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RECOVERY OF DAMAGES & COMPENSATION FOR NON-ECONOMIC LOSS

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This publication is posted to discuss the comparative features of such important legal categories as non-material injury in correlation with damages. In addition to reviewing several doctrinal judgments about them, the findings of higher courts and the European approaches, the author also focuses on question of relationship between concepts of moral and reputational impact, noting here that not all the identified significance commonly used in the doctrine correspond to strict legislative terminology. For example, information injurious to honour, dignity, business reputation does not cause, except moral, harm as such, but associated with the appearance of damages. It seems to be the first time proposed to evaluate the thesis that they can be recovered instead of any non-pecuniary damage. The practice of compensation simply for mental illness, etc. is extremely rare with nominal value of recoveries, in our view, damages, due to the interpretation of Article 1082 of the Civil Code, can be collected due to misery, ailments, suffering, anxiety, etc. Of course, if damages occurred or are to be born, but are not just expected, as the loss of profit is what should have been received.

Keywords: damages; immaterial harm.

1. Background

It would be practically useful to learn about the genesis and evolution of compensation of moral harm in the light of translational differentiation of legal treatment even before the codified civil law emerged and became a decisive factor of the functioning of the society and economy in the 19th century. Originally, adjudication of such compensation was based on liability in the form of penalties. The Law of the Twelve Tables[1] required monetary satisfaction to be provided not only for a bodily injury or irreparable loss of health but also for insult. In the times of the old European monarchies, including the greatest one – the Russian Empire, existing laws set numerous casuistic rules of penalisation for offences and fixed the amounts payable by the offenders.

The humanistic school of legal thought also stood up for the need to prescribe compensations for "tears, pangs and sleepless nights", and the case law as early as in the 19th century supposed that sufferings should be examined on a case-by-case basis for adjudication purposes. The extant publications of that time described various instances of penalty such as that imposed by the cassation court in Palermo (by its judgment of 1 April 1909) in favour of a woman on a male respondent for his failure to keep his promise to marry her. The Genoa court on 10 May 1898 awarded 1,400 liras to a passenger exposed to "a dangerous journey" in a derailed tramcar. A teacher unlawfully denied of employment and slandered was awarded with 15,000 liras on 8 May 1909.[2]

Historically, Russian judicial authorities have tended to recover losses for "insult" in general, including impairment of dignity. The Law Books promulgated by Ivan III (in 1497) and Ivan IV the Terrible (in

[1] Belyatskin, S.A. *Vozmeshchenie moralnogo (neimushchestvennogo) vreda* [Compensation of Moral (Immaterial) Damage]. St. Petersburg, Pravo Publishers, 1913, p. 13.

[2] Belyatskin. *Op. cit.*, p. 23.

1550) contained a number of regulations penalising for disgrace. The penalty depended on "the victim's social standing and sex."[1] A similar penalty was imposed by Czar Aleksey Mikhailovich's Code of Law of 1649.[2] The second paragraph of Article 151 of the Civil Code of the Russian Federation requires a court to take into account the individual peculiarities of any victim. A similar requirement is imposed by the second paragraph of Article 1101 of the Civil Code of the Russian Federation.

Penalties payable for moral harm along with reparation and mitigation of moral distresses and physical sufferings – namely displacement and prevention of personal violence and unlawful retaliatory measures of any kind whatsoever – played a major role in the days of old and still do so today. In that regard, not only did the importance of penalty as a legal remedy not diminish but even grew in some respects.

The Code of Civil Laws promulgated by Catherine II contained a wider list of casuistic cases where monetary compensations were payable for non-pecuniary damages. However, as we can see, despite the literary popularisation of the concept of moral harm in the early 20th century, the contemporary case law appeared to be insensitive to claims for such harm. As early as in the 1900s, the Governing Senate was mostly reluctant to refer claims for moral harm for a new trial and only did so in respect of the courts in the Kingdom of Poland that was known to have its own civil law,[3] even though the territory was *de jure* part of the Russian Empire before the October Coup. However, they applied odd rules of awarding for "unlawful acts", including specifically described encroachments on persons not resulting in any persistent damage to their health (this matter will be discussed further below).

In Russia, there were separate rules (as set by Articles 662 and 663, Vol. X, Part 2 of the Code of Laws of the Russian Empire (the "Code of Laws")) providing for a potential compensation for seduction, rape and disfiguration of girls. A judge rendering an unjust judgment would be charged with a penalty under civil law (according to Article 678, Vol. X, Part 1 of the Code of Laws). As we can see, penalties were imposed for any unlawful act, whether it be a "crime or offense". However, the legislators did not trouble themselves by taking a common approach: e.g., while a maiden was awarded with satisfaction for a brutal behaviour towards her, a young married or ex-married woman got no legal remedy.

The Code of Laws set separate rules of punishment for "criminal acts" such as encroachment on honour affecting the victim's credit, seduction, etc. Thus, personal rights were then usually protected by criminal law. Russian legal scholars expressed an opinion that moral harm constituted part of the notion of damage and losses arising from unlawful acts and, therefore, should be "rewarded" as well.[4]

The Civil Code of the RSFSR of 1922 and 1964 did not consider moral or physical sufferings as a cause for penalty, and Article 131 of the Fundamentals of Civil Law of the USSR and the Republics of 1991 was the only statute stipulating that "moral harm (physical sufferings and emotional distresses) caused to an individual by an illegal act shall be compensated by the harm-doer, provided that the latter is guilty. Moral harm may be compensated in cash or other non-pecuniary form in the amount to be determined by the court irrespective of the compensable pecuniary damage."

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1 *Ib.*, pp. 25 and 36.

2 "Those who falsely blame others for their illegitimate origin shall be subjected to a penalty of double dishonour. Those who wilfully set a dog on others so that it bit them or torn their dress to pieces... shall be ordered to provide the claimant with a double compensation for his or her dishonour and bodily injury." (Code of Law, Ch. X, pp. 28 and 281; see also Ch. XXII, pp. 10 and 11, *et al*.)" (*ib*., p. 25).

3 Governing Senate Cassation Department Resolution No. 46 of 1909 (*ib*., p. 47).

4 Belyatskin. *Op. cit.*, p. 28.

2. Legal Treatment

According to the current Civil Code of the Russian Federation, infliction of moral harm constitutes a tort. The "harm-doer" should compensate the victim for the harm done (pursuant to Article 1062.1 of the Civil Code of the Russian Federation). Its danger may be mitigated by a claim for prohibiting a person from engaging in a certain business (as per Article 1065.1 of the Civil Code of the Russian Federation).

In general, moral harm should be awarded in the event of an infringement of personal rights or non-financial benefits[1] and, in exceptional cases expressly prescribed by law,[2] a damage caused to the victim's properties.[3] Sufferings, illnesses and indispositions, which may well cause an individual to cease to go to work, miss his or her private practice or lose or become unable to get any income or benefit, do not apparently enable such individual to claim the resulting losses under law.

Irrespective of the foregoing, Russian courts tend to determine the extent or value of moral sufferings in miserable amounts – in contrast with the existing Western case law, primarily in the Unites States, where courts may adjudicate astronomical compensations for spiritual torments inflicted by illness or death of relatives caused by low-quality medicines or for shock conditions experienced by consumers as a result of various incidents, undue performance, etc. Legal entities are currently not authorised to claim moral harm. They can only enforce their rights by claiming damage to their reputation.[4]

According to the applicable rules of law currently existing in Russia, no loss may be recovered in addition to moral harm compensable under Article 151 of the Civil Code of the Russian Federation: only the reverse situation is possible for an individual. That is evidenced by the fact that the idea of compensation for emotional distresses is based on penal liability, meaning nothing else but punishment of the harm-doer[5] along with the satisfaction for the victim and the mitigating effect for the victim's

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1 Personal rights serve to formalise the belonging of non-pecuniary benefits such as one's name, honour, personal dignity, life, health, etc. According to some scholars, these include the power of a person to take actions on his or her own, the power of the holder of a subjective right to demand that the public refrain from infringing his or her right, and the power to protect oneself (for details, see Ulbashev, A.Kh. *Osushchestvlenie i zashchita lichnykh prav* [The Exercise and Protection of Personal Rights] // *Zakonodatelstvo*, 2017, No. 9, p. 11).

2 According to the second paragraph of Clause 2 of RF Supreme Court Plenary Resolution No. 10 of 20 December 1994 "Certain Matters of the Application of Law on Compensation of Moral Harm" ("Resolution No. 10"), this type of damage "may, in particular, consist in emotional distresses caused by a loss of one's relative, inability to continue one's active public life, loss of one's job, disclosure of one's family or medical secret, communication of misleading information discrediting one's honour, dignity or business reputation, temporary restriction or deprivation of one's rights, or physical pain resulting from a bodily injury or other damage caused to one's health or from any disease resulting from one's moral sufferings, etc."

3 For example, according to Article 237.1 of the Labour Code of the Russian Federation, "the moral harm done to an employee by any unlawful act or omission to act by his or her employer [i.e. an infringement of the employee's employment (pecuniary) rights – Yu.M.] shall be compensated to such employee in cash in the amount to be agreed on by the parties to the employment contract." (see Ulbashev, A.Kh. *Op. cit.*, p. 18).

4 Clause 21 of RF Supreme Court Case Law Review No. 1 (2017) (as approved by the RF Supreme Court Presidium on 16 February 2017) // ConsultantPlus Law Information System.

5 However, the European Court of Human Rights (the "ECHR") believes the purpose of an award is to reimburse the claimant for the actual adverse effects of a violation rather than to punish the defendant:

"9. The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting Party responsible. The Court has therefore, until now, considered it inappropriate to accept claims for damages with labels such as "punitive", "aggravated" or "exemplary"."

<…>

13. The Court's award in respect of non-pecuniary damage is intended to provide financial compensation for non-pecuniary damage, for example mental or physical suffering." (Clauses 9 and 13 of the Practice Direction "Just Satisfaction Claims" // https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf (the "Practice Direction")). That said, it should

emotional condition.[1] And since the claimant gets even more than the replacement cost of the damage inflicted to his or her personality, he or she may not claim any loss.

Noteworthy, Russian courts tend to never award moral harm in a large amount even in apparent cases of deterioration of health caused by consumption of low-quality goods or inadequate performance of works or services. In foreign jurisdictions, courts tend to adjudicate considerable monetary compensations for such moral sufferings.[2]

As mentioned above, the Russian legislators have chosen to compile a close-ended list of elements of crime that allows claimants to claim moral harm as an additional remedy if their proprietary rights are infringed. According to Article 1099.3 of the Civil Code of the Russian Federation, moral harm shall be compensated irrespective of any pecuniary damage. Such regulatory approach permitting both pecuniary and non-pecuniary damages to be simultaneously awarded is also embodied in the second paragraph of Article 15 of RF Law No. 2300-I dated 7 February 1992 "On the Protection of Consumer Rights".

be taken into account that "it is in the nature of non-pecuniary damage that it does not lend itself to precise calculation" (Clause 14 of the Practice Direction); "… the task of estimating damages to be awarded is a difficult one. It is especially difficult in a case where personal suffering, whether physical or mental, is the subject of the claim. There is no standard by which pain and suffering, physical discomfort and mental distress and anguish can be measured in terms of money" (Clause 9 of the Joint Partly Dissenting Opinion of Judges Spielmann and Malinverni as expressed in the case of *Maksimov vs Russia* (Application No. 43233/02) (ConsultantPlus Law Information System))." However, "if the existence of such damage is established, and if the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis" (Clause 14 of the Practice Direction).

We would like to note that the question of which function – compensatory or punitive – is more important for the concept of compensation of moral harm still entails doctrinal difficulties (see, e.g., Vorobiov, A.V. *Institut kompensatsii moralnogo vreda v rossiiskom grazhdanskom prave* [The Institution of Compensation of Moral Damage in Russian Civil Law]. St. Petersburg, 2008; Sebok, A.J. Punitive Damages in the United States // Punitive Damages: Common Law and Civil Law Perspectives (Tort and Insurance Law, vol. 25) / H. Koziol, V. Wilcox (eds.). Springer, 2009. P. 161–162).

[1] Russian legal scholars often note that the obligation to compensate moral harm is intended to enable the victim to get some material benefits alleviating his or her pain and sufferings. In that sense, the reasonings by V.T. Smirnov and A.A. Sobchak are quite indicative (see Smirnov, V.T., Sobchak, A.A. *Obshchee uchenie o deliktnykh obyazatelstvakh v sovetskom grazhdanskom prave: uchebnoe posobie* [The General Theory of Tort Obligations in Soviet Civil Law: Textbook]. Leningrad, 1983, p. 61) as they give the following example: a huge music, theatre and movie buff was bedridden as a result of his injury and became unable to go to theatres and cinemas. Therefore, in addition to the pecuniary damage in the form of loss of his earnings, he also incurred a certain moral harm in the form of his inability to visit entertainment events, concerts, etc. In such cases, according to the authors, it would be reasonable to obligate the harm-doer to buy the victim a radio receiver, a record player with a set of suitable music records, or a TV set, i.e. to pay only those costs (or to take only those actions) that could help at least reduce, if not eliminate, the damage. Such "functional" approach to moral harm is often criticised by those scholars arguing, in particular, that the victim is not at all required to get material benefits that could help improve his or her emotional condition and, therefore, alleviate his or her sufferings (for details, see Yagelnitsky, A.A. *K voprosu o nerazryvnoi svyazi prava s lichnostiu: preemstvo v prave trebovat kompensatsii moralnogo vreda i vreda, prichinyonnogo zhizni ili zdoroviu* [On the Inextricable Relationship of Law with the Individual: Succession in the Right to Demand Compensation for Moral Damage and Damage Caused to Life or Health] // Bulletin of Civil Law, 2013, vol. 13, No. 2, pp. 68-70).

[2] The concept of punitive damages, which is widespread in general law, is designed to fight such violations committed by sellers (for details, see Gloov, D.H. *Shtrafnye ubytki v potrebitelskom prave* [Punitive Damages in Consumer Law] // *Dogovory i obyazatelstva: Sbornik rabot vypusknikov Rossiiskoi shkoly chastnogo prava pri issledovatelskom tsentre chastnogo prava imeni S.S. Alekseeva pri Prezidente RF* [Contracts and Obligations: Collection of Works by Graduates of the Russian School of Private Law at the Alekseev Private Law Research Center under the President of the Russian Federation] / Comp. and ed. by A.V. Egorov, vol. 3, Moscow, 2018).

3. Reputation

One important type of non-pecuniary damage is the damage caused to a legal entity's business reputation or to an individual's honour and dignity[1] (as per Article 152 of the Civil Code of the Russian Federation). Under Russian law, such offences are penalised by a recovery of losses if the victim is a legal entity and by an award of both losses and moral harm if the victim is an individual. Russian courts have now established an extensive case law on defamation. While the Supreme Arbitration Court of the Russian Federation had not encountered such cases for a long time, it stated that legal entities may not claim any moral harm.[2] Subsequently, Russian courts changed their approach under the influence of the ECHR case law[3] and Russian Federation Constitutional Court Ruling No. 508-O dated 4 December 2003.[4] Furthermore, it became more uniform thanks to Russian Federation Supreme Court Plenary Resolution No. 3 dated 24 February 2005 "On the Case Law Concerning the Protection of Individuals' Honour and Dignity and Legal Entities' Business Reputation" ("Resolution No. 3"). As stated in the first paragraph of Clause 15 of Resolution No. 3, "Article 152 of the Civil Code of the Russian Federation permits an individual whose honour, dignity or business reputation has been discredited by the communication of any information concerning him or her to claim losses and moral harm along with the rebuttal of such information." To the extent concerning the protection of individuals' business reputation, said rule had also been applied for a while to the protection of legal entities' business reputation. As a result, the Russian Federation Supreme Arbitration Court and subordinate arbitration courts have ceased to deny the possibility to recover a compensation for moral harm in favour of certain legal entities closely affiliated with their members.[5] Some courts even tended to equate moral harm, in a rather curious way,

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1 Honour was previously considered as a "social assessment of a person as a member of society" (Malein, N.S. *Okhrana prav lichnosti sovetskim zakonodatelstvom* [The Protection of Individual Rights by Soviet Law]. M.: Nauka, 1985, p. 31; see also Farber, I.E. *Svoboda i prava cheloveka v Sovetskom gosudarstve* [Freedom and Human Rights in the Soviet State]. Saratov: Saratov University Publishers, 1974, p. 18). RF Supreme Court Plenary Resolution No. 3 dated 24 February 2005 "On the Case Law Concerning the Protection of Individuals' Honour and Dignity and Legal Entities' Business Reputation" explained that the concept of "honour" "embraces a set of objectively formed, well-established positive social perceptions of proper conduct and personal characteristics of an average individual rather than a particular person". (see Ulbashev, A.Kh. *Op. cit.*, p. 15). A legal entity's business reputation is treated similarly.

2 For example, RF Supreme Arbitration Court Information Letter No. 46 dated 23 September 1999 "Review of Arbitration Court Decisions Resolving Business Reputation Protection Disputes" says nothing about compensation of non-pecuniary damages. Among the relevant concepts, it focused on non-monetary methods of protection of rights such as rebutment and compensation of losses (the evolving case law is discussed in Gavrilov E.V. *Evolyutsioniruyushchii kharakter praktiki Evropeiskogo suda po pravam cheloveka o kompensatsii nematerialnogo vreda yuridicheskim litsam* [The Evolving Nature of the Case Law of the European Court of Human Rights on the Compensation of Immaterial Damage to Legal Entities] // *Arbitrazhniye spory*, 2018, No. 2, pp. 101–118).

3 For details, see Gavrilov E.V. *Evolyutsioniruyushchii kharakter praktiki Evropeiskogo suda po pravam cheloveka o kompensatsii nematerialnogo vreda yuridicheskim litsam* [The Evolving Nature of the Case Law of the European Court of Human Rights on the Compensation of Immaterial Damage to Legal Entities] // *Arbitrazhniye spory*, 2018, No. 2, pp. 99–117. For instance, in its judgment rendered in the case of *the Freedom and Democracy Party (ÖZDEP) vs Turkey* (Application No. 23885/94, Judgment of 8 December 1999), the ECHR concluded that legal entities may suffer *dommage moral* through the moral harm done to their employees, founders and managers. The Court then changed its approach so that its judgment rendered in the case of *Comingersoll S.A. vs Portugal* (Application No. 35382/97, Judgment of 6 April 2000) found that companies may suffer non-pecuniary losses due to a damage to their business reputation resulting from actions or omissions to act by the government. In terms of perception of the ECHR case law by Russian courts, it is interesting to review case No. A40-97503/2016 where the claimant relied on the aforementioned judgment in the case of *Comingersoll S.A. vs Portugal* (see the Moscow City Arbitration Court Order dated 19 December 2016, the Ninth Arbitration Appellate Court Order dated 13 March 2017 and the Moscow Circuit Arbitration Court Order dated 27 June 2017).

4 RF Constitutional Court Ruling No. 508-O dated 4 December 2003 "On the Dismissal of the Complaint Filed by Mr Vladimir Arkadievich Shlafman for the Alleged Infringement of His Constitutional Rights by Article 152.7 of the Civil Code of the Russian Federation" // ConsultantPlus Law Information System.

5 See RF Supreme Arbitration Court Resolution No. 16140/05 dated 23 May 2006 which was passed in case No. 5-70/04 and West-Siberian Circuit Federal Arbitration Court Order No. F04-185/2007 (210-A46-11) dated 31 January 2008 which was issued in case No. A46-5-70/04.

to reputational damage.[1] In 2013, it was finally determined (by Federal Law No. 142-FZ dated 2 July 2013 "On Amendments to Subsection 3 of Section I of Part One of the Civil Code of the Russian Federation") that legal entities may not suffer moral harm.

It should be noted that the existing legal literature provides virtually no reasoning as to how to calculate losses caused by reputational damage, because such penalty may not be considered as part of those liabilities in tort assuming pecuniary damage even though some authors allow such equation.[2]

In our opinion, losses in this case should be determined pursuant to Article 15 of the Civil Code of the Russian Federation[3] and the communication of information detrimental to the business image of a victim would primarily result in a loss of profit from frustrated projects, acquisitions and carrier expectations.[4] Ideally, unlike moral harm, losses in this case should not be deemed to play any morally-supporting or compensatory role. *De rigore juris*, the principle of full compensation should apply in this case.

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1 See, e.g., the North-Western Circuit Federal Arbitration Court Order dated 21 August 2007 which was issued in case No. A56-50637/2005, providing that: "The appealer's suggestion that the proceedings in this case should be terminated is unsound as the clarified claims do not show the claimant changed the subject matter of its claim, which remained the same – recovery of a monetary compensation for the damage caused to the claimant's business reputation or, in other words, moral harm." In its orders issued in other cases, the same Court stated, with reference to Clause 5 of Resolution No. 10, that "if harm is done to a legal entity's business reputation, the provisions concerning the payment of a compensation may be applied by analogy to that payable for moral harm done to an individual under Articles 151 and 1101 of the Civil Code of the Russian Federation" (see North-Western Circuit Federal Arbitration Court Order No. F07-3454/2014 dated 10 June 2014 which was issued in case No. A05-9627/2013 and the North-Western Circuit Federal Arbitration Court Order dated 10 July 2013 which was issued in case No. A56-42664/2012). We would like to note that, in our opinion, Article 1101 of the Civil Code of the Russian Federation deals with losses.

2 See, e.g., Gavrilov, E.V. *Nasledie praktiki VAS RF i noveishaya praktika VS RF o kompensatsii nematerialnogo (reputatsionnogo) vreda yuridicheskim litsam* [The Legacy of the Case Law of the Supreme Arbitration Court of the Russian Federation and the Newest Case Law of the Supreme Court of the Russian Federation Concerning the Compensation of Immaterial (Reputational) Damage to Legal Entities] // *Arbitrazhniye spory*, 2017, No. 4, p. 109.

3 The RF Supreme Arbitration Court agreed with us in its Resolution No. 2183/09 dated 9 July 2009 which was passed in case No. A40-7356/08-22-53. The same opinion was also expressed in RF Supreme Arbitration Court Resolution No. VAS-9565/12 dated 6 September 2012 which was passed in case No. A55-14394/2011, East-Siberian Circuit Federal Arbitration Court Order No. F02-595/2015 dated 11 March 2015 which was issued in case No. A33-7716/2014, the Volga Circuit Federal Arbitration Court Order dated 12 May 2012 which was issued in case No. A55-14394/2011, Ninth Arbitration Appellate Court Order No. 09AP-59187/2015 dated 4 March 2016 which was issued in case No. A40-211797/14, Eleventh Arbitration Appellate Court Order No. 11AP-2842/2016 dated 25 March 2016 which was issued in case No. A49-10535/2015, and the Third Arbitration Appellate Court Order dated 13 November 2015 which was issued in case No. A33-5001/2015.

4 However, that does not boil down to any non-pecuniary damage that becomes apparent, in particular, as the legal entity loses its positive business acumen as perceived by the public and professional community and its competitiveness and becomes no longer able to plan its business. We agree only in part with A.M. Erdelevsky and K.I. Sklovsky who equate all adverse effects of damage to a company's reputation to losses in their classic meaning; anyway, such losses should be determined in a different way: first of all, these are future costs, and any lost profit may only be part of them if obviously associated therewith (see Erdelevsky, A.M. *O moralnom i "reputatsionnom" vrede v svete izmenenii Grazhdanskogo kodeksa RF* [On Moral and "Reputational" Damage in the Light of Amendments to the Civil Code of the Russian Federation] // *Khozyaistvo i parvo*, 2017, No. 2, p. 101; and Sklovsky, K.I. *Povsednevnaya tsivilistika* [Everyday Civil Law]. M.: Statut, 2017, pp. 118-120). The opposite opinion is expressed by S.A. Kirakosyan, E.S. Emelina, N.N. Parygina and E.V. Gavrilov (see Kirakosyan, S.A., Emelina, E.S. *Reputatsionnyi vred yuridicheskogo litsa: osobennosti dokazyvaniya i sudebnaya praktika* [Reputational Damage of a Legal Entity: Features of Evidence and Judicial Practice] // Bulletin of Arbitration Case Law, 2017, No. 2, pp. 21-22; Parygina, N.N. *Zashchita prava na delovuyu reputatsiyu yuridicheskikh lits i individualnykh predprinimatelei po grazhdanskomu zakonodatelstvu Rossiiskoi Federatsii: Dis. … kand. yurid. nauk* [Protection of the Right to Business Reputation of Legal Entities and Individual Entrepreneurs under the Civil Legislation of the Russian Federation: Thesis for a Candidate Degree in Law Sciences]. Omsk, 2017, p. 146; and Gavrilov, E.V. *Nasledie praktiki VAS RF i noveishaya praktika VS RF o kompensatsii nematerialnogo (reputatsionnogo) vreda yuridicheskim litsam* [The Legacy of the Case Law of the Supreme Arbitration Court of the Russian Federation and the Newest Case Law of the Supreme Court of the Russian Federation Concerning the Compensation of Immaterial (Reputational) Damage to Legal Entities] // *Arbitrazhniye spory*, 2017, No. 4, p. 113). Mr Gavrilov asserts that while defamation not always results in losses, non-pecuniary damages are obvious in this case and should be compensated under certain conditions.

However, we may not rule out the relativeness of that principle. If a media rebuttal is required to counteract a harmful publication, the related expenses could be fairly called "costs to restore the infringed rights". By 2008, experts of the Supreme Arbitration Court of the Russian Federation had prepared several draft Plenary Resolutions providing for compensation of non-pecuniary damages incurred by business entities. Those drafts, however, have never been adopted – mainly due to the reluctance of the civil lawyers' community to accept that concept.[1]

According to the up-to-date position taken by the Russian supreme judicial authority, it is up to a claimant to prove that such claimant has a well-established reputation in a business area.[2] In addition, the victim should substantiate not only the alleged adverse effects resulting from the communication of discrediting information but also the alleged loss of trust and image devaluation.[3] Furthermore, the claimant has to prove that the infringement of its rights was material and no other legal remedy would allow effectively restoring those rights.[4] Thus, according to some scholars, the approach set out in Clause 21 of Russian Federation Supreme Court Case Law Review No. 1 (2017) effectively equates non-pecuniary damage to losses.[5] That is why G.M. Reznik called it a "funeral" of reputational damage.[6] Nevertheless, non-pecuniary damages to legal entities as a remedy against infringement of their rights may well be recognised as undoubtedly admissible in the future. It would be difficult to value damage to one's reputation in terms of money[7] – in contrast to deprivation of pecuniary benefits that can be measured based on the actual property value as of the date of such deprivation. That said, said damage

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1 For details, see Gavrilov, E.V. *Nasledie praktiki VAS RF i noveishaya praktika VS RF o kompensatsii nematerialnogo (reputatsionnogo) vreda yuridicheskim litsam* [The Legacy of the Case Law of the Supreme Arbitration Court of the Russian Federation and the Newest Case Law of the Supreme Court of the Russian Federation Concerning the Compensation of Immaterial (Reputational) Damage to Legal Entities] // *Arbitrazhniye spory*, 2017, No. 4, pp. 101-118.

2 See RF Supreme Arbitration Court Presidium Resolution No. 17528/11 of 17 July 2012 passed in case No. A45-22134/2010 and clause 21 of Russian Federation Supreme Court Case Law Review No. 1 (2017). The approach taken by the RF Supreme Court to the requirement to prove damage to one's business reputation has already become well established and is embodied, *inter alia*, in its newer rulings (see RF Supreme Court Rulings No. 305-ES18-21841 of 26 December 2018 issued in case No. A40-40306/2017, No. 301-ES16-8279 of 11 August 2017 issued in case No. A17-5788/2014 and No. 306-ES17-7583 of 27 July 2017 issued in case No. A57-29630/2015).

3 See clause 21 of Russian Federation Supreme Court Case Law Review No. 1 (2017); RF Supreme Court Ruling No. 307-ES16-8923 of 18 November 2016 issued in case No. A56-58502/2015; and RF Supreme Arbitration Court Presidium Resolution No. 17528/11 of 17 July 2012 passed in case No. A45-22134/2010.

4 See clause 21 of Russian Federation Supreme Court Case Law Review No. 1 (2017) and RF Supreme Court Ruling No. 307-ES16-8923 of 18 November 2016 issued in case No. A56-58502/2015. According to the North-Western Circuit Arbitration Court, "for the right to claim losses caused by impairment of business reputation to be recognised as held by [the claimant]… the latter has submitted no evidence showing that the information disseminated by the defendant has entailed the effects resulting in [its] financial losses incurred in the amount claimed" (North-Western Circuit Arbitration Court Order No. F07-8111/2017 of 11 August 2017 issued in case No. A56-3154/2014).

5 For details, see Gavrilov, E.V. *Nasledie praktiki VAS RF i noveishaya praktika VS RF o kompensatsii nematerialnogo (reputatsionnogo) vreda yuridicheskim litsam* [The Legacy of the Case Law of the Supreme Arbitration Court of the Russian Federation and the Newest Case Law of the Supreme Court of the Russian Federation Concerning the Compensation of Immaterial (Reputational) Damage to Legal Entities] // *Arbitrazhniye spory*, 2017, No. 4, p. 118. The author believes the Supreme Court of the Russian Federation in its opinion in question formalized a singular method of protection of legal entities against defamation, which in fact constitutes a compensation for any proven essential impairment of their business reputation.

6 *Opasniye slova: fakty i otsenki. O slozhnikh delakh po zaschite chesti, dostoinstva i delovoi reputatsii (vystuplenie vitse-prezidenta FPA G.M. Reznika)* [Dangerous Words: Facts and Assessments. On Complex Cases Concerning Claims to Protect Honour, Dignity and Business Reputation (speech by G.M. Reznik, Vice President of the Federal Bar Association)] // Bulletin of the Federal Bar Association, 2017, No. 2, p. 209.

7 For example, clause 14 of the Practice Direction provides that "it is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law."

also takes the form of costs "to be borne" by the creditor (according to Article 15 of the Civil Code of the Russian Federation).

The perception of a legal entity that reflects the objectively formed, well-established views of the professional community towards proper conduct and business acumen of an average economic agent has a direct impact on the company's capabilities. According to Prof. Ya.M. Magaziner, a talented Soviet scholar, while "risk is nothing else but potential evil", chance is something opposite: it promises a certain probability of benefit rather than evil.[1] So, in relation to one's impaired reputation, while it would be easier to determine a lost profit or lost opportunities, the requirement of causality must always be met. Meanwhile, any direct costs to restore one's business image may raise doubts if that image is subject to further impairment. However, as discussed above, future costs are those losses revealing themselves most explicitly. They form part of actual damages (pursuant to Article 15 of the Civil Code of the Russian Federation) and constitute the essence of "reputational damage" as a non-legislative but doctrinal concept.

4. Losses (as per Article 1082 of the Civil Code of the Russian Federation)

So far, we have seen no commentaries asserting that actual damages or lost profits may be awarded instead of claimed moral harm. However, if read literally, Article 1082 of the Civil Code of the Russian Federation does allow recovering losses instead of such compensation as the provisions of Para. 1 ("General Terms of Compensation of Harm") of Chapter 59 also apply to Para. 4. Article 1082 of the Civil Code of the Russian Federation enables us to conclude that losses may be substituted for "harm done to the personality… of an individual" (as per Article 1064.1 of the Civil Code of the Russian Federation). Moral sufferings entail an impairment of non-pecuniary benefits, including such important ones as dignity,[2] health and life. That constitutes a legal cause for claiming a compensation.

So, according to our interpretation of law, the communication of discrediting information and the infringement of consumer rights entitle the victim to claim damages and lost profits instead of moral harm. However, any loss of or damage to properties and pecuniary benefits caused by the physical and moral sufferings stemming from the impact of sources of increased danger, imprisonment, etc. should give the green light for claiming compensations for the actual damages resulting from the loss of business opportunities, etc.

If, by analogy, due only to the continuing anguish of mind caused by his or her illegal detention, a person had to close his or her workshops generating a transparent taxable income constituting the amount of the lost profit in the form of expected net profits, then such person has certainly incurred losses and the ECHR will apply an annual ten-percent indexation when calculating such losses.[3]

The Russian legislators have designated compensation of moral harm as a special legal remedy along with recovery of loses and a default interest as listed in Article 12 of the Civil Code of the Russian Federation. That list mentions no "usual" harm – a fact that, at first sight, enables us to conclude that

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1 Magaziner, Ya.M. *Obshchaya teoriya prava na osnove sovetskogo zakonodatelstva* [General Theory of Law Based on the Soviet Legislation] / Magaziner Ya.M. *Izbrannye trudy po obshchei teorii prava* [Selected Works on the General Theory of Law] / Ed. by A.K. Kravtsov. St. Petersburg, 2006, p. 112.

2 Personal dignity is a purely subjective characteristic. N.S. Malein defined it as an "internal self-assessment by a person of his or her qualities, abilities, attitudes and social significance" (Malein, N.S. *Okhrana prav lichnosti sovetskim zakonodatelstvom* [The Protection of Individual Rights by Soviet Law]. M.: Nauka, 1985, p. 32).

3 For details, see Egorov V.V. *Vzyskanie ubytkov v forme upushchennoi vygody: praktika Evropeiskogo suda po pravam cheloveka i arbitrazhnykh sudov RF* [Recovery of Damages in the Form of Lost Profits: The Case Law of the European Court of Human Rights and the Arbitration Courts of the Russian Federation] // *Arbitrazhnaya praktika*, 2009, No. 8, p. 62.

this concept is identical to losses. However, we believe that conclusion would be wrong. While compensation of harm is not on the open-ended list contained in Article 12, it is still mentioned in the Civil Code of the Russian Federation – that is, first of all, replacement in kind or fixing of damages (Article 1064). Losses may be recovered with reference to Article 15.2 of the Civil Code of the Russian Federation in accordance with its Article 1082 – and that constitutes another protective instrument, which, nevertheless, differs from compensation for losses or damages under Chapter 59 of the Civil Code of the Russian Federation.

It is important to note that, when determining the value of moral sufferings, a court must take into account the extent of guilt of the harm-doer (according to Article 1101 of the Civil Code of the Russian Federation). That wording supposes a closer causal relationship if there is an intention to do harm than where there is a slight negligence when a non-pecuniary damage is to be recovered. However, the first paragraph of Article 1101.2 of the Civil Code of the Russian Federation contains the following wording: "… where guilt constitutes a cause for recovering a compensation for harm…" It appears that if damage to a one's health entailing his or her death was intentionally caused by a car (as a source of increased danger) and the accident occurred by chance due to low visibility conditions, the extent of guilt does not matter. Obviously, despite the fact that the first episode was a murder and the second one was just a tragic combination of circumstances, the amount of the compensation payable will be identical in both cases. In the event of an intentionally poor performance of public catering services resulting in damage to one's health, the amount of the compensation would depend, after all, on the degree of the violator's impoliteness (as per the second paragraph of Article 151 and Article 1101.2 of the Civil Code of the Russian Federation). The first example clearly shows that the extent of guilt is a very important factor for the purposes of both determination of the amount of liability and revelation of the causal relationship between losses and harm. The fact that the obligations arising from moral harm do not require guilt has a destructive impact on the concept in general (this matter will be discussed in more detail below).

5. Comparison

The compensation of moral harm as a legal remedy was not based on dogmatic assertions. On the contrary, it developed along with the evolution of legal science in line with public needs and time. Moreover, despite the natural unification of understanding of legal concepts, especially fundamental ones such as liability, contract, obligation, transaction, etc., there is still a considerable difference in legal treatment of compensation of moral harm between Russian laws and certain international laws and treaties incorporating all modern ideas of European civil law such as the Principles of European Contract Law (the "PECL"), the Principles of European Tort Law (the "PETL"), the Draft Common Frame of Reference (the "DCFR"), and the UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles"). In all of those documents, moral harm *per se* is part of the so-called "non-economic" or "non-pecuniary" losses or damages. They constitute a universal component of the recoverable damage (according to Articles III.–3:701(3) and VI.–2:101(1) of the DCFR, Article 9:501(2)(a) of the PECL, and Article 10:301(1) of the PETL). In Russian civil law, they constitute a kind of harm that is done to a person whose non-proprietary rights or, where specially prescribed by law, other subjective rights are infringed (pursuant to Articles 151 and 999 through 1001 of the Civil Code of the Russian Federation) (this matter will be discussed in more detail below).

The Russian legal doctrine's special attitude towards the term in question manifested itself in the fact that when Article 7.4.2 (*Full Compensation*) of the UNIDROIT Principles was translated into Russian in 2003, non-economic losses were said to include moral harm, even though the English version contained no such concept. Instead, the latter stated that non-economic losses include, *inter alia*, physical sufferings and emotional distresses, which is a wider definition. The DCFR (in its Article VI.–2:101(4)(b)) also provides that non-economic losses shall include impairment of quality of life. Hence, the aforementioned international statutes set a much higher standard of protection than the Russian laws. And the difference in the scope of meanings is not the main point.

The infliction of harm or tort is supposed to entail effects with a closer connection between the destructive act and the resulting damage. There is a close-ended list of only three events where moral harm can be compensated without *culpa*. And, as discussed above, those provisions act to persuade judges that in the event of sufferings from pains or emotional distresses caused, e.g., by baiting, they should award monetary satisfaction in the minimum allowable amount. Obviously, their logic is that one can hardly imagine the extent of another's sufferings or indispositions. And in the context of tough directive unification of the case law, the smallest possible amount of compensation will be less vulnerable during the appeal process.

Adversariality and proactivity in proving the facts parties rely on in their pleadings are fundamental concepts of civil litigation (according to Article 65.1 of the Arbitration Procedure Code of the Russian Federation and Article 56.1 of the Civil Procedure Code of the Russian Federation). And courts rely on those principles when suggesting that victims should prove the alleged sufferings.

As mentioned above, according to the latest European private codification, non-pecuniary losses are equivalent to moral harm as part of damages recoverable in tort and losses caused by breach of contract. Therefore, the very concept of losses as a measure of infringement of subjective rights is different. Moreover, the replacement value of personal rights, which are called "protected interests" in the PETL (Article 2:102) and are related with life, bodily or mental integrity, human dignity and liberty, assumes the practical use of presumptions and assessments resulting in material compensations for non-pecuniary damages. The DCFR clarifies (in its Articles VI.–2:203 and 2:204) that it is personal injury *per se* rather than the extent of sufferings caused by tort that constitutes a cause for recovering a compensation.

Suffering without any pecuniary effects for a person is the main criterion of moral harm in Russia. That is a necessary condition, so if any of the aforementioned personal non-proprietary rights are infringed without any suffering or emotional distress, there is nothing to award – that is the logic behind this legal treatment. Because no personal harm means no infringed right.

Let us imagine an unlawful detention that causes no distress due to the certain personal peculiarities of the detainee who is, say, a former prisoner. The Civil Code of the Russian Federation expressly obliges courts to take into account the personal peculiarities of claimants as a major criterion. Under European law, that is the so-called non-pecuniary damage to an interest related to the right to freedom, so its restriction would suffice to entail liability irrespective of whether the person had suffered or not. Under Russian law, moral harm may only be compensated if non-proprietary benefits granted by civil law get impaired or, where specifically prescribed by law, other subjective rights are infringed. Accordingly, you will have to substantiate to a Russian court your allegations that the defendant's conduct was improper, there was a causal relationship between the defendant's behaviour and your sufferings and that your sufferings really took or are likely to take place.

The interpretation of physical and moral sufferings as a result of intentional encroachments on an individual and as an effect of any improper conduct entailing multilateral liability, including that for a potential non-pecuniary damage, has led to a situation where the numerous or even massive real-life cases of physical impact fall under criminal law in the first place. Cases of hooliganism or bodily injury are usually investigated for a long time, and potential claims for the accompanying sufferings tend to have a criminal context, with punishment of the offender by the government being the key message. In contrast, moral harm is a minor and dependent thing. In addition, of great importance is one rarely mentioned fact that the difference in understanding of guilt the extent of which must be taken into consideration by a court when awarding a compensation (according to Article 151 of the Civil Code of the Russian Federation).

Civil law, as well as criminal law, differentiates between intention and neglection. Under civil law, guilt means a failure to observe a rule of law, whether intentionally or through legal negligence. Under criminal law, guilt assumes a person's desire to cause a criminal effect or his or her complacency that

such effect will never occur. In criminal proceedings, a scrupulous research into the premises of civil liability will be replaced by efforts to find out whether the criminal wanted, or at least showed criminal negligence by allowing, the victim to experience the sufferings or indispositions.

Petty negligence would hardly entail a large compensation. According to the new understanding that is now becoming well established, guilt is a *post factum* assessment of one's conduct that is practised when the harmful event has already occurred, and the extent to which the defendant tried to observe the applicable rule of law appears to be the most important factor of the causal relationship in the first place. In proceedings, petty negligence borders on accident. As reasonably mentioned in legal literature, moral harm is irreparable and may only be compensated. Thus, no correlation is required between negative effect and retaliatory measures.

The amount of satisfaction depends on two factors: the extent of guilt and the victim's personal peculiarities. Needless to say, if somebody intentionally causes sufferings and indispositions to a subtle person (such as a woman, a child or an elderly person), the harm-doer should be ordered to pay a large compensation. Russian courts, who are currently dealing with over 15 million civil cases, took a uniform approach to satisfaction of claims by tending to award only nominal amounts for moral harm. They usually cut the amounts claimed for sufferings by half at least, thereby demonstrating their absolute reluctance to earnestly look into the claims which, according to the legislators, must be decided on a case-to-case basis.

The concept of moral harm is the most important dispute regulator in general and supports the canonical approach of highly civilised justice. The task of law is to thoroughly and efficiently counteract any encroachment on a person. As appears from both modern and historical legal literature, law-making efforts in the field of moral harm are based on two concepts. The first one is about peace of mind and serene existence that help a person unlock his or her versatility and integrity as independent values to be protected. Therefore, any intrusion, anxiety or deformation of one's inner world would be enough for a legal intervention in the form of compensation for the displeasure experienced, whatever the life episode during which it occurs. The second theory equals moral harm to physical and moral sufferings arising only when subjective (primarily personal) and proprietary (only in specifically prescribed cases) rights are infringed.

Where a house containing family paintings and photos is lost as a result of tort and fire, there is no doubt about the owner's distress as he has lost his relics and a source of his peace of mind and harmony, so, according to the first theory, he is entitled to a financial compensation from the person responsible for the fire plus a payment for the non-economic losses incurred. However, according to another understanding, moral harm resulting from the encroachment on pecuniary benefits and, directly, on personality and health, bodily injuries causing physical pain, and slander resulting in a loss of benefits should only be awarded where expressly required by law. The second theory stipulates that the owner should get nothing in excess of the value of his properties. Nevertheless, the legislators used the concept in question to provide for the possibility to recover the maximum harm done as by an infringement of not only pecuniary but also usual civil rights resulting from low-quality consumer services or an unlawful detention.

We assume that the first doctrine constitutes the essence of the European law where the universal legal remedy also incorporates compensation for an unlawful impact on personality, which impact now consists not only in the infliction of physical or mental sufferings but also in the impairment of the quality of life or the communication of information affecting one's honour *per se* instead of the mandatory clarification of the effect of the impairment or restriction of freedom that usually causes sufferings rather than based on the persuasiveness of the supporting evidence.

As discussed above, according to Article VI.–2:203 of the DCFR, any encroachment on honour, dignity or privacy "as such", i.e. irrespective of the extent of the resulting sufferings, will cause a legally relevant

damage, including, but not limited to, non-economic losses. The same rule applies if a person communicates any information about another person that the communicator knows or could reasonably be expected to know is incorrect, even if the need to substantiate the reputational devaluation is not expressly stated: in that case, a legally relevant damage is deemed to occur (as per Article VI.–2:204 of the DCFR).

As mentioned above, the Russian legislators have adopted laws approaching the second theory that moral harm is essentially associated with physical and mental sufferings. This conclusion is based on the fact that the applicable rule of law is Chapter 59 of the Civil Code of the Russian Federation, which requires the victim to prove his or her sufferings. Even when the appearance of a person is disfigured by a car accident and the resulting personal impairment is absolutely obvious, Russian courts tend to recover moral harm in a small, if not zero, amount.

Under Russian law, the communication of discrediting information does not constitute a tort: unlike moral harm, tort is not mentioned in Chapter 59 of the Civil Code of the Russian Federation and will only entail the recovery of losses if the reputational damage has been proved. The following question appears to be very interesting to us: If the communication of any information has inflicted a considerable loss of profit on a prominent business person or, what is more, has resulted in the communicator's enrichment (by winning a tender, etc.), should the communicator become liable without guilt? The literal interpretation of the Civil Code of the Russian Federation prompts the affirmative answer. Moreover, in this case, the moral harm must be recovered without guilt (pursuant to Article 1101.2 of the Civil Code of the Russian Federation) along with a source of increased danger and measures to be taken under criminal law.

However, we believe guilt as a particular instance of unlawfulness should be a factor to consider when deciding whether to award a compensation. The communication of any harmful information, even without neglection, may entail no pecuniary consequences under law. In the same situation, Article VI.–2:204 of the ECHR provides that, as mentioned above, the communicator will become liable if he or she knew or could reasonably be expected to know that the information so communicated was incorrect.

6. Guilt

The concept of moral harm attracts keen interest of legal scholars. And we have not doubt that it will be developed further. The key provisions of the Civil Code of the Russian Federation (Articles 151 and 1099 through 1101) require at least the following two conditions to be met to recover moral harm: moral or physical sufferings such as pain, physical ailment or distress; and encroachment on a non-pecuniary benefit such as honour, good name, life, health, reputation, freedom of movement, choice of seat or residence, authorship, privacy, inviolability of home, and personal and family secrets, as well as infringement of proprietary rights. Thus, in the literal sense, only an attempt to cause a bodily injury or a fight would legitimise the compensation of moral harm, provided that the event has caused sufferings.

However, as stated above, those authorities responsible for resolving disputes in Russia never take such claims seriously. They have tended to always award a small compensation even for a property-related violation in a broad sense of the word and only where such compensation is prescribed by law. In particular, these include the results of administrative or criminal prosecutions restricting the claimant's liberty, failures to meet legitimate consumer expectations, irreparable deterioration of health, encroachment on reputation, etc.

It turns out that so far Russian judicial authorities have never accepted claims for any considerable "pure" moral harm. That legal remedy is specially mentioned in the tenth paragraph of Article 12 of the Civil Code of the Russian Federation. It appears that in reality it has no independent character but only

serves as a method of protection in addition to such remedies as recovery of losses, compensation of harm, specific performance, restoration of pre-infringement condition, etc.

Another point of discrepancy among law, case law and everyday life is the list of conditions under which obligations to compensate moral harm arise. Unlike damage to property or health, moral harm may not always be measured, cannot be proved and is not based on a usual legal algorithm. The claimant can always argue that he or she has undergone heavy sufferings or a serious illness. Therefore, it would be unreasonable to impose liability for moral damage without guilt for the following two independent reasons.

Any compensation payable for distresses and illnesses has always the nature of a penalty as there is nothing to restore in those cases and monetary compensations are due and payable for encroachments on or infringements of inalienable non-pecuniary benefits that will eventually remain in place. This punitive instrument of civil law appears to be used always, even in the absence of guilt.

There is no unlawfulness without *culpa*, and any alternative opinion would suffer from a defect of legal logic. Any abuse of or the very abstract possibility to recover a no-guilt compensation, e.g., for an unlawful administrative arrest or mistakes made by law enforcement authorities due to their unawareness of the key facts, will generate a stream of similar claims if the value in question is considerable. That is why we've got what we've got today – critically low amounts of compensation directly humiliating claimants. Being aware of that, honest claimants will never raise such claims – that's exactly what they do now. The concept of compensations for moral harm will not evolve due to the lack of the necessary critical mass of such cases as a basis for a substantive summary of the supreme judicial authority's case law that would give an impetus to the further review aimed at determining the conditions under which human distresses should inevitably entail financial penalties for the offenders.

7. Conclusions

As discussed above, an encroachment on personality in Europe is supposed to be considered as part of non-economic or non-pecuniary damages or, in the event of contractual relations, losses. That consideration gives rise to a presumption (that would be difficult to refute), rather than to an assumption of the need to prove the existence and extent, of sufferings. As mentioned above, Russian law provides that moral harm is a kind of personal harm that is to be proved, as generally prescribed by the Civil Code of the Russian Federation. However, moral harm, as well as any other harm, may be replaced, at the discretion of a court, with losses (pursuant to Article 1082 of the Civil Code of the Russian Federation) – e.g., in a reasonable amount thereof (according to Article 393.5 of the Civil Code of the Russian Federation).

Should the victim be recognised to be free to claim losses instead of moral sufferings as a more troublesome but stronger remedy, that would release the lock on claims for moral harm as such and reanimate the concept. We believe if that idea gets support from both the legal doctrine and the case law, the institution of moral harm will become more efficient.

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