

Report on civil law

“Compensation for moral damages”

Quite frequently in our everyday life we hear such phrases as “I demand indemnification”, “I’ll sue you” (for example for insults) and the like. Often one, indeed, would like to start an action against his offender and, thus, get a compensation for material and moral damages suffered, but no one does that as they just don’t believe in the efficiency of our court and its justice (which can be confirmed by numerous sociological research works and interrogations, for example over 70% of the interrogated do not believe that court hold lawful and just decisions – see www.fom.ru for details). And indeed, the Russian institution of moral compensation, being rather well developed in theory (laws), is poorly, indifferently actualized in practice. Further in my report I’ll try to highlight the most important aspects of this institution followed by recent cases and comparisons with foreign experience in the field.

Civil legislation of pre-revolutionary, monarchal Russia didn’t contain any general rules providing compensation for moral damages as a safeguard for non-pecuniary rights. In those times the duel served such purposes. Moreover, refusal to answer the call, or equally failure to ‘throw down the glove’, were regarded as being disgraceful.

After the revolution in 1917 new order, its ideology were completely incompatible with moral compensation, which, as a result, wasn’t present in soviet legislation. There could be no non-satisfied or offended persons in soviet society which was seen as unified and peaceful.

The institution of moral compensation appears in legislation of Russia in the 1990s. First it was mentioned in the Act of USSR 12 June 1990 'About press and other mass media'. The present concept is seen more broadly in the Fundamentals of civil legislation 1991 – here moral harm is described as any wrongful action made by a guilty person (art. 131).

This institute has been fixed and regulated thoroughly in the Civil Code 1995, having gone through a number of laws (Environmental Act, Mass Media Act, Customers Protection Act and others).

Democratic tendencies in Russian society of recent years has given birth to such institutes as compensation for moral damages. A man had been granted the rights that, in fact, can be best protected only by this institute. To see this more clearly let's consider an example of insulting. The Criminal Code in art. 130 does provide punishment for insulting, but can a person be truly satisfied with the fact that even if the fine is paid, it'll be paid to the government? In this case it looks more like revenge or something. Whereas moral compensation seems much more, so to say, pleasant and just. Thus a person can have real reason and benefit to bring an action.

It should be mentioned that even though current legislation provides special, separate proceedings for cases about moral compensation, it rarely occurs in practice. More often a plaintiff just applies for moral compensation during court proceeding: in the above example of insulting it'll be an application for paying moral compensation in the criminal procedure.

The meaning of moral damages is quite broad. There were and still are contradictions, collisions in its understanding. A writ (a decision of the Supreme Court's plenum) 20 December 1994 no.10 'Some issues of application of the legislation about moral harm compensation' somewhat reduced misunderstanding and misreading. Let's see how this writ defines moral damages. These are moral or physical sufferings caused by action or inaction which infringes upon citizen's non-pecuniary rights (such as life, health, person's dignity, business reputation, privacy and so on) or which violates one's personal non-pecuniary rights (such as the right to a good name and reputation, right of authorship and other non-pecuniary rights provided by copyright legislation) or which violates property rights of a citizen.

Particularly, moral damages can consist in moral sufferings caused by the loss of relatives, incapability to continue normal, active style of life, loss of position, revealing of a family or a medical secret to 3rd parties, defamation (which is an intentional false communication, either published or publicly spoken, that injures another's reputation or good name), temporary denial or limitations of any rights, physical pain etc. Thus we see that the list remains open.

I would also like to draw your attention to the fact that a period of limitation is not applicable to the demands for compensation for moral damages (according to the mentioned writ). In other words you can bring a civil case against an offender concerning moral damages compensation in whatsoever period of time. You should bear in mind, though, that once you appeal for moral compensation during criminal procedure you cannot start a civil case about the same complaint irrespective of whether your application was or was not allowed by the court.

One of the main and obvious problems of the studied institute is the defining of the compensation in pecuniary form. When our property is injured it isn't hard to estimate the pay-off, but what should be done, what should be taken into consideration by judge and others when estimating moral damages? That's an issue discussed among many scientists and lawyers. I'll review the most common points of view that are held, in particular, by one of the best known Russian specialists – Erdelevskiy.

First, we should consider the degree of a guilt (art. 151 and 1101 Civil Code): whether it was gross or petty negligence or intentional guilt, malice. True, this factor seems to be of importance and shouldn't be left out. One thing is when you wanted to commit the wrong and the other is when it 'just happened', therefore compensation should differ too. Though there are some cases mentioned in art. 1100 of the Russian Civil Code 1995 when compensation is paid irrespective of guilt. That is:

- harm to someone's health or life made by a source of extreme danger;
- harm made by illegal actions of law-enforcement bodies, such as unlawful detention, false imprisonment, wrongful conviction etc;
- defamation
- other cases covered by law.

Second, the court should pay attention to the degree of sufferings of the plaintiff and his personality (art.1101). This means if one claimant is more, say, sensitive and 'delicate' then he is likely to receive a bigger payment than the one with strong nerves. Quite a few of the lawyers and scientists point out that this is in contradiction to the principle of equity of everyone before the court and it is indeed. The question is whether moral compensation is paid as a punishment for the defendant or does it right a wrong and, so to say, helps the claimant. I believe it is the latter and then this factor is fully justified.

Third, the court looks into actual circumstances (art.1101) during which the harm occurred.

These are 3 main factors which must be considered. Then the Civil Code in art. 151 grants judges freedom to decide other factors. It says that compensation should be estimated in respect to rationality and justice.

Some believe that it would be wise and useful to define the scopes of the compensation regarding above factors. For example, when intentional (malice) – 100%, gross negligence – 50%, petty negligence – 20%, no guilt – 10%. I do not hold this view. Any scopes here will only harm each individual case. This is the case when judges should be granted as much freedom in decisions as possible. People can understand people, numbers cannot. At least the differences in negligence shouldn't, to my mind, make a difference in the dimension of compensation expressed in fixed numbers.

Alleging to the second factor mentioned – sufferings of the plaintiff – it should be said that our courts trust medical opinions a lot. If your medical certificate proves you had headaches, weaknesses, insomnia etc then you are lucky and likely to get the compensation.

Unfortunately, Russian judicial practice in this field isn't nearly as vastly spread and 'reach' as foreign one. In most of our cases moral compensation is paid off for doing harm to health or life. Therefore it's popular to demand moral compensation after car accidents. For example, there was a case when a man got in a car accident, his new car was badly damaged. The Court allowed to the payment of moral compensation as the claimant, first, lost his new, recently bought car. Second, he wasted time in long proceeding and, finally, he collected the money to buy his new car after quite a long period of time, thus he suffered a lot, as was held. Therefore, the defendant not only has paid off material damages (for the broken car) but moral damages suffered by the plaintiff, as well.

Another popular common example is demanding moral compensation for the death of a close relative. Just a year ago the court in a criminal procedure agreed to pay 100 000 rubles (approximately \$3200) as a moral compensation for the loss of a father. I also couldn't find a single case when the loss of an only child wasn't followed by moral compensation if applied for.

But such cases as the protection of a good name, dignity etc. are not raised in Russia unlike other countries, where, say, defamation trials are rather wide spread, at least, so to say, used, which I'll explain later on. There was one awesome case which really surprised me. Some woman won 1 million dollars for burning her tongue with a hot tea in a fast-food restaurant! It's amazing how the court could uphold this. I mean, one knows that hot tea is a tea at 100 degrees Celsius and, reasonably, you should be careful drinking it. The plaintiff, though, considered that the restaurant should have showed some warning about the

temperature of the tea and the court agreed! I believe this to be absurd. Maybe it was some kind of demonstration of justice...

Most of you have probably heard about numerous actions against tobacco companies. When a man can win hundreds of thousands or even millions of dollars for smoking and, thus having ruined his health. It might seem odd to us. In some cases it really is odd but they try to make this institution work, work well and work for the people. However, despite this fairly ideal picture of the West they, too, do have problems.

In most of the Russian cases in which moral compensation is paid, compensation itself has only supplementary importance, in other words the case isn't about moral damages. It's just an extra penalty to the one which in fact gave a raise to the action. Therefore we can conclude that, so to say, abstract, non-pecuniary rights (such as person's dignity, business reputation, right to a good name, privacy and so on) do not meet due defense in our legal system. However in the world such cases are wide spread, in particular defamation.

Defamation plays an important role in our life as it has to do with such an essential thing as information. And from the civil-law point of view defamation is valuable in the moral harm institution. Therefore I'd like to be more detailed here and look into this matter a bit deeper.

As I have mentioned before, in foreign legislation defamation is defined as an intentional false communication, either published or publicly spoken, that injures another's reputation or good name.

To prevail in a defamation action the plaintiff must show that there was a false published communication about the plaintiff, which proximately caused harm to the plaintiff. Each instance – and this is important – of defamatory statement is a new cause of action. Thus defamatory statements that are republished give rise to a cause of action against each party that published the statement. The American Defamation Law's roots spring from the English Common Law. Defamation is divided into two major classifications: slander and libel. Slander historically was the legal expression of defamatory statements that were orally communicated; for example comments or stories told at a meeting or party. Libel encompassed written and other defamatory statements which can be proved materially; for example a newspaper article or television broadcast, pictures as well as words can be libelous. The theory behind distinguishing between slander and libel was based on the presumption that written defamatory statements (libel) were more injurious because they could be more widely published, spread.

The following examples might be found arguable, but mostly this is what happens in practice. You tell your friends that the boss is unfair and a liar – that's slander of the boss. You write a letter to the newspaper saying a politician is corrupt – that's libel of the politician. You say on television that a building was badly designed – that's libel due to the imputation that the architect is professionally incompetent, even if you didn't mention any names.

The common law also differentiated between defamation that is apparent (*per se*) and defamation that requires extrinsic evidence to show damages (*per quod*). Slander or libel *per se* is defamatory statements that are readily apparent. Since the defamation is readily apparent, plaintiff does not need to show harm: the defendant was strictly liable. The defendant's only defense in a defamation *per se* action is the truth of the communication, which he has to prove, he bares the burden of proof. In addition, since the harm is apparent, punitive damages are also available.

Defamation *per quod* is defamation that requires extrinsic evidence to show how the statement is injurious. For example, it is not generally "injurious" to say that someone eats pork. If he is Jewish, however, such a statement may be seen injurious. The plaintiff, in a *per quod* action would be required to show the harm. Since the harm is not apparent, punitive damages are not available to a prevailing plaintiff.

Let's examine and compare two fairly similar actual cases of defamation in the USA and in Russia. I'll start from the latter.

M. Lobanov has published an article in *Zvezda* (it's a newspaper) somewhat criticizing actions of law-enforcement bodies. The public relations department of the police replied. Their text contained the following words: "...the article surprises us greatly with its ignorance of the law and judicial nihilism (denial of law)..." Lobanov, the author of the article, found this defamative and sued the department. The case went a long way – up to the Supreme court, which held that defamation did take place and the defendant had to dispose, withdraw his communication and that's it.

Now the foreign one. Physicist Alan Roberts wrote a review of a book by Lennard Bickel entitled *The Deadly Element: The Men and Women Behind the Story of Uranium*. The review was published in the *National Times* in 1980. Bickel sued the publishers. He was particularly upset by Roberts' statement that "I object to the author's lack of moral concern." There was a trial, an appeal, a second trial, a second appeal and a settlement. Bickel won \$180,000 in the second trial but received a somewhat smaller amount in the settlement.

We see how little these cases differ in their substance and how much they differ in the outcome.

The Internet has substantially come into our life. But it has a lot of problems in the legal sphere as it is comparatively new phenomenon. Nevertheless, the Internet is the best place for defamation – it can have a serious outcome and it is hard to find and punish an offender. To prove that processes in the Net can turn out to be really serious I'll give you a couple of examples.

Nevada-based AgriBioTech Inc. recently suffered the effects of a cyber-gossip posted to a Yahoo Finance message board. The Internet rumors, posted anonymously, falsely claimed that one of the company's co-founders would be indicted within two days, that the company was about to declare bankruptcy and that there was evidence of accounting fraud. This drove the company's stock to close at \$9.75 per share compared to its previous price of \$29.50, and AgriBioTech is not alone in such misfortune. More, so to say, peaceful example with a humorous element. A rumor that recently circulated throughout the Internet suggested that Nike would replace old sneakers collected and forwarded to the company by schools. The rumor prompted the return of truckloads of sneakers to Nike's doorstep. Although the rumor was false, nearly 7,000 pairs of smelly shoes quickly piled up in the company's headquarters.

But how can Internet defamation be accounted? Libel – because it has the potentiality of being widely disseminated, or is it slander – because it is not a "writing" in its substance? Are hosts of chat rooms or online bulletin boards liable for defamation that is posted on their site? That is already answered in foreign law, particularly USA, but there is a complete hole in ours. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. Most cases show that Online service providers are completely immune from all liability – even if they had actual knowledge and nevertheless did not respond – so long as the ISP did not originate the statement. But second-hand publishers or media defendants are held to a heightened malice (KRD) standard and can be liable. Here the court went one step further and made online service providers completely immune, though, of course, it doesn't mean you cannot sue the original publisher; the thing is that mostly he is impossible to find. Still then there is a question why each publication in the Net isn't a new cause of action? Why should online service providers be treated differently from other media outlets? That one is a matter of dispute.

The basic idea of defamation law is simple. It is an attempt to balance the private right to protect one's reputation with the public right to freedom of speech. Defamation law allows people to sue those who say or publish false and malicious comments. The hard thing is to find an ideal balance.

In practice defamation court actions can be mostly afforded by rich people, and defamation law mostly protects them. The result is that defamation law is often used by the rich and powerful to deter criticisms. It is seldom helpful to ordinary people whose reputations are attacked unfairly. But, unfortunately, this flaw 'law for the reach' is inherent not only to defamation cases and not only in foreign countries, of course, but to the overwhelming majority of cases concerning payments for moral damages, as these are the cases where qualifications, skills and experience of the lawyer play a great, even decisive role in the court decision.

In conclusion, moral harm cases, as we can see, are wide spread in developed countries. Certainly they do have problems but, all in all, I believe we should use their experience in this sphere to make the process of fortification of the moral damages institution in Russia more speedy.