

# THE PROBLEM OF DEFINING MORAL DAMAGE CAUSED TO THE EMPLOYEE

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**Annotation.** Compensation for moral damage is one of the rights guaranteed by the Basic Law of Ukraine; reimbursement of this type of harm is one of the ways to protect labor rights as well. One of the main problems at the moment is the absence of the enshrined concept of moral damage in the Constitution and the Civil Code of Ukraine (this institution is of a civil law nature). Consequently, the aim of the Article is to consider how foreign and domestic scientists approach the term “moral damage” in general and in labor relations in particular and to provide our own definition of this category. The following methods were used when preparing the Article: dialectical, monographic, historical, normative and dogmatic, sociological, legal modeling. Research results. The origin of the term “moral damage” in the world practice and in our country has been investigated. It has been examined, what is moral damage in Ukrainian legislation, as well as in the legal instruments of some other States (Italy, Philippines, El Salvador, Kazakhstan, UAE). The approaches to the concept of moral damage in general and in labor relations in particular have been studied based on the works of foreign and Ukrainian researchers, relevant legal acts of our and other countries, court practice. It has been established that there are three approaches to defining the term of moral (non-property) damage caused to an individual in the theory of civil law. We agree with the opinion by researchers who believe that the fact of establishing moral, mental or physical suffering is not enough – it is necessary to have losses of non-pecuniary nature or negative consequences of a moral or other character. The author’s definition of moral damage as well as moral damage caused to the employee as a result of violation of his (her) labor rights has been proposed.

**Key words:** court decision, definition, employer, employee, legislation, moral damage.

## 1. Introduction.

Compensation for moral damage is one of the rights guaranteed by the Basic Law of Ukraine. Thus, according to Art. 56 of this Act [13], everyone has the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of bodies of state power, bodies of local self-government, their officials and officers during the exercise of their authority.

Compensation for this type of damage is one of the ways to protect labor rights as well, since the legislation provides that compensation for moral damage by the employer is carried out in the case of violating legal rights of the employee, including as a result of discrimination, mobbing (harassment), the fact of which is confirmed by the court decision, which has entered into force, led to moral suffering, loss of normal life ties and require additional efforts to organize his life [15].

Considering the significant number of lawsuits related to the compensation for moral damage in labor relations and its significant increase, provoked by the mass release of workers first during the Covid-19 pandemic, and then – by the full-scale aggression of the Russian Federation against Ukraine, this issue is becoming more and more urgent.

One of the main problems at the moment is the absence of the enshrined concept of moral damage in the Constitution and the Civil Code of Ukraine (this institution is of a civil law nature); the legislator lists only the circumstances in which it is expressed. The definition of this term, provided

for in the Laws of Ukraine "On Foreign Economic Activity" [17], "On the Procedure for Compensation for Damage Caused to a Citizen by Illegal Actions of the Bodies Conducting Initial Inquiries, Pre-trial Investigation, Procurators' office and Court" [14] are somewhat specific, because they regulate relations in other spheres, and therefore are aspectual concepts regarding to formulation provided by the Civil Code of Ukraine.

Consequently, let's consider how foreign and domestic scientists approach this problem and try to give our own definition of this category.

## **2. Analysis of scientific publications.**

Moral damage, also known as mental trauma, was first studied on veterans who witnessed the atrocities of war. The first definition of moral damage in this context was given by Litz (2008), who defined it as emotional, psychological, social, behavioral and spiritual consequences of actions that violate the basic moral values of a serviceman and behavioral expectations about himself or others.

Not so long ago, this institution was implemented in the field of health care, education, social work, etc. In recent years, it has become more and more obvious that moral damage can also occur in labor relations.

In legal literature, there are three approaches to understanding the concept of moral damage: social; individual and mental; individual and social. P. Rabinovych and O. Hryshchuk [25] combine two elements in the concept of moral damage – social-moral and individual-psychological. In their opinion, moral damage is an illegal humiliation (or attempted humiliation) of the evaluation of a person's dignity, which causes negative processes and states in his psyche. At the social level, it manifests itself as a violation of human dignity, and at the personal level – as negative mental processes and states.

Thus, in the theory of civil law, there are three approaches to defining the concept of moral (non-property) damage caused to an individual. For the first, it is characteristic to establish the fact of moral, mental or physical suffering. For the second, it is not enough to establish this suffering, but it is necessary to have losses of a non-pecuniary nature or negative consequences of moral or other non-pecuniary nature that arose as a result of moral, mental or physical suffering. The third approach lies in degrading honor, dignity and business reputation or in moral suffering in connection with damage to health, as well as a result of violation of other rights [6].

Viewing moral harm as suffering, we should note that the following types of suffering distinguished in world practice:

- elementary suffering, which is defined as a psychoneural process, which is a conscious subjective nuisance that may occur in any negative emotional situation;
- physical suffering, which is quite often synonymous with the concept of pain and means an unpleasant sensory and emotional event associated with actual or potential tissue damage or described in terms of such damage;
- mental suffering as unpleasant mental and emotional events associated with actual or potential psychological damage [1].

Despite the considerable number of studies devoted to the concept and features of compensation for moral damage, this issue has not been sufficiently studied within the framework of labor relations, which resulted in the relevance of our work.

## **3. The aim of the work.**

The aim of the Article is to consider how foreign and domestic scientists approach the term "moral damage" in general and in labor relations in particular and to provide our own definition of this category.

#### 4. Review and Discussion.

The first mention of moral damage was enshrined in the Preamble to the Law of Ukraine “On the Rehabilitation of Victims of Political Repressions in Ukraine” [18], where, in particular, the aspiration of the Verkhovna Rada “... to provide compensation for the material and moral damage caused by illegal repressions to the rehabilitated and their families...” was noted. However, this act did not directly define moral damage.

Instead, as we have already noted, this concept is found in the Law of Ukraine “On Foreign Economic Activity” [17], according to which moral damage is damage caused to the personal non-property rights of the actors of foreign economic activity and which has led or may lead to material losses.

As for the Law of Ukraine “On the Procedure for Compensation for Damage Caused to a Citizen by Illegal Actions of the Bodies Conducting Initial Inquiries, Pre-trial Investigation, Procurators’ office and Court” [14], moral damage is defined as suffering caused to a citizen as a result of physical or mental impact, which has led to the deterioration or deprivation of the enjoyment of his habits and desires, deterioration of relations with others, other negative consequences of a moral nature.

However, as we have already noted above, the specified acts govern relations in other areas (respectively, in economic sphere and in the area of compensation for damage caused by illegal decisions, acts or omission by the State authorities and their officials), so they are only suitable for solving this problem within compensation for moral suffering to the actors of foreign economic activity, and in the second case – to the citizens who suffered from illegal actions of the bodies performing operational and investigative activities, bodies of pre-trial investigation, the prosecutor’s office and court.

As for the general understanding of moral damage, it is contained in the Civil Code of Ukraine, because this institution is a civil law one. According to Art. 23 of the Civil Code of Ukraine [16] moral damage lies in:

- inflicting physical pain and suffering suffered by the individual as a result of injury or other damage to his health;
- mental suffering suffered by such a person due to illegal behavior towards himself, his family members or close relatives;
- mental suffering inflicted on the individual by destroying or damaging his property;
- degrading honor and dignity of the individual, as well as the business reputation of the individual or legal entity.

According to Clause 3 of the Resolution of the Plenum of the Supreme Court of Ukraine No. 4 (hereinafter referred to as the Resolution No. 4) [27], moral damage should be understood as losses of a non-pecuniary nature as a result of moral or physical suffering or other negative phenomena caused to the individual or legal entity by illegal acts or omission of others.

The wording of the concept of moral damage given in Clause 3 of the Resolution No. 4 is rather recommendatory and developed as a result of the accumulated jurisprudence, as the Civil Code of Ukraine does not enshrine such a term. This is due to the impossibility of a clear definition of such an evaluative concept, what scientists pay attention to; therefore, Part 2, Art. 23 of the Civil Code of Ukraine only outlines the ways of manifesting such damage.

Para. 2.3 of the Resolution No. 4 additionally states that moral damage can also manifest itself: in moral suffering in connection with damage to health, in violation of property rights (including intellectual), rights granted to consumers, other civil rights, for unlawful stay under investigation and trial, in interruption of normal life ties due to the impossibility of prolonging active social life, in disturbing relationships with others, in the event of other negative consequences.

Art. 237-1 of the Labor Code [15] states that moral damage means moral suffering, loss of normal life ties, need for additional efforts to organize one’s life. It is subject to recovery only if these negative consequences were the result of violation of employee’s legal rights or interests.

It should be noted that the legislation of some countries directly enshrines what constitutes moral damage. Thus, according to the Civil Code of the Philippines [26], it is physical suffering, mental pain, fright, serious concern, tarnished reputation, injured feelings, moral shock, social humiliation, etc. (Article 2217).

Under Salvadoran law [28], non-pecuniary damage may include, but is not limited to, suffering, pain, loss of access to available goods, damage to appearance, sexual function or feelings of attachment (such as those suffered by the person as a result of the death or serious injury of a loved one).

According to the Civil Code of the UAE [10], moral damage is considered an infringement on the freedom, honor, dignity, reputation, social or material situation of epy others.

In Kazakhstan, the legislator defines moral damage as “disorder, oppression or deprivation of personal non-property goods and rights of the individual, causing mental or physical suffering (humiliation, anger, depression, shame, despair, physical pain, mutilation, discomfort, etc.)” (Article 951 of the Civil Code [8]). As a general rule, moral damage is subject to compensation in the presence of the fault of the perpetrator, except for the following cases of innocent responsibility: 1) damage to life and health of a person caused by a source of increased danger; 2) damage caused to a citizen as a result of his illegal conviction, prosecution, application as a preventive measure in the form of detention, house arrest or stay-at-home order, illegal imposition of an administrative penalty in the form of arrest, illegal placement in a psychiatric hospital or other institution; 3) damage caused by dissemination of information that disgraces honor, dignity and business reputation; 4) other cases provided for by legislative acts.

In Italy, the definition of moral damage was given thanks to the corresponding decision of the Court of Cassation in 2008, and it is literally translated into English as “biological damage” (“danno biologico”). According to the Italian law, it lies in harming absolute human rights guaranteed by the Constitution, such as the right to life, health, family, education, work, etc. “Biological damage” should be understood as temporary or permanent damage to psychophysical integrity of the person, which negatively affects his daily and social activities. To confirm the fact of causing such damage, the following must be proven: presence of physical or mental injury; disruption of the normal process of personal activity; causal relationship between the injury and the violation of physiological processes in the victim’s body [9].

We consider such specific definitions of this institution to be appropriate, because in such cases judges have no questions, whether a person’s negative experiences can be considered a moral injury; all of them are listed in detail in the relevant law.

Having analyzed domestic legislation and court practice, we can come to the conclusion that in Ukraine, when considering this issue, the emphasis is on suffering, which is divided into physical and moral (mental).

Note that physical suffering means physical pain, deterioration of health and other negative changes in the human condition.

Moral suffering is a negative psychological experience of an individual, which manifests itself in the form of such feelings as fear, shame, humiliation, or a state of mental pain, excitement, depression, or any other psychologically unfavorable state.

S. Shymon [30] analyzed this institution as a means of protecting subjective civil rights. In her opinion, moral damage lies in moral suffering in connection with the loss of relatives, failure to continue an active social life, loss of employment, disclosure of family or medical confidentiality, dissemination of information that does not correspond to reality and disgraces honor, dignity or business reputation of a citizen, temporary restriction or deprivation of any rights, etc.

O. Hryshchuk [11] is convinced that moral damage is a complex social phenomenon characterized by social and personal unity (individual-psychic). At the social level, moral damage is considered as a damage to human dignity, humiliation of his evaluation by other actors, as well as (or) his self-esteem, and at the personal level - as negative mental reactions and human states caused by the said injury.

According to L. Maliuha [21], moral harm lies in demeaning the assessment of a person's dignity, which causes negative states and processes in his psyche. At the same time, the author draws attention to the non-identity of the concepts of "moral damage" and "non-property damage", which are used in the current legislation. For example, health damage causes moral damage that may be inflicted only to a natural person, while illegal copying of goods, copyright infringement is non-property damage that can be caused to both individual and legal entity. In view of this, the latter cannot suffer moral damage.

Under the Pavlovska's research [24], moral damage arises as a result of moral suffering, because it is moral suffering that determines moral damage. It is concluded that the definition, in which the notion of moral damage is defined because of the specificity of the benefits violated in its occurrence, seems to be more suitable. At the same time, the scientist notes that originally the concept of good is well-being, satisfaction of needs, and law, as a result, is a category protected by the state, a legalized opportunity, freedom to do something. Therefore, the object of the relationship related to the legal regulation of moral goods is the right to life, to health, to freedom and personal integrity, etc.

R. Stefanchuk [32] believes that the concept of "moral damage" should include negative consequences of a non-property nature caused to an individual as a result of physical, mental and moral suffering, which are associated with the violation of his rights or interests protected by law, or the threat of committing such behavior.

O. Andrienko [2] analyzed this institution as a complex legal and psychological phenomenon, covering 3 levels: conditionally theoretical (understanding of moral damage) and conditionally practical: (a) level of negative experiences due to infringement of significant normatively protected good (actually moral damage) and (b) the level of implementation of behavior aimed at compensation for moral damage.

O. Onyshchenko [23] proves that the task of moral damage is an illegal humiliation (or attempted humiliation) of the rights and freedoms of a person, which causes negative processes and states in his psyche. Since moral damage can be caused by any illegal encroachment on the rights and interests of a person, it is always an organic component of any type of offense.

Having analyzed scientific views on this issue, we agree with the researchers, who believe that establishing the fact of suffering itself is not enough to receive compensation. It is necessary that these sufferings result in negative changes in the human body, because everyone has his own personal threshold of sensitivity, individual characteristics of the psyche, and therefore, on the health of one person these experiences will not have much influence, while physical and mental condition of another can be significantly affected by them. For example, due to strong emotions as a result of illegal dismissal, a former employee may fall into depression, which will lead to a series of functional disorders in his body up to such serious diseases as heart attack or stroke or certain somatic or mental diseases; he may develop aggression towards others as a "response" to the injustice done to him; develop a certain form of addiction (alcohol, drugs) or deviant behavior. The other is easier to deal with the situation and for a week period upset and bad mood will start looking for another job (that is, he does not perceive the current situation as traumatic). This is related to the internal "moral code" of each person, because some people are simply unable to understand and comprehend how others can behave dishonestly, unjustly or illegally, and such behavior causes a strong internal protest and a powerful emotional reaction, which will have an impact on health. In addition, one person is able to «turn» the regulatory mechanisms of his body and adapt to a traumatic situation, while others cannot do this, which is manifested in a whole series of negative reactions listed above.

This is in line with the with the view of R. Stefanchuk [32, pp. 69 – 70] on this problem, who distinguishes "mental suffering" (which causes damage to a person's mental health as a result of psychotrauma) and "moral suffering" (which is caused to a person as a result of a violation of the integrity of his system of moral values and priorities). In addition, the author emphasizes, the basis for moral damage can only be qualified suffering (physical, mental and moral) and cannot be elementary suffering, since, first of all, they are caused by any unacceptable behavior on the part of a person, and, secondly, they are extremely subjective, which should make it impossible for the law to influence them.



Besides, our arguments correspond to the conclusions drawn by O. Andriienko [2, pp. 8-9], who claims that experiencing moral damage is influenced by the person's interpretation of:

1) psychotraumatic situation;

2) one's own personality and behavior – according to the parameters of comparing one's condition with the offender's condition (physical, mental, psychological, social, economic); severity of subjective consequences; choice of response methods; reflections on the attitude towards the offender; choosing other options for behavior in a traumatic situation; the presence and form of own guilt; reflection of assessment by society of his own behavior;

3) personality and behavior of the offender – according to the parameters of taking into account the condition (physical, mental, psychological, social, economic) and personal characteristics; presence and form of guilt, attitude towards what happened, attempts to atone for violation; other options for dealing with traumatic situations; gravity of the offense; reflection of social assessment of offender's behavior; expectations regarding the offender's behavior and ascertaining the fact of violation of a social norm.

Therefore, as the author correctly points out, the institution of compensation for moral damage is designed to protect persons who either (a) experienced gross interference in the subjective space, which made it impossible to use compensatory mechanisms of self-regulation, or (b) have an insufficient level of development (defects) of self-regulation and dispositional systems.

Thus, in our opinion, moral damage is a powerful cognitive and emotional reaction of a person to an event (act or omission on the part of other people), which violates his internal moral or ethical code.

Foreign scientists also did not ignore the problem of moral damage in their scientific works. S. Litvinoff's [19, p. 6] view on this issue is quite interesting; he emphasizes that mental suffering is not material damage, and therefore it can hardly be measured in monetary terms. It should also be distinguished from physical injuries and physical pain that can be caused by physical trauma. The exact line between mental suffering and physical pain is invisible, because the first, like the second, is a violation in the functioning of the body; but courts have learned to distinguish between these concepts, and it will continue to do so until science shows that it is unjustified.

According to the team of authors led by T. Murray [22, p. 426], "humiliation", "embarrassment", "emotional stress", "mental suffering" and similar formulations, aimed at defining harm of a special kind, are only a description of the negative emotions accompanying the disappointment with certain expectations or deterioration of normal adaptation to circumstances. Moral damage is general enough to cover all kinds of such negative emotions. If the latter are caused by a violation of the terms of the contract or a criminal offense, moral damage is a good definition for receiving the appropriate compensation.

D. Sutherland [31] claims that moral damage is the result of psychological, social and spiritual impact of events on the person. Its symptoms can be a strong sense of guilt and shame, anger, contempt for offenders, a high level of self-criticism, loss of trust in people and organizations, weakening of personal relationships.

V. Williamson et al. [34, p. 453] come to the conclusion that moral damage is not a mental illness, but the individual's experience of potentially morally dangerous events can cause deep feelings of shame and guilt, changes in awareness and beliefs (for example, «I am a failure», «colleagues are indifferent to me»), as well as inadequate responses to stress (for example, alcohol or drug abuse, deliberate social isolation, or self-destructive actions). It is these experiences that are believed to lead to the development of mental health problems, and exposure to potentially morally threatening events is strongly associated with post-traumatic stress disorder, depression, and suicidal behavior.

As for the definitions of moral damage given by the scientists, who studied this institution specifically in labor relations, we should single out the research by V. Chernadchuk [7, p. 70], in which he suggested that moral damage caused by the violation of labor rights should be understood as losses

of non-property nature that occurred as a result of emotional, mental, or physical suffering caused by the violation of legal labor rights by unlawful acts or omission on the part of the owner or the body authorized by him, leading to humiliation of professional honor, dignity, labor reputation.

S. Selezen [29, p. 23] considers compensation for moral damage in labor law in three aspects: as compensation for moral damage caused to the employee; as a special, independent and universal type of employer's responsibility; as a way of protecting the labor rights of the employee. The specified damage is moral (or physical) suffering caused by one subject of labor relations to another by illegal acts or omission encroaching on their moral benefits (and in other cases provided for by labor legislation). Consequently, compensation for such damage in labor law (in this sense) will be understood as a set of compensatory measures to reimburse the victim in accordance with the basic principles of such compensation.

O. Kyselyova [12, p. 60] notes that the presence of this type of damage in labor law means that the employee is protected on the part of the code of ethics, as well as of occupational safety, which is defined at the legislative level, because for violations by the employer which do not cause only material harm, the employee is entitled for compensation for the emotional or physical suffering caused to him; he has the right to receive reimbursement to reclaim the state that was before the employer broke his intangible goods.

According to D. Svitovenko [33, p. 192], moral damage is a consequence of an offense in the field of labor relations (failure or improper performance by the employer of the duties imposed on him by labor legislation), as a result of which the rights of the employee are violated.

The interest in this topic was also reflected in the works of some foreign scientists and legal practitioners. For example, according to the research by R. Carucci and L. Praslova [3], moral damage in labor relations is a traumatic response of the employee to the situation at the workplace, which contradicts his moral beliefs and can cause physical, psychological, social or economic harm.

Experts of the World Health Organization, investigating the problem of chronic stress in the workplace, come to the conclusion that the moral damage in labor relations is the suffering that occurs in response to an adverse situation. The employee gets the feeling that he knows what he has to do, but is not able to do it, because the situation is beyond his control. This causes intense feelings of anger, guilt, and shame, which can lead to serious psychological problems, including post-traumatic stress disorder, depression, and suicidal thoughts [35].

Note that the definition of moral damage caused to an employee is also found in foreign court decisions. Thus, according to the materials of the case No. UNDT/NBI/2013/016 [4], moral damage arises as a result of a violation of the fundamental rights of the employee following from the employment contract and/or as a result of a violation of the procedural rights enshrined in it, or if there is evidence of injury to the employee, stress or anxiety, which can be directly related or reasonably attributed to the violation of his/her material or procedural rights. At the same time, the basis for compensation can be delay (obviously, when solving any issue related to the exercise of legal rights of the employee), disappointment, suffering and anxiety.

Case No. UNDT/NBI/2013/036 [5] proposed two definitions of moral damage in labor relations: (i) non-pecuniary damage is the result of the violation of the employee's fundamental rights arising from the employment contract and/or due to the violation of the procedural rights enshrined in it (regardless of whether they are defined in the Staff Regulations and Rules or follow from the principles of natural justice). If the violation is of a fundamental nature, it may itself result in compensation for moral damage not in the sense of punishment for the act of misconduct itself, but rather because of the harm caused to the employee.

(ii) The right to compensation for moral damage may also arise if there is evidence, set forth in the relevant medical or psychological certificate or otherwise, of harm, stress or anxiety caused to the employee, which can be directly related to or reasonably attributed to the violation of his (her) substantive or procedural rights, and if the court is satisfied that the stress, damage or anxiety are compensable.

## 5. Conclusion.

Consequently, there are three approaches to defining the concept of moral (non-property) damage caused to an individual in civil law practice. For the first, it is characteristic to establish the fact of moral, mental or physical suffering. For the second, it is not enough to establish this suffering, but it is necessary to have losses of a non-pecuniary nature or negative consequences of moral or other non-pecuniary nature that arose as a result of moral, mental or physical suffering. The third approach lies in degrading honor, dignity and business reputation or in moral suffering in connection with damage to health, as well as a result of violation of other rights.

Having analyzed the views on this issue, we agree with the researchers, who believe that establishing the fact of suffering itself is not enough to receive compensation. It is necessary that these sufferings result in negative changes in the human body, because everyone has his own personal threshold of sensitivity, individual characteristics of the psyche, and therefore, on the health of one person these experiences will not have much influence, while physical and mental condition of another one can be significantly affected by them; all this is related to the internal "moral code" of each person. Consequently, in our opinion, moral damage is a powerful cognitive and emotional reaction of a person to an event (act or omission on the part of other people), which violates his internal moral or ethical code.

Based on the analysis of the works of domestic and foreign scientists, as well as court practice, we offer our own definition of moral damage caused to an employee. It is mental, physical, or moral suffering that occurs as a result of the employer's violation of the basic rights of the employee, enshrined in legislation, employment agreement or contract, which leads to the loss of normal life ties, requires him to make additional efforts to organize his life, and other negative phenomena.

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