. 60/Pdt.G/2017/PN.Bjb, Court Decision Nr. 75/PDT/2018/PT.BJM, and Supreme Court Decision Nr. 179K/Pdt/2020, and 3) Court Decision Nr. 710/Pdt.G/2020/PN.Tng. Meanwhile, civil court decisions granting claims for immaterial compensation based on accountability of unloawfull acts, are in 1) Court Decision Nr. 205/Pdt.G/2019/PN.SDA, 2) Court Decision Nr. 544/Pdt.G/2017/PN.Sgr, and 3) Court Decision Nr. 323/Pdt.G/2012/PN.Jkt.Sel.

The analysis of these decisions was carried out to see that many panels of judges had granted the claim for immaterial compensation filed by the plaintiff. The granting of immaterial compensation claims by the panel of judges shows the acceptance of the concept of immaterial compensation in civil law practice. This is a legal development that is different from the positive law (Civil Code of Indonesia) which does not regulate/implicitly regulate immaterial compensation. In order to see the acceptance of the claim for immaterial

compensation, it is necessary to discuss the judge's considerations in granting the claim for immaterial compensation.

On the other hand, since *Nieuw Burgerlijke Wetboek (NBW)* regulated in 1992 in the Netherlands, there was a development regarding compensation arrangements in civil law in the Netherlands, specially, according to Article 6:106 NBW, it stipulates that demands for immaterial compensation, both compensation based on default and compensation based on unlawful act. In Indonesia is currently using the Civil Code which is a codification of civil law made by the Netherlands refer to Ex-Civil Code of Netherlands (BW). For this reason, it is felt necessary to examine the development of compensation arrangements in civil law by conducting a comparative study with the NBW.

There are researches (article) discussing immaterial compensation, first article entitled *Judge's Consideration in Granting Immaterial Compensation Lawsuits in Unlawful Acts: Analysis of Cassation Decision Nr. 3215 K/PDT/2001* by Rai Mantili and Anita Afriana discussing immaterial compensation granted by the judge with defamation cases (Mantili and Afriana 2019). Second research entitled *Normative Review of Compensation in Cases of Unlawful Acts Causing Immaterial Losses (Case Study of The Decision of The Jakarta Special District Court Nr. 568/1968.G* by Rivo Krisna Winastri, Ery Agus Priyono, and Dewi Hendrawati, which discusses the normative review of immaterial compensation in cases of unlawful acts, detailing the importance of proving the elements of unlawful acts in granting claims for immaterial compensation, and must consider fairness, decency and appropriateness (Winastri and others 2017). The comparison between first and second article with this research is that this research has a wider scope by examining six decisions that grant immaterial compensation based on contractual responsibility and due to unlawful acts, which is aim to see what scope the judge grants immaterial compensation claims. Third research entitled *Immaterial Compensation for Unlawfull Acts in Practice: Comparison Between Indonesia and Netherlands* by Rai Mantili, discusses immaterial compensation for unlawful acts by also comparing the practices in Indonesia and Netherlands (Mantili 2019). While the comparison between third article with this research is that this research also discusses immaterial compensation based on contractual responsibility, not only based on unlawful acts, as well as its comparison with NBW.

Based on the discussion above, this research will discuss immaterial compensation based on the Civil Code of Indonesia and court decisions. As a comparison, to see the development regulation of the concept of compensation in civil law, a comparative study will be carried out according to the concept of compensation in the Civil Code of Indonesia in Indonesia and NBW in the Netherlands.

Method Research

This research will use normative juridical method for this research analyzes legal principles (Soekanto 1986) about compensation in civil law in Indonesia based on the Civil Code and court decisions. This research is prescriptive analytical by discussing the solutions offered with the aim of legal development in Indonesia. As a comparison, an analysis will also be carried out with provisions related to compensation based on NBW.

The research approach which is used are, first, the legal approach that researchers use laws and regulations as an initial basis for conducting analysis (Ariawan 2012) which the laws referred to the Civil Code and NBW. Second, the comparative legal approach (Cruz 2016), to explain the similarities and differences between compensation under the Civil Code and NBW. Third, the case approach, that the cases used in this research as mention before ini introduction.

Results and Discussion

Immaterial Compensation in Indonesia

There is not provision about immaterial losses based on contractual liability and immaterial losses based on unlawful acts liability is implicitly regulated in the Civil Code. Instructions regarding immaterial compensation can be found in Article 1372 of the Civil Code, which are restoration of honor and restoration of good name (Satrio 2005). J.Satrio distinguishes between immaterial and material losses based on the instructions in Article 1372 of the Civil Code, which states "Sues regarding insults are aimed at obtaining compensation and restoration of honor and restoration of reputation." Whereas the phrase "compensation" is a material loss, while the phrase "restoration of honor and good name" is an immaterial loss. The definition of immaterial loss given by J.Satrio is a loss that does not concern an object (in the legal sense), which in principle, does not have a monetary value, which is actually not translated/calculated in a certain amount of money (Satrio 2005).

Immaterial losses have started to be recognized even though these immaterial losses are not at all related to assets, and are recovered or replaced by providing a sum of money (Satrio 2005). The form of immaterial compensation in the form of money is also in line with Wirjono Prodjodikoro's opinion (Prodjodikoro 2000). Regarding the light weight or low or high nominal compensation money is submitted to the judge who examines the case. This is based on Article 1372 paragraph (2) of the Civil Code. Judges, for example, may consider the victim's social position (in terms of defamation/insulting), or may also consider the economic condition of the party committing the unlawful act, and so on (Satrio 2005). The right to claim compensation is not lost with the death of the person who insulted or the death of the person who was insulted (Article 1379 of the Civil Code). The claim for compensation does not only cover material losses, but also includes immaterial losses. Parties that can file charges on behalf of victims of unlawful acts, in this case victims of humiliation or defamation, include husbands, wives, parents, grandparents, children and grandchildren for insulting wives or husbands, children, grandchildren, other their parents, grandparents and grandparents after this person (the victim) passed away (Satrio 2005).

The discussion of immaterial compensation in court decisions is carried out in order to analyze the developments in current court decisions regarding the acceptance of demands of immaterial compensation submitted by the plaintiff:

Civil judgment granting immaterial compensation claims on the basis of contractual liability

a. Court Decision Nr. 1096/Pdt.G/2021/PN.JKT.SEL

The plaintiff in this case acted as the leaser of heavy equipment who leased his heavy equipment to the defendant. The lease agreement is stated in the Heavy Equipment Lease Agreement. The heavy equipment rental agreement is for a minimum period of 3 months with the defendant's total invoice amounting to IDR 486,435,000. However, the defendant only made a payment of IDR 75,000,000. The plaintiff's claim for compensation is in the

form of material losses (in the form of underpayment) of IDR 411,435,000 and immaterial losses of IDR 50,000,000. Regarding the nominal claim for material compensation filed by the plaintiff, the plaintiff has detailed it in the posita of the lawsuit and is the nominal that has not been paid by the defendant. Meanwhile, the nominal claim for immaterial compensation was not specified by the plaintiff in his posita. The panel of judges granted the claim for compensation on the basis that the plaintiff as the lessor had carried out his obligations, which is handing over the heavy equipment that was leased. However, on the other hand, the defendant had only carried out some of his obligations, he had only paid a rental fee of IDR 75,000,000. For this reason, the defendant is obliged to pay the remaining rental costs that have not been fulfilled by the defendant as detailed in the details provided by the plaintiff in the claim posita. Regarding the considerations related to the immaterial claim, the panel of judges did not elaborate further why they grant it, but the immaterial compensation was also granted by the panel of judges along with the acceptance of the claim for material compensation.

- b. Court Decision Nr. 60/Pdt.G/2017/PN Bjb, Court Decision Nr. 75/PDT/2018/PT.BJM, and Court Decision Nr. 179K/Pdt/2020

This default lawsuit is a case between the plaintiff against Defendant I, Defendant II, and Co-Defendant. The principal case in this case is that the plaintiff bought a housing unit from Defendant I who entered into operational cooperation with Defendant II as the land owner as well as the Main Commissioner of Defendant I with evidence of a Purchase Agreement (in Indonesia known as PPJB) and Deed of Sale and Purchase (in Indonesia known as AJB). In making the purchase of the house, the plaintiff obtained a credit loan from the co-defendant. When they make PPJB and AJB, the house isn't exist yet and Defendant I promised that the house would be available and ready to use 7 months after the credit agreement was made. However, there was a delay in the process of constructing the house for approximately 4 years from the date of the credit agreement in April 2013, which is the house that was purchased had not been 100% completed and was not ready for use, because the toilet and kitchen have not been completed, the ceiling is leaking, electricity and water services have not been installed according to the agreement. Because of the delays in the process of building the house, the plaintiff suffered material and immaterial losses, which are: material loss, amounting to IDR 150.000.000 based on the purchase price of land and for the construction of the house that had been paid by the plaintiff to Defendant II and IDR 150.000.000 that payed by the plaintiff to Defendant I through co-defendant based on credit loan since Mei 2013 to September 2017. So that the total material loss of the plaintiff is IDR 300.000.000. Immaterial losses, that the plaintiff has to bear is the costs of living/boarding, the lawsuit was filed, and the plaintiff also has to pay additional costs for the needs of the family's residence who come from out of town when there is a family wedding, which the total is IDR 150.000.000. The panel of judges for the Banjarbaru District Court considered against the claim for material compensation that the material loss that the plaintiff actually experienced was IDR 150.000.000 based on the payment of credit loan for the purchase of a house from May 2013 to September 2017

to Defendant I through co-defendant. Whereas IDR 150.000.000 in the form of the purchase price of land and for the construction of a house that the plaintiff has paid to Defendant II is not a loss to the plaintiff because Defendant II has carried out his obligations by handing over the land he sold. Regarding immaterial losses, the panel of judges for the Banjarbaru District Court did not grant the plaintiff's petition because the plaintiff did not specify the immaterial losses. A different opinion was expressed in the court decision on appeal Nr. 75/PDT/2018/PT.BJM. The panel of judges at the Banjarmasin High Court argue that although the plaintiff did not clearly detail the loss, in order to prevent from causing further harm to the plaintiff, it is appropriate and fair if co-appellant I (originally defendant I) is also sentenced to pay immaterial compensation which the amount is set at the morotair interest, as stipulated in Article 1250 of the Civil Code, which is $6\% \times \text{IDR } 150.000.000 = \text{IDR } 9.000.000$ per year, starting from the time of the court decision has been in *kracht* until Appellant I (Defendant I) implements the decision. The appeal decision was later strengthened by Cassation Decision Nr. 179K/Pdt/2020. The consideration of the Panel of Judges at the Cassation Level is that the decision brought by the *judex facti*/judge of The Banjarmasin High Court which amended the Banjarbaru District Court's decision in this case did not conflict with the law.

c. Court Decision Nr. 710/Pdt.G/2020/PN.Tng

The main point of this default lawsuit is that all of the defendant's obligations have not been fulfilled in respect of the agreements between the plaintiff and the defendant. There are 3 agreements or legal relations between them and after a process of answering and proving, the panel of judges stated that the defendant still has an obligation based on the refund statement letter dated February 17th, 2020 in the form of a refund of IDR 1,447,000,000. Based on the unfulfilled obligations of the defendant, the plaintiff demands material and immaterial compensation. Material losses in the form of principal loan repayments and profit sharing. Meanwhile, immaterial losses are 0.5% per month of IDR 1.447.000.000 starting November 23th, 2019. The panel of judges of the Tangerang District Court granted the plaintiff's petition regarding the claim for material and immaterial compensation because the plaintiff could prove that the defendant was in default, the plaintiff should have received his rights (the defendant bears the legal consequences of default, which is compensation) as well as the plaintiff's costs suffered as a result of the act of default. The plaintiff is entitled to demand the defendant to pay in cash, immediately and at the same time the loss (both material and immaterial).

Court decisions granting an immaterial compensation claim based on liability for an unlawful act

a. Court Decision Nr. 205/Pdt.G/2019/PN.SDA

The main point of the unlawful acts lawsuit is that the plaintiff's diploma was not returned which was entrusted to the company from the start when the plaintiff worked at the defendant's company until the plaintiff retired. That the plaintiff initially worked at the defendant's place and was asked to deposit his diploma. The plaintiff's original high school certificate become a guarantee to the defendant and as an absolute requirement for company rules. On the other hand, the company's rules regarding the safekeeping and/or withholding of workers' diplomas are not regulated (in laws and regulations) so that it can be said that the defendant as a company has no legal basis for withholding diplomas,

both according to labor regulations and or other laws and clearly this action is an act against law. The details of the material and immaterial losses provided by the plaintiff are in the form of loss and reduced income of the plaintiff, if the material loss is calculated in the form of normal income lost due to unlawful acts by the defendant since the plaintiff retired, amounting to IDR 5.000.000. X 40 months (calculated from retirement to trial) = IDR 200.000.000. The calculation of immaterial losses is based on the psychology of the plaintiff who does not receive his diploma, cannot apply for a job elsewhere, and must owe money to relatives and neighbors so that it is set at IDR 200.000.000. The consideration of the panel of judges of the Sidoarjo District Court that by not returning the certificate, the plaintiff could no longer use his high school diploma to make a living for himself and his dependent family after the plaintiff no longer worked for the defendant's company (the defendant served as director of the company). As well as immaterially harming the plaintiff's psychologically because he does not have a high school diploma it is. The panel of judges determines the amount of compensation (material and immaterial). The plaintiff's material and immaterial losses that must be given by the defendant amount to IDR 100.000.000 and immaterial losses of IDR 50.000.000 that the defendant must pay compensation in cash and at once to the plaintiff. The reason for accepting the immaterial compensation claim in this case was the plaintiff's psychological injury as a result of the plaintiff's high school diploma not being returned by the defendant.

b. Court Decision Nr. 544/Pdt.G/2017/PN.Sgr

This case is regarding unlawful acts, the existence of bad faith by the defendant and co-defendant by not paying off the loans given by the plaintiffs to the defendant. The loans were given verbally with a total of IDR 120.000.000. Claims for material compensation filed by the plaintiff in the amount of the total principal debt plus interest of 5% (which has been running for 3 months since the lawsuit was registered), as well as immaterial losses due to the defamation of the plaintiff's good name as a civil servant and teacher, decreased level of client trust on a project being carried out by the plaintiff (Principal 1), project losses that must be covered by making loans to the bank by the plaintiff (Principal 1) as well as financing that has swelled due to having to pay interest on the debt at the bank, which it can be assessed that the immaterial losses totaled IDR 1.000.000.000. Regarding proving the elements of a loss, the panel of judges based it on the existence of a material loss experienced by the plaintiffs, IDR 112.000.000 in the amount of the principal debt of the defendant and interest of 12% per year. The panel of judges determined the interest rate based on the national interest rate, because the panel of judges considered that 5% interest per month was very large. The consideration of immaterial losses given by the panel of judges based on the evidence submitted, the plaintiffs succeeded to prove that by not implementing the work agreement by the plaintiff (Principal 1) for the construction of a shop which until now has not been completed, this has resulted in non-achievement results and also shop dysfunction which cannot operate in time. The failure to build the shop also had an effect on the trust of the plaintiff's clients/work partners (Principal 1). Besides that, the plaintiff must bear the swelling financing because he has to pay interest

on debt at the bank. So that these matters should be considered as immaterial losses suffered by the plaintiff (Principal 1) due to the bad faith of the defendant and co-defendant who refused to pay their debts on time. The panel of judges added their considerations regarding the immaterial loss that based on the unrealized budget plan value of the gondola rack, which amounted to IDR 68.000.000 plus with the loss of the budget swelling due to the inappropriate completion time and also the non-operation of the shop on time (store dysfunction), the amount of loss requested by the plaintiffs that is IDR 1.000.000.000 is an appropriate amount and based on law.

c. Court Decision Nr. 323/Pdt.G/2012/PN.Jkt.Sel

This case began when the plaintiffs on January 1st 2012 planned to stay at the hotel owned by Defendant I for a vacation. The plaintiffs, immediately fell from a height of 3 meters and were crushed by the collapsed floor, because the room at the hotel which the plaintiffs stand collapsed. As a result of this incident, the plaintiffs suffered serious injuries, Plaintiff I suffered a fracture in the bone on the right leg, so he had to used a cane for 2 months, and Plaintiff II suffered injuries to both legs, then plaintiff III suffered injuries to his legs, and Plaintiff IV suffered a fracture to his back. The immaterial losses explained by the plaintiffs were that until this lawsuit was filed, the plaintiffs experienced prolonged severe shock and also experienced defects in certain parts, moreover the pain caused by the incident was still felt by the plaintiffs, especially Plaintiff III, still could feel the pain in the bones, the back of the tail, because of falling in a sitting position below, from a height of 3 meters. So, the plaintiffs filed an immaterial compensation claim of IDR 5.000.000.000. The panel of judges at the South Jakarta District Court did not grant the claim for material compensation submitted by the plaintiffs with consideration is all the losses argued by the plaintiffs and after the panel of judges examined the evidence submitted by the plaintiffs, none of the evidence proved in detail the loss exists. However, on the other hand the panel of judges granted the claim for immaterial compensation filed by the plaintiffs. The panel of judges consider about this immaterial claim that based on the principle of decency, it is appropriate to give the plaintiffs immaterial compensation. However, according to a sense of justice, it would be too much if the defendants had to compensate for an immaterial loss of IDR 5.000.000.000. The panel of judges stated that based on the principle of decency, it would be fair if each plaintiff was given immaterial compensation for the trauma caused by the collapse of the part of the hotel and it was deemed appropriate if each plaintiff was given IDR 20.000.000. From the six cases, it can be seen that there are various reasons for granting immaterial compensation claims by the panel of judges filed by the plaintiff. The various reasons or considerations for granting immaterial compensation claims are due to the absence of definite guidelines or instructions in positive law regarding immaterial compensation. These reasons or considerations would be better if regulated in positive law so that the judge in deciding has guidelines regarding the scope in granting immaterial compensation claims. The nominal value of immaterial compensation imposed by the judge is also handed over to the examining judge in accordance with Article 1372 paragraph (2) of the Civil Code (in cases of unlawful acts). However, this norm, the freedom of judges in assessing the nominal amount of claims for immaterial compensation, is not contained in the regulation regarding compensation for default in the Civil Code.

The following table contains a summary of the reasons for accepting or granting claims for immaterial compensation from the six cases analyzed in this research, as follows:

Table 1. Summary of Consideration in Granting Immaterial Compensation

Nr	Cases	Immaterial Compensation Filed	Immaterial Compensation Granted	Consideration
1.	Default – Court Decision Nr. 1096/Pdt.G/2021/PN.JKT.SEL	IDR 50.000.000	IDR 50.000.000	There is no consideration given by the panel of judges in granting immaterial compensation
2.	Default – Court Decision Nr. 60/Pdt.G/2017/PN Bjb, Putusan No. 75/PDT/2018/PT.BJM, dan Putusan No. 179K/Pdt/2020	IDR 150.000.000	6% x IDR 150.000.000 = IDR 9.000.000 per year, count since this decision has permanent law come along Defendant I carry out the verdict	Prevent more losses to the plaintiff (consideration of the panel judges on appeal) and indeed there are immaterial losses that are indeed experienced by the plaintiff as the aggrieved party and this does not conflict with the law (consideration of the panel of judges on cassation)
3.	Default – Court Decision Nr. 710/Pdt.G/2020/PN. Tng	0,5 % per month from IDR 1.447.000.000 since November 23th, 2019	0,5 % per month from IDR 1.447.000.000 since November 23th, 2019	There were costs that the plaintiff suffered as a result of default by the defendant
4.	Unlawful Act - Court Decision Nr. 205/Pdt.G/2019/PN.SDA	IDR 200.000.000	IDR 50.000.000	Psychological damage to the plaintiff as a result of not returned the plaintiff's high school diploma by the defendant.
5.	Unlawful Act - Court Decision Nr. 544/Pdt.G/2017/PN.Sgr	IDR 1.000.000.000	IDR 1.000.000.000	Lost of trust from the plaintiff's client (Principal 1) due to the failure of the shop construction as a result of the default of the defendants and the plaintiff (Principal 1) had to pay interest on the credit he borrowed at the bank to cover the credit loan borrowed by the defendant.
6.	Unlawful Act - Court Decision Nr. 323/Pdt.G/2012/PN.Jkt.Sel	IDR 5.000.000.000	IDR 20.000.000 each of plaintiff	There is a trauma experienced due to the accident.

The table shows the various considerations given by the panel of judges in accepting claims for immaterial compensation, which are loss of client trust, trauma, disturbed victim psychology, costs incurred as a result of default, and preventing more losses for the aggrieved party. There is even an immaterial loss claim granted without any particular consideration or reason. Although the acceptance of immaterial compensation claims is a positive thing, because it can accommodate losses beyond the material losses that are

actually experienced by the aggrieved party, this immaterial compensation needs to be regulated in a positive law – for example in a Supreme Court Regulation (SCP).

The regulation aims to provide guidelines for judges in granting claims for immaterial compensation. These arrangements may include:

1. The conditions under which immaterial compensation claims can be granted, for example the plaintiff needs to explain the reasons and details of the claim for immaterial damages, the panel of judges is obliged to give consideration in terms of granting the claim for immaterial compensation (as it see in jurisprudence, the Decision of the Supreme Court Nr. 1720 K/Pdt/1986, dated August 18th 1988, that every claim for compensation must be accompanied by details in what form is the basis for the claim);
2. Limitation or scope of immaterial compensation, for example, as in the decision above where there is trauma, psychological injury, defamation, or as in several previous decisions such as loss of enjoyment of a calm caused by a neighbor (Badruzaman and dkk 2001), loss or reduction of people's enjoyment of their rights over their wealth - Arrest Januari 29th, 1937 NJ. 1937, 57 and Hooge Raad Decision Desember 31th, 1937 NJ. 1938, 517 - (Satrio 2005), the suffering experienced by accident victims and the loss of happiness in life - *Hooge Raad* Decision Mei 21th, 1943 NJ. 1953, 455 - (Satrio 2005).
3. The form of compensation, for example in the form of money - Court Decision Nr. 14/PDT/G/1990/PN-Mdn jo. High Court Decision Nr. 150/PDT/1991/PT.Mdn, jo. Supreme Court of Indonesia's Decision Nr. 1265 K/Pdt/1984 - (Satrio 2005; Prodjudikoro 2000).
4. Condition if aggrieved party got a benefit because of the damage, such as insurance.
5. The freedom of the judge in appraising the value of the loss.
6. Parties that can sue for losses in condition that the injured party dies. (Poin 4, 5, and 6 will be discussed while compare immaterial compensation between Civil Code and NBW)

Comparison (Equalities and Differences) in Immaterial Compensation according to the Civil Code and NBW

First, take a compare on the systematics of compensation arrangements according to the Civil Code and NBW. That the Civil Code does not regulate general provisions regarding compensation as is the case in the NBW. As the Civil Code adheres to two bases of liability that are liability based on contractual liability and liability based on unlawful acts, compensation arrangements for the two bases of accountability are also different. Compensation for default according to the Civil Code is regulated in Article 1243 to Article 1252 of the Civil Code, while compensation is based on lawsuits for unlawful acts are not regulated as strictly as compensation arrangements for default, but in determining compensation based on unlawful acts, it can find the instructions in Article 1365, Article 1371 paragraph (2) and Article 1372 paragraph (2) of the Civil Code.

NBW provides a different systematic regarding damages or compensation. The NBW regulates compensation in a general provision in Section 6.1.10 of the NBW regarding the legal obligation to pay compensation, Article 6:95 NBW to Article 6:110 NBW. General provisions regarding compensation are applied to any liability or legal consequences designated by other Articles in the NBW, (Hijma 2002). Except if the responsibility to provide compensation is indeed the main engagement in the agreement, for example an insurance agreement - the claim for compensation is waived if the debtor has enjoyed the benefits due

to the loss. Return of benefits using unjust enrichment concept and if this benefit is in the form of a debtor's debt claim against a third party (insurance company or other responsible person), the debtor can return the benefits he received by transferring the debt claim to the creditor (Article 6:78 NBW) - (von Bar and others 2014), or liability for damages sourced directly from the contract or in other words the parties have agreed on compensation if default is happened which is usually set forth in the form of a penalty clause (Scherpe 2007). For example, compensation arising from default is regulated in Article 6:74 NBW, the basis for compensation or compensation due to liability for unlawful acts is regulated in Article 6:162 NBW, unjustified enrichment (Article 6:212 NBW), caretaking (Article 6:198 NBW), obligations related to one's position as supervisor over other people or owners of certain objects (Article 6:169 NBW), and responsibility for a product/consumer protection (Article 6:185 NBW) (Scherpe 2007; Hijma 2002).

However, the compensation provisions in the both regulation are complementary legal provisions, it means that the parties can arrange or make an agreement regarding compensation in the agreement or contract they make. Article 1249 of the Civil Code state that if the parties agree on the amount and form of compensation in the agreement they make (in practice it is usually regulated in the clause on the limitation of liability for compensation or is called the maximum liability amount, then the compensation given may not be less or more than what was agreed upon unless there is bad faith on the part of the debtor. While in NBW, a penalty clause, arrange in Article 6:91 NBW, that every contractual provision stipulates that the debtor, if in default, must pay a sum of money or provide other performance according to the agreement, regardless of whether the amount of money or other performance is intended as compensation for losses or simply as an incentive to carry out an obligation.

NBW provides limitations on the compensation agreement held by the parties, that the judge is given the authority to reduce the amount of compensation deal by the parties based on Article 6:109 NBW, if giving full compensation will lead to results that are clearly unacceptable given the circumstances certain situations, among others based on the nature of the obligation, the legal relationship between the parties and their financial resources. The amount of the obligation to pay for losses cannot be reduced to a lower amount if the debtor has covered his responsibilities with insurance or is forced to do so. In fact, this provision regarding the judge's authority is a coercive provision that cannot be violated, with null and void consequences for the clause that violates it.

The Civil Code and NBW adhere to the same principles in determining compensation due to default and unlawful acts. The principle is that the aggrieved party must be placed in the same position as if the agreement was implemented properly and on time or as if the victim had not suffered any loss as a result of an unlawful act (Schelhaas 2020). The same concept about when the moment of responsibility is appear and provide compensation, which is when the debtor is declared to have been in a state of negligence/default or when an unlawful act has occurred. This can be seen based on Article 6:74 paragraph 1 NBW that the default of a debtor results in him being responsible for providing compensation to the

creditor caused by the non-performance of the agreement, except that the non-performance cannot be accounted to the debtor, whereas the Civil Code stipulates that the obligation to compensate arises when the debtor is declared in default and he can be held accountable for his mistakes (Article 1243 jo. Article 1244 of the Civil Code).

Then, compare the scope of compensation. That there are fundamental differences regarding the meaning of compensation according to NBW and the Civil Code. If in the Civil Code compensation consists of costs, losses and interest which this limitation covers material losses, while immaterial losses are only found the instructions in compensation based on liability for unlawful acts, NBW arrange the meaning of compensation not only cover material losses, but also includes immaterial losses, which are expressly stated in Article 6:95 NBW.

Regarding material losses, both the NBW and the Civil Code stipulate that compensation or (material) compensation consists of costs, losses and interest. The concept is the same between the Civil Code and NBW that loss suffered as well as lost profit and cost. The difference is in the details of the costs that can be claimed for compensation contained in Article 6:95 NBW, while the Civil Code does not explain at all what is meant by costs. What included in the cost according to NBW are:

1. Reasonable costs to prevent or limit the damage which could be expected as a result of the event which makes someone liable;
2. Reasonable costs for determining the nature and scope of the damage and of the liable persons;
3. Reasonable costs for attempts to get satisfied on the basis of a settlement out of court.

For attention regarding the definition of cost are: 1) Points b and c does not apply as far as in the prevailing case the rules regarding the costs of legal proceedings are applicable pursuant to Article 241 of the Code of Civil Procedure, 2) In the case of commercial transactions as referred to Article 6: 119a paragraph 1 or 6: 119b, paragraph 1, the cost compensation as referred to in point 2c, is at least 40 Euros. This amount is due, without the need for reminder (formal notification), as of the day following the one on which the statutory or agreed deadline for payment has expired. It is impossible to derogate from this rule to the detriment of the creditor. 3) Further regulations will be issued by the Order in Council for the compensation of costs referred to in point 2c. It is not possible to derogate from this material loss rule to the detriment of the debtor if the debtor is a natural person who did not act in accordance with his professional practice or business. In that case the first sentence of Article 241 of the Civil Procedure Code cannot be applied. 4) If the debtor is a natural person who did not act in his professional or business practice, then compensation according to further regulations will only be paid if the debtor is after default as referred to in Article 6:81 NBW, ordered to perform with formal notification within 14 days, including payment of compensation claimed in accordance with further regulations, by mentioning with formal notice the consequences when he fails to make this payment, appears to have been formally notified in vain, in that case the compensation shall be indebted as of the day on which the formal notice was sent, 5) If the same creditor can send an official notification as referred to in point 4) for more debts against the same debtor, he has to do so in one formal notice. For the purposes of calculating compensation, the principal amount of these debt claims are added.

In contrast to the Civil Code which does not regulate immaterial losses based on contractual liability/as a result of default by the debtor, NBW strictly regulates matters concerning immaterial losses that can be claimed by the aggrieved party. This is regulated in Article 6:106 NBW, that the aggrieved party can claim immaterial compensation provided that:

1. if the liable person had the intention to inflict such damage;
2. if the injured person sustained physical injuries or if his honour or reputation is injured or if he is harmed otherwise in person;
3. if the damage consists of harming the memory of a deceased and is inflicted to the not legally separated spouse, the registered partner or a blood relative up until the second degree of the deceased, provided that the memory of the deceased is harmed in such a way that the deceased himself, if he would still be alive, could have claimed damages for injuring his honour or reputation.

Debt claims for immaterial compensation cannot be alienated (conveyed) or seized, unless the existence of the debt-claim has been acknowledged by agreement or unless a legal claim (right of action) has been filed in respect thereof. For an acquisition under universal title of such a debt-claim it is, however, sufficient that the entitled person has notified the liable person that he lays a claim to such a compensation.

Because of compensation in NBW is a general provision that can be applied to the legal consequences of responsibilities designated by other articles in the NBW, both material and immaterial losses can be sued by the injured party due to default. In some literature regarding immaterial losses in the Netherlands, claims for immaterial losses are possible, especially if the loss is a physical or mental injury, for example Harriet N. Schelhaas in his article entitled *A Lex Mercatoria of Remedies for Breach of Contract*, provides relevant examples that physical injury may occur in contracts for medical treatment, transportation, travel or sales, for example buying and selling electric bicycles, in which the bicycle explodes when it used causing physical injury, pain and fear (Schelhaas 2020).

Besides in contracts for medical treatment, transportation, travel or sales, damages for physical injury can also be claimed under contracts or employment agreements. Ken Oliphant in *Tort and Insurance Law Volume 31: Employer's Liability and Worker's Compensation* explains that it can happen in employment (with definite contract) where workers have experience physical injury. Article 7:658 NBW, which is part of title 7.10 about employment agreement that provide contractual obligations outside of individual employment agreements or collective labor agreements, specifying that the duty of care is not fulfilled (duty of care) based on Article 7:658 NBW results in contractual liability without prejudice to tort liability (so employees can combine claims based on default and unlawful act) (Oliphant 2012).

Article 6:106 NBW, especially number 2, is the scope of immaterial compensation. Immaterial compensation according to NBW can be demanded "if the injured person sustained physical injuries or if his honour or reputation is injured or if he is harmed otherwise in person." Meanwhile, the court decisions analyzed above in granting immaterial

compensation were based on the PMH provision, Article 1365 of the Civil Code and default provision, Article 1243 of the Civil Code, because there is no provision regarding immaterial compensation. The following table presents a brief comparison between the scope of immaterial compensation according to NBW and the judge's considerations in the court decisions that have been analyzed previously:

Table 2. Comparison of the Scope of Immaterial Compensation in NBW and in Court Decision

Nr.	Scope of Immaterial Compensation in Article 6:106 Number 2 NBW	Judge's Consideration in Granting Immaterial Compensation in Court Decisions analyzed previously
1.	Physical Injuries	Court Decision Nr. 323/Pdt.G/2012/PN.Jkt.Sel that the plaintiff suffered physical injury (disability) and experienced trauma. Injuring psychologically also occurred in Court Decision Nr. 205/Pdt.G/2019/PN.SDA. In these two decisions the provisions used are Article 1365 of the Civil Code.
2.	Honour or Reputation is Injured	Court Decision Nr. 544/Pdt.G/2017/PN Sgr, in which the plaintiff (principal 1) lost self-confidence due to the decreased trust of his client due to the failure of the shop construction which was the result of the default of the defendants (decreased reputation). The provision used is Article 1365 of the Civil Code.
3.	Harmed Otherwise in Person	<p>Court Decision Nr. 75/PDT/2018/PT.BJM bahwa majelis hakim menimbang memang telah terdapat kerugian dan untuk itu agar kerugian yang dialami penggugat tidak bertambah perlu diberikan ganti rugi immateriil sebesar 6% dari Rp150.000.000 per tahun sampai putusan tersebut dilaksanakan tergugat. Ketentuan yang digunakan adalah Pasal 1243 dan 1250 KUHPerdara. Putusan No. 179K/Pdt/2020 yang menguatkan Putusan No. 75/PDT/2018/PT.BJM, menyatakan bahwa memang telah ada kerugian immateriil yang dialami penggugat.</p> <p>that the judges considered there had indeed been a loss, and in order to prevent losses suffered by the plaintiff in the future, it was necessary to grant immaterial compensation which is 6% of Rp150,000,000,00 per year until the decision's done by the defendant. The provisions used are Articles 1243 and 1250 of the Civil Code. Court Decision Nr. 179K/Pdt/2020 which strengthens that Court Decision states that the plaintiff had indeed suffered immaterial losses.</p> <p>Court Decision Nr. 710/Pdt.G/2020/PN. Tng, stated that the plaintiff bears the costs as a result of the default committed by the defendant. The provision used is Article 1243 of the Civil Code.</p> <p>Court Decision Nr. 544/Pdt.G/2017/PN Sgr, state that in this case the plaintiff (principal 1) must pay interest on the credit he borrowed at the Bank to cover money for his project which borrowed by the defendant. The provision used is Article 1365 of the Civil Code.</p>

Conclusion

In accordance with the problems in this research, the conclusions that can be given in this research first, immaterial compensation due to default is not regulated in the Civil Code and immaterial compensation due to unlawful acts is not strictly regulated in the Civil Code of Indonesia. The scope of compensation is in the form of costs, losses and interest (material), and includes restoration of honor and good name (in cases of defamation or insult) which in practice are valued in terms of money (immaterial). Some of the considerations given by the judge in granting immaterial compensation demands that can be seen in the decisions discussed in this study such as loss of client trust, trauma, psychologically disturbed victims,

costs arising from defaults, preventing more losses for parties those who suffered losses due to default, even grant a demand for immaterial compensation without being accompanied by the consideration of the panel of judges. The diversity of these considerations shows that there is no clarity on the boundaries regarding immaterial compensation.

Second, the similarities between the Civil Code in Indonesia and the NBW in the Netherlands regarding compensation arrangements are 1) compensation arrangement is complementary law, which means that the rules apply as long as the parties do not agree with them in the agreement, 2) the principle is that the injured party must be placed in position as if he did not experience the damage, 3) the judge has the authority to assess the amount of compensation suffered by the injured party in the event that the parties have agreed on the amount of compensation, 4) there is a causal relationship between the loss and the act (default/unlawful act). The differences between the Civil Code and the NBW regarding compensation arrangements are 1) regulatory systematics; that NBW regulates general provisions regarding compensation, while the Civil Code is regulated respectively in arrangements regarding default or unlawful acts, 2) there is the authority of judges in assessing the amount of compensation agreed upon by the parties to the agreement, 3) NBW strictly regulates the scope compensation, which are material and immaterial, 4) NBW regulates losses that may arise in the future, 5) NBW regulates conditions if the injured party has an insurance claim, 6) NBW regulates claims for compensation by third parties who also experience losses, 7) NBW regulates third parties who can claim compensation if the injured party dies, and 8) NBW regulates forms of compensation. Those differences can be a reference for make an arrangement regarding compensation, especially regarding immaterial compensation.

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