Issue of determining the amount of compensation for moral damage through the prism of retrospective and modernity

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Abstract. The article discusses the most relevant aspects of determining the amount of compensation for moral damage. Exploring the problems of the corresponding mechanism in different periods of the development of Russian law, the author identifies the main approaches to calculating the amount of compensation for moral damage.

Keywords: the amount of compensation for moral damage, judicial discretion, methods.

Introduction

In Russian civil law, the main criteria for assessing the amount of compensation for moral damage are legally enshrined [2, Art. 151; 3, article 1101]. However, despite this, individual provisions regarding the determination of the amount of such compensation are debatable both in theoretical and practical terms. Actually, it would be more accurate to say: they ***continue*** to remain so, since the disputes around this problem have not just been going on for a long time, but are rooted in the first mentions of some kind of moral harm in the texts of ancient Russian legal monuments. The approaches to compensation for moral harm that existed at different times in the domestic civil science changed depending on the characteristics of a particular stage of development of society and the state. A retrospective look at the evolution of legislation and civil law views in this area can, in our opinion, contribute to a more complete scientific understanding of a number of problematic elements of the mechanism for realizing the rights of citizens in the event of moral harm to them and, accordingly, transforming these elements into an effective complex legal structure.

Purpose of the study - identification and consideration of the most significant, problematic aspects of determining the amount of compensation for moral damage, the essence of their transformation in domestic civil law and law enforcement at different stages of the development of Russian society and state, and which remain relevant at the present time.

Methodology

To achieve this goal, the authors used historical-legal and formal-legal research methods.

Results and discussion

As noted in the legal and historical literature, in the earliest eras, the courts considered appeals of private individuals for compensation not only for property damage, but also for pecuniary damage for moral damage inflicted on them as a result of insult, injury, theft, etc. The prescriptions of the treaties noted in the first written sources of Old Russian law and providing for a monetary penalty for property crimes and bodily harm, "can rightfully be considered the founders of the current institution of compensation for moral harm" [15, 9]. And the mention of "three hryvnias for an insult" in the first codification act – Russian Truth, where a number of articles aimed at protecting honor, life, and human health were enshrined, can be taken as a forerunner, a prototype of a specific amount in compensation for moral damage. The same applies to "12 hryvnia for pulling out a mustache", as a concept of "mental insult" [15, 10] Note that the monetary tax in favor of the offended was differentiated depending on the class, which was especially clearly manifested in later sources of law, which quite accurately regulated sums for "dishonor" to people of different ranks and dignity [16].

Omitting the details of the evolution of some distant analogs of moral compensation in the law of subsequent periods of the Russian state, we emphasize that further there was either the absence or the presence of clear unambiguous norms that determine the level of physical and mental suffering and strictly fix the amount of their monetary compensation. This legal "leapfrog" made it difficult to establish the amount of payments and their receipt by the affected persons. And as in the pre-revolutionary period, as well as after the 1917 revolution, disputes about the impossibility of determining the measure of monetary compensation for moral suffering and the corresponding official position dominated, not only specific limits on the amount disappeared from legal sources, but also the very provision on compensation for moral damage. Accordingly, the judicial practice has also changed, the courts simply rejected rare attempts to file claims aimed at compensation for moral damage. Obviously, the ideological background prevailed, but, let us note, it was not at all in the minds of a significant part of scientists, who did not leave the substantiation of their arguments in support of the principle of compensation for moral harm, relying to a large extent on the experience of other states. As a result, a turning point has gradually taken place in the public consciousness and in the position of the legislator regarding the solution of this issue. However, the subsequent prevalence of new views by no means put an end to the discussion, but shifted it to the plane of proportionality of the amounts recovered to the damage caused and to the problem of determining the amount of compensation.

Research by a modern specialist in this field A.T. Tabunshchikova, covering a significant historical period, including almost the last 30 years, extensively analyze and clearly illustrate the multifaceted attempts of civil lawyers, legislators, law enforcement officers to find optimal solutions to the problem of determining the amount of compensation for moral damage [15; 16].

Following the logic of the scientist, as well as other researchers, it is possible, both in the past and at the present time, to conditionally distinguish two main approaches to solving this problem: on the basis of judicial discretion and on the basis of the proposed unified calculation algorithm. Proponents of the first approach, referring, among other things, to a variety of situations that are unrealistic to be covered by the norms of the law, believe that a preliminary monetary assessment of compensation for moral damage is impossible, and therefore this task is put before the judicial discretion. The second approach can be designated as a combination of two components: a) options for methods and other methods of calculation; b) taking into account in these methods a number of criteria for assessing compensation for moral harm (duration, depth of suffering, the situation of its infliction, the causal relationship between the actions of the inflictor and the suffering of the victim, his individual psychological characteristics). The wide range and complexity of the issues considered by researchers at different times make it possible to isolate from the general problem block a number of aspects that have stepped from the historical "distant" to the present day and have not lost their relevance.

Thus, like their old predecessors, modern courts, according to the representatives of the judicial community themselves, still "find themselves in a difficult situation" [7, 177] when considering claims for compensation for moral damage. They associate the complexity of such cases, first of all, with the absence of a normatively approved or recommended method for determining the amount of compensation for moral damage, although the broadcast of the question of its necessity continues in the scientific world. Meanwhile, various options for streamlining the system that determines the amount of compensation are available in Western countries and the United States. For example, in England there are special approved tables, and in France and Italy there are catalogs indicating hundreds of types of harm to life and health, according to which points are awarded for compensation or ranges of amounts are recommended according to various criteria [6].

In Russia, when determining the amount of compensation by law, the courts are required to take into account the degree of guilt of the offender, physical and mental suffering associated with the individual characteristics of the victim, as well as "other noteworthy circumstances" [2, Art. 151]. As a result of this rather "vague" legislative guidance, judges have to rely mainly on their own sense of justice, and therefore the subjectivity of judicial discretion manifests itself in a very wide range, including a significant difference in amounts depending on the region and even

on the resonance around the case. For example, in the sensational case of the fire in the Zimnyaya Vishnya shopping center, the total amount of claims of the victims exceeded 2.9 billion rubles. [12] A subjective assessment of the circumstances of cases, admissible in connection with the principle of the independence of judges, entails the lack of motivation in the amounts awarded, an unjustifiably large price range in the amount of payments, or even obvious injustice. So, according to statistics, Russian courts in favor of a person permanently deprived of the ability to move, on average, collect from 500 thousand to 700 thousand rubles of compensation, while in Italy - up to 2 million euros, and in Germany, England and France - up to 700 000 euro [12].

Meager payments, bringing additional humiliation to the victim, add even greater moral distress. There is another important side to this. Let us recall the well-known tragic events: the fire in the Perm club "Lame Horse", the wreck of the motor ship "Bulgaria" in Tatarstan, the death of schoolchildren on Syamozero in Karelia, the collapse of the roof in the Moscow entertainment complex "Transvaal-Park", etc. [5] Similar situations, unfortunately, are repeated, because the for organizers and owners of such entertainment centers, no matter how cynical it may sound, is easier to pay insignificant sums in a claim for moral damages, rather than spending millions on the safety of facilities under construction. Thus, the important preventive function of compensation is practically nullified. Moreover, all this raises doubts among citizens and in society in general about the real, and not declarative, implementation of the constitutional principle that proclaims the equality of all before the law and the court [1, part 1 of Art. 19], and about the competence of justice, and also causes quite, I think, an explainable distrust of the authorities.

The problem of determining the amount of compensation is aggravated by the lack of clarity of the conceptual apparatus of the institution of compensation for moral harm. Indeed, is it possible to effectively solve the problem of specifying the amount of compensation without a uniform understanding of the main important concepts and without legitimizing their definitions (first of all, without a legal interpretation of the moral harm itself and physical, moral, psychological suffering, their criteria)? The question is, of course, rhetorical. Nevertheless, it also hangs in the hazy atmosphere of the ambiguity of the categorical apparatus. Even the comparability of the concepts "compensation for harm" and " reparation for harm", in our opinion, requires clarification, since they are often used interchangeably, although their identity can be disputed. At the same time, additional difficulties are caused by the presence of norms on compensation for moral harm in many codified and other regulatory legal acts that are subject to regulation in various spheres of public relations (see, for example, Family, Labor, Criminal and other codes, laws on the media, on consumer protection, on the status of military personnel, etc.).

Their cross-sectoral nature did not exclude, especially before the adoption in 1994-1996 of the first and second parts of the Civil Code, the emergence of legal collisions, that is, contradictions of legal norms that govern the institution of moral harm. A similar "competition" of norms persists today, which causes a well-founded fear of collisions in law enforcement [5, 13-15; 11, 36-39].

Let's move on from these problems to identifying a number of measures that have been proposed at different times and aimed at eliminating the legislative gap in determining the amount of compensation for moral damage, including by creating a unified calculation algorithm. At the same time, we will try to accumulate some "pluses" and "minuses" in them.

1. In the 90s of the last century, a number of points of view on the criteria for assessing compensation for moral damage was associated with the sanction provided for by the article of the Criminal Code of the Russian Federation applied to the defendant ("sanction" method), in conjunction with the recovery from the guilty of a certain minimum wage [15, 54]. In subsequent years, a proposal was also made to establish, but already in the Civil Code of the Russian Federation, with the introduction of a corresponding change in Art. 1101, the lower "bar" for the amount of compensation for non-property damage associated with a specific multiplicity of the minimum wage and with the obligation to recognize the established limit - for court, and not for the victim [7, 178].

Three provisions can be considered "pluses" here: a) the focus of the methodology on a single basic level, on the basis of which any court may be able to determine the amount of presumed moral harm for each specific offense, and then, taking into account the criteria provided for by the Civil Code of the Russian Federation, determine the amount of actual moral harm; b) focusing on the minimum wage will allow for inflation; c) the court will have the opportunity, satisfying the claims of the victim, to more correctly differentiate their regulation. So, if the amount of compensation declared by the plaintiff exceeds the minimum "legal" amount, the judge "is not entitled to reduce the amount below the amount established in the law" [7, 179]. If an amount less than the established amount is presented in the claim, then the court must satisfy the claim amount. "Disadvantages": a) this method was often focused on determining the amount of compensation for moral damage solely for criminal offenses; b) the regional minimum wage may differ from the federal one due to the right of the constituent entities of the Russian Federation to adopt "their own" minimum wage, established by a tripartite agreement between the state, employer and trade unions, which may create difficulties in law enforcement; c) the dubious applicability of the situation to the victim, as noted by A.T. Tabunshchikov back in 2007, if he is a child, student, unemployed [15, 55]. The point of view was also expressed about the expediency of using the multiplicity not of the minimum wage, but

of the subsistence minimum, which, moreover, allows taking into account the economic situation of a particular subject of the federation [9, 15].

2. The circle of attempts to introduce a unified calculation algorithm includes a "mathematically" expressed methodology for calculating the amount of compensation for moral damage proposed by A.M. Erdelevsky, as well as some other approximate analogs developed by other scientists. Without resorting to a detailed consideration of them, we will only say that A.M. Erdelevsky proposes to use the principle of equivalence of the amount of compensation to the amount of moral damage caused: "... the amount of compensation should be adequate to the suffering inflicted" [17, 233].

The "plus" here can be considered a carefully thought-out approach to the "economic" side of the calculations, expressed through the combination of the corresponding symbols using a special universal formula as one of the forms of consideration of the criteria for compensation for moral damage. A number of researchers attribute to the disadvantages of the method the inability to take into account the individual characteristics of the victim, which are associated with his ability to experience, "therefore, its application can lead to the emasculation of the essence of compensation for moral harm to a specific person (and not an abstract victim)" [10, 63].

3. The previous paragraphs can be supplemented with options for proposals to create, using a baseline, tariff tables or grids, providing for the dependence of the determination of the amount of compensation on stable indicators in the form of severity, nature, intensity, duration of the consequences of the suffering inflicted and other circumstances. For example, in relation to the suffering experienced by the victim when inflicting grievous bodily harm, a base level of 720 minimum wages (minimum wages) was proposed, and on its basis, together with Art. 111 of the Criminal Code of the Russian Federation, a scale of compensation for presumed moral harm was proposed. already to various types of personality disorders [17, 236]. The "plus" of such tables, according to the authors, is that the court only gets the opportunity to adjust the amount of compensation, depending on the circumstances and individual characteristics of the victim, the property status of the tortfeasor and other factors. A "minus" should be considered a rather cumbersome structure of such tables and tariff scales, which somewhat levels the clarity of perception of their elements, makes it heavier, complicates the application in practice. In addition, adjustments are inevitable in case of appropriate changes in legislation, which also applies to the basic amount of compensation.

4. As an obviously undeniable, proven way to concretize "moral" payments, one should talk about the participation of the highest judicial bodies, providing useful explanations and necessary interpretations, in the formation of "criteria and guidelines on which the courts can

rely when making decisions, as well as all other participants in the process when conducting business" [7, 179], especially in difficult legal situations. Paying tribute to the importance of such work, let us only state the following considerations. First. The practice of interpretation and clarification by the highest authorities of complex situations that arise, including issues related to determining the amount of compensation for moral damage, should be deeply analyzed through a temporary legislative prism. This is necessary to understand the legal and social reasons for the occurrence of such situations and, possibly, their preventive detection. Second. Documents and decisions of the European Court of Human Rights (ECHR) are mentioned as unconditional guidelines for domestic courts of any jurisdiction. However, in our opinion, the events in the geopolitical and legal space of recent years somehow do not tune in to the former relevance of this traditional statement, since there is a distortion of international law, its, to put it mildly, strange selectivity in relation to a number of countries, and causing bewilderment of legal scholars and diplomats separate requirements and decisions of the ECHR.

Far from refuting the categorically definite expediency of the above developments of the researchers, nevertheless, they would believe that one should move not only and not so much in the direction of "mathematical" calculations. In this sense, we are impressed by the opinion of researchers who position, as an addition to the formulas, the conduct of special types of research that objectify personality traits, as well as the degree and depth of its physical and mental suffering [8; 4, 72-79].

Conclusion

On the whole, despite the persistence of time-traveling problems, the dynamics in attempts to solve them in the last year or two appears to be optimistic. This is how one can assess the response of Senator I.V. Rukavishnikova about the initiative and laborious work of "enthusiasts, specialists who, having united under the auspices of the Association of Lawyers of Russia," prepared Methodological Recommendations for determining the amount of compensation for moral harm in case of encroachments on human life, health and physical integrity [14, 1].

This document, very solid in terms of volume and importance, undoubtedly deserves separate consideration. Here, we will only say that the developers have previously conducted scientific and analytical studies of domestic judicial practice in cases of compensation for moral harm, polls of representatives of the professional legal community, questioning of citizens. It is also expected to seek the views of the regions, a number of human rights organizations, etc. In our opinion, one should take special account of the "lessons" of retrospective studies of domestic scientists and foreign experience in this area. The document has yet to go through additional stages of legal expertise and receive an opinion from the federal executive authorities, including

on the methods of its normative legal consolidation. It seems that this path is not fast and difficult, judging by the many comments made at the previous stage of the discussion.

However, in conclusion, we would consider it appropriate to quote an extremely appealing fair statement: "... it is impossible to come to a consensus, given the peculiarity and uniqueness of every citizen and person. Nevertheless, following the evolution of social relations, the law should also evolve, and therefore, it is necessary, by trial and error, to seek a compromise that will equally suit the victims, and at the same time will strengthen the authority and strength of the judicial system of Russia" [13, 10].

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