



Juridical Psychology

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Reverting to the problem of forensic and psychological expertise of moral injury

This article examines possibilities of forensic and psychological expertise in civil cases of moral injury under trial. Its main subject is the psychological aspect of moral injury. The author describes the procedure of psychological expertise. Different viewpoints are stated and analyzed on above-mentioned problem.

Key words: moral injury, forensic and psychological expertise, mental damage, subject, jurisdiction and tasks of forensic and psychological expertise, degree of moral sufferings, cause and effect link.

The institution of compensation of moral injury has been existing in Russian Law over 10 years. The number of cases of this category under trial is increasing each year. There is a lack of evidence, as a whys and wherefores of claims, along with it. That's why they make recourse to appointment of forensic psychological expertise (FPE) to solve this problem.

This expertise is wide-spread abroad. In our country it is a relatively new kind of expertise. The theory, methods and methodology of this direction is on the stage of development in connection with its "youth". In actual practice psychological experts lean upon different theoretic and methodological concepts, they create their own methods of a concrete expertise according to their notions of the subject and their professional possibilities. It causes experts' controversial conclusions about the same problems.

The necessity of examination of some difficult questions concerning the subject and procedure of forensic psychological expertise (FPE) in cases of compensation of moral injury determined the aim of this work.

The works by Engalitsev V.F. and Shipshin S.S. (1997), Romanov V.V. (1998) [6; p. 169-174], Nagaev V.V. (2000) [4; p. 239-252] have marked the beginning of elaboration of scientific, theoretical and methodological bases.

At the same time the results of the first monograph studies were published on this problem by Ujaninova A.L. (2000) [19] and by Holopova E. N. (2003) [13] In 2006 Kalinina A.N. has made the first dissertation research. [3]

The articles of Utehin S.V. and Ujanina A.V. [11], Holopova E.N. [12], [14], Kalinina A.N. [15], [16], [17], Saphouanov F. S., Haritonov N. K., Dozortseva E.G. [8] and others were



devoted to the psychological and combined expertise in cases of compensation of moral injury. As this problem lies in the field of different branches of science, the above-mentioned articles examined the legal, psychological, medical aspects of moral injury and possibilities of its expert assessment.

In the decision of Plenum of the Supreme Court of the Russian Federation "Some questions of law application of compensation of moral injury" of the 20 th of December 1994 № 10, they give the following definition of moral injury: The moral injury is moral or physical sufferings caused by activity or non-activity. It is encroachment on citizen's immaterial welfare (life, health, dignity, business reputation, personal immunity, personal or family secret and etc) that he possesses from his birthday or owing to law. It violates citizen's personal immaterial rights (copyright, right of using one's name or other immaterial rights according to Law of protection of intellectual activity results) or property right". [quoted by 18; p.223]

"The definition of contents of moral injury as sufferings means that acts of the offender must be reflected in victim's consciousness and provoke certain psychological reaction. Besides unfavorable changes of welfare protected by Law must be reflected in consciousness in form of negative sensations (physical sufferings) or emotional experience (moral sufferings). The contents of moral sufferings must be fear, shame or other unfavorable psychological state. It is clear that any illegitimate activity or non-activity is able to provoke moral sufferings of different degree and deprive completely or partially of psychological welfare. [18; p. 1].

In the law the notion of "moral injury" is the synonym of notions "physical and moral sufferings". In Russian the word "suffering" means physical or moral pain, torture, and the word "injury" means "damage" and "spolage". Offender is the person who does damage with the criminal purpose.... and the person who inflicts injury consciously..."[5;p.798, 102]

The adjective "moral" is used in this context in its common sense: "concerned with consciousness, inner personality life" [5; p. 433]. The word "moral" is used by legislator as "internal, emotional" [5; p. 374]. So semantics of these notions, used in the law let describe this situation of interrelations, legislatively regulated, as a situation of conflict, as a situation in which person needs protection suffering from pain and torture, experiencing psychological damage as a result of violation of his legitimate rights.

The notion "suffering" is a part of psychological category apparatus.

The words "moral" and "ethical" have psychological meaning, used as definition of the term "moral injury". These notions are organically established in legislation norms, they are psychological by their semantics (they are special, illegitimate) they present psychological phenomena which are taken into consideration by these norms.

In opinion of Sahnova T. V. such circumstances are the objective reasons to appoint an expertise in case under trial. [9; p. 7] The case of moral injury implies the use of special knowledge in the psychological field in the form of forensic- psychological expertise. However, in civil legal proceedings they often use worldly and everyday ideas instead of scientific assessment of the facts having psychological nature that results in erroneous verdicts.



As evidence of moral injury in cases of this kind they usually use the testimonies of the claimant about his physical and moral sufferings.

In the view of Erdelevskii M.A., the statement of claimant that he has experienced physical and moral sufferings it is the direct proof of the fact of moral injury. [18; p. 84]. Other means to testimony experienced sufferings are different documents, medical certificates and experts' conclusions.

Psychological knowledge let us underline that the description of the claimant's sufferings should be regarded as a hypothesis: it can represent the facts or represent them partially or absolutely differ. That's why in the medicine there is a tradition to write down the patient's complaints and objective medical diagnosis.

Certainly, it is difficult to contest the statements of sufferings because sufferings are the subjective sensations that belong to an individual. But contemporary methods of psychoanalysis let distinguish psychological sufferings and cut off subjective statements about them of the claimant.

The people who were witnesses of emotional experiences of the man, that can only make suggestions about his psychological state, because they only see external display of emotions that can be consciously controlled, and thus they do not always correspond to internal state. The appointment of forensic and psychological expertise of mental state of the victim gives information which is difficult to receive by other means. The symptoms of strong emotional sufferings, mental trauma which are described by the citizen and his relatives, or people who had the possibility to observe him after injury, in V.V. Romanov's opinion, are reasons to appoint psychological expertise [6; p. 231]. The disregard of the possibilities of psychological expertise by the court in some cases means that the court doesn't use all accessible ways to explore the situation, which is very important to pronounce the right verdict.

However we would like to pay attention to the fact that the regard of practical advocates to psychological contents of moral injury has recently been changing. The data received by Kalinina A.N. suggest that 86.3% of opinion poll consisted of advocates and judges from Kalinigrad and Kalouga think that forensic-psychological expertise should be generally accepted in cases about compensation of moral injury. But 93.7 of advocates and 78.9% of judges admit that the intuitive understanding by judges of the real state of things between claimant and defendant has the most significant impact on the size of compensation of moral injury [3].

Tolstikova N. thinks, that the judges are not specialists in the assessment of physical and moral sufferings related to individual particularities of the person who endures injury. In connection with this the appointment of forensic and psychological expertise is absolutely necessary. If we give the decision of this question at judges' discretion, they can consider the notions of reasonable demand and justice from the point of view of their own attitudes, it gives freedom to subjective interpretation of law and its application.

The nature of moral injury is not limited by psychological components. The degree of physical and moral sufferings can be assessed by specialists of different profiles:



mental state can be tested by psychologists, mental and somatic disorders, appeared after experienced injury, according to particularities of a concrete case, can be assessed by psychiatrists, neurologists, therapists and other specialists. The court can appoint complex psychological and mental expertise, medical and psychological expertise and medical-psychological-mental expertise.

Legal and psychological jurisdiction in assessment of sufferings after injury is precisely separated. The notion "moral injury" is a legal category. According to norms of civil law (art.151 of CL of the RF) while examining compensation of moral injury, the court must take into consideration the guilt of the offender, the degree of physical and moral sufferings, connected to individual's traits.

Based on law in force and explanations of the plenum of Supreme Court, we can assign the following targets that arise before the court while examining the cases of compensation of moral injury:

1. To establish the fact of moral injury.
2. If the citizen has experienced moral injury, to establish the degree of his physical and moral sufferings.
3. To find connection between the degree of physical and moral sufferings and individual traits of the person who has experienced moral injury.
4. To establish the degree of guilt of the offender.
5. To determine the size of the compensation of moral injury.

Forensic-psychological expertise doesn't deal with diagnostics of moral injury, it only assesses its psychological component. Alieskerov M.A. and Engalitchev V.F. call this phenomenon a psychological damage [1], and Kalinina A.N. uses the term of a psychological harm. [3]. FPE can not establish the degree of guilt of the offender and the size of the compensation of moral injury that must be levied. All these questions are under court's jurisdiction. The legal assessment of moral injury is the unique prerogative of the court, it doesn't only include forensic-psychological expertise, but other evidence, presented in court by the both sides.

The final verdict must be pronounced with due regard to all the evidences presented during the trial.

In civil cases of compensation of moral injury lawyers and psychologists face the problem of determination of "moral injury" with the suitable means, methods and categories. Thus, the question arises of whether we examine one phenomenon from different directions. The jurisprudence and juridical psychology use different category apparatus. When we "translate" the notion of "moral injury" from the language of the jurisprudence into "psychological language" it is necessary to take into account that psychology unveils its own aspect of this phenomenon, that is not identical with legal one. That's why it is so important to realize the meaning of legal category of "moral injury" and make the adequate "translation" of it into psychological language and, on the contrary, before pronouncement of verdict they need adequate understanding of results received in expert's psychological research.

If the court appoints forensic psychological expertise, it can not put the questions of legal character to a psychologist. The class of main problems, defining the subject



and the algorithm of FPE, is limited by the task which the court must decide, on one hand, and the subject of psychological science, on another hand.

So the experts-psychologists must answer the following questions:

1. Does the claimant endure the sufferings, subjective states whether or not illegal actions of defendant? What do these sufferings consist of?
2. Is there a link between the sufferings of the claimant and actions of the defendant?
3. What is the degree of the claimant's sufferings?
4. Does the claimant have individual psychological traits? What kind of traits are they?

For the first time the necessity to answer to the above-mentioned questions in FPE in cases of compensation of moral injury was noted by Engalitchev V.F. and Shipshin S.S. [2]. All the subsequent works have proved scientific validity of proposed subject of this kind of expert psychological research. This manifested itself in the fact that other psychologist always started to include in the expertise the similar questions of the degree of the claimant's sufferings, of cause of these sufferings, individual traits of the claimant.

It is fair for complex forensic psychological and mental expertise. (CFPME). For instance, Saphouanov F.S. and Sekerage T.N. write that "experts-psychologists in cooperation with experts-psychiatrists) must clarify the following points (Saphuanov F.S., Haritonov N. K., Dozortseva E.G. and others, 2005): psychological state of the claimant (including mental disease), individual psychological particularities, the degree of changes of mental activity, dynamic particularities of changes of mental activity (stability, convertibility, duration), cause and effect link between damage and origin and development of mental disorders"[7].

The first step of FPE are closely linked to determination of psycho-emotional state of the respondent after offender's actions. The results of psycho-diagnostic research usually reveal different negative experience: fear, shame, anxiety, humiliation, depression, alarm and others. The next stage is to establish the link between the claimant's sufferings and illegal actions of the defendant. Different authors put forward different mechanisms of its expert assessment.

Engalitchev V.F. and Shipshin S.S. suggest that first of all we must find out mental state of the respondent before the moral injury, to compare retrospectively the present state with the previous one. The changes discovered in emotional sphere are signs of cause and effect link. Besides the traumatic experience can terminate in changes of activity, personality, life regard and decrease of social adaptation [2].

Negative changes can happen in the life of the claimant, they can violate integrity and stability of consciousness and mental functioning, aggravate his psychological and somatic welfare [19; p. 77].

It is important for the psychologist to establish the type of traumatic effect that the claimant is sensitive to. If the actual traumatic experience doesn't correspond to the sensitivity of such kind of injuries, then testimonies of the claimant rest on personal particularities which the claimant slightly realizes and intentions concerning the defendant and the



court which have manipulating character [19; p. 75]. They have discovered the dependence between the offender's actions and defeat of essential values of the sufferer. [2].

Kalinina A.A. suggests that cause and effect link between illegal action and negative changes of mental activity should be ascertained with the availability of two obligatory attributes: 1) the fact of temporary link of mental activity of sufferer and the situation of moral injury, including the cases of postponed reaction to traumatic event; 2) personal significance of violation of the rights and changes logically connected to moral injury for the sufferer [3; 17].

The general approach to expert assessment of the degree of sufferings as a result of illegal actions of the offender has not elaborated yet. We came to this conclusion because different authors haven't created similar lists of obligatory and sufficient attributes, necessary for differentiation of suffering levels. Engalitchev V.F. and Shipshin S.S. suggest as criteria the depth and intensity of sufferings [2]. Ujaninova A.L. propose to add to intensity of sufferings, their duration, the forecast of consequences of mental trauma (reversibility/irreversibility up to loss of physical and mental welfare) and the character of moral injury (the degree of its objective and subjective significance) [19]. Kalinina A.N. thinks that they can only determine the depth and duration of mental activity [3].

Saphouanov F. S. and Sekerage T. N. distinguish the degree of the expression of mental activity changes and dynamic characteristics of changes of mental activity (stability - reversibility, duration) [7].

The lack of the sole approach is displayed when we try to find divisibility of the scale, measuring the degree of suffering. Relying on the level of suffering intensity, their duration and forecast of possible consequences of the experience, Ujaninova A.L. proposed to distinguish five degrees of sufferings as a result of illegal actions of the offender:

1. The emotions of small intensity with time limit, which do not have any serious consequences.
2. The emotions of moderate intensity with time limit which do not have any significant consequences.
3. The emotions of high intensity with time limit, leading to temporary mental and physical disorders of personal operation.
4. The emotions of high intensity, surpassing by temporary indexes the norm, reducing the efficiency of activity, violating temporary mental and socio-psychological adaptation.
5. Strong emotional shock, leading to the forms of mental and psycho-somatic pathology (or the forecast of "postponed reaction", high probability of illness in the future) [19; p. 43].

Kalinina A.N. takes such characteristics as depth and duration as a basis and designates four degrees of mental injury: light, moderate, strong and particularly strong. Light degree of mental disorders correspond to temporary unpainful level, insignificant changes of mental activity. Moderate average degree is characterized by unpathological state, significant changes of mental activity allocated on two levels of reaction (mental, physiological, behavioral, personal), the duration of sufferings and



negative changes from one up to six months. The strong degree of moral injury means significant changes of mental state transferring into boundary state with the duration of six months, but reversible, unpathological states, as a personal crisis.

Particularly strong disorders are the mental disorders, including chronic and irreversible changes of mental activity [3].

Among individual traits of the person who suffers from the injury, they take into account his personal disposition to a certain kind of sufferings, sensitivity to a certain kind of injury, and especially his particularities of his intellectual, emotional, communicative and behavioral spheres, explaining his style of reaction to offender's actions.

Summing up all the above-stated, we would like to underline that in spite of differences of understanding of the subject and procedure of FPE of moral injury and its psychological aspects, there is no principal divergence of opinions of the researches.

The formation of general theoretical and methodological positions, including all the existing materials, will let practical psychologists and experts to make forensic expertise which will meet the requirements of scientific validity.

The court, in its turn, will address to psychologists to receive expert definition of moral injury as evidence proving the necessity of compensation of moral injury and its size.

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