

UDC 343.97:343.154:351.74

Panchenko O. – Postgraduate Student of the Department of Civil Law and Procedure of the National Academy of Internal Affairs, Kiev, Ukraine

PECULIARITIES OF COMPENSATION OF MORAL HARM CAUSED BY THE POLICE

This article focuses on the issue of compensation of moral harm caused by illegal actions of National Police in Ukraine. Special attention is given to the determination of the amount of compensation of moral harm, in particular, the practice of leading European countries, considering this issue, is investigated. The options, that may be used by the court of Ukraine while determining the amount of such harm, are observed. These alternatives are: to use the amount, claimed by the plaintiff; to appoint a forensic psychiatric inquiry; to determine the amount of compensation for moral harm by itself, using the requirements of the Civil code of Ukraine.

Keywords: harm, moral harm, civil liability, compensation, police officer, illegal actions.

The protection of person's rights and freedoms is one of the most important tasks of our time. For the performance of this target a number of international legal acts that recognize a person as the highest social value, and ensuring their rights and freedoms – the main duty of a democratic legal state, were adopted.

The Preamble of the General Declaration of human rights, adopted on the 10th of December 1948 by the General Assembly of the United Nations Organization [1], establishes that the recognition of dignity of all members of the human family and their equal and inalienable rights are the foundation of freedom, justice and peace in the world. These provisions are also reflected in art. 3 of the Constitution of Ukraine [2].

The art. 55 of the Basic Law declares that the rights and freedoms of a person and a citizen are protected by the court, that is, any person whose rights are violated can apply for protection to the

judicial institutions, as well as to demand compensation for the caused harm, including moral.

The concept of moral damage in Ukrainian legislation was introduced in 1993 with the amendments to the Civil code of the Ukrainian SSR, and from that time it is gradually supplemented and expanded. Certain provisions of the Constitution (art. 32, 56, 62, 152) straight provide the possibility of compensation for moral damage. This right is also assigned in the Civil code of Ukraine, the Commercial Code of Ukraine, the Code of labor laws of Ukraine, in such laws of Ukraine as «About information», «About protection of consumer rights», etc., as well as in some acts that are «explanatory» in nature, as, for example, the Resolution of the Plenum of the Supreme Court of Ukraine No.4 dated from 31.03.1995.

The question we consider in this article are the issues of compensation of moral damage caused by illegal actions of the police, because, as the court practice shows, cases of violation of rights and freedoms of the person while the police performs their duties, are not isolated. The number of cases about compensation of moral harm caused by law enforcement agencies has significantly increased over the past years.

The problem of compensation of non-pecuniary injury caused by illegal decisions, actions or inactivity of public authorities and law enforcement agencies, has been the subject of research of such scholars as: S. Agafonov, A. Benjamin, K. Golubev, V. Kucher, O. Musika-Stefanchuk, O. Loviak, S. Narizhnii, I. Nizhynska, M. Shumylo etc. However, with an appearance of the National Police of Ukraine the issues of compensation of damage, in particular moral, caused by its employees in the performance of their official duties, currently require further investigation and elaboration.

The purpose of this article is to analyze the specifics of compensation of moral damage caused by illegal actions of the police, as well as providing proposals for their legal solutions.

The rules for the compensation of moral damages caused by illegal actions of the police are contained in the Law of Ukraine dated 01.12.1994 No. 266/94-VR «About procedure for compensation of damage caused to a citizen by unlawful actions of authorities carrying out operational investigative activity, of bodies of preliminary investigation, public procurator's office and trial» (further – The Law) [3],

as well as in art. from 1173 to 1175 of the Civil code of Ukraine (further – CC of Ukraine).

According to the components 5,6 of art. 4 of The Law by moral damage we recognize the suffering caused to a citizen as a result of physical or mental influence, which led to the worsening or deprivation of the opportunities to realize his habits and desires, the deterioration of relations with people, who surround him, other negative consequences of moral character.

Pursuant to clause 3 of the Resolution of the Plenum of the Supreme Court of Ukraine No. 4 dated 31.03.1995 «About court practice in cases of compensation of moral (non-property) injury» (further – the Resolution of the Plenum) [4] moral injury should be understood as losses of non-property nature due to moral or physical suffering or other negative effects caused to a natural or a legal person by illegal actions or inactivity of other persons.

The compensation of moral damages performs in the case, when unlawful actions of authorities carrying out operational investigative activities, the pre-trial investigation, have caused moral damage to a citizen, has led to infringement of his normal relations of life, require additional effort for organizing his life.

The list of actions for committing of which the person has the right to demand compensation of moral damage, caused by a police officer, is defined in art. 1176 of the CC of Ukraine, in art. 1 of The Law. In addition, the appropriate actions are enumerated in clause 16 of the Resolution of the Plenum of the Supreme Court of Ukraine dated from 01.11.1996, No. 9 «About application of the Constitution in the administration of justice» [5].

According to art. 1 of The Law these actions are: 1) unlawful conviction, unlawful involvement as an accused, an unlawful commitment and detention, unlawful conduct during the investigation or prosecution in the criminal case a search, seizure, illegal arrest of property, unlawful removal from work (position) and other procedural actions restricting the rights of citizens; 2) an illegal application of an administrative arrest or correctional work, an illegal confiscation of property, or unlawful imposition of a fine; 3) an illegal performance of operational search activities, provided by such laws of Ukraine as: «About operational search activity», «About organizational legal foundations of fight against organized crime» and other legislative acts.

Since the CC of Ukraine has entered into force, this list was supplemented with several clauses: 1) an illegal prosecution; 2) an illegal application as a preventive measure on his own recognizance not to leave; 3) an illegal detention.

Moreover the legislation determines a list of actions for committing of which the person has the right to demand compensation for moral damage caused by a police officer, it also fixes the reasons for such compensation, which are enumerated in art. 2 of The Law: 1) acquittal court decision; establishment in the guilty verdict or another court decision (except a court determination or resolution about the return of the case back for additional investigation or for a new trial) the facts of illegal prosecution, illegal capture and detention, unlawful conducting during the investigation or prosecution in a criminal case a search, seizure, illegal arrest of property, unlawful removal from work (position) and other procedural actions which restrict or infringe the rights and freedoms of citizens; 2) the illegal performance of operational search activities (the right for compensation of injury in this case, according to part 2 of art. 2 of The Law arises if within six months after realization of such events the decision of complaining was not passed or this decision was abolished); 3) closure of the criminal case because of lack of criminal event, absence of body of a crime or inability to prove the participation of an accused person in committing of a crime; refusal in initiation of proceedings of a criminal case; termination of the case upon administrative infringement.

One more consideration is regulated in art. 62 of the Constitution of Ukraine: the abolishment of the unjust sentence of the court.

The compensation of moral injury caused to the person by the police is realized in the presence of all general terms of responsibility for causing harm. These provisions are subject to clarification: the availability of such harm, an illegal act of its injurer, the causal connection between the harm and the illegal act of the causer and his guilt in its causing. «The court, in particular, needs to determine the circumstance, which confirm the fact of causing moral and physical sufferings or non-property losses to the plaintiff, under which circumstances or actions (or inactivity) are they caused, in what monetary amount or in what material form does the plaintiff assess the harm and what does he proceed from, as well as other

circumstances, that are relevant to the resolution of the dispute» (clause 5 of the Resolution of the Plenum).

The subject of proof during the court proceedings are the facts that justify the filed claims or objections or have other value for resolving a case and should be determined in a court decision.

In accordance to the provisions of art. 1176 of the CC of Ukraine the injury caused by illegal actions of bodies of preliminary investigation, public prosecution and trial should be entirely compensate by the state regardless of guilt of officials. However, as it's correctly emphasized in legal literature, for a few years the laws about State budget of Ukraine contained a provision that established that the injury caused to individuals by illegal actions of investigative bodies, preliminary (prejudicial) investigation, public prosecution and trial is compensated by the State Treasury of Ukraine at the cost of funds of the State budget of Ukraine that are provided for keeping, in particular, the courts, the General Prosecutor's office of Ukraine, the Security Service of Ukraine, the Ministry of internal Affairs of Ukraine. Just the Decision of the Constitutional Court of Ukraine dated from 03.10.2001 No. 12-rp/2001 (the case of compensating in jury by the state) [6] proclaimed the provisions of art. 32 of the Law «About State budget of Ukraine for year 2000» and art. 25 of the Law «About State budget of Ukraine for year 2001» such as not conforming to the Constitution of Ukraine and established that the harm caused by public authorities, is not able to be reimbursed at the cost of funds for maintaining them. Now a days annual laws contain a separate line, which provides expenses for compensation of damages caused to a citizen by illegal actions of investigative bodies, pre-trial investigation, public prosecution and court» [7, p. 90].

However, according to the opinion of some authors, the compensation should be carried out at the cost of the funds assigned to provide the operating of those bodies, which caused the damage [8, p. 59].

In view of the fact that moral injure is compensated now by the state, while opening the proceeding concerning compensation of damage caused by a police officer, it is necessary to identify the defendant correctly. According to section 10-1 of the Resolution of the Plenum along with a certain act by a public authority, the court must engage as a defendant the relevant body of the State Treasury of Ukraine equally with the body of state authority defined by law.

«This requirement does not act if under the provisions of a special law the public authority is charged for the caused harm» [9, p. 112]. For example, the Law of Ukraine «About investigation and search operations» (art. 9) [10] establishes, that in case of violation of individual's rights and freedoms and if the person's criminal involvement concerning who operational search actions were performed, was not confirmed, the Security Service of Ukraine, the Ministry of internal Affairs of Ukraine, the Frontier Forces of Ukraine, the Management of national guard of Ukraine are obliged to restore the violated rights and reimburse inflicted material and moral losses. The law of Ukraine «About organizational legal bases of fight against organized crime» [11] (art. 9, 10, 12) provides that the operational departments, divisions and offices of special units for reducing organized crime of the Ministry of internal affairs of Ukraine and special divisions for struggling with corruption and organized crime of the Security Service of Ukraine are legal entities and have the authority of an investigative body. According to clause 3 of part 1 of art. 1 and art. 2 of The Law, in the case of illegal performance of operational search actions by the agencies mentioned above, a citizen has the right to receive a compensation for damages at the rate and by the procedure provided by this Law.

According to part 3 of art. 1191 of the CC of Ukraine, the state, while compensating the damage caused by the official of an investigation or pre-trial inquiry body, has the right of reverse claim to that person. However, the right of a reverse claim arises only in the case of determination a body of a crime in actions of these persons according to a court decision, which gained legal force. In the absence of guilty verdict, even according to guilty available of an official of an investigation or pre-trial inquiry body and thereby his involvement to disciplinary or administrative liability, the right of a state to apply to such person with reverse claim does not arise.

Concerning the question of the amount of compensation for moral injury determined by a court it is necessary to assign that the law (namely, art. 13 of The Law) sets a minimal bound: the amount of damage in these cases is determined based on the circumstances of the case within the limits set up by the civil legislation, but for time of an illegal staying of a citizen under investigation or by a trial it should not be less than one minimal wage per each month of staying under an investigation or by a trial. It should be meant that in cases

when the limits of compensation of moral injury are determined in multiple ratio with the minimal wage or exemption limit of citizens' income, the court while deciding this matter should proceed from such minimal wage or exemption limit of citizens' income, which is in force at the time of the case [12].

Per valid legislation the moral injury is compensated with money, property or other means (art. 23 of the CC of Ukraine). The amount of monetary compensation for moral injury is defined by a court depending on the nature of the offense, the depth of physical and mental suffering, worsening of victim's abilities or deprivation of their realization, the extent of person's fault, that inflicted moral injury, if the guilt is a ground for compensation, and taking into account other circumstances that are essential.

In particular, the state of health of the victim, the severity of forced changes in his life and relations of production, the extent of decrease of prestige, of business reputation, time and effort which are required to restore the previous state are taking into consideration.

In case of causing moral injury by illegal actions committed by several persons, the amount of compensation is determined by taking into account the degree of fault of each of them.

The main role while determining the amount of compensation of moral injury by courts play the principles of reasonableness and fairness, which are primarily specified by authoritative requirements of the Civil code of Ukraine (art. 23). The Decision of the Constitutional Court of Ukraine dated 02.11.2004, No. 15-RP-2004 case No. 1-33/2004 (case about appointment of more lenient punishment) [13] noted that justice, which is one of the fundamental principles of law, is deciding in determining law as a regulator of social relations, and is one of the universal dimension of law.

As a rule, justice is considered to be a quality of law, which is expressed, in particular, in equal legal measure of behavior and in proportionality of legal responsibility for committed offense. Clause 9 of the Resolution of the Plenum stresses that while determining the amount of compensation for moral (non-property) injury, the court should introduce the appropriate motives in his decision.

As practice shows, «while determining the amount of compensation, the judge has several options:

1. To use the sum claimed by the plaintiff as the basis. The court may modify the amount or leave it to be in the same rate as the plaintiff requests. While determining the amount of compensation for moral (non-property) injury, the court should introduce the appropriate motives in its decision.

2. To appoint a forensic examination. The order of appointment and performance of a forensic examination is regulated by the Order of the Ministry of justice of Ukraine “About the approval of the Instruction about appointment and accomplishment of legal expertise and expert researches and Scientific methodical recommendations about preparation and appointment of legal expertise and expert researches” dated from 08.10.1998 No. 53/5.

3. To determine the sum of compensation for moral injury at its own discretion. Of course, while determining the amount of moral injury a wide variety of factors, including those are listed in art. 23 of the Civil code of Ukraine should be noted» [14, p. 125–126].

Let's review all of these points in turn. So, the sum of money, which the victim receive for his experienced suffering is not able to make amends for the negative consequences of the injustice which was committed against him, but, it is able to cause some positive emotions, which to a certain extent level negative changes in his psychology. However, the person cannot determine the depth of physical and mental suffering in monetary equivalent. It is impossible, since there are no clear criterion for determination of depth and strength of human pain, and, in addition, he is an interested party. In our opinion, O. M. Erdlevskii's view that «...the plaintiff has no subjective right to claim for compensation in an amount, that was determined previously. He may demand the court to determine this sum...» [15, p. 39] is absolutely correct in this case. However, now a days the court practice requires the victim to indicate the amount of compensation in his claim, including the sum for moral injury that in turn, helps the court to rely on certain digits when making a decision.

So far as each person responds to negative psychological factors caused to him by the illegal actions of the police in a different way, we believe it is necessary to assign a psychological

examination in each civil case, concerning the issue of compensation for moral injury, to determine how one or another illegal action have affected the victim. As the display of emotional distress of some victims are fear, shame, and other unfavorable morale conditions, and the others get persistent mental illnesses, lingering depressions, insomnia, susceptibility to suicide. The expert share with examine, if a case is considered to be traumatic for the victim, does the examined person have some changes in his emotional condition, in his individual psychological display of emotions that prevent his active social operation as an individual and are resulted from the certain circumstances, are the suffering caused and if it is so, what is the possible sum of money compensation for moral injury [16].

When the court determines the amount of compensation at its own discretion, it has to examine the evidential basis to confirm the availability of moral injury and the causal connection between the illegal actions of the police and the negative consequences for the victim in a form of moral injury. As the proofs, for example, can appear witnesses who may confirm that the person has got a nervous breakdown because of illegal actions of police. It can also be written evidence: medical certificates, registrations, which proof that the victim has called for an ambulance, a list of prescribed medicine, checks, which confirm their purchase, and so on.

In past years, quite often court decisions about compensation of harm caused by the bodies of investigation, pretrial investigation, public prosecution and trial, could not be performed because of lack of funds as much as these expenses are unpredictable by their nature and cannot be foreseen or planned in a budget statement. The funds for the compensation of such kind of injury by the state have been provided in the state budget only since the year 2005. And if in the state budget for year 2006, when the economic situation in the country was much more stable and the institute of compensation of moral injury caused by law enforcement agencies, just began to arise, these costs were provided in the amount of 15 000 000 UAH [17], then the budget for year 2016 [18] carried just 18 000 000(!) UAH. This amount, of course, is an inadequate, and we observe a situation when court decisions just cannot be executed. Besides, the sum of compensation for moral injury, which a citizen obtain for a perpetrated harm to his health or property, is included in the

total taxable income and is taxed on general basis at the rate of 18 % (from 1 January 2016) and military training of 1,5 % [19].

The problem of compensation of moral injury caused by police, and especially the determination of its size – is not solved for today. At the moment there is no single legal act that could be used for solving this issue. Even the methodical recommendations «Moral damages», which were sent by the letter of the Ministry of justice of Ukraine dated 13.05.2004 No. 35-13/797 [20] for application in work of other ministries and departments, were cancelled because of references to outdated or non-existing provisions of law [21]. But the legislator did not pass any law of this kind instead of the cancelled one.

The lack of a common concept and unified machinery for granting compensation and determination a monetary amount for a certain type of suffering in the Ukraine gives scope to courts, which often award the sum twice and even three times smaller, than the plaintiff has claimed. To avoid such a situation lower and superior limits of compensation of moral injury caused by law enforcement agencies are prescribed one legislative level in most European countries [22, p. 110–112]. Most often, the sum of compensation depends on the severity and type of crime in which a person was accused, previous history of the person (if he was ever convicted or not), how long his arrest and the criminal proceeding against him had been highlighted in mass media. In our opinion, the implementation of such practice in Ukraine is more than appropriate, because the lack of «framework» leads to the situation when the sum of compensation is too small to mitigate the severe consequences of moral injury.

Thus, the issue of determination of the amount of compensation for moral injury is quite difficult, since the legislator has not specified clear criteria for such determination. It should be decided by taking into consideration all the circumstances of infliction of moral damage, considering the principles of reasonableness and fairness. So far as to determine the amount of such compensation is impossible because of their unpredictable nature, it would be reasonable to identify clearly the sources of public funds, at the cost of which the compensation for injury caused by illegal actions of the police officers would be accomplished. It is necessary to set the lower and superior limits of the amount of compensation for moral injury at a legislative level in order to judges could assign an adequate

compensation according to the circumstances of each case. It is worth to note that the institute of compensation for moral injury caused by the police, requires now an active development by combining the efforts of law enforcement agencies and judicial system, as well as compulsory state's support. It would assist for creation of confidence that men must protect their rights. And, as a consequence, human rights would actually become top priority for our state, and their proper protection would be its main task.

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Стаття надійшла до редколегії 03.10.2016

Панченко О. І. – ад'юнкт кафедри цивільного права і процесу Національної академії внутрішніх справ, м. Київ

Особливості відшкодування моральної шкоди, завданої неправомірними діями поліцейських

Розглянуто особливості відшкодування моральної шкоди, завданої неправомірними діями поліцейських. Визначено підстави такого відшкодування та умови, які передбачають відповідну цивільно-правову відповідальність. Обґрунтовано доцільність чіткого визначення джерела державних коштів, за допомогою яких буде здійснюватися відшкодування завданої неправомірними діями поліцейських шкоди. Розглянуто варіанти визначення розміру такої шкоди, а також його межі.

Ключові слова: шкода, моральна шкода, цивільно-правова відповідальність, відшкодування, поліцейський, неправомірні дії.