CHAPTER 13

Civil Liability Concept Transition in Post-Industrial Countries

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Introduction

This work is aimed at tracing the changes in the theoretical concept of the legal regulation of relations when dealing with the repayment of losses, corresponding to the modern conditions of the post-industrial society of Russia. This could help us to clarify the methodological basis for improving the norms and practices of their application, protecting the rights and legitimate interests of participants in these legal relations.

Methodology

The methodological basis of the research included both private scientific (special legal, comparative-legal, historical) and general scientific (problem-theoretical, teleological, systemic) methods of analysis. The problem-theoretical approach is applied when studying fundamental issues. The specific scientific method of comparative-legal analysis is used to highlight

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the peculiarities of various claims for losses and foreign regulation. The historical method was used for analysing the continuity of views on the conditions for the declaration and consideration of claims for losses in Russia's pre-revolutionary, Soviet, post-Soviet, and post-industrial periods. The main trends in the development of the ideology of compensation for losses and liability, alongside other aspects under discussion, as reflected in domestic and foreign studies, were approached using the methods of problem-theoretical and systemic analysis. The teleological method contributed to the establishment of current and future regulatory goals. General logical methods (abstraction, analysis, synthesis, analogy, generalization, etc.) were used for studying and comprehending specific legal issues.

Results

Summarizing the existing knowledge, this chapter made it possible to formulate a concept for the legal regulation of relations for protecting legal rights, and, in particular, loss indemnity. It has significant scientific and practical importance. Our findings could form the basis for further doctrinal research in this field within the framework of creating a modern Russian theory of loss reimbursement and so on. This will contribute to improving scientific ideas about the legal nature of the recovery of damages and a better understanding of the specific character of this important legal remedy, and establish its universal relevance and unlocking its potential.

The Origin of the Loss Theory

In Russian historical legal documents, property liability for any "insult" was sanctioned in the form of fines. In the nineteenth century, prominent Russian civil lawyers, who worked at leading Russian universities, worked at developing the general legal principles of damages, to make such laws more mature and sophisticated (Belyackin 2005). The starting point for writing conceptual works was primarily the research of German civil law theory and the legislative process, firstly in German states and later in a united Germany.

In the second half of the nineteenth century, industrial development provoked an increase in political demands in the case of harm especially personal injuries; thus, there were not so many claims based on these articles. The Governing Senate (Russian supreme judicial authority) heard up to several hundred cases per year. Of those, in 1871, only approximately

10% of claims were for compensation, whereas in 1910, such claims constituted approximately one-third of cases. They arose both from tort and from domestic and small-scale transactions.

The doctrine of losses did not exist at that time, and moreover, reviewers of the Senate's decisions sometimes directly referred to the works of top German legal experts and to the achievements of the German legislators (Zmirlov 1908).

Thus, we can see that the theory of losses itself only appeared at the beginning of the twentieth century. Since then, it has become possible to compare legal experts' viewpoints on the problem under consideration. Their works influenced how the relevant formulations of the Civil Law of the Russian Empire were drafted, although this was not adopted due to World War I. For the first time, civil responsibility for guilt was established.

German legal experts' legislative activity came to the following conclusion: no one has the right to realize their subjective intention for the sole purpose of harming another person.

As for the regulation of both tort and contracts, their non-fulfilment subsequently resulted in the single normalization, as established by Article 684 of the reprinted collection of legislation of the Russian Empire "on compensation for harm and losses resulting from acts not recognized as crimes and misconduct". This was particularly significant, as it included the conditions of exemption from liability—"the requirements of the law or government", personal defence (defensio propria), or an unavoidable circumstance. Although this Article was initially intended mainly for cases causing various property damage and harm outside of transactions, it began to be applied to contractual losses, along with Article 574: "Everyone has the right, in cases of non-performance under contracts and obligations, as well as in cases of grievances, damages and losses, to seek satisfaction and compensation through the court". In general, the legislative base was limited to this.

A necessary condition of liability in Soviet civil law was unlawfulness (*ubicunque est injuria ibi damnum sequitur*) (Alekseev 1959). Since a violation of obligations was recognized as the criterion of judicial response in the pre-revolutionary civil tradition, cases whenever a person does not receive or is deprived of what they can claim on the basis of participation in the relations within the scope of the rule of law had to be taken into account.

First of all, because of the planned economy, there was not the economic basis upon which such laws could be established; the division into positive damage and lost profits, in relations between organizations, was

not possible. In the socialist system, the enterprise could not have such an indicator as "lost profit", if only because the organization's income was not a market but an accounting unit. The main task of business entities was to fit into the plan for the fiscal period. Failure of the boundary partner to fulfil their obligation (e.g. to supply high-quality raw materials) could lead to the following consequences: firstly, to the non-receipt of the total planned income; secondly, to the loss or reduction of excess profits; and finally, to direct damage to property, its reduction, impairment and so on. However, it was difficult to judge to what kind of losses a specific violation led to. Therefore, sometimes, if actions were not executed without harm to the aggregate national output, no measures were taken. If the violation affected the amount of planned income, the difference (*differentia est requisita*) was collected. As mentioned previously, if it reduced super profits, there would have been no measures taken. This practice did not contribute to the theory of losses' development.

The normative category of losses in the well-known Decree of the Council of Ministers of the USSR of July 25, 1988 no. 888—"On approval of the provision for the supply of industrial products, the provision for the supply of consumer goods and the basic conditions for regulating contractual relations in the implementation of export-import operations"—is very indicative. The Soviet era was drawing to its end, and the way in which the issues of lost revenue were regulated in this document (paragraphs 74 and 65 of the first two provisions, respectively) shows that the institution of losses in the USSR had not been introduced properly. For example, as is noted previously, they could be determined in advance.

Legal Nature of Claims for Property Liability

In Russian courts, there used to be a negligible amount of loss cases, although the main task of law in general—legal regulation, judicial activity, and law enforcement agencies—is to bring cases to prosecution. Amendments to the Russian Civil Code, dated March 8, 2015, removed the main procedural obstacle for claims for damages, which once arose in the bowels of judicial lawmaking and consisted of the need for plaintiffs to adhere to the principle of adversariality to prove the exact amount of damages (Ioffe 1975). This disciplinary canon was dictated by the then-current legal ideology of the Soviet Union. The legislator ordered courts in paragraph 5 of Article 393 of the Civil Code to positively decide on the damages awarded, even if it is difficult or impossible to calculate them.

However, another fundamental difficulty for using this remedy is the understanding that the claim for damage and loss of profit is always a request for sanctions.

In case of non-contractual harm, its perpetrator is bound by an obligation not to compensate for losses but to eliminate the consequences of this harm. The postulate of the continental legal system is the following: first comes natural restoration, and only then can a monetary replacement be provided, as stated in Article 1082 of the Russian Civil Code. By virtue of regulation, an ex officio court may invoke the cause to be liable instead of natural enforcement. It is important to note that the restoration in kind implies fulfilling the obligation, while compensating for the losses due to regulation is the responsibility for guilty behaviour, for the assigned risk from a source of increased danger, or for conducting business operations.

Commentators sometimes argue that the moment of harm creates such an obligation (Shepel' 2006), and if it is not executed voluntarily, only then should a sanction (which does not arise immediately due to obvious malicious behaviour) follow. This is a peculiar feature of Russian regulation.

Responsibility occurs at the moment of violating the subject's rights. In the contractual area, it is related to the property expectations of the participants of legal relations. In the case of tort, the violation does not occur in the field of agreements, but because of the damage that has to be suffered not by the victim.

The main condition of loss is the presence of guilt. An exceptionally subjective understanding of intent and negligence needed to change, and this happened in 1994 when Article 401 was introduced into the Civil Code of the Russian Federation, linking guilt with the lack of a proper degree of care and caution in taking measures for the proper fulfilment of obligations "required ... by the nature of the obligation and the terms of the turnover". However, it was introduced only in the section on obligations, not next to the concept of good faith (Articles 1, 10 of the Russian Civil Code). The following conclusions suggest themselves: the subjectivity of guilt was left behind only when dealing with contracts or torts, but it does not apply to non-contractual duties, and when dealing with intellectual property, it applies to both contractual and non-contractual relations. It sounds paradoxical, but it is logical. When dealing with the unauthorized use of someone else's intellectual property or when obstacles to ownership are created, the compensation of losses does not arise

from obligatory relations, but from other property relations, and in these cases, Section III of the Russian Civil Code should not apply.

EU Loss Compensation Approaches

The EU's Model Regulations of 2002 and 2009, adopted for the purpose of formulating the legislation of European countries, contain more flexible approaches to compensation of losses than in domestic legislation, its priority being a remedy. When dealing with delayed monetary obligations and violation of personal rights, the provisions of these documents imply a stricter liability than the "pure economic losses".

In Europe, unified acts have been adopted to implement the principles of European contractual law and the Principles of European Tort Law (PETL) in domestic legislation. These are considered the best documents, as well as the most recent, which include the greatest achievements of legal thought. The Framework or the Model Rules of European Private Law (DCFR) was adopted as a guideline in 2009. Except for non-contractual liability chapter this document is not perfect from the point of view of losses, but is nevertheless worthy of attention.

These acts are a compromise between the established views of common law and the decisions of the Romano-German or continental legislation. They contain a set of approaches which is useful primarily for Russian theorists.

In Russian law, guilt is an indispensable condition for imposing sanctions if something is damaged or a contract is not executed. Russian entrepreneurs are obliged to cover losses regardless of their *dolus* or *culpa*; indeed, their liability is even stricter than in Europe. Those who are aimed at profit-making do not pay losses only due to circumstances not under control—these should be extraordinary according to the prevailing point of view, and thus even if the phenomenon cannot be defined as rare (although harm cannot be prevented by any measures), the entrepreneur should compensate the missing profit. For example, a strike may be unpreventable, but it cannot be called an "extraordinary event". Europeans are exempt under a much wider range of circumstances that are merely "beyond the control of the debtor" and—it is important to underline this—they could not anticipate them. This category is most likely to include: power outage, currency exchange rate collapse, and, especially, unexpected actions by third parties. Meanwhile, this formula also gives room for the discretion of the court in each individual case.

However, a completely different approach was adopted in the Old World—the cradle of jurisprudence—in awarding damages due to tort. The main reason for this is guilt, hazardous activity (PETL), whatever it may be (Art. 1: 101. (2) PETL).

When regulating tort and contracts, one can see the English influence in prioritising awarding payments before the compulsory fulfilment of an obligation (Burrows 2007). At the same time, we have identified a number of fundamental approaches in this regard. In European law, tort does not give rise to obligations. This term is missing in PETL, but the corresponding legal relationship is declared when causing harm not to property and personality, as we have seen previously, but to interest. Hence, an important consequence emerges: damage correction, repair, replacement, or restoration of things can be a substitute rather than a priority remedy. Article 10: 104 of PETL states that, instead of damages, restoration may be required by the affected party to the extent that it "is possible and not burdensome for the other side" (Art. 10: 104. PETL). It can readily be understood that, because of the quoted legal provision, whether in the past or the present, and well into the future, potential claims for restoration in kind are conceivably quite rare.

The preference for monetary performance in contractual relations can be clearly traced as well. Despite the current breach of obligations, a creditor can always recover payments and a good equivalent in the full sense of the word in the form of interest on short-term unsecured loans at the location of the creditor (Art. 9: 508 (1) PECL).

Thus, greater cost and fulfilment of financial obligations in comparison with others are supported. To do this, the creditor must adhere to only two conditions (Art. 9: 508 in conjunction with Art. 9: 101 PECL): not to enter into a replacement transaction, and to continue to make a property provision to the debtor. However, there is a wide discretion within the courts as to whether such a performance by the creditor has become unreasonable (Art. 9: 101 (2) PECL).

In European law, it is not always possible to require in-kind performance under a contract according to the all the documents provided: it is impossible to be obtained from another source, it has become burdensome for the debtor, it has not been announced promptly and so on. (Art. 9: 508 (1) PECL). The institution of losses, its universality, its effectiveness, all are affected by the monetary obligation regime. It is enforced if the creditor has fulfilled their part, with the addition of the rate on the

short-term loan (Art. 9:508 (1) PECL), while the implementation of the non-monetary claim occurs with reservations.

The European concept introduced a significant weakening of the fundamental principle of *pacta sunt servanda* (treaties must be respected) through a revolutionary revision of the institution of withdrawal from the treaty (Karapetov 2007). Continental national law means that assessment of whether the current deviation from execution was fatal or incurable, and whether it could be terminated upon request or not, is solely left to the prerogative of the court.

It must be said that European regulation has incorporated the decisions and institutions of the Anglo-Saxon legal system (Benjamin 1960), and we are not trying to judge whether this is good or bad; the usual tools have been radically transformed into some hybrid means that are already tested by the legal system, in which the precedent predominates in its diverse interpretation by practising lawyers, judges, lawyers.

Rethinking the Role of Losses Institute

The potential of this universal legal instrument is not fully realised by law enforcement agencies for a number of reasons. At first glance, the institution of losses can be considered unconventional for the domestic legal system. The restoration function of civil law is understood in its framework, first and foremost, as the performance of what is due in kind: that is, in the form in which it arose due to legal facts.

However, the obligation ignored by the defendant is often no longer of significant value to the victim in a dynamic legal and commercial environment in the post-industrial era. For these cases, only monetary satisfaction is appropriate as the only acceptable way to compensate for lost property or to replace non-received material goods.

The essence of economic turnover is that compensation for losses objectively becomes the main means of protecting subjective civil rights. At the same time, the dispute settlement bodies cannot cope with its use and, in some cases, either refuse to sue or, as mentioned, reduce the number of requested amounts for various reasons.

Wrongfulness is not a necessary basis for imposing the burden of loss. Such consequences may arise from both the accepted risk and the direct legal establishment. The logic of the economic turnover regulation has already allowed liability in contractual relations without fault and unlawfulness, when a causal relationship determines the number of reimbursable

losses of the principal, the customer with the permitted withdrawal from the contract of their counterparties, the attorney and the service provider (paragraph 3, Article 978, paragraph 2, Article 782 of the Civil Code of the Russian Federation, etc.). Nowadays, it is necessary to proceed from a generalization of liability without unlawfulness, following the *de lege lata* legislative establishment, long known from the norms of the Russian Air Code on compensation for the loss of baggage by an air carrier (n. 3 of Art. 118). In accordance with paragraph 1, part 3, Article 1064 of the Russian Civil Code, compensation for harm, and even losses (Article 1082) arising from lawful acts, may be separately provided for in the legislation. This norm, however, was included in Chapter 59 on tort. In this regard, it makes sense to supplement Article 15 of the Russian Civil Code with the clause on the compensability of losses from lawful actions by virtue of the normative direction of the law.

Guilt is increasingly becoming not so much a liability condition as a significant determinant of the amount of damages claimed, including but not limited to the commercial sphere. In case of solidarity of the debtors, joint harm and negligence of the creditor, the amount of losses depends on the degree of the defendants' fault. In this case, a literal understanding of this phrase as three types of guilt—intent, mild and gross negligence—makes it difficult to identify the true legal influence of this important legal category to establish the amount of losses, the factor of which is the degree of guilty infliction. It happens to depend on the persons involved in their joint intent or carelessness, including the sphere of entrepreneurial relations.

The classification of losses in the form of real damage or lost profits, including in the amount not less than the income of the offender (paragraph 2, part 2, Article 15 of the Russian Civil Code), is supplemented by the cost of measures and preparations (part 4, Article 393 of the Civil Code), but this is not exhaustive, since it does not include other results of harm, the spread of false information and the like. Compared to different works on civil law, the definition by Pobedonostsev—"Any deterioration, decrease of values and forces, any damage on property is a loss" (Pobedonostsev 1896)—is the most relevant. The formula adopted by the courts allows for the absence of consequences if there has been an offence, but there is no real damage or loss of profit. The courts do not include future costs as a significant form of loss (part 2, Article 15 of the Civil Code).

In cases of loss recovery, all legal provisions on the obligations of Sections III and IV of the Russian Civil Code—which, as a result of increasing detail, no longer apply to the circumstances of the losses—are not applicable. Claims for the imposition of their burden are taken without evidence of a reminder of the need to repay them, as these are obligations that do not have a period of performance (paragraph 2, Article 314 of the Civil Code of the Russian Federation). Thus, if these are obligations, then all of them—without expiration of the execution time—are unaffected by the limitation period; this was not what was meant by the legislator and the developers of the Russian Civil Code. Rules—such as Chapter 22, Article 310, 311, 313, 315 and 328, and other rules from other chapters of Section III, Subsection 1 of the Civil Code—are incompatible with the recovery of damages. However, it is advisable to include a reference norm to Chapter 24 (Replacement of persons in obligations) on application to claims for losses in the general provisions of the Russian Civil Code.

Conclusions

The main feature of the civil liability's evolution is the changing ratio of losses' recovery and forfeit payment. At first, its variety (a fine) implied responsibility, but was charged only for guilt. The institution of losses began to increasingly replace fines and later spread to an innocent violation of rights. The forfeit in entrepreneurial relations began to perform the same function in the post-Soviet era, and by its legal nature, it approached the substitute for losses, and finally, in the post-industrial period of development, a request for property liability without fault and unlawfulness appeared as a means of restoring property balance.

There is no single legislative concept of compensation for losses in Russian civil law. The rules governing the implementation of the aforementioned requirements are located in different parts of the Civil Code and are not agreed among themselves in Sections I, III, IV and VII. There are many legal provisions on the possibility of recourse to liability in the amount of losses incurred; nevertheless, such claims can be used in other cases. Detailed regulation of damages should be placed in Chap. 2, "The Emergence of Civil Rights and Obligations, the Implementation and Protection of Civil Rights", of the Russian Civil Code, along with the chapter on obligations.

Claims for losses are more correctly defined as the cost of violated subjective civil law, and not just norms, and not only as real damage and lost profit, which, primarily as legal categories, are designed to calculate and vary sanctions.

The institution of recovery of damages is central to all civil law, and urgently requires development and improvement.

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