

MORAL DAMAGES RESULTING FROM OFFENCES OF A PATRIMONIAL NATURE

The obligation to indemnify the *ex delicto* civil liability is predicated on sections 109, 110 and 115 of the Spanish Criminal Code ("C.C.").

Section 109.1 of the C.C. stipulates that *"The execution of an act described by Law as an offence obliges to compensate, in the terms provided for in the regulations, the damages caused by it"* and section 110 of the C.C. describes the concepts within the civil liability caused by a criminal offence that must be compensated, and include: 1. Restitution of property; 2. Redress of loss; and 3. Compensation for material and moral damages.

Therefore, the Law provides a first classification of compensatory damages arising from the commission of a crime or misdemeanour: material and/or moral damages. Both categories constitute the total of the damage that must be repaired by the person who has committed the criminal behaviour, and the victim must be fully compensated.

Although none of the two types of damages laid down have been exempt from case law debate, it seems that there is no doubt that moral damages, due to their nature, show additional difficulties when it comes to be noticeable and above all, when it comes to be assessed by the courts due to their abstract nature and the absence of a scale or of other objective aspects of assessment that do exist to fix the *quantum* of material damages.

Focusing on moral damages, the Court of Appeal [Audiencia Provincial] of Barcelona gives us a definition in its Judgment of 8 February 2006, of the concept of moral damages, and thus, it states that: "it is the damage inflicted on the beliefs, the feelings, and the dignity of the person or on his/her physical or mental health [...]. The anxiety, the worry that disturb a person in the psychic realm".

The jurisprudence has readily noticed the existence of moral damages in the cases of offences against freedom and physical integrity of persons, since it seems relatively clearer that an offence against physical integrity, where serious injuries have occurred (such as a rape or an attempted murder), may cause a feeling of restlessness, anxiety, worry or may inflict damages against the dignity and physical or mental health of the victims.

Nevertheless, it was more difficult to assess moral damages (to assess that there was indeed such anxiety, restlessness and worry) in those cases of offences of a patrimonial nature, and there was no well-defined line of case law regarding the compensability of those moral damages resulting from offences of a patrimonial nature.

It is not until 2006 that the Supreme Court [Tribunal Supremo], by means of an agreement adopted in the full court [Pleno] meeting in a non-adjudicatory session on 20 December of that year, states that: *"As a general rule, compensation for moral damages in offences against property is not excluded and is compatible with section 250.1.6 of the CC (aggravated fraud)"*.

It seems that the idea of compensation for moral damages in property offences was somewhat vague; being this agreement adopted by our High Court [Alto Tribunal] the one providing more clarity and definition to this issue, establishing at that time that, as a rule, moral damages are also noticeable in cases of offences of a patrimonial nature.

However, our case law requires an indispensable condition in order to consider that a damage is indemnifiable, also applicable to those resulting from property offences. This requirement is **the causal relationship between the offence and the damage caused**.

Thus, it is a consistent case law of the Supreme Court that only those damages that are a direct and necessary consequence of the criminal offence must be compensated (Supreme Court Judgments 1253/2005 of 26 October, among others).

It is therefore crucial that the person affected by the offence can reliably prove the existing causal relationship between the criminal offence and the moral damage, because if this causal relationship cannot be proved, it will not be considered an indemnifiable damage.

As an example, the judgment of the Supreme Court of 18 February 2015, does not consider as a causal relationship the one between the psychological affectation of the injured person, accredited by a psychological report of the year 2014, and a fraud of which she was a victim eight years before.

When establishing such moral damages by the courts, it is an established case law of the Supreme Court to leave as a discretionary matter to the court in the determination both of the existence of moral damages and of the amount of such damages (Supreme Court Judgments of 28 October 2010, dated 25 March 2010, 30 June 2008).

The moral damage is proportional to the seriousness of the offence and to the "moral harm" that the victim suffers, depending on the "spiritual significance" that the offence has in relation to the victim. The Supreme Court claims that moral damages are not determined by quantitative bases, but depend on the reasonable discretion of the courts according to the seriousness of the offence.

In practice, the amounts granted by the courts as compensation for moral damages are usually round amounts, fixed at a guess and not very high. There is no predefined scale or references, and therefore, they must be quantified on a case-by-case basis paying attention, according to the Supreme Court, to the nature and seriousness of the act, as well as to the relevance and society's repulsion towards it, appeasing the interested parties' demands according to the existing socioeconomic reality at any time.

In terms of proving that a person has experienced moral damage, it is common to rely on psychological reports. However, there have been convictions without a solid evidentiary basis, the seriousness of the situation itself being sufficient grounds for the sort of moral injury we are dealing with.

Regarding jurisprudence in this area, we will hereafter refer to some judgements where moral damage was considered to result from property offences:

-The well-known Supreme Court Judgement 1/2007 on January 2 where fraud was accepted as a cause of moral damage but in quite a tragic case: the injured party accepted the proposal made by the accused, mortgaging their home to obtain a loan that would allow them to set up a telephone and internet cafe, the accused having no intention of carrying out any business whatsoever. As a result of this fraud, the injured party fell into debt and lost their home. The Supreme Court ruled that, in addition to the calculable economic damage, the injured party had suffered extremely significant moral damage to the tune of 30,000 euro.

-The Provincial Court of Madrid judgement (Section 1) 17/2015 on 16 January concerned a case where the accused set up several different cooperatives by promising to procure land in order to build future social housing. The accused used the funds provided by the cooperative members for other purposes, so the homes were never built.

The Court said: *“It is undeniable that an average person’s frustration with this type of expectation is likely to create obvious unease that can cause personal and/or family emotional destabilisation, which can vary depending on how sensitive a person is, especially when it concerns a commodity of prime necessity and affects people with limited economic resources who allocate their scant savings to realise one of their major dreams.”*

The Court finally concluded with: *“Due to the victims’ mental suffering, the severity of what was referred to above and the lengthy period of such conditions, the court considers that in order to compensate them, the sum of 10,000 euro is absolutely reasonable and suitable.”*

-The Supreme Court Judgement 565/2007 on 21 June concerned a case in which the company director siphoned funds provided for the company for his own use and purchased assets with the stock capital for private businesses. To establish the company, the accused had asked his cousins in Venezuela to join him and put up their assets, for which they had to sell their possessions in Venezuela.

The High Court highlighted the following statement from the District Court: *“it cannot be ignored that they left their country to come to Spain with their family and invested the amount obtained from the sale of their assets in the company, with the ensuing feeling of rootlessness from having their expectations thwarted mainly by unfair management that was a breach of loyalty inherent in a manager...”. “Both the particularities of the case and the amount awarded by the District Court must be regarded as reasonable [...]”.*

The Supreme Court confirmed that the accused was ordered by the A.P. Asturias to pay the amount of 20,000 euro for moral damage to his cousins.

Nevertheless, other convictions for property offences exclude compensation for moral damage:

The Supreme Court Judgement 63/2015 on 18 February, aforementioned, concerns a case where the injured party handed money over to the single manager of a business specialising in the promotion of urban planning for the construction of a building on a plot of land. The accused used the money for other purposes other than for the construction of the building, which he had no intention of carrying through.

The Supreme Court saw no causal link between the psychological distress (outlined in a 2014 expert’s report) and the actions of the accused (fraud committed 8 years previously) and it found no evidence to suggest that the psychological damage and distress was relevant enough to warrant compensation.

-The Supreme Court Judgement 209/2012 of 23 March, regarding a case where a joint administrator sold a property under construction to another company. On the due date for delivery of the building that was negotiated in a private document, the accused did not deliver and instead resold the same property. The accused was convicted by the District Court for the concealment of assets.

The Court did not see the validity of awarding compensation for damage stemming from “unease and distress” caused by a delay in the delivery of property and considered that “it is certain that the contested ruling does not highlight any special circumstance, other than capital loss, to justify compensation for moral damage.”

-Finally, the Judgement A.P. Barcelona 122/2010 of 25 January, concerns a case in which the injured party entered into a contract with the administrator of a company specialising in the promotion of housing for the construction of a house. The accused received various cheques, which he kept for himself and he was convicted for misappropriation of funds.

The Supreme Court confirmed that this was a property offence and that the damage had already been compensated. There was no evidence to support the claim of moral damage and “unease as a result of a diversion of payments is not sufficient”.

In short, there is no doubt that the courts, while using discretion in determining both the existence of moral damage and its quantification, referred to previously, have recognised, in some cases, the existence of moral damage due to economic and property offences. They have quantified the amount of compensation for such damage based on seriousness and society’s condemnation of said damage, although such damage is determined on a case by case basis using quite restrictive criteria in relation to the amount to be awarded.

Notwithstanding the foregoing, we must not forget that it is the victims who bear the burden of the proof of the causal link (an essential prerequisite) between the crime and the moral damage caused, as if there are doubts, it will not be considered compensable.

Raúl Romero Núñez

Associate lawyer at Sánchez-Cervera