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THE SPECIFICS OF PROVING CAUSING MORAL DAMAGE TO THE EMPLOYEE

Keywords: causal link; employer; expert; individual features; labor relations; presumption of moral damage; psychological examination; victim

ABSTRACT: The article is devoted to causation as one of the main conditions for compensation for moral damage. The specifics of causal link in labor relations are considered and it is established that the theory of direct and indirect causation is the most acceptable from both theoretical and practical perspective for solving the question of its presence or absence. It is proved that an illegal act on the part of the employer should result in moral damage to the latter; if there is no such connection, then, accordingly, the damage to the employee was caused for other reasons, which means that there is no obligation in this legal relationship. Particular attention is paid to primary (direct) and indirect (secondary) moral damage, as moral damage may lie in pain-related experiences or in connection with a disease caused by mental suffering.

The process of proving the fact of moral damage and the existence of a causal link, which is quite specific in the employment relationship, is considered. The employee can prove the existence of moral damage by the following means: 1) written, physical and electronic evidence; 2) expert opinion; 3) testimony.

Some legal practitioners argue that most labor courts today actually apply the presumption of moral damage, but we do not agree with this conclusion, although we insist on enshrining it in Ukrainian legislation. In our opinion, any lawlessness on the part of the employer affects both the employee's mental health, i.e. his (her) self-esteem, self-reliance, attitude to the events taking place in his (her) life, etc., and physical health, i.e. the normal functioning of the body.
It is proved that it is expedient to involve an expert in every case related to compensation for moral damage in labor relations, whose conclusion is important both in the process of proving the fact of moral damage and determining its amount. Only a specialist is able to properly assess the characteristics of the victim’s behavior in problematic situations and the features of his (her) emotional state under certain circumstances.

**INTRODUCTION**

There was no concept of moral damage in labor legislation of Ukraine before the entry into force of the Law of Ukraine “On Labor Protection” (Law of Ukraine No. 2694-XII, 1992). However, the ratified Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force for Ukraine on 11 September 1997, obliged the State to recognize that individual rights and freedoms are priority in the society. Therefore, this was the impetus for the enshrinement of Art. 12 “Compensation for non-pecuniary damage” in the above mentioned Law № 2694-XII, which stipulated that compensation for non-pecuniary damage is paid by the owner if dangerous or harmful working conditions led to moral loss of the victim, disruption of his (her) normal life, require additional efforts to organize his (her) life. Currently, this issue is regulated by Art. 237-1 of the Labor Code of Ukraine.

One of the conditions for liability for moral damage is the existence of a causal link between the wrongful act and moral damage caused. The wrongful act committed must be the main reason that led to the infliction of moral damage. Liability for moral damage arises only when it is established that this damage is a direct consequence of the relevant unlawful conduct. The absence of such a direct causal link means the absence of the corresponding obligation.

The procedure for proving the fact of moral damage and the existence of causation is quite specific, and therefore it is problematic for the victim to collect evidence to establish the existence of moral damage and causal link between illegal acts of the employer and negative consequences for the employee in the form of moral damage. By the way, the issue of evidence is urgent, because any legal act explains how to how to prove any degree of mental suffering.
Certain aspects of compensation for moral damage, such as determining its legal nature, establishing its size, proving the fact of its existence, the conditions for its compensation have been studied by such scholars as: Erdelevskyi, Kapustianskyi, Holubev, Paniukova, Polishchuk, Romovska, Shevtsov and others. However, little attention was paid to the specifics of causation in labor relations, as well as the peculiarities of its proof, which led to the need for this investigation.

Therefore, the purpose of this article is to study the features of establishing a causal link between employer misconduct and moral damage caused to the employee, as well as to make proposals to collect evidence to establish the existence and extent of moral damage.

To achieve this goal, the following general scientific and special legal methods are used. The method of hermeneutics is applied in the process of studying the texts of relevant legislative acts and the views of scientists on the specifics of causal link between the wrongful act and moral damage caused to the employee.

The use of formal and logical method allows to analyze the norms of the current labor and civil law legislation and the practice of its application in the relations under consideration.

Dogmatic method is applied to study the terms “causal link”, “moral damage”, “presumption of moral damage”, “evidence”, “individual features of a person”.

System and structural method allows to present the classification of evidence, which may be submitted by the employee to confirm the fact of causing moral and physical suffering by the employer.

The method of generalization helps to draw relevant conclusions and suggestions.

**SPECIFICS OF CAUSAL LINK IN LABOR RELATIONS**

Currently, the issue of compensation for moral damage to the employee is regulated by Art. 237-1 of the Labor Code of Ukraine (Law of Ukraine No. 322-VIII, 1971), according to which compensation for moral damage by the owner or his authorized body to the employee is carried out if the
violation of his (her) legal rights led to moral suffering, loss of normal life ties and require additional efforts to organize his (her) life.

As derived from the provisions of the article, compensation for moral damage to the employee is possible in the presence of certain conditions provided by the law, which are common in all cases of moral damage: 1) the fact of infliction (presence) of moral damage; 2) illegality of the employer’s actions; 3) the existence of a causal link between the wrongful act of the employer and moral damage caused to the employee; 4) the fault of the employer.

As one can see, one of the conditions for liability for moral damage is the existence of a causal link between the wrongful act and moral damage caused. An illegal act on the part of the employer – failure to fulfill its obligations to ensure the legal labor rights of the employee or violation of the legal labor rights of the employee – should result in moral damage caused to the latter, i.e. lead to moral suffering, loss of normal life ties or require additional effort to organize his (her) life. If there is no such connection, then, accordingly, the damage to the employee was caused for other reasons, which means that there is no obligation in labor relationship.

According to Erdelevskyi (2004, p. 93) the existence of causal link between an illegal act and moral damage suggests that illegal act should be a necessary condition for the occurrence of negative consequences in the form of physical or moral suffering. An illegal act should be the main reason that inevitably entails the infliction of moral damage.

In our opinion, the theory of direct and indirect causation is the most acceptable for solving the question of the presence or absence of causal link from the theoretical and practical perspective. This theory is based on two main propositions derived from the philosophical doctrine of causality. Firstly, causality is an objective connection between phenomena and exists independently of our consciousness. Due to this, it is wrong to be guided by the offender’s ability or degree of prediction of the harmful result when deciding whether there is a causal link. The possibility of predicting damages is subjective and is relevant only in dealing with the culpability of the offender, but not the causal link. Secondly, cause and effect, as such, are only relevant for each individual case. Unlawful conduct
of a person is the cause of harmful consequences only if it is directly connected with them. The presence of an indirect connection between illegal behavior and consequences means that such behavior lies beyond the specific case, and therefore – beyond the legally significant causation (Paniukova, 2003).

For example, the victim works in a mine causing him to develop occupational diseases – deafness, vibration disease and dust bronchitis. According to the social security assessment board, he is determined to be permanently incapacitated for these diseases. As a result of occupational diseases, the employee experiences physical and moral suffering, psychological discomfort, mental imbalance; he (she) is forced to be constantly treated and limit any activity that requires extra effort to organize his (her) life. As a result of legal proceedings it is found that the employer did not take any measures to provide the employee with personal protective equipment against vibration, noise and dust in violation of the Law of Ukraine “On Labor Protection”. Thus, we see a direct causal link between the employer’s wrongdoing and the moral damage caused to the employee.

We pay special attention to the fact that the court recognizes both direct (primary) and indirect (secondary) moral damage, stating that “moral damage may consist of experiences due to pain or in connection with an illness caused by mental suffering” (Erdelevskyi, 2004, p. 98).

For example, as a result of illegal dismissal, the employee experiences moral damage in the form of moral suffering in connection with the loss of work and income; consequently, he develops stomach ulcer disease, which manifests itself in pain in epigastria, nausea and vomiting, other dyspeptic disorders (due to which the victim experiences moral damage in the form of physical suffering). In this case, moral damage in the form of moral suffering (experience due to loss of work) is the primary moral damage, and moral damage in the form of physical suffering (due to clinical manifestations of ulcers) is the secondary moral damage.
PROBLEMATIC ISSUES OF PROVING THE CAUSATION

The process of proving the fact of moral damage and the existence of causation is quite specific; therefore, it can be difficult for the employee to gather evidence to confirm the existence of moral damage and causal link between illegal actions of the employer and negative consequences in the form of moral damage.

According to court practice, argumentation of moral damage and collection of the evidence rests with the employee, who must prove in court by all available and appropriate evidence the existence of moral damage. Evidence can be any data that reveal the relationship between the violation of rights and confirmation of suffering and changes in lifestyle. However, in practice, the lack of a unified approach to determining moral damage complicates the lives of both complicates the life of both employees who are suing by themselves and lawyers, who provide legal assistance to dismissed workers, and judges who deal with moral damage (Polishchuk, 2020).

Some legal practitioners argue that today most courts actually apply the presumption of moral damage when considering labor disputes, which lies in the fact that a breach of a rule by itself entails the possibility of seeking compensation for moral damage.

The principle of presumption of non-pecuniary damage means that any natural person in respect of whom an illegal act or omission has been committed is recognized as having suffered moral damage, unless the perpetrator proves otherwise (Kapustianskyi, 2005, pp. 14–15). At the same time Erdelevskyi (2004, p. 90) emphasizes that it is necessary to apply the principle of presumption of moral damage and to assume that the victim is suffering if the offender does not prove otherwise. This significantly simplifies the position of the victim, and at the same time the offender can refute such a presumption. The scientist is supported by Romovska (2005, pp. 42–43), who argues that moral damage should be considered a constant “companion” for any illegal behavior against an individual, so the fact of moral damage does not need to be proven: it is obvious as soon as proven illegal behavior.

We fully agree with these views of scientists and believe that moral suffering is an indispensable “companion” of wrongdoing against the
person. Thus, any lawlessness affects, first of all, a person’s mental health, i.e. his (her) self-esteem, self-belief, attitude to the environment and society, events taking place in his (her) life, etc. However, it can also affect physical health, i.e. the normal functioning of the body, its organs and systems, self-regulating capacities.

In the legal relations in question, the employee may experience both physical and mental suffering. Thus, in the case of an accident at work, the victim becomes partially or completely disabled, which makes it impossible or significantly complicates the possibility of his (her) further work; there is a need for constant treatment and appropriate physical restrictions, which deprives him (her) of the opportunity to work properly and requires additional efforts to organize his (her) life, makes it difficult to communicate with family members and other people.

In the case of illegal dismissal or systematic humiliation on the part of the employer, the person is under constant stress and anxiety for his (her) future and for the future of the relatives, especially if his (her) work was the only source of income in the family. The employee is worried about his (her) business reputation, honor, professional dignity, as well as the attitude of colleagues and comrades because of the current situation. As a result, the victim becomes depressed, tense, nervous; he (she) may lose sleep and appetite, which in turn may provoke mental disorders, depression, exacerbation of chronic or new diseases, addiction to excessive drinking, psychotropic or even narcotic drugs.

As one can see, moral suffering is always “accompanied” by violations of the employee’s legal labor rights, and therefore the presumption of moral harm to the latter should be enshrined in law. Although, for example, Slipchenko (2010, p. 14) believes that the establishment of such a presumption in any case will lead to the situation, where, in all actions brought before the court, a claim for compensation for moral damage will also be filed and the plaintiff will not burden himself with collecting any evidence to justify his (her) claims of non-pecuniary damage, we cannot agree with this opinion. Thus, despite the application of the principle of presumption of moral damage in these legal relations, the plaintiff will in any case have to prove the nature, depth, duration and intensity of the harm, which will determine the amount of compensation.
At the same time, unfortunately, we have to note the erroneous assertion of legal practitioners on the application of the presumption of non-pecuniary damage in labor disputes by courts, because Ukrainian law does not enshrine this principle; the plaintiff must ensure that evidence of violation of his legitimate rights and moral damage. Pursuant to Clause 4 of the Resolution of the Plenum of the Supreme Court of Ukraine No. 4 (1995), the statement of claim for compensation for moral damage shall specify what the damage is, what wrongful acts or omissions caused it to the plaintiff, on what grounds he based his determination of the amount of damage and how the evidence supports this. Thus, the burden of proving the existence of moral damage rests with the victim. What evidence can an employee provide to prove the fact of its causation?

**EVIDENCE TO PROVE CAUSATION AND MORAL DAMAGE**

According to Art. 76 of the Civil Procedure Code of Ukraine (Law of Ukraine No. 1618-IV, 2004) evidence is any data on the basis of which the court establishes the presence or absence of circumstances (facts) justifying the claims and objections of the parties, and other circumstances relevant to the case. These data are established by the following means: 1) written, physical and electronic evidence; 2) expert opinion; 3) testimony.

Written evidence is documents (except electronic documents) that contain information about the circumstances relevant to the proper resolution of the dispute (Part 1, Article 95 of the Civil Procedure Code of Ukraine). In cases of compensation for moral damage caused to the employee, they may be: orders on dismissal, on resumption of work, on transfer to another position, on transfer to part-time work; equipment passport, organizational and methodological documents (methods, instructions, other documents for inspection, testing and expert examination of equipment), operational documents; briefings journals (on labor protection and safety, compliance with fire safety rules, etc.); job descriptions (for example, with the presentation of information that does not correspond to reality, discredits the employee, contains false information
about his (her) professional qualities or behavior, etc.); certificates and receipts of wages or other remuneration from the employer approved in the prescribed manner; acts of medical examination, conclusions of the medical and social expert commission, other medical conclusions; card of departure of ambulance to the victim; certificates from doctors; extracts from the employee’s medical card; prescriptions for the purchase of certain drugs (sedatives, antidepressants, psychotropic drugs, etc.); checks confirming their purchase; confirmation of the fact of visiting the psychologist (receipts for payment of services; extracts from the log of visits), etc.

Note that Part 3, Art. 95 of the Civil Procedure Code of Ukraine provides for the right of the parties to the case to submit written evidence in electronic copies, certified by an electronic digital signature, which is equivalent to a handwritten signature in accordance with the law. An electronic copy of a written proof is not considered electronic proof.

Material evidence are objects of the material world, which by their existence, qualities, properties, location, and other features make it possible to establish circumstances relevant to the case (Article 97 of the Civil Procedure Code of Ukraine). Such evidence in the matter of interest may include: traces on the employee’s work clothes, defects, damage and malfunctions of equipment, etc.

According to Part 1, Art. 100 of the Civil Procedure Code of Ukraine electronic evidence is information in electronic (digital) form, which contains information about the circumstances relevant to the case, in particular, electronic documents (including text documents, graphics, plans, photographs, video and audio recordings, etc.), websites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. Such data can be stored, in particular, on portable devices (memory cards, mobile phones, etc.), servers, backup systems, other places of data storage in electronic form (including the Internet).

Electronic evidence that an employee may provide to prove that he or she has suffered moral damage include: video or audio recordings that contain evidence of the employer’s misconduct or unlawful statements (threatening voice messages; presentation of untrue or defamatory information about employee’s honour and dignity by the employer at the staff meeting, if it was published in the media), information about other illegal
acts of the defendant against the plaintiff, which are on the Internet, recordings of television and radio programs, etc.

The expert’s opinion is a detailed description of the research conducted by the expert, the conclusions reached and the reasoned answers to the questions posed to the expert, compiled in the manner prescribed by law. The subject matter of the expert’s opinion may be the study of the circumstances that are part of the subject matter of evidence, the establishment of which requires the expert’s special knowledge (Article 102 of the Civil Procedure Code of Ukraine).

The expert’s opinion is important both in the process of proving the fact of infliction of moral damage and its amount. As Kolinko (2020, pp. 32–33) correctly points out, the experience gained in psychology can be used to establish the presence of emotional suffering, including the use of complex methods of psychological counseling developed and implemented in the form of psychodiagnostics (including computer one) and providing comprehensive psychological assistance. Recourse to psychological techniques is not only appropriate but also reasonable. In fact, only an expert psychologist can determine the presence or absence of signs of moral harm to a person.

According Holubev (2001, p. 103), it is not so easy to prove that the illness of the victim, as well as the accompanying physical pain and experience, are precisely moral suffering caused by the offense. It is likely that in this case conclusions of forensic, forensic and psychiatric, forensic and psychological examinations may be required.

We fully agree with this view and emphasize that the expert should be involved in every case concerning compensation for moral damage to the employee. Firstly, the expert’s opinion can be ordered by the victim before the lawsuit is filed, which will help to justify the amount of monetary compensation for moral damage. Secondly, each person reacts differently to adverse psychological factors, depending on his (her) individual characteristics. The latter are influenced by age, gender, life experience, worldview, etc. The individual characteristics of the victim is a circumstance that must be proved, and which the court must establish in the manner prescribed by procedural law and take into account to assess the actual depth (degree) of physical or moral suffering and determine the appropriate
amount of compensation (Erdelevskyi, 2004, p. 129). The “response” of the victim to illegal actions on the part of the employer depends on his (her) individual features: what will cause fear in one person (for the future, for his (her) material well-being or well-being of his (her) family, for the future career), the other will provoke severe stress or a mental disorder that will require long-term and costly treatment. And only a specialist will be able to give a correct assessment of the characteristics of the behavior of the sub-expert person in problematic situations and the peculiarities of his (her) emotional state under certain conditions.

In accordance with the Instruction on the appointment and conduct of forensic examinations and expert research and Scientific and methodological recommendations for the preparation and appointment of forensic examinations and expert research (Order of the Ministry of Justice of Ukraine No. 53/5, 1998) psychological examination establishes those features of mental activity and their manifestations in the behavior of persons, which have legal significance and certain legal consequences.

The main task of psychological examination is to determine from the sub-expert person: 1) individual-psychological features, character traits, leading qualities of the personality; 2) motivational factors of psychic life and behavior; emotional reactions and states; 3) patterns of mental processes, the level of their development and individual properties.

To establish the fact of causing moral damage to the employee, the expert may ask the following questions:

- Does the sub-expert person have changes in emotional state, individual psychological manifestations that hinder his active social functioning as a person and arose as a result of certain circumstances (illegal dismissal, occupational disease, work injury, etc.)?
- Is the situation under investigation psycho-traumatic for the person? If so, has the person suffered (moral damage)?
- Has the person suffered (moral damage) in the context of the situation under investigation? If a person has suffered (moral damage), what is the possible amount of monetary compensation for the suffering (moral damage)?

Note that forensic psychological examination does not focus on resolving the issue of determining the amount of monetary equivalent of moral
damage. The expert opinion is of a scientific and advisory nature in this situation. The expert’s opinion is important evidence in the case, but the final decision is made by the court. In this case, the latter should be based on the principles of reasonableness and fairness, and disagreement with the examination should be motivated by appropriate procedural means (Shevtsov & Tymoshenko, 2011, pp. 9–10).

Witness testimony is another type of evidence to establish the fact of causing moral damage to an employee. The testimony is a statement of circumstances known to him (her) that are relevant to the case (Article 90 of the Civil Procedure Code of Ukraine).

Necessary data can be obtained from colleagues, friends, acquaintances, relatives and other persons with whom the victim is in close contact. The testimony of relatives and friends should reflect the peculiarities of the victim’s behavior, living conditions, environment, his (her) inherent inclinations, hobbies, interests. Personal diaries, letters, creative samples of the plaintiff can be provided as confirmation of their statements. The court should pay special attention to information about the characteristics of a person’s behavior and emotional state during and after a problematic situation (work and family conflicts, loss of a relative or a friend, prosecution).

It is also advisable to invite the victim’s doctor as a witness, who will tell about the course of his (her) illness, physical and moral suffering as a result of the latter, features of treatment (duration, cost, effectiveness), physiological and psychological features and changes, etc.

In turn, Ivasiuk and Hochachko (2020) claim that the following may be used as evidence:

- evidence of deteriorating health (medical reports, prescriptions from doctors, confirmation of a visit to a psychologist);
- evidence to prove the fact of inability to get a job given the reasons for the previous dismissal;
- evidence to prove the impossibility of leading a normal life (severance or deterioration of social and family ties, the impact of the employer’s actions on the reputation of the employee);
- evidence to support the deterioration of the financial situation due to the consequences of illegal actions of the employer (the need to
reduce normal expenses or take out a loan to fulfill the obligations, which could be performed independently if the employer did not violate the employee’s rights).

CONCLUSIONS

Therefore, causation is one of the prerequisites for liability in the form of compensation for moral damage caused to the employee as a result of wrongful conduct of the employer. An illegal act on the part of the employer – failure to fulfill its obligations to ensure the legal labor rights of the employee or violation of the legal labor rights of the employee – should result in moral damage caused to the latter, i.e. lead to moral suffering, loss of normal life ties or require additional effort to organize his (her) life. If there is no such connection, then, accordingly, the damage to the employee was caused for other reasons, which means that there is no obligation in labor relationship.

The process of proving the fact of moral damage and the existence of causation is quite specific; therefore, it can be difficult for the employee to gather evidence to confirm the existence of moral damage and causal link between illegal actions of the employer and negative consequences in the form of moral damage.

The employee can prove the existence of moral damage by the following means: 1) written, physical and electronic evidence; 2) expert opinion; 3) testimony.

In the framework of this article, we have specified in detail what evidence the employee can submit to the court to confirm the fact of causing moral and physical suffering by the employer.

In addition, we stressed on the need to establish the presumption of moral damage (i.e., assumption that the victim suffers unless the offender proves otherwise) in the employment relationship; after all, as has been proven in the process of research, moral suffering always “accompanies” violations of employee’s legal labor rights.

Besides, in every case related to compensation for moral damage, the expert should be involved, as only the specialist can properly investigate
individual characteristics of the victim, on which the response of the latter to misconduct depends, which in turn affects the amount of compensation.

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