

Matters on Compensation of Moral Damage: Practical Aspects

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ABSTRACT

Matters on compensation of moral damage are one of the most controversial and topical in enforcement practice for today, especially in developing countries, such as Kazakhstan. This is because the matters of protection of the individual, his moral rights and benefits are the same priority as the protection of property rights. In this paper, the authors conducted an attempt to study the matters of enforcement practice related to the definition of criteria for compensation of moral damage, caused by the offenses. The article made a comparative analysis of some aspects of the legislation Institute on arising from the offense (torts) liability for compensation of moral damage, attention is drawn to the different definition of the term "moral damage". As the regulatory basis were used the legislative acts of Russia, Kazakhstan and Germany. The results substantiate the necessity of reforming the legislative basis of the Republic of Kazakhstan in the sphere of regulation of the compensation of moral damage. Moral hazard is defined as "moral and physical suffering", which did not disclose fully the term and can be interpreted in different ways. Therefore, it is necessary to consolidate at the legislative level the full concept of "moral damage", as well as to develop a single system for calculating it.

KEYWORDS

Moral damage, the tortfeasor, a criminal offense, mental suffering, physical suffering.

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Introduction

The institute of the compensation of moral damage is one of the most complicated legal institutions, the content and application conditions of which do not have single, stable criteria in research and in the jurisprudence (Reale, 2015; Jagusch & Sebastian, 2013; Blake, 2012).

The importance of thorough research, clear formulation in the rules of law and their uniformity of application in judicial practice due to the fact that the Republic of Kazakhstan declared as the highest values the human life, rights and freedoms (Constitution of the Republic of Kazakhstan, 1995).

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The legislator subdivides all legal relations regulated by law into three categories:

- 1) Property, the object of which is the good, which is having a value (Constitution of the Republic of Kazakhstan, 1994);
- 2) Personal non-property relations, related to property, the objects of which have no value, but include property obligations (Constitution of the Republic of Kazakhstan, 2011);
- 3) Moral relations, which do not have the value of the object (Constitution of the Republic of Kazakhstan, 2011).

Personal non-property goods from birth and by operation of law have one fundamental important feature: they are inalienable from the legal personality of legal capacity of human and non-transferable for any reason (by way of inheritance or civil transaction) to any third parties (Constitution of the Republic of Kazakhstan, 2011).

Only because of this caused by personal non-property benefits and rights harm is a personal non-pecuniary damage (moral damage) to the legally capable individual, which is expressed in a negative psychological and emotional experiences of an individual, in violation of his psychological well-being (Parfilova & Karimova, 2016). Such experiences take form of physical or mental suffering.

The implementation of the constitutional norm, provision of psychological well-being of every person in the Republic of Kazakhstan is the task of the legislator, the law enforcement agencies, the judiciary system and the society as the whole.

The concept of moral damage was specified in Paragraph 1, article 951 of the Civil Code of the Republic of Kazakhstan (hereinafter – CCRK). The legislator defines the moral damage as a "disorder, impairing or deprivation of personal non-property benefits and rights of individuals, including mental or physical suffering (humiliation, anger, depression, shame, despair, physical pain, lameness, discomfort, etc.), experienced (undergo) by victims as a result of the offense committed against him" (Constitution of the Republic of Kazakhstan, 2011).

Considering the studied notion on the example of the Russian legislation, it should be noted that the Civil Code does not give a detailed definition of the moral damage.

Thus, Article 151 of the Civil Code defines moral damages as "physical or moral suffering, caused by actions, which are violating the personal non-property rights or infringing on other intangible benefits belonging to the citizen, as well as in other cases, provided by law."

Thus, a particular subject undergoing the moral damage is not defined; the acts that violate the moral rights and material benefits are not concretize. Thereby, a list of such actions may be wider than in domestic legislation.

The advantage of CCRK is that the legislator disclose those types of negative psycho-emotional experiences that can experience the legally capable natural person, as a result of infringement of moral good and right belonging to him from birth or by virtue of the law.

The advantage of the editorial board of the Civil Code is that against the consequences of the offense against the personal non-property benefits and rights belonging to a natural person by birth or by virtue of the law are very accurately recorded; there is indicated that an individual is experiencing physical or mental suffering.

Both the CCRK (Paragraph 3, Article 115) and the CCRK (Paragraph 1, Article 150) have the list of objects of personal non-property benefits and rights, which is not exhaustive. The legislator provides for the extension of such benefits and rights that can be subjects of moral relationships and receive legal protection.

Article 951 of the CCRK has the blanket character. The legislator has left the list open, indicating that the physical and mental suffering may be caused in other cases, specified in the law. We believe that it is more correct approach, since we cannot advance to give an exhaustive list of actions, as a result of committing which a person can experience such suffering.

French law does not allocate the moral damage as a separate type of injury, but it allocates the common grounds of responsibilities for causing such a damage (Civil Code of France, 2016).

Paragraph 823 of the Civil Code of Germany provides a quite detailed definition, including methods of causing moral harm. However, the German legislator has a unique approach to the determination of moral damage.

The Germany legislator, in contrast to the Kazakh legislator, does not divide the objects of guilty unlawful attacks on property and personal property, but establishes a general rule that the harm to the rights of any other person entails the obligation to provide compensation for damage.

Such an obligation arises only if there is guilt (intent or negligence) from the side of a tortfeasor [8].

Wherein, there was established a rule that if the harm, which is caused to a person or property, is subject to compensation, the lender instead of restoring the previous status may demand the payment of a certain money sum (§ 249, Article 2 GCC).

However, in the event of the death of the injured person, there must compensate the funeral expenses to a person, who under the law bear these expenses, and reimburse the dependents of lost content, which they received from the provider, whom the offense caused the death (§ 844 GCC).

Similar position are contained in Paragraph 1, Article 940 and Article 946 of CCRK.

Thus, lawmakers of mentioned states do not envisage the chance that relatives can demand payment as compensation for moral damages on the grounds of causing the death of their relative. Causing the death of a person, on whom depended the disabled individuals in need, means causing damage to property and the right to demand compensation from the perpetrator of lost content.

Aim of the Study

Consider the compensation of moral damage, as a means of recovery of the legal status of the aggrieved party.



Research questions

What is defined under the term “moral damage”?

How to determine the amount of compensation for moral damage?

Method

As the methodological basis of the study were used the scientific works on philosophy, sociology, psychology, economics, general theory of law. The study used methods of logic and system analysis, historical, legal and comparative legal analysis of the fundamental provisions of the science of civil law, as well as the achievement of other legal sciences.

As information sources we used the laws and normative acts, governing the process of compensation of moral damage: The Civil Codes of Russia, Kazakhstan, Germany, France; the decisions of the Supreme Court of the Republic of Kazakhstan are considered; compilation of scientific works of lawyers, specializing in this subject.

Data, Analysis, and Results

German legislator defines the compensation of moral damage as "money for pain and suffering" (Civil Code of Germany, 2015). Paragraph 823 specifies that the duty of reparation is assigned on the person, "who unlawfully, deliberately or inadvertently infringe on someone's life, physical integrity, health, freedom, property right or any other right of another person, he is obliged to compensate the caused damage " (Bergmann, 2006).

Thus, the Germany legislator focuses on the signs of the act that is likely to lead to moral damage, for which it can be concluded that this is a culpable offense. Paragraph 823 lists the forms of guilt among the signs of such acts. Unlike the CCRK, where Paragraph 3, Article 951 lists the cases, where the moral damage is subject to compensation, regardless of the fault of the causer. At the same time, the list is not comprehensive.

Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated by June 21, 2001 "On application of the law by the courts for compensation of moral damages" reveals the content of "moral suffering", defining them as "emotional and volitional human suffering by having feelings of humiliation, anger, depression, shame, frustration, inferiority, the state of discomfort" (Normative Resolution of the Supreme Court of the Republic of Kazakhstan, 2009). This Resolution lists, through what these feelings may be caused. These feelings can be caused not only by illegal encroachment on the life and health of the victim and his close relatives, but also a violation of family, personal and medical confidentiality, violation of the right to represent, copyright and related rights and a number of other illegal activities". Physical suffering" are perceptible by a person through physical pain due to "unlawful violence" or personal injury against him (Paragraph 3 of the Normative Resolution of the Armed Forces). However, it seems necessary to make a critical judgment that the loss of close relatives does not apply to objects of personal non-property rights of any victim or his family members. By virtue of this family members may not feel the legal physical or mental suffering, an experience of which is the basis to claim for the compensation of moral damage in monetary terms.

Analyzing the arguments for the decision of the cassation judicial board of the East Kazakhstan Regional Court on the claim K. for compensation of moral damage in connection with causing the death of his father in the performance of work duties, would be useful to note that the infliction of the death of the victim entails different legal consequences. These legal effects are directed only for reparations to the dependents and compensation for burial expenses of his body. With regard to the victim's relatives, whose death was committed against him by a criminal offense, no offense had been committed and no moral rights belonging to them, which are protected by the law, were not violated (Generalization of court practice on examination of civil cases involving claims of compensation for moral damage in monetary terms, 2015).

In terms of current legislation, the misinterpretation was allowed by the court in the claim of K. and A. on the compensation of moral damage in their favor in connection with causing the death of their son (Generalization of court practice on examination of civil cases involving claims of compensation for moral damage in monetary terms, 2015).

By virtue of Paragraph 1, Article 952 of the CCRK the moral damage shall be compensated in cash. In accordance with Paragraph 7 of SCRK "On application of the legislation by the courts on compensation of moral harm" it is necessary for the courts in determining the amount of compensation for moral damage in monetary terms, to take into account both the subjective evaluation by the citizen of the gravity of caused to him moral and physical suffering, and the objective data, evidence, in particular:

- The vital importance of moral rights and benefits (life, health, freedom, inviolability of the home, personal and family secrets, honor and dignity, etc.);
- The degree of undergo mental or physical suffering (deprivation of liberty, bodily injury, loss of a close relative, the loss or limitation of ability to work, etc.);
- A form of guilt (intent, negligence) of a tortfeasor, when you need its presence for the compensation of moral damage (Vorobiev, 2004).

It should be noted that the text of Regulatory decisions need to remove the base of "the loss of close relatives," due to the fact that, as it is noted above, the legislator does not among the recognized as moral rights the continuous communion, preservation of family ties, the loss of a relative, a close, dear man.

In 2014, the courts finished 4743 cases involving the compensation of moral damage. In terms of categories, the largest part made up the cases of the labor disputes and related to road traffic accidents (Generalization of court practice on examination of civil cases involving claims of compensation for moral damage in monetary terms, 2015).

On making a decision (similarly) were reviewed 3077 cases or 65% of the number for completed cases in this category (in 2013 –3003, or also 65%). More than a half of them complete satisfaction of requirements, presented to the court (1664 or 54% of all decisions). Similarly, in 2013 (1614 or 54%) (Generalization of court practice on examination of civil cases involving claims of compensation for moral damage in monetary terms, 2015).

The most pressing matter in compensation of moral damage ia the criteria of its determination. Paragraph 3, Article 953 of the CCRK defines the



independence of moral damage from the property. For determining the amount of moral damage, we cannot come from the size of losses and property damage. They are compensated independently. V. Uskov (2000) also notes the difference in the approaches for compensation of moral damage.

The law does not provide clear criteria for determining the moral damage. This leads to the fact that the practice leaves inconsistency. It is often possible to trace the absence of the principle of fairness in the determination of moral damage.

In the practice of some countries of the common law, there are ways to solve these issues. For example, the UK developed special tables that determine compensation to the victim of physical and mental suffering, caused by an intentional crime. There was created and is functioning the Commission, which currently uses the fixed tariff scheme of 1994, which described in detail the conditions and the amount of compensation payments depending on the case.

The United States limited the upper limit for compensation of moral damage. For example, in the case of death of the victim the monetary compensation is paid to his heirs in an amount not exceeding \$ 250,000. The question of compensation of moral damage is resolved in Japan legislation in a similar way. In Germany and France – through the development of jurisprudence rules, guided by earlier court rulings in cases involving comparable offenses.

Discussion and Conclusion

The attempt to make a table on compensation of moral damage was carried by A.M. Erdelevsky (2004) on the basis of medical, statistical and other data. He suggested taking as the base level a fixed 720 of minimum wage and specific amounts of compensation for different types of crimes. This method is widely used in the jurisprudence of the Russian Federation.

Paragraph 2, Article 952 of the CCRK states that "in determining, the amount of moral damage is treated as a subjective assessment by the victim of the gravity of caused to him moral damages, as well as objective evidence of the degree of moral and physical suffering: the vital importance of the benefits of the former object of attacks (life, health, honor, dignity, freedom, inviolability of the home, etc.); the severity of the offense (bodily injury that resulted in disability, imprisonment, deprivation of work or homes, etc.); the nature and scope of dissemination of false defamatory information; living conditions of the victim (office, family, household, material, state of health, age, etc.), and other relevant circumstances". However, it should be noted that the legislator has not defined the term "degree of suffering" and its measurement units are not defined.

A.M. Erdelevsky (2004) determines the degree of suffering by measuring its depth, indicating that "speaking of the pain, we evaluate it as weak, strong, unbearable, and therefore the depth of suffering for the average person depends largely on the type of non-pecuniary benefits, which was caused harm and the degree of depreciation of this benefit, and the individual characteristics of the victim can raise or get lower the depth (degree) of suffering". Therefore, the individual characteristics of the victim should be taken into account.

The legislator also does not define the term "the nature of suffering." The legal literature understands the "nature of suffering" as "an indication of their

form, namely physical pain – the pain, dyspnea, nausea, dizziness and other painful symptoms (feelings)" (Pushkina, 2013).

The amount of compensation depends on the actual circumstances, in which the harm was caused, and only those that deserve attention. Meanwhile, the "degree and nature of physical and moral suffering of the victim should be taken into account in relation to its individual characteristics" (Pushkina, 2013).

Implications and Recommendations

Based on the mentioned above it can be concluded that the current legislation has a number of gaps in the regulation of the institute of moral damage compensation.

Firstly, the legislative definition of moral damage by listing the ways of such damage did not reflect the essential features of the studied concept. Disclosure of the concept of moral damage through "moral and physical suffering" category is blurred, as the content of such suffering is not determined, there can be traced a certain identification of the concepts "morality", "mental suffering". We believe that the disclosure of these categories through legal instruments put an end to the considered matter.

Secondly, there is a conflict of norms of civil and administrative law, the solution of which is possible by making the appropriate changes to the CAO. Determination of the victim in the sense of the Article 745 of CAO contradicts the Articles 143 and 951 of the CCRK, which set the impossibility of causing moral damage to legal persons. In connection with this the Paragraph 1, Article 745 of ACRK shall be read as follows: "The victim is an individual, to whom an administrative offense caused physical, property and moral damage and legal person, to whom an administrative offense caused property damage."

Thirdly, there are no clear criteria for determining the amount of moral damage; as a result, there is an ambiguous approach enforcer. The solution to this problem is possible by the development of criteria and methods for determining the amount of moral damage based on the experience of the common law countries. Such an attempt, carried out by A.M. Erdelevsky (2004), had a positive impact on legal practice of the Russian Federation in matters of moral damage. It is proposed to develop a table of the compensation of moral damage on the basis of medical, statistical and other data, in which the fixed amounts of MCI and the specific amounts of compensation for different types of offenses are proposed to be taken as the base level.

Disclosure statement

No potential conflict of interest was reported by the authors.

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