
CASE LAW REVIEW

Media and Moral Damage

LIKA SAJAIA*

I. Introduction

Monetary compensation for damages is one of the important innovations of the Civil Code. Soviet legislation did not acknowledge the possibility of financial compensation for moral and ethical damages. Compensation for moral damage dates back to Rome. According to Roman law, certain compensation, i.e. some fixed amount, was to be paid for assault. Roman nobles used to walk on the central square of the city and slap everyone, whom they did not like. The nobles were followed by a slave with a purse and the latter used to pay the amount, fixed by law for each strike. As a result there was no claimant.¹

In Georgia, politicians have played the major role in the development of judicial practice in the field of compensation for moral damage. They familiarised themselves with this novelty best of all, and fixed a rather high price for their emotions and spiritual-mental distress. Little by little judicial practice has become more like a battle between the politicians and media. The moral torments of ordinary Georgian citizens seldom became the subject of court proceedings. The reason might have been the lack of awareness or the absence of hope that somebody would have compensated their damage.

Just about three years ago, ordinary Georgian citizens started to make claims for moral damages. Their rights have been violated mainly by the media. The above situation gives rise to a problem – moral damages may cause unjustified restriction of freedom of the press. In the resolution of a similar case, the main problem is the attainment of a balance between freedom of expression and respect for an individual's private life. Moreover, the freedom of speech and media are of particular importance in the process of building an independent state.

The Supreme Court Decision 3k-1483-02² is interesting for several reasons. Firstly, because moral damages were claimed not by a person, who was well-known to society (as frequently happens in Georgian judicial practice), but by an ordinary citizen. And secondly, the injured party claimed moral damages for the violation of his right to his own photo image, which is also uncommon for Georgian judicial practice.

* The Tbilisi State University Law Faculty, Department of International Relations and Strategic Development.

¹ *Mayne*, A Treatise on Damages, 1909, 53.

² Decisions of the Supreme Court of Georgia on Civil Entrepreneurial and Bankruptcy Cases, 2003, 6.

II. Circumstances of the Case

The plaintiff filed an action against one of the large-edition publications and sought compensation for moral damage in the amount of 5000 GEL based on the following: a neighbour told him that his photo was published in one of the newspapers without his prior consent for the illustration of one of its articles. The article gave an overview of the history of thyroid enlargement as a disease. It called for the readers to use the iodised salt instead of ordinary salt. The plaintiff's photo, with a tumour in the afflicted neck area was attached as an illustration of the grave consequences of the disease.

The plaintiff considered that publication of the photo without his consent, moreover of such an offensive one, violated his rights guaranteed by law. The defendant rejected the claim on the grounds that its objective was not the publication of the photo of this plaintiff in particular. Furthermore, the eyes of person on the published photo were covered, which precluded the defendant's liability and thus respectively, its financial responsibility.

The case was considered by the Tbilisi Vake-Saburtalo District Court. The Court did not recognise the claim under its decision of 14 December 2001. The Court considered that the covering of the plaintiff's eyes in the photo, published in the newspaper excluded any intention by the defendant to cause harm to the plaintiff. The plaintiff appealed the decision of the Tbilisi Vake-Saburtalo District Court.

III. Assessment and Qualification of the Tbilisi Circuit Court

In its decision of October 16, 2002, the Chamber for Civil, Entrepreneurial and Bankruptcy Cases of the Tbilisi Circuit Court partially recognised the appellant's claim, and a judgement of 500 GEL in favour of the appellant was entered against the newspaper.

The Court referred to Article 18 I, II, V, and VI of the Civil Code of Georgia and considered that publication of a persons' image requires his consent, except in those cases provided for by law. Namely, under Article 18 V, a person's consent to the publication of his photo is not required only when "photo-taking" (video recording, etc.) is connected with his public notoriety, the office he holds, the requirements of justice or law enforcement, when the photo-taking (video recording, etc.) has occurred in public, or when the person has received remuneration for posing". As far as none of these circumstances was present in the given case, the person's consent was required. Although the eyes of the plaintiff are covered with black hatches on the photo published in the newspaper, the former was still recognisable due to the very peculiar feature – a tumour in the neck area. The Chamber considered that it did not matter how many people could have recognised the person concerned in the photo. It would have been enough for him to see his diseased image in the newspaper to feel an acute spiritual pain. Although the eyes were covered in the photo, the newspaper should have allowed for the possibility of the injured party to be recognised. The Court presumed that the defendant's liability had been proved, and thus the newspaper was to bear the responsibility for it on the grounds of Article 18 VI, under which an authorised person is entitled to demand non-physical, moral damages in the case of a culpable violation.

The appellant appealed against this decision to the Court of Appeals. The appellant considered that the court had not been prudent in determining the amount of moral damages. In appellant's opinion, the court should have taken account of the economic and social conditions of the appellant when defining the amount of damages. In particular, the fact, that the former's family consisted of 5 persons, none of whom was currently employed, while the defendant was a mass-circulation publication, and thus imposition of the claimed amount (5000 GEL) would not have placed it in a grave financial situation.

The newspaper also appealed against the decision of the Court of Appeals, which was rejected in its ruling of March 19, 2003 of the Supreme Court Chamber for Civil, Entrepreneurial and Bankruptcy Cases, as being inadmissible due to the subject matter of the dispute.

IV. The Supreme Court Motivation

The Supreme Court Chamber for Civil, Entrepreneurial and Bankruptcy Cases examined the case file and considered the appellant's appeal as groundless due to the following circumstances: the Chamber could not uphold the appellant's opinion that the court was to fix the amount of compensation for moral damages with due consideration of the economic situation of the plaintiff. Based on Article 413 I of the Civil Code, under which "monetary compensation for non-physical damages may be claimed in cases, explicitly provided for by law, in terms of reasonable and fair compensation", The Court of Appeals considered, that the defendant was to be assessed damages in the amount of 500 GEL. In its decision the Court gave its grounds for considering the above stated amount as reasonable and fair. Namely, under its decision, in cases provided for by Article 413 I of the Civil Code, a court shall take account of the degree of culpability, the defendant's financial status, as well as factors of deterrence and prevention of in determining the amount of moral damages to be paid, not the economic statuses of the injured party.

The Chamber explained that as far as the damage caused does not have any monetary equivalent, recognition of a defamation claim does not mean the restitution of the violated right, but rather the moral compensation for the physical or spiritual pain caused by the violation. Consequently, for the determination of the amount of damages, the consideration of property status of the violator is not enough, as presumed by the appellant.

Guided by Article 410 of the Code of Civil Procedure,³ the Supreme Court Chamber for Civil, Entrepreneurial and Bankruptcy Cases did not recognise the appellant's appeal.

V. Comments

The court's assessment of the circumstances of the case and the reasoning for its decision are to be analysed from various points of view. Namely, attention must be accorded to the assess-

³ Under Article 410 of the Civil Procedure Code, the appellate court shall not entertain the appeal if: a) there was no violation, provided for by the law; b) the decision of an appellate court is not based on the violation of law.

ment of the defendant's liability, determination of the amount of compensation and the purposes of compensation of moral damages.

1. Liability

It is noteworthy that the case was examined by the courts of three instances, and that each of them understood the existence and the degree of the defendant's liability in its own particular way. At the District Court, the defendant rejected the claim on the grounds that it did not intend the publication of the photo of this plaintiff in particular. In this case, it does not matter whether the violation of the rights of the plaintiff was the intention of the defendant. It is important that the defendant wilfully violated the right of another person and that the injured party was entitled to seek compensation. Had the defendant intended to violate the rights of this particular plaintiff, than the violation would have related to another purpose, and not the existence or degree of culpability of the defendant.

The Tbilisi Vake-Saburtalo District Court did not recognise the claim under its decision of December 14, 2001 based upon the reasoning that covering the eyes of the plaintiff in the photo precluded the culpability of the defendant.

The reason for excluding the existence of liability on these grounds on the part of the court is not clear. There would be no elements of liability, if the person had no desire to commit an offence, or if he could not have imagined that his actions might have violated someone's rights. The covering of the eyes in the photo does not exclude any of these alternatives. As the defendant decided to alter the photo of the injured party in such a manner as not to be recognisable, one can suppose that the former was aware of the unlawfulness of its actions, i.e. it was aware that it was violating the other person's rights and still did not stop.

The defendant's liability is also mentioned in the Supreme Court ruling, although it is quite indistinct in manner. The plaintiff demanded 5000 GEL in compensation for the moral damage caused by the plaintiff, while the Court of Appeals imposed upon the defendant payment of 500 GEL, from which decision the plaintiff appealed. The Supreme Court upheld the decision of the Court of Appeals. Along with some additional factors, the court of highest instance mentioned the gravity of the degree of liability of the defendant as well. However this does not explain why the defendant's culpability was so *de minimis* that it caused a 10-fold reduction in the amount of the judgement. Publication of a photo without consent of the person depicted in it is in any case a violation of the rights of the person concerned. An offence may be aimed at both defaming the person depicted in a photo, as well as use of the photo in advertising, or for additional political or social purposes. In this particular case, the journalist used the photo concerned for visual design of his article, and for the illustration of the ideas conveyed therein. Though he did not intend to injure the person depicted in the photo, this points merely to the purpose of the offence, and not the degree of culpability of the defendant.

An additional interesting aspect is that it is not mentioned anywhere how the defendant managed to get hold of the photo of the plaintiff. The Court should have examined this issue, and thereby the discourse on the culpability of the defendant and its gravity would have been more successful.

2. Determination of the Amount of Compensation

Determination of the amount of compensation is one of the most problematic issues, not only in this specific case, but for the identification of moral damage in general.

The Georgian courts resolve cases involving compensation for moral damages in accordance with a simple and uniform scheme: the court refers to the application of Articles 18 and 413 of the Civil Code, reduces the amount, demanded for the compensation of damage, at least five times, and, most importantly, interprets the requirements of Article 413 rather narrowly and inadequately.

It is worth mentioning that the legislature did not identify what is meant under "reasonable and fair compensation". Such an approach might be good from one point of view, as in the case of moral damage it is rather difficult to measure the acuteness of torment and gravity of negative emotions. Furthermore, the injury sustained, as well as the perception of this damage will vary from case to case. Perhaps this was the reason for lawmakers leaving the determination of the amount of compensation for moral damages to the discretion of the judge. However, it would have been reasonable to assume that the judge's assessment will be biased by legal concepts and principles as well, as by individual perceptions of reasonability and fairness.

The following opinions were expressed in Georgia with respect to the determination of the amount of compensation for moral damages:

"The court must take account of the gravity of physical and moral torment related to individual features of the injured party. Reference to reasonable and fair compensation in Article 413 of the Civil Code implies the due consideration of the gravity of the offender's culpability, depth of the emotions, and individual peculiarities of the injured party";⁴

"When determining the amount of moral damage, the court must take account of both the subjective attitude of the injured party towards such damage, as well as objective circumstances. One such circumstance is the living conditions (official, marital, household, material, health status, age, etc.) of the injured party";⁵

"The compensation itself must be rather voluminous in order it to be used as a sanction for an offence. A person, whose rights were violated, will be satisfied only if he is aware that a sanction truly detrimental to the offender has been imposed".⁶

In the aforementioned case, the plaintiff demanded 5000 GEL as compensation for the injury he sustained. His rationale was based on the fact that he had numerous family members, as well as their social-economic condition. The plaintiff also stated that the defendant was a mass-circulation publication, and thus payment of the demanded amount (5000 GEL) would not have imposed any financial burden on the publication.

⁴ *Chikvashvili*, Moral Damage in Civil Law, 1998, 88.

⁵ *Zoidze*, Commentary to the Civil Code of Georgia, Book Three, 2001, 474.

⁶ *Ninidze*, Commentary to the Civil Code of Georgia, Book One, 1999, 75.

The Supreme Court Chamber explained that recognition of a defamation claim does not mean restitution for damage caused by violation of a right, as the damage caused does not have any monetary equivalent, but rather implies moral compensation for physical or mental pain caused by the violation. The purpose of compensation is the moderation of pain caused by moral injury. The so-called satisfactory purpose of moral damages means the satisfaction of the injured party. If we treat the issue in this light, it may seem that the injured party "assessed" that his pain would be moderated by payment in the amount of 5000 GEL, a sum that the Chamber then reduced by 10 times. It is doubtful that an amount reduced by 10-times would be able to moderate the pain, i.e. that the purpose will not be attained. The injured party feels the moderation of his pain even when the offender is punished not only symbolically, but also when the offender is forced to bear a financial loss.

3. Purposes of Compensation of Moral Damage

In its decision, the Court referred to compensatory, punitive and preventive purposes of compensation for moral damage.

The compensatory purpose implies the satisfaction of the injured party. This, first of all, implies moral satisfaction. However, if satisfaction is effected through the payment of money, and money is a material value, it is impossible not to pay attention to the social-economic status of the injured party when speaking about this function. The judge did not pay attention to the latter situation. The Supreme Court justifies its decision and places it within a framework of fairness and reasonability bases solely on the grounds of the degree of culpability and purposes of punishment. The role of the injured party is never mentioned in the determination of the amount of compensation.

The amount of compensation is easily determined in cases of property damage. In such cases, the property itself is the measure, and the personality of the injured party is of no importance. The scope for moral damages must be found in the personality of the injured party, and thus total ignorance of the conditions of the latter is not reasonable. Such an approach will not lead to the attainment of desirable goals.

The punitive function seeks to influence the behaviour of the offender. When examining this purpose, the legal status of the offender must be taken into account, i.e. the responsibility must be sufficient for the newspaper not to contemplate commission of a similar offence. Will the imposition of a payment of 500 GEL produce such a result? It may happen that no specific photo will be worth 500 GEL for the newspaper. But would not the advertisement of own ideas, opinions, outlooks and their better substantiation be worth a bigger sum? One more interesting aspect, as was mentioned in the article, concerns the use of iodised salt. The court showed no interest in the question as to whether the materials were of an advertising nature. Could it have been that the article was published at the request of a producer or importer of the iodised salt? In our opinion, the clarification of this issue should have influenced the amount of compensation.

And finally, the deterrent function promotes the prevention of violation of human rights by other persons. As mentioned above, Georgian judicial practice allows for the assertion that

moral damage is mainly caused by the media. Thus the preventive purpose of responsibility must be paid particular attention. Although the courts try not to restrict the freedom of the media through their decisions, reduced liability may fail to promote the deterrent function, and the exercise of the freedom of the press may result in the violation of the rights of other persons.

Thus, the court must pay greater attention to the determination of the amount of compensation for moral damage when examining similar cases. Judges must explain according to which grounds, principles and circumstances the imposed amount of damages might be placed within a framework of reasonability and fairness. Only two articles of the Civil Code concern moral damages specifically. When the legislative basis is so limited, judicial practice and elaboration of court decisions must play a decisive role in the inclusion of this field within the sphere of law.