

CHAPTER I

INTRODUCTION

1.1. Background

People make mistakes all the time. Whether they meant it or not, mistakes are simply inevitable to happen. In general, mistake can be interpreted as action, decision, or judgment that leads to an unwanted or unintentional result.¹ Most of the time, these mistakes lead to a problem that either affect the doer themselves or others. When faced with a certain problem, people can usually get by with it. However, when this mistake leads up to a significant loss towards someone, they are most likely going to fight for their right to get justice for their loss.

When we were in kindergarten, we were told to apologize to our friends after we did something bad to them, since it is a simple manner that has been taught from a young age. However, as we grow mature and older, we realize that sometimes a sentence of apology is not enough to heal the harm that other people caused. As an adult, people learn the value and price of things in their surroundings. They realize that even if the loss that they bear may not be replaceable and priceless, there is still a way to compensate for such loss to make them feel better.

According to Indonesian Civil Code, there are two sources of loss. The first one is "*Wanprestasi*"/Breach of Contract, or in legal term known as "Default", is an event of a party not fulfilling their part in any kind of agreement. The event of breach of contract may took on different forms, such as: (1) One of the parties did

¹ Cambridge University Press, Cambridge Advanced Learner's Dictionary & Thesaurus, <https://dictionary.cambridge.org/dictionary/english/mistake>, Accessed 11 October 2021

not fulfill their part of agreement at all, (2) One of the parties fulfills their part of agreement but not as it should be (or not perfectly done), (3) One of the parties fulfills their part of agreement, but not on time, and (4) One of the parties fulfills their part of agreement, but they did things that are prohibited in the agreement.² In addition, according to Cambridge Dictionary, default means “to fail to do something, such as pay a debt, that you legally have to do”.³ Therefore, it is concluded that breach of contract is an act of not only being unable to fulfill an agreement, but also being unable to fulfill legal obligation.

Just as with other losses, we can also claim compensation for the losses from an act of breach of contract. In Indonesia, according to Art. 1243 of Indonesian Civil Code, the government regulates people to pay compensation for incurring losses towards other people as the result of breach of contract. This article stated that compensation for costs, damages and interests for the breach of an obligation only becomes obligatory, if the debtor, after having been declared to be in default, remains in default, or in case of obligations where he must give or produce something, is only given after the lapse of a period of time.

The second action source of losses is tort (tortious conduct). Tort is an unlawful act that brings harm to the interests of other people, or the other person itself. This action can be done either directly or indirectly and either intentionally or unintentionally. In order to bring justice to the victims of unlawful actions, the government regulates the perpetrator of such action to give a compensation for the

² Ahmadi Miru, *Hukum Kontrak dan Perancangan Kontrak*, (Jakarta: Rajawali Pers, 2007), hal. 74

³ Cambridge University Press, Cambridge Advanced Learner's Dictionary & Thesaurus, <https://dictionary.cambridge.org/dictionary/english/default>, Accessed 11 October 2021

victim that is worth the loss that they have incurred. This regulation is stipulated on Art. 1365 of Indonesian Civil Code regarding “Tortious Conduct”. Even though the term of “wanprestasi” is not regulated in the Indonesian Civil Code, there is still a regulation that can be used for the case of *wanprestasi*. The article that is referred to *wanprestasi* is Art. 1238 jo. 1243 of Indonesian Civil Code, regarding Compensation for Costs, Damages and Interests for Breach of Obligations.⁴

According to Art. 1365 of Indonesian Civil Code, “Every unlawful act that causes damage onto another person obliges the wrongdoer to compensate for such damage.”, meaning that when people make mistakes that harm other people or other people’s interest, they are required to pay some compensation in order to make up for the loss that they made. The government requires people to compensate to bring justice among society, especially to the victims of those losses. This rule is also in accordance with the fifth principle of Pancasila which reads, "Social justice for all Indonesian people", where the Indonesian Government will give their best in order to provide the equal amount of justice for all Indonesian people including the victim and the one who made the mistake.

The Indonesian Civil Code also regulates several types of illegal actions in which the victim is entitled to claim compensation through several articles. According to M.A. Moegni Djojodirjo in his book on 1976, Art. 1365 of Indonesian Civil Code regarding Unlawful Acts gave the impression that there are multiple types of compensation for someone to claim, such as: (1) compensation in the form

⁴ Hukum Online, “Dimana Pengaturan Kerugian Konsekuensial dalam Hukum Indonesia?” [https://www.hukumonline.com/klinik/detail/ulasan/lt4da27259c45b9/di-mana-pengaturan-kerugian-konsekuensial-dalam-hukum-indonesia-/,](https://www.hukumonline.com/klinik/detail/ulasan/lt4da27259c45b9/di-mana-pengaturan-kerugian-konsekuensial-dalam-hukum-indonesia-/) Accessed 11 October 2021

of money; (2) compensation in the kind of returning the damage to its original state; (3) a statement that the act committed by the defendant is unlawful act; (4) prohibition to perform a certain act; and (5) announcements regarding the judge's decision or the defendant's fault has been redeemed. However, for breach of contract, according to Federation of Advocates of the Republic of Indonesia, compensation for breach of contract must be calculated based on monetary value and must be in the form of money. This is intended to avoid the occurrence of difficulties in the assessment if it must be replaced by other means.⁵

Furthermore, if the defendant is found guilty of unlawful act, the defendant is obliged to pay the compensation in regards of their action.⁶ Moreover, upon the payment in regards to the compensation, according to Art. 1371 Paragraph 2 of Indonesian Civil Code, the determination of the compensation is assessed fairly from the position and ability of both parties. In addition, Art. 1372 Paragraph 1 of the Civil Code also says that in determining the value of this compensation, the judge must also pay attention to the severity of the loss as well as the position, ability, and condition of the two parties involved.

According to Art. 1365, for an act to be considered as tort, it does not actually need to break a literal rule that is written in a written law. An action is considered as a tort (unlawful act) when the act has intentionally or unintentionally inflicted harm on another person.⁷ The Art. 1370-1373 of Indonesian Civil Code

⁵ Federasi Advokat Republik Indonesia, "Pengertian, Bentuk, Penyebab dan Hukum Wanprestasi", <https://www.dppferari.org/pengertian-bentuk-penyebab-dan-hukum-wanprestasi/>, Accessed 04 January 2022

⁶ Sri Redjeki Slamet, "Tuntutan Ganti Rugi dalam Perbuatan Melawan Hukum: Suatu Perbandingan dengan Wanprestasi". Jurnal: Kantor Advokat Sri Redjeki Slamet & Partners.

⁷ Art. 1365 of Indonesian Civil Code

regulates what are the examples of unlawful acts and which parties are entitled to get compensation.

Art. 1370 states that if there is an accident of murder, whether it is due to negligence or intentional, the people who are the financial responsibility of the victim have the right to claim compensation from the perpetrator. In Art. 1371, it stated that if there is an incident where a person suffers an injury or disability in any part of the body, whether that occurs due to negligence or intentional, the victim of the incident is entitled to compensation for all costs incurred by the victim in recovering the injury or disability suffered. Furthermore, this compensation is based on the financial status and condition and the circumstances of the individuals involved. In Art. 1372 it is stated that if there is an incident where a person experiences humiliation or defamation, the victim has the right to claim compensation for losses and the right for restoration of their honor and good name. Furthermore, in fulfilling these demands, the severity of the insult, as well as the position, status, and financial circumstances as well as the circumstances of the parties involved will be taken into consideration by the judge in determining the decision. As a continuation of Art. 1372, this article stipulates a provision whereby a person who felt that they have been insulted or defamed can also sue the perpetrator on charges of slander. If the accusation of slander is met, then in accordance with Art. 314 of the Criminal Code, the perpetrator can be convicted. However, this accusation of slander can only be made if the victim requests it.

The Indonesian government, through the regulations stated in the Indonesian Civil Code, also regulates which parties should be responsible for the

losses suffered by victims. According to the law, a person could be the party responsible for providing compensation to the victim, even though that party was not directly involved in the incident that caused damage to the victim. According to Art. 1366 of the Indonesian Civil Code, “A person is responsible, not only for the damage which he has caused by his act, but also for that caused by his negligence or recklessness.” Therefore, it is also regulated on Art. 1367-1369 of the Indonesian Civil Code, that a person must be responsible for providing any compensation to the victims if they are involved in several scenarios.

The first one, according to Art. 1367, if a person causes another person to suffer losses, either because of his own actions, or the actions of others who are his responsibility and under his supervision, then that person must be responsible for that act. For example, parents and guardians are responsible for the damages that are caused by their children under the age of 18, and/or living with them, and/or for whom their guardianship is responsible. Furthermore, the Employer or any other person who has employees working for them, is liable for any damages caused by the employees working for them. Lastly, teachers and craftsmen are responsible for any damage caused by the students and their interns, during the last period in which those teachers and craftsmen play their role.

The second one, according to Art. 1368, the owner of animals, or the person who benefited from the animals, must be responsible for all losses that the animal has caused, whether the animal is under their control, or when the animal escaped from their control

Lastly, according to Art. 1369, if there is a person who suffers loss or damage caused by the collapse of a building, or parts of it and it turns out that this happened because the owner of the building was negligent in maintaining the building, or there is a defect in the whole or partial construction of the building, then the owner of the building must be responsible for the damage that occurred.

Before a judge determines whether a person is guilty or not in a court of law, there are several legal processes that need to be taken. First, in order for the trial itself to take place, the party who feels aggrieved must take the suspect to court. Usually, in cases of illegal acts (torts and breach of contract), victims will sue the perpetrator to court, to compensate for the losses they have suffered, both material and immaterial losses. After the administrative process of the prosecution has been completed, the trial will be executed according to the schedule given by the court.

Later, the judge will assess and weigh the case claims submitted by the plaintiff to the defendant in the court. The judge will also assess whether the demands given by the plaintiffs are in accordance with the applicable law and whether the defendant has been proven guilty of the charges given by the plaintiffs. Furthermore, if the judge found the defendant guilty, the judge will assess whether the claim for compensation requested by the plaintiff is appropriate or fair with the actions committed by the defendant. In the end, at the final judgment of the court, if proven guilty, the judge will provide the amount that the defendant must pay to the plaintiff as compensation for the damages that have been caused.

According to KBBI, loss is a condition in which someone does not benefit from what they have spent (capital).⁸ According to *Guru Besar Fakultas Hukum Universitas Indonesia*, Rosa Agustina, the losses suffered by the defendant, especially in the result of tort and breach of contract, can be categorized into two types, namely, material losses and immaterial losses.⁹ One of the case example that support this statement is in the case of Decision No. 165/Pdt.G/2015/Pn Tng, where the judge granted both material and immaterial claims that the prosecutor filed. Furthermore, material losses are usually take form as an actual loss that can be physically seen by the Petitioner.¹⁰ In addition, according to Dr. Riki Perdana Raya Waruwu, S.H., M.H., Hakim Yustisial Biro Hukum dan Humas MA, Material loss is a loss of material goods that can be objectively estimated at a price and is not something that has a subjective value to the person.¹¹

Goods that are objects of material loss are usually one or more inanimate objects whose value is only limited to what the market valued. For example, if the material damage was a regular car, then the value of the car is only limited to the value that people put on the car market. So, apart from the price listed for these goods, the objects of material loss have no additional or personal value to the owner. In a legal proceeding, usually the value of the object of this material loss is determined by the claimant as their compensation claim based on the value of

⁸ Kemdikbud, Kamus Besar Bahasa Indonesia Online, (Indonesia: Kemdikbud, 2016). <https://kbbi.kemdikbud.go.id/entri/rugi>, Accessed 11 October 2021

⁹ Hukum Online, “Doktrin dan Ragam Pertimbangan Hakim Tentukan Besaran Ganti Rugi Immateriil” <https://www.hukumonline.com/stories/article/lt5f61da7488a1c/doktrin-dan-ragam-pertimbangan-hakim-tentukan-besaran-ganti-rugi-immateriil>, Accessed 11 October 2021

¹⁰ Hukum Online, *Loc.Cit.*

¹¹ Kepaniteraan Mahkamah Agung Indonesia, “Perluasan Ruang Lingkup Kerugian Immaterial”. Surat Kabar, Jakarta: Kepaniteraan Mahkamah Agung, 2017

similar object in the market. However, the amount of material damage compensation that the defendant must pay can only be determined by the judge at the final court decision. Different from material losses, immaterial losses are losses whose value cannot be measured definitively like material losses, as it takes a form of non-physical losses. For example, fear, trauma, disappointment, pain, and so on. Moreover, Immaterial losses can also represent losses on foreseeable benefits or foreseeable income in the future.¹²

It is easier to determine the price of the losses on the potential benefit of the victim of this settlement rather than other kinds of immaterial losses. If the victim were to lose their potential benefit because of an unlawful act or a breach of contract that is conducted by other parties, the victim would be able to count the rough estimate of the potential benefit that they lost from the incident. Therefore, if the victim shall sue the defendant to compensate for their loss, the judge could determine the amount of compensation that the defendant needs to pay as fair as possible based on the rough estimate that the victim has calculated. However, since other immaterial losses, such as fear, trauma, disappointment, pain, and so on are personal to the victim, it is very difficult to determine the amount of compensation the victim deserves.

Many efforts have been made by the Government of Indonesia to ensure that victims of immaterial losses receive the fairest compensation possible. In order to uphold justice between the victim and the accused, based on Art. 1371 paragraph 2 of the Indonesian Civil Code, the situation of the compensation that has to be

¹² Hukum Online, *Op.Cit.*

received by the victim will be assessed by the judge according to the position and ability of both parties, and according to the circumstances. Furthermore, according to Art. 1372 paragraph 2 of the Indonesian Civil Code, in determining the compensation for tortious conduct, the judge must pay attention to the severity of the insult, as well as the rank, position and ability of the two parties, and on the circumstances.

However, as of the time during the Author's process of researching and writing this thesis, the fulfillment of the immaterial loss claim is submitted to the Judge on the principle of *ex aequo et bono*. Nevertheless, the Supreme Court has outlined a guideline in its Judicial Review Decision No. 650/PK/Pdt/1994 which is often used as a reference.¹³ Furthermore, according to this Supreme Court in its Judicial Review, based on Articles 1370, 1371, 1372 Indonesian Civil Code, because of the difficulty of immaterial losses to prove, immaterial losses can only be granted in certain cases such as cases of death, serious injury, or/and defamation. Therefore, the Supreme Court only acknowledge a loss as "immaterial loss" if it involves with death, serious injury, or/and defamation.

According to The Juridisch Latin Dictionary by GRW Gokkel and N van der Wal, that has been translated into Indonesian language, *ex aequo et bono* means "menurut keadilan", or in English means, "for justice".¹⁴ *Ex aequo et bono* can also be translated into "out of fairness and goodness". Which means, when the

¹³ Hukum Online, *Loc.Cit.*

¹⁴ Hukum Online, "Bahasa Hukum: Ex Aequo et Bono."

<https://www.hukumonline.com/berita/baca/lt4d904eea83da8/bahasa-hukum-iex-aequo-et-bonoi/>,

Accessed 12 October 2021

fulfillment of the immaterial loss claim of the victim entirely depends on the judge's judgement as fair as possible.

Since the benchmark for the amount of immaterial damage compensation to be received by the victim is given to the judge with the principle of *ex aequo et bono*, there is no definite measure in determining the amount of immaterial loss to a person. Therefore, difficulties arise in determining the amount of immaterial losses, which makes the Author worried that the determination of the amount of immaterial losses received by victims has not been carried out fairly

In this thesis, the Author will discuss further and, in more detail, whether the determination of the amount of compensation for immaterial losses made by the judge has been carried out fairly, will the decision to determine the amount of compensation for immaterial losses can be taken fairly if the Indonesian Government makes regulations that dedicated to the issue, and whether the government needs to make regulations dedicated to determining the amount of compensation for immaterial losses.

1.2. Formulation of Issues

In regard to the topic of the thesis, the Author will discuss the following formulation of issues:

1. Why is there a legal void in giving compensation for immaterial damage under Indonesian Law?
2. Whether a dedicated regulation regarding the guidance for determining the value of compensation for immaterial damage is needed or not?

1.3. Research Purposes

The Author's purpose of writing this thesis is to answer the formulation of issues stipulated above, namely:

1. To understand how giving compensation for immaterial damage is regulated under Indonesian Law.
2. To understand whether or not a dedicated regulation regarding determining the value of compensation for immaterial damage is needed.

1.4. Research Benefits

1.4.1. Theoretical Benefits

The theoretical benefit that the Author hoped to provide is to educate people on how the fulfilment of compensation for damages in Indonesia currently works. Furthermore, the Author would like to show his perspective on whether Indonesian legal system needs to provide a dedicated regulation regarding the process of determining the value of compensation for immaterial damage or not. By understanding the perspective of the Author of this thesis, the Author also wanted to let the readers participate in assessing whether there is an urgency for the Indonesian government to make regulations dedicated to providing compensation for immaterial losses.

1.4.2. Practical Benefits

The practical benefits that the Author hoped to provide in this thesis is to educate people in need of the information for determination

of the value of compensation for immaterial damage. In writing the thesis, the Author hoped that victims of unlawful acts or breach of contract that wanted to claim compensation for their immaterial damage know there is absolutely not any single regulation on how the judge can determine the value of compensation for immaterial damage. Furthermore, the Author hoped that in the future of Indonesian legal system, there will be dedicated regulations that determine the value of such compensation so that neither party of the related dispute feels aggrieved.

1.5. Framework of Writing

CHAPTER I: INTRODUCTION

The first chapter is about introduction. With this chapter, the Author hoped that the reader will be familiarized with the basic understanding of what is damage and compensation, immaterial damage compensation, and judge authority in giving immaterial damage compensation. This chapter is divided into five parts which are background, formulation of issues, research purposes, research benefits, and formulation of writing.

CHAPTER II: LITERATURE REVIEW

The second chapter is about literature review. In this chapter, the Author will have divided it into three sub-chapters. The first sub-chapters will consist of laws, regulations, and

policies about the damage and compensation. Second one will consist of the regulation of material compensation. Lastly, the third chapter will elaborate on the regulation/lack of regulation of immaterial compensation.

CHAPTER III: RESEARCH METHODS

The third chapter is about research methods. In this chapter, the Author will generally discuss the type of research, the type of data, the type of data analysis technique, and the type of research that the Author is using in order to provide the necessary information that is laid out in this thesis. This chapter will also consist of the types of research, data that supports the writing of this thesis, and everything that is related to the answer of the analysis that has been provided by the Author.

CHAPTER IV: DISCUSSION AND ANALYSIS

The fourth chapter is about discussion and analysis. In this chapter, the Author will answer all of the research questions that are stated in the formulation of issues by giving an elaborate discussion based on the research that has been done by the Author. Furthermore, the Author will divide this chapter into two further sub-chapters that will provide each of the individual respective answers towards the research question as stipulated in chapter two of this thesis. The first

sub-chapter is going to discuss and analyze about giving compensation for immaterial damage regulated under Indonesian Law, meanwhile the second sub-chapter is going to discuss and analyze on whether or not a dedicated regulation regarding determining the value of compensation for immaterial damage is needed. These two sub-chapters will be discussed and analyzed elaborately.

CHAPTER V: CLOSING

The last chapter, chapter five, is about closing. In this chapter, the Author will conclude this thesis with an explanation based on the analysis that has been done by the Author, as written in the fourth chapter. Furthermore, the Author will also provide suggestions and recommendations towards how the Indonesian government should respond to the legal vacuum in the regulation regarding how judges determine the amount of compensation that needs to be given to victims of immaterial losses.