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Determining Amount of the Moral Damages in Cases of Health Damage

The article discusses the specifics of compensation for moral damages and the method of calculation in case of the health damage. The article presents definitions and decisions from the practice of the common courts, where the gaps and inconsistent approach caused by the vague record of the law are clearly visible.

Moreover, it presents the results of comparative legal research. In particular, the legislation and practice of the following countries have been studied: Austria; USA; Belgium; Bulgaria; United Kingdom; Germany; Spain; Slovakia; Hungary; Croatia; Greece; Estonia; Lietuva; Latvia; Portugal; Finland.

Keywords: *compensation, amount, delict.*

1. Introduction

The method of calculating damages and its philosophical significance originates from Aristotle's "Nicomachean Ethics".¹ Even today, many scholars believe that "corrective" compensation of damages should be the basis of tort law. However, they are in the minority and looking at torts from a purely economic perspective is rejected.² This is evidenced by the widespread practice of compensation for moral damages, which is based on the principles of both local and international law.

Article 13 of the European Convention on Human Rights obliges states to effectively protect the rights deriving from the Convention. The right to an effective remedy is an auxiliary right. Based on the article 13, the States may be required to adopt new regulations to ensure compliance with the obligations of article 13.³ According to the practice of the European Court of Human Rights, moral damages as a form of compensation must be available under domestic law as an effective remedy, and this obligation is envisaged in Article 13.⁴

This paper specifies and discusses only the issue of determining the amount of moral damages in cases of health damage as a result of a tort.

The first chapter of the paper analyzes the approach of Georgian law regarding the amount of moral damages. What are the criteria for determining the amount and how consistent is the case law? The second chapter is devoted to comparative legal research and analyzes the legislation and practice

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¹ *Aristotele, Ethics of Evidemos*, Book IV, ed. Merani, 2016, 105-106.

² *Levmore S., Foundations of Tort Law*, Foundation Press / Thomson Reuters, 1994, 61-62.

³ *Grabewarter C., European Convention on Human Rights: Commentary*, Bloomsbury Publishing, 2014, 328.

⁴ *Keenan v. United Kingdom*, [2001] ECHR (no. 27229/95), §130; *Kontrova v Slovakia*, [2007] ECHR (no. 7510/04), §64; *Poghosyan a Baghdasaryan v Armenia*, [2012] ECHR (no. 22999/06), §46.

of other countries on determining the amount of moral damages. The last chapter is a summary and provides recommendations from the study.

2. Approach of the Georgian Law Regarding Determination of the Amount of Moral Damages

Determining the amount of non-material (moral) damages for physical pain and suffering is one of the biggest challenges for Georgian courts. National legislation provides the victim of a tort with the opportunity to claim compensation for moral damages. However, the legislator does not establish the criterion by which the scope of compensation for moral damages should be determined.

Article 413 of the Civil Code of Georgia refers only to reasonable and fair compensation. Accordingly, the mentioned issue is subject to the court's reasoning and in each specific case, it is done taking into account the peculiarities of the case itself.

According to the definition of the Supreme Court of Georgia, when determining the amount of moral damages, the following is acceptable:⁵

- the severity of the damage;
- subjective attitude of the victim towards moral damage;
- intensity of feelings;
- significance of the violated right;
- the extent is determined both by the severity of the damage and the degree of culpability;
- compensation for moral damage is determined by the court in monetary form independently of compensation for property damage;
- the amount of compensation should not be unreasonably increased and exceed the economic capabilities of a specific country;
- no matter how big the compensation is, it still cannot restore the victim's mental state before the intrusion, the main goal of compensation for moral damages is not the restitution of violated rights, because the damage caused does not have a monetary equivalent;
- its purpose is to ease the suffering caused by the damage of intangible good, to reduce the severity and intensity of negative feelings.⁶

The absence of additional criteria in the law regarding the amount of compensation for moral damages creates many challenges in practice. Courts have not even agreed on general criteria, which gives different results in similar cases. And the victim is completely entrusted to the judge's subjective opinion when determining the amount of damages. Therefore, in many decisions, the court system is either inconsistent and/or determines a disproportionately small amount. For illustration, it is enough to consider a few cases regarding moral damages:

⁵ Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of May 16, 2019 in the case BS-327-309(2k-07); Decision of the Administrative Affairs Chamber of the Supreme Court of Georgia of December 27, 2012 in the case BS-78-78(K-12).

⁶ Ibid.

- The victim received severe burns and needed to use a hearing aid. It is also significant that he was a music teacher and after losing his hearing he became incapacitated. The court considered the determination of 4,000 GEL as moral damages to be reasonable.⁷
- The victim lost both upper limbs, the first instance considered 100,000 GEL as fair compensation for the plaintiff, and the cassation court considered 300,000 GEL. The court explained that the obligation derives from the delict liability due to which he/she suffered physical loss – amputation of limbs and psychological suffering during his/her adolescence, which manifests itself in each specific case and periodically based on the physically expressed form of the injuries inflicted on him/her and the emotionally (psychologically) constantly overcoming obstacles.⁸
- Due to the damage inflicted on the victim (a 9-year-old child), one hand was amputated, while the other hand became non-functional. The court awarded the defendant 100,000 USD in moral damages.⁹
- After receiving an industrial injury, the victim lost 100% of his/her ability to work and became a disabled person (loss of lower limbs). According to the court's decision, 50,000 GEL was determined as moral damages.¹⁰
- As a result of a traffic accident, the victim had a severe brain injury, due to which he became a disabled person. According to the court's decision, 7,000 GEL was determined as moral damages.¹¹
- As a result of the traffic accident, the victim had both brain and body injuries, with multiple fractures. According to the court's decision, 5,000 GEL was determined as moral damages.¹²
- Due to incorrect diagnosis, the patient's health condition worsened significantly. In addition, he underwent an unnecessary surgery. While considering the issue of compensation for moral damages, the court evaluated the situation of assets of the defendant along with the situation of the plaintiff. Because the moral damages “cannot be a kind of punishment of the defendant, which will stop his activity and functioning.” The moral damages was determined in the amount of 20,000 GEL.¹³

⁷ Decision of the Civil Chamber of the Supreme Court of Georgia of July 10, 2018 in the case AS-660-660-2018.

⁸ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of December 23, 2016 in the case AS-543-518 2016.

⁹ Civil, Entrepreneurial and Bankruptcy Chamber of the Supreme Court of Georgia, decision of October 22, 2003 in case AS-43-745-03.

¹⁰ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 1, 2014 in the case AS-756-717-2013.

¹¹ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 4, 2011 in case AS-762-818-2011.

¹² Decision of May 24, 2019 of the Civil Affairs Chamber of the Supreme Court of Georgia in case AS-238-2019.

¹³ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 22, 2016 in the case AS-1102-1038-2015.

- Due to incorrect treatment by the dentist, the patient lost healthy teeth. 2,000 GEL was determined as moral damage.¹⁴
- Due to a traffic accident, the person's skull was damaged (the right hemisphere was replaced with plastic) and spine. Moral damage was determined in the amount of 7,000 GEL.¹⁵
- The convict was harmed due to repeated stenting – he/she was forced to endure unbearable pain, due to which he/she harmed himself/herself several times. However, he/she did not give his/her consent to the treatment methods, because the doctor did not report anything. The appellate court determined the amount of moral damages at 3,000 GEL. The Supreme Court overturned the decision because a causal link between stenting and pain could not be proven.¹⁶
- As a result of a medical error, a person lost a kidney. The Court of Appeal determined the amount of moral damages at 5,000 GEL.¹⁷
- The child did not receive timely medical care in summer school. He had broken his hand and had to endure physical pain for several days. The court determined the amount of moral damages at 3,000 GEL.¹⁸

As the reviewed cases have shown, in some cases the court determines very small amounts for moral damages. For example, 4,000 GEL was allocated to a fire victim, for whom the damage was particularly painful both physically and emotionally. He lost his hearing, which reduced his enjoyment of life and also made him unable to work. Therefore, the court was not guided by proper criteria.

Besides, the court does not differentiate what form of delict caused the damage and does not determine the amount accordingly. For example, a person lost a kidney as a result of a medical error, and the court determined 5,000 GEL as the amount of moral damages. Living without a kidney significantly reduces the quality of life and requires special care and attention of the medical staff. These facts were not taken into account when determining the amount.

Additionally, it should be noted that the amount of moral damages for the delict resulting from a car accident is similar in all decisions. In these cases, the court tries to be guided by common criteria and the amount of money is similar in all cases. However, this equal and blanket approach creates an unequal result, because the imposition of 7,000 GEL for damages with a temporary effect, as well as for damages that cause permanent disability, is not proportionate and cannot perform a compensatory function.

¹⁴ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of January 9, 2014 in the case AS-714-677-2013.

¹⁵ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of June 14, 2013 in the case AS-95-90-2013.

¹⁶ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of May 11, 2018 in the case AS-111-111-2018.

¹⁷ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 1, 2013 in the case AS-247-237-2013.

¹⁸ Decision of the Civil Affairs Chamber of the Supreme Court of Georgia of July 11, 2019 in case AS-669-2019.

It is also significant that the court does not discuss the circumstances of the damaging action, nor the pain and suffering experienced. One of the cases mentioned above concerned the improper medical care of a convict and the suffering he experienced over a long period of time. The court determined the amount of moral damages in the amount of 3,000 GEL. The European Court of Human Rights considers similar cases in the context of Article 3 of the Convention (prohibition of inhuman treatment), which is a particularly serious violation. This conclusion is consequently reflected in the amount of moral damage. These issues are not assessed in the the decision of the Tbilisi Court of Appeals.

Mo, the court assesses the harm caused to the children quite strictly, which has caused a long-term/permanent limitation of opportunity, and orders the defendant to pay a large amount of money.

3. Comparative Analysis – Amount Determined for Moral Damages

Countries have different approaches to determining the amount of moral damages:

- Some of the countries only establish criteria by legislation and entrust the question of the amount to the discretion of the judge;
- There are countries that develop guidelines to ensure equal treatment, where they determine the degrees and amounts of damages in a scheme;
- The third group includes countries that legislate an upper limit of moral damages to avoid the threat of differential treatment.

3.1. Unites states of America

In the state of Columbia, according to the established practice the judge instructs the jury what to consider when determining the amount of moral damages.¹⁹ In the United States, it is common for moral damages to be set at particularly high rates because they take into account the physical and emotional suffering that a physical injury or other type of tort may cause.

However, there is no uniform approach in the country and the practices of the states are quite different from each other. The United States of America is the only country that meets the criteria of all three groups listed above. For example, the New Hampshire Supreme Court found the limiting moral damages (capped at \$875,000) is unconstitutional.²⁰ A similar precedent exists in the practice of the Supreme Court of Washington.²¹ However, there are several states that limit the amount of moral damages, and the amounts vary widely.²²

¹⁹ *Allstate Ins. Co. v. Ramos*, (D.C. 2001), 782 A.2d 280, 282: “The extent and duration of any physical injury sustained by the Plaintiff, the effects that any physical injury have on the overall and physical and emotional well-being of the Plaintiff. Any physical pain and emotional distress that the Plaintiff has suffered in the past. Any inconvenience that the Plaintiff has experienced. Any medical expenses incurred by the Plaintiff. Any loss of earnings incurred by the Plaintiff”.

²⁰ *Brannigan v. Usitalo*, (N.H. 1991), 587 A.2d 1232.

²¹ *Sofie v. Fibreboard Corporation*, (Wash. 1989), 771 P.2d 711.

²² *Plosser W. M.*, *Sky's The Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule*, Mondaq, 2018.

3.2. United Kingdom

Unlike the USA, in England, a special parliamentary body (Law Commission) introduced a guidance document that helps the judge to determine the amount of moral damages. The document discusses the disputed issues and provides maximum and minimum amounts for damages, which are based on various factors.²³ The commission first conducted work on this issue in the 70ies and issued recommendations.²⁴ Later in the 90ies it worked on the essence of exemplary damage and in 1997 published a report that was not shared.²⁵ In 1999, it estimated the costs of medical care in case of physical damage.²⁶

Apart from the charts, this document is a kind of generalization and brings together all important decisions on this issue, separated by form of damages/cases and highlights the issues that should be taken into account when determining the amount. For example, age, intensity of pain, interference in profession, state of disability, decrease in quality of life and others. This document does not include a mere list of numbers, but analyzes the practice and examines the precedents of other countries.

The responsibility for determining the amount was taken by a special body (Judicial Studies Board, replaced by the Judicial College after the 2011 reform). The amount guideline was first published in 1992 and is usually updated annually.²⁷ The document is of an auxiliary nature and has no binding force.

In the table, the injuries are divided into categories of severity, for example, an injury that caused death, an injury to internal organs, or a facial injury, and so on. And then, within each category, each specific damage is separated, for example, brain damage.

Amounts of money usually increase over the years. For example, severe psychiatric damages were £36,000-£76,000 in the 10th Edition,²⁸ £43,000-£92,000 in the 14th Edition,²⁹ and £46,000-£98,000 in the 15th Edition. In 2022, the 16th edition was published, increasing the amounts and responding to the challenges of inflation, as well as adding new categories, such as sexual assault cases.³⁰

3.3. Belgium

Legislation of Belgium does not regulate the amount of moral damages caused by an illegal act at the legislative level. The amount of money is determined by all judges according to their inner

²³ Document published in 1995, Damages for Personal injury: non-pecuniary loss, A Consultation Paper, Law Commission Consultation Paper No140; Conclusion LC257.

²⁴ <<https://bit.ly/3aTirEx>> [20.08.2023].

²⁵ <<https://bit.ly/3MNpImT>> [20.08.2023].

²⁶ <<https://bit.ly/3txs4zz>> [20.08.2023].

²⁷ <<https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/governance/>> [20.08.2023].

²⁸ 10th edition of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* (JC Guidelines).

²⁹ 14th edition of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* (JC Guidelines).

³⁰ Judicial College Guidelines 16th Ed.

beliefs. However, there is a pre-designed table of quantities that is not binding and is more of a helpful guide.³¹

3.4. Hungary

There is a special provision in the Hungarian legislation, which imposes the obligation to pay moral damages in case of illegal actions of the state.³²

In addition, the Civil Code regulates restitution issues.³³ According to section 2:52, the amount of the compensation is determined by the judge, who takes into account the severity of the violation, whether the act was committed once or several times, the severity of the responsibility, the impact of the act on both the victim and the environment.³⁴ Section 2:53 specifically establishes the obligation to pay damages if a person's personality rights are violated.

Accordingly, the amount of moral damage compensable by administrative and civil law has no upper limit. However, the country's legislation independently separates procedural violations of criminal law, where there are certain guidelines for determining the amount. For example, the law establishes a rule for compensation if a person is wrongly found guilty and deprived of liberty.³⁵ The length of imprisonment is taken into account. According to the special law, moral damages for imprisonment are calculated in a special way, ranging between 3500-7000 HUF.³⁶

3.5. Austria

Austrian law does not specify the method of determining the amount of moral damages. However, there is one exception for wrongful convictions that result in imprisonment. The legislation determines a maximum of 50 euros as moral damages for the day of detention.³⁷

The amount of moral damages is decided by the judge based on his inner faith and according to the following criteria: severity, duration and intensity of emotional and physical suffering. However, despite these criteria, the subjective element in determining the amount is crucial.³⁸

³¹ ECPRD (The European Centre for Parliamentary Research and Documentation), Request n°: 4213, Response of the Parliament of Belgium.

³² “..Everyone shall have the right to demand compensation, as specified in an act of Parliament, for damages unlawfully caused by the authorities in discharging their duties.” (Article XXIV para 2).

³³ Civil Code sets forth both the *Restitution* (Section 2:52-2:53) and the *liability for the actions of public authorities* which latter is the special form of liability. The general liability rules (see Section 6:518-534) are also applicable, <http://njt.hu/cgi_bin/njt_doc.cgi?docid=159096.370225> [20.08.2023].

³⁴ (3)The court shall determine the amount of restitution in one sum, taking into account the gravity of the infringement, whether it was committed on one or more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and his environment.

³⁵ Act on Criminal Proceeding, Articles 844-855 <http://njt.hu/cgi_bin/njt_doc.cgi?docid=202672.367021> [20.08.2023].

³⁶ Government Decree No. 138/2018. (VII. 26.), <http://njt.hu/cgi_bin/njt_doc.cgi?docid=209618.357306> [20.08.2023].

³⁷ § 5 para 2 Strafrechtliches Entschädigungsgesetz 2005

³⁸ *Oliphant K. & Wright R. W. (Eds.)*, Medical Malpractice and Compensation in Global Perspective, Tort and Insurance Law, de Gruyter, 2013, 27

The Austrian court tried to balance the subjective element with an objective assessment. For this purpose, the court started to produce statistical data every year, which reflected the type of damage and the amount of compensation awarded.³⁹ The auxiliary table lists the severity of suffering (strong, moderate, and mild) as well as its duration (in days). The table indicates how much money should be allocated per day.⁴⁰

The analysis of court decisions over the years reveals that the amount increases over the years, and also, for similar damages, more or less similar amounts of compensation are awarded.⁴¹

3.6. Croatia

Croatian legislation provides for compensation for moral damages for illegal imprisonment.⁴² The amount is given in proportion to the days of illegal detention and the table is developed by the Ministry of Finance to respect the principle of equal treatment and also to take into account the socio-economic capabilities of the country.

Regarding moral damage, the court judges from its point of view, whether it is illegal deprivation of liberty or other cases. It is guided by the general criteria of the law, which does not consider the amount.⁴³

3.7. Portugal

Legislation of Portugal does not determine the amount of moral damages. According to the Civil Code, the severity of the damage and the violated right must be taken into account. The same article determines the compensation received by the wife/partner and children in case of the death of a close person. In the absence of such, parents receive compensation.⁴⁴ When determining the amount, the judge also takes into account the degree of culpability and the economic situation of the victim.⁴⁵

3.8. Greece

Articles 105 and 932 of the Civil Code establish the obligation to pay moral damages if the tort was committed by a private person or a representative of an administrative body. These articles do not specify the amount of compensation and state that it should be reasonable.

³⁹ <<https://bit.ly/39hKhtX>> [20.08.2023]; Table of 2019 in German <<https://bit.ly/3zzeIX3>> [20.08.2023]; 2020: <<https://bit.ly/3Qkw6Vu>> [20.08.2023].

⁴⁰ <https://www.koerperverletzung.com/schmerzengeld-oesterreich/#Die_Schmerzengrade-Trias> [20.08.2023].

⁴¹ <<https://bit.ly/3zQdaIH>> [20.08.2023].

⁴² Constitution of the Republic of Croatia, Article 25; the Criminal Procedure Act, Article 14 and Article 573.

⁴³ Article 1100 of the Civil Obligations Act.

⁴⁴ Article 496 of the Civil Code, <<https://bit.ly/3zxWHZc>> [20.08.2023].

⁴⁵ Article 494 of the Civil Code, „where the liability is based on recklessness, compensation may be set, in an equitable manner, in an amount lower than that which would correspond to the damages caused, provided that this is warranted by the degree of culpability of the perpetrator, both his/her economic situation and that of the injured party, as well as the other circumstances of the case“, <<https://bit.ly/3Hiyl7K>> [20.08.2023].

In addition, the Greek constitution has strengthened the possibility of compensation for moral damages in case of illegal conviction.⁴⁶ As for the limits of the compensation, it is determined in Article 540 of the Criminal Procedure Code.⁴⁷

3.9. Estonia

The right to compensation for moral damages is enshrined in Article 25 of the Constitution of Estonia. In addition, in case of illegal detention, moral damages are compensated based on a special act.⁴⁸ In case of unlawful deprivation of liberty, damages are calculated according to calendar days. The monetary value of the day varies based on the country's economic statistics.

3.10. Bulgaria

In Bulgaria, moral damages are compensated in case of illegal punishment, damage to reputation and dignity, loss of capacity, suffering, violation of personal rights, etc. According to the legislation, the amount of money is determined by the court.⁴⁹

3.11. Lithuania

In case of violation of the right by the state in Lithuania, a person can directly claim damages from the Ministry of Justice, which has a set limit – 1500 euros for moral damages.

The Civil Code (Article 6.272) does not set limits on the amount to be compensated and, therefore, the amount is decided by the judge. It is also significant that in 2006 the Constitutional Court of the country recognized the provision that determined the upper limit of moral damages in cases of illegal convictions as unconstitutional. The court explained that it is not permissible for the legislature to limit the discretion of the court, especially when it is discussing the determination of the amount of moral damages in the case of tort caused by the state.⁵⁰

3.12. Slovakia

In Slovakia, the criteria for determining moral damages are stipulated by legislation.⁵¹ In particular, when estimating the quantity, the following are taken into account:

⁴⁶ Art. 7§4 of the Constitution.

⁴⁷ Law 4620/2019.

⁴⁸ Compensation for Damage Caused in Offence Proceedings Act, Article 11, <<https://bit.ly/3xlXrhz>> [20.08.2023].

⁴⁹ Art. 52 of the Obligations and Contracts Act.

⁵⁰ The Constitutional Court of the Republic of Lithuania: *the legislature has no constitutional powers to establish any maximum sizes of damage inflicted upon the person by the state institutions or officials, which is subject to compensation, which would restrict the court and would prevent it from awarding just compensation for that material and/or moral damage sustained by the person*, Ruling on the compensation for damage inflicted by unlawful actions of interrogatory and investigatory bodies, the prosecutor's office, and a court, <<https://bit.ly/3mI0SKv>> [20.08.2023].

⁵¹ Act No. 514/2003 Coll. on Liability Caused during the Exercise of Public Authority, Section 17.

- quality of life of the victim;
- the environment in which he/she lives and works;
- the significance of the damage and the circumstances that caused it;
- Impact of damage on the personal life of the victim;
- Impact of damage on the victim's social life;

3.13. Latvia

The Constitutional Court of Latvia initiated a case regarding the constitutionality of the compensations' law.⁵² The Constitutional Court of Latvia initiated a case regarding the constitutionality of the compensations' law. The disputed law regulates the compensation for the damage caused to a person during criminal proceedings and the imposition of an administrative fine. According to the law, the average amount is 7,000 euros, and if the damage is particularly severe, it is 10,000 euros, as for the case of health damage – 30,000 euros. The Constitutional Court did not recognize the contested norm as unconstitutional.⁵³

3.14. Spain

According to Article 292 of the Criminal Code,⁵⁴ as a result of judicial error if a person's property or other rights are damaged due to the incorrect functioning of the court, he/she will receive compensation from the budget. According to Article 294 of the Spanish Criminal Code, a wrongfully convicted person has the right to claim moral damages if the prerequisites defined by law exist.⁵⁵ However, the Constitutional Court recognized the scope of the law as unconstitutional and determined that moral damages should be extended to illegal imprisonment on any grounds.⁵⁶

The amount of moral damages in civil cases is not regulated at the legal level in Spain and is decided on a case-by-case basis. The victim's age, conviction status, salary and etc. are taken into account.

⁵² Section 14(4) of the Law on Compensation for Damages Caused in Criminal Proceedings and Record-Keeping of Administrative Violations, Section 92 of the Constitution of Latvia, <<https://bit.ly/3xJC5vH>> [20.08.2023].

⁵³ <<https://bit.ly/3xKMyHp>> [20.08.2023].

⁵⁴ Criminal Code (Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal), <<https://bit.ly/3xLk9kD>> [20.08.2023].

⁵⁵ “Those who, after having been remanded in custody, are acquitted for the (1) non-existence of the alleged act or, (2) for the same reason, there is a dismissal of the accusation, shall have the right to compensation, provided that they have suffered damages”.

⁵⁶ Constitutional Court, eliminates the limitation of the two cases of Article 294 and extend the compensation for moral damages to those who have suffered remand detention and who are subsequently acquitted, whatever the cause. The Case 85/2019 of the Constitutional Court (Plenary), of 19 June, Rec. 4314/2018, declares the unconstitutionality and nullity of the paragraphs “for the non-existence of the imputed act” and “for the same cause” of Article 294.1, <<https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/25972>> [20.08.2023].

State responsibility for damages is regulated by several laws: the Constitution,⁵⁷ special acts on administrative procedures⁵⁸ and the public sector.⁵⁹ However, even in this case, the amount of moral damage is not determined.

In Spain, an annex to one of the orders⁶⁰ regulates the calculation of compensation for torts in traffic accidents. Often, the courts used this appendix by analogy and extended it to other types of delicts (non-traffic cases), however, according to the Supreme Court, this annex has no binding force and is only an auxiliary tool.

Hence, the right to compensation for moral damages is enshrined in criminal, administrative and civil laws. However, the legislation does not regulate the amount of moral damages. The only exception is traffic accidents, where the rule/table for calculating economic damages along with moral damages is provided.

3.15. Finland

In Finland, moral damages are regulated by the Torts Act.⁶¹ And compensation for illegal conviction is regulated by a special law.⁶²

The amount of moral damages is determined by the court, but if the dispute arises from an illegal conviction or other crime, the victim of which is a resident of Finland, and the crime occurred in Finland, the legislation determines the upper limit of damages, because the amount is reimbursed by the state.⁶³ The number will be revised every 3 years.

3.16. Germany

Under German law, the amount of moral damages determined in case of wrongful conviction and imprisonment is 25 euros per day.⁶⁴ In other cases, the amount of moral damages is not predetermined.

⁵⁷ Article 106.2 Spanish Constitution: “Private individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operation of public services”.

⁵⁸ Act 39/2015, of 1 October, on Common Administrative Procedure for Public Administrations, <<https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565>> [20.08.2023].

⁵⁹ Act 40/2015, of 1 October, on the Legal Regime of the Public Sector (Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público), <<https://www.boe.es/buscar/act.php?id=BOE-A-2015-10566>> [20.08.2023].

⁶⁰ Royal Legislative Decree 8/2004, of 29 October, approving the revised text of the Law on civil liability and insurance in motor vehicle traffic, <<https://www.boe.es/buscar/act.php?id=BOE-A-2004-18911>> [20.08.2023].

⁶¹ Chapter 5 of the Tort Liability Act.

⁶² The Act on Compensation for Crime Damage, 1204/2005.

⁶³ <<https://www.finlex.fi/sv/laki/ajantasa/2005/20051204>> [20.08.2023].

⁶⁴ Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen vom 8. März 1971 (BGBl. I S. 157), das zuletzt durch Artikel 6 Absatz 19 des Gesetzes vom 13. April 2017 (BGBl. I S. 872) geändert worden ist, <<https://www.gesetze-im-internet.de/streg/BJNR001570971.html>> [20.08.2023].

Compensation for non-material (moral) damages is provided for by paragraph 253 of the Civil Code.⁶⁵ The severity of the injuries, the emotional and/or physical suffering caused by them, the duration and the degree of culpability of the defendant are taken into account when assessing damages.

The analysis of the decision of the German court reveals that the damages imposed in similar cases are more or less similar and the amount is increased taking into account aggravating circumstances.⁶⁶ For example, on holidays and/or vacation days, the amount of moral damages may increase because the victim cannot take advantage of these days.⁶⁷

The interpretations of the court in the part of the imposition of moral damages and the relation to criminal law are interesting. In one of the cases, the court considered the case of a woman who was a victim of sexual violence. The victim “had multiple bruises on her body and severe mental disorder. The abuser beat her for 3.5 hours, strangled her, tore her hair and threatened her with death. The fact that the offender was imprisoned for 6.5 years did not reduce the amount of the compensation amount. The court considered that the imprisonment of the offender represented compensation for moral damages to society, not to the victim herself.”⁶⁸

As a conclusion, it should be noted that the countries can be divided into three categories:

- **The amount of moral damages is determined by the opinion of the judge:** Belgium; Portugal; Bulgaria; Slovakia.
- **The amount of moral damages is determined at the legislative level for several cases (mainly illegal convictions):** Hungary; Croatia; Greece; Estonia; Lithuania; Latvia; Finland; Germany; Several States of USA (some countries impose limit to all cases).
- **Reference/recommendation tables, which determine the amount of moral damages according to the degrees of damage:** Austria; United Kingdom; Spain.

Consequently, countries which, like Georgia, rely only on the opinion of the judge when determining the number, are few. It should be noted that the legislation of these countries is quite detailed and defines the criteria.

4. Conclusion

As the research has shown, there are many gaps and ambiguity in the Georgian legislation and practice. In particular, the provision of the law regarding the amount of moral damages is general and does not include specific criteria. The amount of moral damages imposed by court decisions is often not proportional to the harm caused. In addition, in case of analogue/similar factual circumstances, the amounts of damages imposed differ significantly.

⁶⁵ See online: <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0761> [20.08.2023].

⁶⁶ A collection of summaries of special decisions of the German federal courts regarding moral damages. Electronic Law Library, <<http://www.library.court.ge/upload/moraluri%20ziani%20asdasfda.pdf>> [20.08.2023].

⁶⁷ Ibid, 80-81.

⁶⁸ Ibid, 58.

It is desirable to create an interdisciplinary commission that will work on an in-depth study of the problem. It will analyze all decisions and generalize the findings. In addition, it will make a comparative legal analysis and develop recommendations based thereon. A similar precedent exists in the United Kingdom, where a special parliamentary body (Law Commission) has conducted a study and developed a detailed guiding document that helps the judge to assess the criteria for moral damages and determine the amount. Representatives of special fields must be invited to the commission, who will be able to assess the damage from a medical and other professional perspective. When discussing harm, one must consider its impact on the victim's entire life. After an assessing how significant the harm is (physically, mentally, socially) in percentages, a recommendation table/criteria should be developed, indicating the estimated amounts. Moreover, it must be defined what is the impact of specific type of damage on health and, in general, the quality of life. Recommendations/tables developed by the UK and Austria may be used as a guide.

The conclusion drawn up regarding the quantity should be of a recommendatory nature and it cannot have a binding force.

The existing wording of the law, which leads to many gaps and ambiguity in practice, has been confirmed by the present study. Accordingly, the legislation should be narrowed down based on comparative legal analysis. The legislator should develop the criteria for the judge to consider when determining the amount of moral damage.

The practice of developed countries shows that all countries at a certain stage began to critically analyze decisions on moral damages. They developed and published statistical data every year. The report outlined the decisions, in particular, what was the actual harm and what the amount of the moral damages was. This allowed judges to make more or less similar decisions and also revealed disproportionate amounts. This rule promoted both transparency and unification of approaches.

Therefore, the common courts of Georgia should issue a similar report on an annual basis, which will reflect all the cases where the defendant was ordered to pay moral damages; indicating the amount and the form of the damage caused? This will help to establish a uniform practice and also increase transparency.

Implementation of all the above recommendations will significantly improve the observance of the principle of equality in proceedings. The introduction of criteria at the legislative level and the introduction of a recommendation table will prevent radically different results on similar facts, as well as create adequate expectations for the parties.

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