

The Question of Compensation for Moral Damage in the Event of the Victim's Loss of Consciousness and/or Perception

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Abstract

Full regulation of the issue of compensation for moral damages remains an important and problematic legal issue. Georgian legislation does not fully regulate compensation for moral damages, which leads to ambiguity in practice. Independent assessment of individual cases within the broad discretionary powers of the courts often leads to different solutions for similar cases and risks the development of heterogeneous practice. For this reason, a systematic analysis of the various issues relating to compensation for moral damage and the establishment of a uniform legal framework are essential.

One of the important issues related to compensation for moral damage is the consideration of the admissibility of moral damage in cases of partial or complete loss of consciousness and perception of the victim. This issue is not directly regulated by Georgian legislation and there is no judicial practice in this regard, which makes it even more interesting to study. In the case of complete loss of consciousness and perception, it is necessary to study the compatibility of compensation for moral damage with its functions, since in such a case attributing moral damage to the victim may not achieve the goals of compensation for the damage caused and satisfaction of the victim, which makes the issue of general recognition of moral damage in such cases questionable.

The paper discusses the admissibility of moral damages in cases of loss of consciousness and/or perception of the victim, the protection of the victim's interests, the determination of the amount of moral damages and the distribution of the burden of proof, identifying the main problematic aspects and suggesting ways to resolve them.

Keywords: damage, moral, loss, consciousness, compensation, personality.

Introduction

Introduction The issue of compensation for moral damage becomes particularly relevant in cases of loss of consciousness and/or perception of the victim, since at this time the main functions of compensation for moral damage - in the form of satisfaction of the victim, deterrence of the offender and prevention of infringement of the rights of others - cannot usually be achieved.¹ In general, loss of consciousness and/or awareness occurs in cases of particularly severe brain damage. At this point, the victim is unaware of their own condition, unable to feel or experience pain, and completely dependent on the care of another person. Such a state may last until the victim dies, and the fact of death may occur within a few minutes, hours or years. Since the main characteristic of moral damage is a negative impact on the mental and spiritual sphere of a person, which in turn is expressed in the moral suffering of a person, the following definitions shall apply,² in view of the victim's situation, the question of granting him or her a claim.

Georgian legislation does not provide for any regulation directly related to the research question, nor are there any proposed judicial practices to resolve the disputed issue, problematic aspects related to the granting of a claim for compensation for moral damage, which makes the study of the issue particularly important. In addition, the increasing number of appeals to the ordinary courts for compensation for moral damage in cases of physical injury or damage to health makes the interest in studying the issue even more relevant.

¹ Makhatadze N., Jugheli T., "Mechanisms for Determining Non-Property Damage", 2024. p. 9.

² Decision of the Civil Cases Chamber of the Supreme Court of Georgia in Case No. AS-1129-2020, 16 March 2021.

One of the research methods used was comparative law. On the basis of this method, an analysis of the German judicial practice is carried out, since the Georgian legislation has the most in common with it. In general, it should be noted that there is no unanimity of opinion in the scientific literature and the judicial practice of foreign countries on the issue of granting a claim for compensation for moral damage in cases of loss of consciousness and/or perception. There are those who believe that a claim for moral damages in such a case is inadmissible due to its incompatibility with the functions of compensation for moral damages, and those who believe that it is permissible to grant the victim a claim for moral damages expressed in a symbolic amount, etc.

The purpose of this paper is to discuss the judicial practice of other countries on the admissibility of a claim for moral damages in cases of loss of consciousness and/or perception, to identify the characteristics of the determination of the amount of moral damages, to analyse the characteristics related to the distribution of the burden of proof, and to make relevant recommendations.

1. Specificities of the recognition of moral damage in the case of loss of consciousness and/or perception of the victim

The aims and functions of compensation for damage manifest themselves in different ways in the case of a claim for compensation for moral damage. One of the determining factors is the intangible nature of this type of damage, the impossibility of clear/precise determination. Compensation for moral damage is concerned with the mental suffering and feelings of the injured party, which excludes the imposition of responsibility for restoring the material sphere of the injured party. In this case, moral damages are considered as a means of reducing the physical and moral suffering of the injured person, restoring the mental balance and alleviating the pain caused by the moral damage. Through the recognition of compensation, the injured person is given more possibilities to facilitate the everyday life after the damage.³ Thus, the dual function of compensation for moral damage should provide the victim with adequate compensation for non-pecuniary damage. In this case, the function of compensation is paramount and cannot be subject to a strict mathematical calculation.⁴ In addition, the satisfaction function contributes to the "healing" of the emotional pain and suffering suffered. Satisfaction aims to compensate for the emotional pain, in which case the recognition of compensation in monetary terms is crucial.⁵

In the case of bodily injury and damage to health, the award of a claim for compensation for moral damage, in addition to property damage to the victim, is conditioned by the functions of compensation for moral damage. Therefore, the question of awarding a claim for moral damages becomes doubtful when the victim has lost the ability to feel, perceive and understand. As a rule, such cases can arise in the case of severe brain damage, when the person is in a comatose state. The question arises whether it is compatible with the functions of moral damages to grant the victim a claim for moral damages in such cases.

In the Netherlands, the question is whether a person in a coma can experience or feel moral damage. In this case, it is recognised that there is no basis for a claim. The legal basis for this is the fact that an unconscious person does not suffer moral damage because he or she does not have the capacity to do so, and the aim of satisfying the victim is not achieved either because he or she does not have the capacity to use it.⁶ Given the narrow definition of moral damage, moral damage becomes ineffective when the victim loses the ability to subjectively perceive the damage to the body or health,⁷ since moral damage refers to the feeling or physical pain that the victim directly experiences. It should also be noted that the perception of pain and mental suffering is not directly related to a person's age or capacity. Due

³ Danelia T., "Liability for Moral Damage Caused by Inflicting Bodily Injury or Health Damage", 2019. p. 10.

⁴ BGH Beschl. V. 06.07.1955 - GSZ 1/55.

⁵ Bitchia M., "Protection of Private Life under the Civil Law of Georgia", dissertation, 2012. p. 133.

⁶ Danelia, see footnote 3, p. 36.

⁷ BGH, Urt. v. 16.12.1975 - VI ZR 175/74.

to age-related characteristics, including a heightened sense of self-determination, pain may be felt more intensely by a teenager whose health has been seriously injured.⁸

In the case of loss of consciousness and/or perception, German case law has established a different rule for the admissibility of moral damages. It should be noted that initially the approach of the German courts was not uniform, not as regards the direct admissibility of compensation for moral damage, but as regards the determination of the amount to be awarded. It is noteworthy that in the case of the most serious injury, which results in the loss of a person's perception and sensibility, non-material damage can be expressed in the form of the destruction of the person.⁹ In one case, the court stated that the recognition of the fact that the victim is incapable of perceiving/feeling satisfaction due to the destruction of his mental functions constitutes a sufficient basis for establishing a violation of personal rights and dignity under Articles 1 and 2 of the German Constitution, which in turn creates an independent legal basis for compensation for non-pecuniary damage. The destruction of the person - the degree and extent of the violation of life - is the main criterion for assessment.¹⁰ At present, the existence of moral damage does not require the victim to perceive and feel the damage caused. In the case of the most serious injury caused by an accident, accompanied by a loss of perception resulting in the destruction of the person, appropriate compensation must be provided.¹¹ In this case, the legal good protected is the constitutional right to the free development of the individual, which is the most general right and whose aim is to encompass and effectively guarantee all spheres of life.¹²

2. Peculiarities of determining the amount of moral damages in the case of loss of consciousness and/or perception of the victim

Determining the amount of moral damages is a major difficulty because pain is a subjective category and has no monetary equivalent. In general, there are no methods available for determining moral damages, precisely because of the subjective factor of pain. The determination of moral damage, its reasonable assessment, is carried out in each individual case, since the variables depend not only on the person, but also on a specific period of time for the same subject. According to one of the opinions on the gradation of pain itself, it is subject to assessment as a subjective syndrome, which manifests itself differently in individuals, taking into account the ability to endure/bear pain. Even minor injuries can cause severe pain, and the opposite should also be possible.¹³

One of the criteria for determining the amount of moral damage, in addition to the seriousness of the injury and the suffering caused by it and its continuing nature, may be the victim's ability to perceive it.¹⁴ There is no consensus in German jurisprudence on the recognition of the victim's capacity for perception as one of the elements for determining moral damage. The amount of damage, in particular the extent of the specific injury, is one of the decisive factors in determining compensation, although the determination of the specific amount of moral damage is particularly controversial in cases where the injury was so severe that the victim is no longer able to feel the losses caused by the specific unlawful act. According to early judicial practice, in such cases the court considered it reasonable and fair to award the victim a symbolic sum as compensation for moral damage, justifying this by the function of moral damage (compensation for the non-material damage suffered and satisfaction for the suffering caused). In such cases, due to the destruction of the person, the latter was no longer able to realise the function of satisfaction, either subjectively or objectively.¹⁵ Thus, the victim's loss of consciousness

⁸ Decision of the Administrative Cases Chamber of the Supreme Court of Georgia in Case No. BS-972-936(3K-08), 8 April 2009.

⁹ Kropholer I, "German Civil Code - Educational Commentary", translated by Z. Chechelashvili and T. Darjania, 2014, p. 136.

¹⁰ BGH Beschl. 16.09.2016 - VGS 1/16.

¹¹ OLG Koblenz 18.11.2002 - 12 U 566/01.

¹² Decision No. 2/1/536 of the Constitutional Court of Georgia in the case "Citizens of Georgia - Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze vs. the Minister of Labour, Health and Social Protection of Georgia", 4 February 2014. Paragraph 57.

¹³ Kalionzes, P. N. „Infant Pain and Suffering: The Valuation Dilemma“. *Pepperdine Law Review*, vol. 1, no. 1, 1973, p. 102-115, 108.

¹⁴ Kropholer, see footnote 9, p. 136.

¹⁵ Korieth J., Was tun bei geburtshilflichen Schadensfällen? 2009, S. 39.

and/or perception had a mitigating effect on the amount of moral damages. In one case, the court justified a symbolic award for pain and suffering in a case where the victim had lost all mental faculties and basic sensory perception as a result of severe brain damage.¹⁶ Such jurisprudence was based on the assumption that the compensatory function, which is crucial for the assessment of compensation for pain and suffering, implies the actual perception of pain and impairment by the victim. Since this was not available, for example, in the case of severe brain damage or coma, the idea of redemption was used to create a - significantly reduced - "symbolic" compensation for pain and suffering.

It should be noted that in the case of particularly severe damage resulting in the loss of the ability to perceive and understand, as mentioned above, the protected legal asset is the constitutionally guaranteed right to free development and dignity of the person. The reduction of the amount of the victim's claim for damages on the basis of the loss of the ability to feel must be regarded as incompatible with the constitutional and legal requirements for the protection of human dignity. Contrary to previous case law, in which the court agreed to compensate moral damage in a symbolic amount in similar cases, in another case the court considered the function of compensation for moral damage as an expression of the legal effect of a personal right, which ultimately means that even in cases where the functions of the victim's consciousness are impaired/eliminated to such an extent that he can no longer enjoy the benefit of the amount of moral damage, the amount of moral damage should be awarded, which the court recognised in similarly serious cases (in which the victim was aware of his condition). This applies to the so-called brain damage cases, which are manifested in the fact that the personality of the victim is permanently or long-term violated by the fault of the offender, the offender has to live with it and deserves to be awarded the appropriate amount of moral damages.

In spite of the differences of opinion, it is established in the case law on this issue that serious injuries caused by brain damage, which result in the loss of the ability to perceive and feel, prohibit only symbolic compensation and instead require an independent assessment. A reduction in the amount of moral damages in this case is considered unfair and inadmissible. The tendency of the court to determine a higher amount of moral damages in the case of the most serious injury remains unchanged. In addition to the criteria mentioned above, such as the duration and extent of the suffering, the court's decisions in similar cases should also be taken into account when determining moral damages. The extent and magnitude of the violation of a person's life should be subject to an independent assessment, taking into account the gravity of the crime and the ability of the injured party to pay.¹⁷

Since the duration of pain also plays an important role in determining moral damage, it is necessary to distinguish between cases where the victim was put into an artificial coma and could not wake up, and cases where the person had to live in this state for a long time. According to one opinion, an artificial coma is a therapeutic measure and has nothing to do with a violation of personality. In one case, the court completely rejected a claim for moral damages in a case where the victim died three hours after a car accident without regaining consciousness. The court did not attach any independent significance to the phases following the injury and equated the case with instantaneous death, for which the law does not provide for compensation. In another case, where the fact of the injured person's death occurred 3.5 hours after the accident without the victim regaining consciousness, the court gave independent weight to the trauma phase, although it questioned the above-mentioned case law regarding the determination of the amount of moral damages, since the destruction of the personality caused by the loss of sensation is only "a more or less short intermediate stage between injury and death". The court therefore considered it appropriate to award only symbolic compensation, "taking into account the idea of reparation". In another case, where the fact of the victim's death occurred three months after the accident, without the victim's ability to perceive and feel being restored, the court took into account the duration of the injury phase when determining the amount of moral damages. In such a case, it should be considered appropriate to apply the above case law even if the victim died shortly after the accident, did not regain consciousness or regained consciousness only temporarily.¹⁸

¹⁶ BGH Urt. v. 16.12.1975 - VI ZR 175/74.

¹⁷ BGH Urt. v. 13.10.1992 - VI ZR 201/91.

¹⁸ OLG Hamm, Urt. v. 21.01.1997 - 9 U 161/96.

3. Standard of proof for claims for moral damages

The tort-legal concept is built on two important principles:

“Damage must always be compensated” and “no one can be enriched at the expense of a tort.” The victim is obliged to minimize the damage. The impact of these principles is manifested within the framework of procedural relations, in particular, in the context of indicating the facts and distributing the evidence. In the event that the defendant disputes the amount of damage, but recognizes the damage as an event and the fact of its infliction, he is obliged to indicate the amount of damage. He does not have the right to remain passive in relation to this obligation, despite the fact that the burden of proving the damage lies with the plaintiff. A prerequisite for the application of the law of evidence is the existence of legally significant disputed factual circumstances. Accordingly, the plaintiff is obliged to prove the amount of damage after the defendant disputes this fact. The above-mentioned principle “damage must always be compensated” obliges the defendant, in the event of recognition of the damage, to indicate his own version regarding its amount. In the event that the defendant’s passivity or the mere denial of the amount indicated by the plaintiff nevertheless gives rise to the plaintiff’s obligation to prove the amount of damage, this will result in the fact that when the plaintiff fails to properly meet the burden of proof and despite the defendant confirming the fact of causing damage, the obligation to compensate for damage cannot be established against him. Such a situation contradicts the above-mentioned principle.¹⁹

The direct application of the above principles to the imposition of a claim for compensation for moral damage is characterised by its own peculiarities. In particular, one of the conditions for the imposition of liability is the existence of moral damage, the existence of which is not clearly apparent from the outside and its confirmation by specific evidence is essentially difficult, and in some cases impossible. In view of the above, there is a general principle that the burden of proof should not be placed on the victim. As a result of the assessment of the individual characteristics of the case, it should be established whether there is a causal link between the unlawful act and the negative changes in the victim's psyche.²⁰ Moreover, it is not necessary to prove that the effects on a person's health generally have a negative effect on his or her psyche, especially when physical violence is used. The existence of a forensic psychological report is not necessary to prove the existence of moral damage.²¹

Taking into account the burden of proof established by the Code of Civil Procedure, the defendant bears the burden of proving the circumstances excluding the mandatory elements of compensation for damage, namely: the legality of the act, the facts excluding guilt, and the plaintiff bears the burden of proving the fact of the existence of damage and its amount, as well as the existence of a causal link between the alleged damage and the defendant's act. At the stage of proof, the following elements must be established: the damage; the right that has been violated; what has caused the mental and/or physical suffering of the plaintiff; the degree of fault of the person who caused the damage; the amount of compensation.²² In addition, it is presumed that the victim has suffered severe emotional distress, unless the person liable for damages proves otherwise.²³

Conclusion

In the absence of specific rules on compensation for moral damage in the case of loss of consciousness and/or perception, it is essential to exchange best practices with other countries. Loss of consciousness and/or perception can, as a rule, be caused by such physical or health damage that it is impossible to imagine a substantially more serious damage. In this case, the imposition of a reduced liability on the offender, expressed in the denial of the victim's claim for compensation for moral damage, cannot be considered an effective mechanism for the realisation of the principle of justice. In such cases, the victim loses the ability to continue living, to enjoy life and becomes permanently dependent on the care of

¹⁹ Decision of the Civil Cases Panel of the Rustavi City Court in Case No. 2-2343-18, dated 22 September 2021.

²⁰ Decision of the Civil Cases Chamber of the Supreme Court of Georgia in Case No. AS-1477-1489-2011, 3 April 2012.

²¹ Decision of the Civil Cases Chamber of the Tbilisi City Court in Case No. 2/24674-22, dated 1 May 2023.

²² Todua M., Kurdadze Sh., "Peculiarities of decision-making in a separate category of civil cases", 2005, p. 70.

²³ Judgment of the Tbilisi Court of Appeal in Case No. 2b/5794-21 of 16 November 2002.

others as a result of the serious damage. As a rule, such a condition of the victim, taking into account the severity of the damage, may last for the rest of his or her life. Therefore, in this case, a blanket rejection of the claim for compensation for moral damage without taking into account individual circumstances should not be considered a proportionate means of protecting the interests of the victim.

In this case, the approach of German jurisprudence should be followed and no confirmation of the victim's perception and feeling of the damage caused should be required. In the case of the most serious injury caused by an accident, which is accompanied by a loss of perception resulting in the destruction of the person, appropriate compensation should be provided.²⁴

Reducing the amount of compensation claimed by the victim due to loss of sensibility should be considered incompatible with constitutional and legal requirements for the protection of human dignity. In cases where the functions of the victim's consciousness are impaired/eliminated to such an extent that he or she can no longer enjoy the benefits of the amount of moral damage, the amount of moral damage should be awarded, which is recognised by the court in serious cases where the victim has been deprived of the ability to perceive. Such an approach ensures, on the one hand, the protection of the victim's interests and, on the other hand, the establishment of a fair balance between the participants in civil transactions.

The duration of the relevant trauma phase should be considered as one of the relevant criteria for determining the amount of moral damages. This becomes crucial in the case of the death of the victim within a short period of time after the loss of perception and/or consciousness. In this case, failure to consider the duration of the trauma phase will lead to a result that is inconsistent with the principle of justice.

²⁴ OLG Koblenz 18.11.2002 - 12 U 566/01.

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