

THE PARTICULARITIES OF NON-MATERIAL DAMAGES IN ROMANIAN CIVIL LAW

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Abstract

The topic of this article may be analysed only by proceeding from the conception on civil liability. In our civil law, delictual civil liability represents common-law material liability, in the sense that its norms and principles are applied without exception if there are no special regulations. The Civil code also contains provisions regarding contractual civil liability which appear as different from the norms that regulate the regime of civil liability, but practically they are at the same time an application of these norms.

Through its functions and characteristics, legal liability is at the centre of social liability, a position held both previously to adopting the new Civil code and today. Liability reflects the evolution of social life in its dynamics¹. In the old Civil code from 1865, liability was regulated in art. 998-1003, which had the value of principles, complemented by a number of provisions on the effects of obligations, special contracts such as: sales agreements, lease agreements, contractor agreements etc. Analysing these texts, one may see that, at first, civil liability was characterised by universalism, individualism and moralism². Namely, that any human deed causing damages to others requires a remedy; any person is individually responsible for the damages caused; and the idea of liability also implies the idea of sanctioning the author of a deed that has caused damages for culpability in committing the deed. Economic and social development, including the development of insurances, caused civil liability to stop being exclusively individual and founded on fault or guilt. Thus, there are more and more hypotheses in which liability is objective, without guilt, founded on the idea of risk, on social culpability and the idea of guarantee.

Key words: *damages, non-material, liability, guilt.*

In the terminology of the Romanian civil law, different expressions and names are used to designate *non-material damages*, which gives birth to a certain ambivalence as for the content and the sphere of this legal concept. For example, the terms *extra-patrimonial damages, immaterial, non-material, non-pecuniary damages, moral prejudice or moral damages* are all used. The term *non-material prejudice or personal non-material damage* is also used.

Irrespective of the term used to designate them, moral damages are damages generated by a personal non-material interest.

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¹ I.M. Anghel, Fr. Deak, M. F. Popa, *Răspunderea civilă*, Editura Științifică, București, 1970, p. 10; L. Pop, Ionuț -Florin Popa, Stelian Vidu, *Tratat elementar de drept civil. Obligațiile*, Editura Universul Juridic, București, 2012, p. 380.

² G. J. Martin, *Précaution et evolution du droit*, Recueil Dalloz, 1999, pp. 457-462.

From the point of view of *comparative law*, in *French literature* moral damages are „any infringement upon a prerogative that forms the attribute of human personality” or „damages that result from an infringement upon personal interests and which manifests itself through physical or moral suffering experienced by victims³.

The most often used expression is that of moral damages – „*prejudice moral*”, while the opposite term is material damages – „*prejudice materiel*”.

In *Swiss law*, damages are subdivided according to their nature: damages that take the form of an economic, material loss – „*le damage*” and damages that affect a victim’s person – „*le tort*”⁴.

In *American law*, moral damages are called nominal damages or non-financial damages⁵.

A possible classification of moral damages would be the one according to the criterion of non-material right and that of the human personality infringed upon.

According to the *non-material right* violated, we have the following types of prejudice:

corporal damages or those that affect a person’s health. On their turn, these are sub-classified as follows:

damages consisting of physical, mental pain, and the compensation for the remedy of such damages is called „*pretium doloris*”;

aesthetic damages, namely damages caused to one of the most important attributes of human personality, i.e. physical harmony or looks;

loss of amenity, meaning the limitation of one’s possibilities to enjoy life, the lack of ways to reach spiritual enrichment, as well as the lack of entertainment and relaxation offered by it;

sexual damages, defined for the first time in French doctrine, represents the total or partial impossibility in which a victim is found due to traumatism he/she presents to perform sexual intercourse or to reproduce in a normal way⁶;

juvenile damages, are non-material damages caused to young people for which material remedies are requested – „*pretium juventutis*”;

loosing one’s life expectancy, namely uncertainties a person has to bear, medical care, social reactions and the risk of aggravation (for example infection with the HIV virus);

affective damages, namely those that consist of psychological suffering generated by affecting one’s feelings of affection and love determined by the death of a beloved person. These damages are called indirect damages (rebound).

According to the criteria of human personality infringed upon, non-material damages may affect: the social, the physical or the affective personality.

³ Rene Savatier, *La theorie des obligations. Vision juridique et economique*, Dalloz, Paris, 1969, p. 344.

⁴ P. Tercier, *Contribution a l’etude du tort moral et de sa reparation en droit suisse*, Editions Universitaires, Fribourg, Suisse, 1971, p. 14.

⁵ H.F.Lusk, *Principles and Cases*, citat de I.M. Anghel, F. Deak, *Răspunderea civilă delictuală*, Editura Academiei, București, 1972, pp. 7-8.

⁶ L. Melennec, *Evaluation du handicap et du dommage corporel*, Ed. Masson, Paris, 2000, p. 305.

After 1965, the principle of remedying moral damages has undergone several phases in Romanian civil law.

The phase of admitting monetary compensation for moral damages (1865-1944). The legal basis is represented by art. 998, 999 of the Romanian Civil Code, art. 92 of the Romanian Penal Code from 1936. At that time, Romanian jurisprudence was one of the most advanced European jurisprudences in this field.

The phase of admitting monetary compensation for moral damages in jurisprudence and of the objection formulated by legal doctrine to this practice (1944-1952);

The phase of non-admitting monetary compensation for moral damages (1952-1965). On a legislative level, this phase was marked by the adoption of Decree no. 31/1954 on natural and legal persons which introduced a system of non-material damages for the compensation of non-material damages. Unfortunately legal doctrine had also vehemently contested the thesis of monetary compensation for moral damages and it tried to develop the system of protecting non-material rights introduced by Decree no. 31/1954.

After 1965 – the year when a new Constitution was adopted – legal jurisprudence from our country started to adopt a favourable position in relation to the idea of complementing the instruments for the protection of non-material rights by monetary compensation as well.

As for the legal basis, we could witness a return to the provisions of the Civil Code – art. 992. However, establishing the amount of moral damages was left to the discretion of judges, which in most cases led to considerable differences. Evidently, it is necessary to take into consideration the two fundamental principles that form the basis of civil liability, namely the principle of integral remedy for the damages caused (*restitutio in integrum*) and the principle of compensation in kind for damages caused. As for moral damages, the above principles may only have an approximate character.

From the point of view of legal practice, after 1989, moral damages were requested and afforded with certain restraint, just because the position adopted was the one according to which – similarly to remedying material damages – remedy is granted through monetary compensation every time compensation in kind is not possible. The reparatory insufficiency of non-material measures to remedy moral damages may not be, however, contested – we would argue.

In the same manner, we need to find a mixed system of material and non-material means in order to carry out and streamline integral compensation for damages.

More and more frequently, doctrine, and even legal practice, do not contest any more that moral damages may be remedied through monetary means; the problem that arises is to balance these two ways of compensation.

In this respect, the non-material measures already provided for in certain special laws (which started from the provisions of art. 54-55 of Decree no. 31/1954) may become applicable:

art. 11 of Law no. 11/1991 on combating unfair competition „Besides condemnation or obligation to stop an illegal act or to remedy the damage caused,

courts may order that its decision be published in the media, at the perpetrator's expense";

art. 14 of Law no. 8/1996 on copyright provides that: „The holders of the rights infringed upon may request that the court order the application of any of the following measures:

remittance, for covering the damages suffered, of money collected through the illegal act;

destruction of the equipment and means owned by the perpetrator, whose unique or main destination was to produce the illegal act;

withdrawal from the commercial circuit, through confiscation and destruction, of the illegally made copies;

However, in our opinion, these types of measures introduced by special laws may not be considered alone as being sufficient to remedy moral damages.

Examining the issue of correctly establishing certain *evaluation criteria* for monetary compensation granted for moral damages, we may differentiate between *general criteria* – those applicable to all categories of moral damages – and *special criteria* – applicable to certain types of moral damages⁷.

General criteria:

- the social importance of the value affected through committing an illegal act;
- the victim's personality (age, profession, level of education, general culture, professional situation, social position). In case-law, moral damages in the amount of 200000 RON were awarded to the victim of a judicial error, taking into consideration the length of detention, the intensity of perceiving the evolution of the penal action, the mental suffering and health condition of the victim, the impact produced in society through arrest⁸.

Special criteria:

- the gravity and intensity of physical and mental pain (days of medical care, aesthetic or physiological after-effects, temporary or temporary invalidity). In case-law, moral damages in the amount of 30.000 RON were awarded to the victim of an attempted murder, taking into consideration the physical and mental suffering the victim was subjected to⁹;
- the repercussions of damages on the social situation of the victim, including on a family or professional level, through affecting the victim's honour and dignity;
- the existence of strong affective ties between the victim and certain persons, as well as the rank of the obligation to pay alimony/child support.

Separately, we shall specify that:

- the victim's degree of guilt inevitably influences the amount of compensation for moral damages. Some courts decline *de plano* to award moral damages if there is guilt on behalf of the victim, although such a solution would only be justified if the aggressor and the victim are equally guilty¹⁰;

⁷ E. Lupan, *Răspunderea civilă*, Editura Accent, Cluj-Napoca, 2003, p. 88.

⁸ Civil decision no. 637/D/2006 of the Satu Mare Tribunal, unpublished.

⁹ Penal decision no. 380/P/2008 of the Bihor Tribunal, unpublished.

¹⁰ Civil decision no. 1174/D/2008 of the Satu Mare Tribunal, unpublished; V. Brutaru, *Daunele morale în procesul penal*, Revista de Drept Penal nr. 1/2008, p. 106.

- we also take into consideration the criterion of equity and the indemnity shall represent just and integral compensation.

In Romanian legislation there are certain special regulations which expressly stipulate the possibility of awarding compensation for moral damages through establishing lump sums as compensation¹¹.

However, courts have the sovereign power to appreciate the amount of compensation and payment methods and they have to determine the amount of compensation concretely, taking into consideration each separate case submitted to them.

Taking into consideration the amount of compensation and the criteria listed, courts are really helped by forensic examination reports, psychiatric reports, welfare reports and, recently, examination reports carried out by psychologists working by Tribunals.

Compensation evaluation methods are provided by the Institute for the Research of Life Quality which indicate the following as guiding objectives of an expertise in the field:

- the analysis and diagnosis of each family, of the person in question, based on which the costs necessary for a standard of life that allows for the victims' social affirmation will be determined;
- the description, based on a psychological and scientific analysis, of the degree of moral affectedness and of the suffering of the persons injured;

In order to elaborate such objectives in detail, the financial and social situation, the chances to survive, to development and social affirmation of the persons in question shall be investigated. As for the state of suffering, which depends on individual sensitivity and the capacity to control, the entire somatic picture shall be taken into consideration.

The European Council has elaborated a series of recommendations which may serve in approaching the issue of compensating moral damages, namely:

- moral damages consist of damages that may not be evaluated in money;
- the principle of compensating moral damages shall be recognised both for corporal injuries and for prejudices brought to other rights related to human personality, such as libel, intrusion in one's private life, forcible confinement of a person;
- in case of death, compensation for moral damages shall be awarded to the victim's close relatives if compensation is especially justified;
- the compensation of moral damages is justified, in certain cases, by affecting family relationships; for example, moral damages will be awarded for braking off an engagement only if the betrothed has suffered serious moral damages;
- reparation is aimed at giving compensation or satisfaction to the victim. In certain cases, it will be possible to determine the amount of compensation by the gravity of the author's deed which caused the damage;

¹¹ Decree-Law no. 118/1990 on granting certain rights to persons persecuted for political reasons by the dictatorship established on March 6, 1945.

- besides monetary compensation, remedies shall also contain measures to impede the realisation, continuation or repetition of the harmful deeds;
- when awarding damages, a distinction has to be made between material damages and moral damages;
- in certain cases, compensation may be awarded in the form of periodical payments. In these cases it is recommended that beneficiaries should be protected against monetary depreciation;
- the issue of compensating moral damages was examined in relation to civil liability insurance and regular insurance. As for civil liability insurance, in the case of lesions, the guarantee granted by insurance companies shall cover the compensation for moral damages. In the field of insurance, the opportunity to extend the sphere of application up to fully covering moral damages was evoked;
- big differences in the amounts awarded within the same legislation, as well as in different EU member states are unfortunate and should be avoided;
- measures should be taken both on national and on European level in order to make up for the lack of information on damages awarded as compensation in similar cases. The study of the use of computers for collecting and stocking information in the field shall be encouraged.

These recommendations are addressed to Romania as well. As a matter of fact, Romania has already stated the principle of the supremacy of international law over domestic legislation in the field of human rights.

The possibility of the ECHR to directly award moral damages is stipulated in art. 41 of the European Convention on Human Rights and Fundamental Freedoms. More precisely, "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

We shall point out that according to the Court „just satisfaction” may comprise three components: reparation of moral damages, a compensation afforded for moral damages and covering all procedural costs.

A decision in which a violation of a fundamental human right is found may entail the legal obligation of the defendant member state to cease this violation and erase its consequences.

When the different elements that make up damages may not be exactly calculated or when the distinction between material damages and moral damages proves difficult, the Court may be determined to analyse them globally¹².

The case-law of the ECHR also knows other forms of reparation, stating sometimes that even finding a violation of the convention represents in itself sufficient and equitable compensation, considering that such a “finding” has a reparatory character¹³.

¹² ECHR, *Silvestru Cotlet v. Romania* judgment of 3 June 2003.

¹³ ECHR, *Cumpănă and Mazăre v. Romania* judgement of 17 December 2004.

The case-law of the ECHR also recognizes that legal entities may be afforded compensation as moral damages¹⁴.

Recent jurisprudence started to become more favourable to heirs, at least in the situation when an immediate victim dies during the course of the law-suit, after exercising his/her right to moral compensation¹⁵.

In conclusion, the entire jurisprudence of the ECHR appreciates the limits of reparation, the compensation of damages by taking into consideration the gravity of the violation, underlining the importance of the damages caused from the point of view of the victim.

¹⁴ ECHR, Editura Orizonturi S.R.L. v. Romania judgement of 13 May 2008.

¹⁵ ECHR, Bursuc v. Romania judgment of 12 October 2004 .