Legal aspects regarding moral damages

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Abstract: - The invaluable moral character of the damage cannot suppress the protection of the victim, the compensation awarded as constituting its equivalent, as a substitute satisfaction. Moral damages can affect the existence of the person, bodily integrity and health, honor, dignity, prestige or quiet, private life and self image.

Key-Words: - Moral damages, compensation, evaluation criteria, court

1 Introduction

It is certain that a criminal act can cause both material or moral harm. In what follows, we will analyze some issues regarding the way of repairing moral damages.

Such damages, as shown by their name, have not an economic content, but they are caused by the violation of human values such as the very existence of individual, the physical integrity and health, honor, dignity, prestige or tranquility, intimate and personal image etc., pointing out that in reality they cannot be measured precisely, as assessed damage patrimonial content. Consequently, they cannot be repaired or compensated with a certain amount of money. But this is not a reason not to be compensated.

2 Problem Formulation

The first category of moral damage includes the damage resulting from bodily injury or health, also called bodily harm, consisting of physical and mental/psychological pain, aesthetic damage, injury leisure etc. This category consists in “pretium doloris”, “aesthetic damage” (“price of beauty”), the injuries suffered by young people (“pretium juventutis”).

A second category consists of emotional harm, also called “damage by ricochet”, consisting of distress caused by damaging feelings of affection and love (for example, the damages caused by the death of someone loved).

A third category is composed of damages caused by interference with honesty, honor, dignity, prestige or reputation of a person (insults, slander, defamation or other acts of the same kind).

The fourth category covers damages consisting of violations of names, nicknames, reputation which is produced mainly by abusive use of these identifiers of the individual or collective entity.

Romanian law governs the right to privacy and the right to own image, rights whose violation may cause harm of a non-patrimonial nature. [1]

Thus, article no. 26 paragraph 2 and article no. 30 paragraph 6 of the Romanian Constitution establish as a principle that the individual has the right to dispose of himself, if not infringe the rights and freedoms of others, public order or morals and “freedom of expression may not harm the dignity, honor, privacy of the person and the right to own image”. [2]

We specify that doctrine and jurisprudence in Europe concerning the legal protection of privacy includes the scope of protection the privacy of personal memories, the intimacy of the home, married life, secret affairs, leisure etc.

Physical damage to the personality of the human rights violations are the result of subjective closely related person called personal non rights: the right to life, health, physical and mental integrity. Violation of these rights may cause damages known as "bodily harm" in foreign doctrine, showing that the physical integrity of the human being is a value that has been recognized universally in all societies throughout history. [3]

Personal injury/damage involves various forms, which is reflected in harming the physical integrity or health of various intensities: some may continue, affecting lifelong one person, others may be temporary and may affect the victim's physical and mental being.

In the category of “personal injury” we include pain and damage resulting from physical and/or psychological hurt (“pretium doloris”). The
name comes from the allowance granted for physical and mental pain caused by the wrongful act.

The damages of this type involve a wide range of symptoms: the physical and psychological pain caused by the aggression itself, the suffering caused by certain medical interventions that confronts the victim, some certain deprivations, such as prolonged hospitalization and treatment of injuries etc. Another range of distress that may be included in the “pretium doloris” type is the mental suffering by the victims of rape, incest or sexual perversion.

3 Problem Solution

Before the year 1952, the doctrine and jurisprudence of Romania were accepting moral damages due to physical or mental pain, the most common being for assault and battery.

The question debated by the doctrine for a very long time was if for these moral damages, the injured party can claim financial compensation? Some authors have considered that, since by definition the moral damage is not appreciable by money, such damage can be seen not only as an inappropriate sanction, but also as an arbitrary penalty. It was said that, because the past is irreversible and it is not possible to put things in the former situation, the damage can be achieved only by compensation, using the way of compensatory amount.

Basically, some other authors considered that an inappropriate sanction is better than the absence of any sanctions and remedies.

Romanian Criminal Code of 1936 established in article no. 92 second paragraph the repair of moral damages. This paragraph provides that “Compensation to the injured party must always be a fair and full repair for material or moral damage suffered by the offense and may be established on the principles of civil law”.

However, The Romanian Supreme Court adopted during the communist period the thesis of inadmissibility to repair moral damages with money, on the ground that moral prejudice is a non-monetary concept, so there can be no material compensation. By taking this decision no.VII/1952, the courts were forced to repair moral damages only by means of non-patrimonial nature. We can say that this decision has changed the Romanian jurisprudence by influencing the practice at least for two decades. This opinion was in accordance with the communist propaganda that repairing by monetary equivalent of non-material suffering would be a mean of enrichment that contravened the principle that “the main source of an income is the employment”. [4]

During 1952-1970, the judicial practice has remained constant in not granting pecuniary reparation for moral damages. [5]

After the year 1970, the courts’ practice slowly has begun to award compensation for such damage, but not by way of actual damages, but as a compensation for patrimonial damages, due to discomfort caused by injuries suffered by the victim. Basically, the damages awarded were at the border between economic and moral damage. In the period after year 1989, both the damages for physical and mental suffering are again determined by the courts, even being called “moral damages”. Moreover, article no.11 of Resolution no. 75-7 of the Council of Europe has established that “the victim should be compensated (...) for physical pain, mental suffering”. We believe that the existence of injury, objective and unquestionable evidence found by forensic documents evidencing a number of days of medical care necessary for healing, is proving that in addition to physical suffering, the victim has suffered also mental distress. [6]

Since the court has established the existence of the illegal act of the defendant that the victim's injuries occurred that required for healing a specific number of days care, the injury established by a forensic report due to conviction was implicitly recognized that the victim has suffered not only physical pain, but also mental pain. Moreover, there is no need to take other samples to prove this, but only in due to the determination of the amount of compensation. In this regard, the Supreme Court ruled that in the field of moral damages, the victim of a crime is entitled to non-economic damages caused by injury, this injury consisting of physical and mental distress suffered as a result of the illegal act. It was reasoned that hospitalization, awareness of being ill, suffering from being deprived of a normal life for age, implies a distress which also implies a form of compensation for moral damage. [7]

Thus, in a case of negligent injury produced by a car accident, the court ruled that the punitive damages award is justified as a compensation for the victim which suffered mental trauma as a result of the illegal act of the defendant. It was also noted that the act of the defendant resulted in depriving the victim of the advantages of a normal life, including leisure injury, being necessary the extra effort to keep his former living conditions, which justify an appropriate monetary compensation,
together with the sanction of the criminal law in order to provide a necessary satisfaction to the injured party. [8]

Giving moral damages for physical and mental pain caused by offenses other than those directly against life and health of the person, but still affecting the individual, such as unlawful confinement, torture, extortion, rape, assault and battery, unlawful arrest and research abusive, harsh treatment is generally accepted, although there are opinions to the contrary, on the ground that it is the crime of danger, not the outcome, whether by their nature some of these crimes are producing injury only secondarily to the individual, because they are affecting first other social values that the public authority, justice and society’s life. The jurisprudence supports the opinion that can be granted compensation for damage caused by dangerous offenses that primarily protect other social values and only secondarily human being who suffered physical or mental harm.

Along with other authors, we consider that it is appropriate to award such moral damages in spite of the fact that in some cases, the amount can be very large.

In case of offenses against sexual life, moral damage is reflected in the intense mental suffering of the victim's involvement in a natural or unnatural sexual relationship, obtained by coercion. If the victim was forced into sex with multiple partners, which were made public, the damage is more extensive, as the victim’s reputation is seriously injured.

Patrimonial damage resulting from violating the dignity, honor and the right to sexual freedom is appropriate. Sometimes patrimonial damage may result in some inhibition of the victim, who cannot approach the opposite sex. Usually, the victim of a rape committed at an age when he realized the seriousness of sexual assault may suffer irreversible emotional shock, which can cause the inability to achieve a marriage. The consequences left by acts of sexual assault cause strong feelings of intense frustration and generate distress. The damage can be revealed by the forensic psychiatric examination of the victim. In Romanian post revolutionary jurisprudence was decided to award civil damages, including moral damages in cases provided for by article no. 504 of Criminal Procedure Code. According to this legal text, the person which first was convicted to imprisonment is entitled to compensation for the damage caused by the State, if after a final judgment was acquitted. Is also entitled to compensation the person who, during the criminal trial, was deprived of liberty or whose liberty was unlawfully narrowed.

In a case it was decided that the amount of moral damages warranted for the reprisals suffered by the claimant as a result of imprisonment can be estimated at 50,000 lei (almost 11,500 Euros). This amount is an adequate compensation for the sufferings and the humiliations to which the applicant was subjected by the fact of his conviction and the penalty, and then, in family and in society. [9]

Recent legal practice comprising numerous judgments that decided civil compensations, including damages, in this case with the theme as article no. 504 of Criminal Procedure Code.

Aesthetic damage includes those injuries affecting the physical appearance of the human being.

It can be said that this damage is the result of injury consisting of physical and mental pain that occurs when the victim suffers mutilation, disfigurement, loss of a sense organ or a physical or mental infirmity or simply about the scars. It materializes in distress due to mutilation, disharmonies, scarring, disfigurement of the victim's physical harmony and other negative consequences that determine the isolation, limits and worse possibilities to adapt in social, professional, family life. Because of his infirmities, the victim is embarrassed to engage in normal social activity, especially when the activity requires contact with other persons, a situation which generates intense distress.

The intensity of dissatisfaction and suffering is even greater when the victim, as a result of alteration in his physical appearance, must abandon his professional life and must adapt to other activities in order to not have contact but with a limited number of persons, being forced to lead a lonely life.

Aesthetic damage should be covered in all cases, because the victims were subjected to both physical and mental suffering. The compensation awarded for aesthetic damages is also called "price of beauty".[10] Of course, besides the moral damage suffered by the victim, it was also caused material damage that must be properly repaired.

Please note that the damage is not only about aesthetic mutilations and visible scars, but also those which can be masked, for example through plastic surgery. Such damage must be repaired whether they are reversible or irreversible, curable or incurable, more or less visible, because as they can have serious consequences in victim’s
social and professional life. Sometimes, the people affected will be forced to change their jobs and may suffer also economic damages caused by the new situation.

The Romanian courts recognize the aesthetic damage by taking into consideration the character of equity compensation. As a general rule, forensic experts describe disharmonies, mutilation, deformities and other aesthetic consequences of the injury suffered by the victim. The Romanian forensic practice frequently uses the term "ugly", which is synonymous with that of "deformation", "mutilation". If it is required, forensic experts must pronounce expressly on the fact that the injury caused aesthetic impairment and therefore constitutes an aesthetic damage. The qualification of the disharmonies as aesthetic damage lies in the hands of the judge and is based on the information provided by specialized forensic expertise, but also on the observations of the judge himself.

Depending on the degree to which harmony is affected physiognomy or physical integrity of the victim, his sex or age, his state, degree of sensitivity in perceiving injury, specific allowance is established that the judge considered sufficient and to constitute a compensatory satisfaction.

In a case, the court noted that the scars left on the victim's body are "ugly for a woman of 35 years with increased sensitivity to such track, present and future, they are aesthetic damage" and ordered the defendant to pay 500,000 lei (almost 114,000 Euros). In another case, it was established that the loss of vision in the right eye and left scars for a young man of 21 years, unmarried, student, is an aesthetic damage consisting of sufferings which was exhibited by seeing his physiognomy altered and the court forced the defendant to a compensation of 10,000 Euros. Entertainment damage as a form of bodily injury can manifest in various forms. Entertainment damage is the degree of deprivation of a victim which, after a harmful act, has less or no possibilities for relaxation, satisfying pleasures etc. Thus, if the victim is not above a certain sport practice, but carry only the usual leisure activities (walking, etc.), it is wrong to grant compensation in the future because it lacks the chance to practice a sport or performance attending clubs where others practice sports; but it is also wrong to refuse any compensation on the ground that does not practice relaxation. Currently, both doctrine and jurisprudence are unanimous in accepting the need to pay such compensation, consisting difficulties but to appreciate their limits and determining their amount.

Youth damage (or pretium juventutis) is defined in the literature as “non-pecuniary damage suffered by a particular young human being who sees reduced his hopes for a normal life or kidnapped some recreations of existence”.

Affecting the physical and psychological integrity of a person who is very young (a child, a teenager) has important consequences, such as distress caused by the loss of hope to accomplish in professional or social field, to have a profession, to practice a sport or other activity, to participate in certain activities, have a family etc. These individuals, due to infringements are forced to give up their hope for the future. It has been said that physical integrity and health consequences of an injury suffered by a young person, yet unachieved professionally, family or socially, are deeper and should be considered when repairing, in a distinct way than other forms of moral damage, such as aesthetic or recreational damage.

The pecuniary compensation for youth damage seeks removal of a child or young frustrations that cannot participate in games and joys of his specific age. In French law, although it is analyzed separately, compensating the damage is done according to the rules established functionally expressed pleasure on the degree of medical disability.

Emotional damage has an indirect character and is caused by a person's mental and spiritual suffering caused by feelings of affection and love for a close person. These sufferings are caused by the death of a beloved person, or his infirmities, mutilation, injuries or serious disability. Emotional damage is also called "pretium affectionis".

So this type of injury is felt by a third party, which was not directly involved into the harmful
act, but which, because of the deep feelings of affection for the direct victim that dies or remains with serious disabilities, has emotional and affective sufferings. Emotional damage is recognized both by Romanian and foreign jurisprudence.

A situation of this type is very common in practice for the crime victim's death, when entitled to compensation by awarding damages are the close persons (wife, minor children, sometimes other persons like the concubine).

If for property damage suffered by them (loss maintenance, funeral expenses, etc.), there has always been a consistent practice of the courts for the purposes of awarding compensation, the same was not practical for claiming compensation for mental suffering and spiritual incurred by persons close to the victim after his death. In the early 1990’s, Romanian courts have embraced the previous sentence of denial of compensation for moral suffering. Slowly, but increasingly many courts have begun to pay compensation for moral damage suffered by indirect victims, although in practice there are difficulties in establishing the existence of such suffering and identification of the persons entitled to get the compensation.

In relation to mention emotional damage is the injury consisting of physical and mental suffering arising from contamination with HIV. Please note that foreign doctrine and jurisprudence established that the suffering is caused both by the existence of the disease and the mental suffering caused by the uncertainty on the duration life, the future of physically and socially, the fears of the emergence of future physical suffering, the hostile attitude of the other members of the community, marginalization imposed. On the other hand, this type of victims have difficulties in finding partners, so they suffer also a procreation damage, resulted in the suffering caused by fear of biological offspring due to the possibility of disease transmission.

Damage caused to human social personality manifests itself in distress caused by personal non subjective rights violations such as the right to honor, dignity, reputation, privacy, secrecy of personal data, image, copyright, right to name.

Slander, calumny, negative feedback or unreal, disclosure of data, violation of secret personal correspondence, disclosure of personal or confidential data etc. are illegal acts that may cause such damage. Non-pecuniary damage driven by personality rights violation takes particular forms, depending not only to the patrimonial rights violated, but also to the practical way of exercising the harmful act. Transmission through mass-media communication revealing some aspects of the private life of a public personality can have very serious consequences and can produce very significant moral damage.

The right to private life was a subject of dispute both in foreign and Romanian doctrine and judicial practice, pointing out that the legal protection of these rights is still insufficient. Thus, even the Romanian Constitution, in accordance with international conventions on human rights, protects such rights, it is also required the urgent adoption of specific provisions for the protection of these rights.

4 Conclusion
The doctrine emphasized the need to prove the moral damage to the victim, showing that as these items will be more numerous, more convincing and credible, the judges will be able to fix most appropriate equivalent moral suffering inflicted.

Traditional position, which allowed full freedom for the court, was abandoned and in the present the doctrine supports the idea that the the criteria taken into consideration to determine the compensation must be motivated. We agree with this opinion, because motivation and compensation to invoke the criteria on which the determination was made precisely reflect her actual ability of the judge to decide, to retain and analyze the damage and it permits for the courts to exercise their judicial role of verification of judgment.

References:
[5] Former Supreme Law Court, Civil Division, decision no. 29/13.01.1953.
[7] Bucharest District 1 Law Court, Criminal Division, decision no. 531/2008.


[12] Timișoara Law Court, Criminal Division, decision no. 863/11.03.2005