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DEFINITIONS AND CLASSIFICATIONS OF DAMAGES IN THE USA AND KAZAKHSTAN

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Abstract

The article focuses on damages in law in the USA and Kazakhstan. Even though the latter implements continental law and the former develops common law traditions, the countries employ the category «damages». The research compares particular categories in the damages.

The main body of the article, which is called research results, consists of two parts. The first part demonstrates the outcome of the examination of the definitions employed in both countries. The second one illustrates the results of comparative analysis of classifications in damages.

The research results reveal that damages in the USA and Kazakhstan have many correspondences as well as dissimilarities. Matches can be useful for further researches. While discrepancies like diversity are helpful for further development of categories in damages.

The research proposes ways to start extensive studies of all kinds of remedies in Kazakhstan. It is expected that the essay will foster the development of remedies in Kazakhstan.

Key words: damage, definition, classification, category, remedies, civil law, common law.

АҚШ ПЕН ҚАЗАҚСТАНДАҒЫ ЗАЛАЛДЫҢ ҰҒЫМДАРЫ ЖӘНЕ ЖІКТЕУЛЕРІ М.К. Жарылғап¹

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Андатпа

Бұл мақалада АҚШ пен Қазақстандағы заң залалдарға көңіл бөлінген. Соңғысы континенталды заңды іске асырады, ал бұрынғы жалпы заңдық дәстүрлерді дамытса да, екі ел де «зиянды» пайдаланады. Зерттеу екі елдегі залалдардың нақты санаттарын салыстырады.

Зерттеу нәтижелері деп аталатын мақаланың негізгі бөлігі екі бөліктен тұрады. Бірінші бөлім екі елде қолданылатын ұғымдар арасында жасалған сараптаманың нәтижесін көрсетеді. Келесі бөлім залалдардың классификацияларың салыстырудан шыққан нәтижелерін сипаттайды.

Зерттеу нәтижелері АҚШ пен Қазақстандағы зақымдардың көптеген сәйкестіктерге, сондай – ақ түрлі ерекшеліктерге ие екенін көрсетеді. Сәйкестіктер келесі зерттеулерге негіз ретінде пайдалы болуы мүмкін. Дегенмен, сәйкессіздіктер залал санаттарын одан әрі дамыту үшін пайдалы.

Зерттеу Қазақстандағы барлық құқық қорғау құралдарды кеңінен зерттеуге арналған тәсілдерді ұсынады. Мақала Қазақстандағы құқық қорғау құралдарды дамытуға ықпал етеді деп күтілуде.

Түйінді сөздер: залал, ұғым, жіктеу, санаттар, құқық қорғау құралдар, азаматтық құқық, жалпы құқық.

ПОНЯТИЯ И КЛАССИФИКАЦИИ УБЫТКОВ В США И КАЗАХСТАНЕ Жарылғап М.К.¹

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Аннотация

Статья посвящена убыткам в праве США и Казахстана. Несмотря на то, что последний применяет континентальное право, а предыдущий развивает традиции общего права, обе страны используют категорию «убытки». Исследование сравнивает отдельные категории таких убытков.

Основная часть статьи, которая именуется «Результаты исследований», состоит из двух частей. Первая часть демонстрирует результаты изучения определений, используемых в обеих странах. Вторая часть иллюстрирует результаты сравнительного анализа классификаций убытков.

Результаты исследования показывают, что убытки и в США, и в Казахстане имеют много общего, равно как и расхождений. Общие совпадения могут быть полезны в качестве основы для дальнейших исследований. Между тем, расхождения как разнообразие полезны для дальнейшего развития категорий убытков.

Исследование предлагает способы для начала всесторонних исследований всех видов средств правовой защиты в Казахстане. Ожидается, что статья будет способствовать развитию средств правовой защиты в Казахстане.

Ключевые слова: убытки, определение, классификация, категории, средства правовой защиты, гражданское право, общее право.

Introduction

The topicality of the article is that Kazakhstan does not study remedies so deep as the USA does. Damages are the most common remedies in the USA. The USA has developed damages for centuries. While Kazakhstan mostly practiced administrative means in law. Therefore, we suppose that the USA's development of damages is valuable for Kazakhstan law.

The research novelty is that modern damages combine advanced knowledge of remedies, equity, and restitution [1, c. 8]. The USA has accumulated broad experience of damages. However, due to limitations, the article focuses on particular elements of damages.

The object of the article is damages. Courts formed basic rules of remedies by awarding damages. The subject of the essay is essential elements of damages such as definition, classifications of damages in the USA and Kazakhstan. The objective of the article is to start the formation of a unified approach to remedies in Kazakhstan law. The solution of the following tasks contributes to the attainment of the objective: analyzing definitions of damages in the USA and Kazakhstan; considering classifications of damages in both countries.

Research methods

The article employs several methods. There are methods of comparative analysis, historical approach, systematic examination, inductive and deductive means. The essay also embraces case studies, exploring academic writings, scrutinized statutes and rules.

The different sources were researched. The essay quotes laws, statutes and cases. It also cites academic research papers, books, articles. The essay refers to researchers Alice McKean, Armistead M. Dobie, David Ball, Dan B. Dobbs, Donald H. Baskin, Douglas Laycock, Dorian Lambelet Coleman, Ralph Stanley Bauer, William B. Hale.

It is awaited that the article will help to explain courts' resolutions, enrich practices awarding damages in Kazakhstan. Essay's outcomes and further researches will enrich the theoretical basis of remedies in Kazakhstan.

Research results

The first part of the essay tries to reveal whether terms «damages» have the same lexical meaning in the USA and Kazakhstan. It is crucial because if they are not, it is quite probable that tiny discrepancies in the terms can cause incomprehension between lawyers of both countries.

The essay scrutinizes term «damages» in the USA, then Kazakhstan's damages in light of the USA term.

The term damage has a quite broad definition in the USA. It is possible to determine damages as a loss, harm, a sum of money or even bad effect. Its definition is different in a legal dictionary and ordinary dictionary.

For example, Black's Law Dictionary gives three definitions of damages. One of these definitions determine damages as an adjective and sounds as follows «of, relating to, or involving monetary compensation for loss or injury to a person or property» [1, damage].

The second definition in the law dictionary represents damages as a noun and gives two meanings. According to the law dictionary, the noun «damage» means «loss or injuries to a person or property: esp., physical harm that is done to something or to part of someone's body <actionable damage resulting from negligence>» or «by extension, any bad effect on something» [1, damage].

The last definition is «money claimed by, or ordered to be paid to, a person as compensation for loss or injury...» [1, damage]. Thus, damages may define compensation, money, harm, loss or injuries.

However, not everyone supports such set of words like compensation, money, harm, loss or injuries to refer damages as the definition. Someone does not agree to pile a lot of legal terms. They require drawing a line between terms. For example, Donald Beskind and Doriane Coleman urge to separate injury and damages «to the extent possible» for pedagogical purposes [2, c. 367]. They define injury as «a legally recognized harm» [2, c. 367]. While, their textbook delineate damages as «the amounts, expressed in dollars, that a judge, jury or arbitral panel requires the wrongdoer to pay the plaintiff for that injury» [2, c. 367]. Thus, the authors demonstrate that the term «damages» is vague.

Acknowledged lawyers in the USA accept that there are no precise definitions as to damages. Firstly, Donald H. Beskind and Doriane Lambelet Coleman recognize that lawyers rotate the considering terms. Secondly, a trial consultant like David Ball goes further. He directly points out to avoid legal terms in front of a jury in a court. He urges:

«Never use terms such as «economic» or «noneconomic» or «damages». They are legal jargon. Some attorneys misguidedly think there is some advantage to using the language of the instructions. This is a myth. Instead, legal terms are usually misunderstood in ways that hurt you – even if you explain them. Jurors don't learn much vocabulary during [a] trial» [3, c. 29].

Thirdly, Ralph Stanley Bauer stated that the sense of the term «damages» gets up «ambiguity of expression» [4, c. 1]. He sees «damages» not like the plural form of «damage», but only compensation for damage. Thus, academics and practitioners limit the sense of the word «damages» to avoid vagueness in the term «damages».

It is supposed that Kazakhstan's lawyers, whose practice a continental law, as opposed to common law, operate with the precise legal definition stated in a civil code. However, surprisingly, Kazakhstan's law also interchanges words.

Even legislators in Kazakhstan are not so careful in using terms related to damages. For example, legislators treat the same term as «moral losses» in the article 352 and as «moral damages» in the article 951 of the Civil Code of Kazakhstan [5]. Kazakhstan's law sometimes switches terms «damages», «damage» and «losses».

However, Kazakhstan's lawyers indisputably operate with two type of damages: «damages» and «moral damages». The latter represents damages resulting from pain and suffering. Thus, Kazakhstan's moral damages are equivalent to «non – economic» damages in the USA.

Mere damages in Kazakhstan is equivalent to economic damages in the USA. This type of damages includes two parts called «real damages» and «lost profits». Real damages are «the losses, which are incurred or must be incurred by the person whose right is violated, the loss or the damage of his property...» [5, art. 9]. Lost profits embrace «lost profit which this person would have received under the normal conditions of the turnover, should his right have not been violated» [5, art. 9]. Thus, Kazakhstan's mere «damages» consist of the real damages and lost profits. It has the legal definition and takes place in the code.

The term «moral damages» has quite short history and limited practice in Kazakhstan. It emerged in 1994 when Kazakhstan, gotten independence in 1991, enacted the new civil code [5].

Courts have a quite limited practice of awarding moral damages. Lawyers still refer to the resolution of the Supreme Court of the Republic of Kazakhstan because moral damages are a new institution in Kazakhstan's judicial practice [6].

It might be argued that the third type of damages called «damages for the loss of time» exists in Kazakhstan's law. Kazakhstan's lawmakers use such term inherited from the Soviet period in the Civil Procedure Code [7, art. 114]. However, a plaintiff receives such compensation for the loss of wages, impossibility to earn money because the counterpart intentionally and many times delay the trial [8, art. 13]. The former judge, Ph.D. Kuanova I.Z. stated that «obviously, the compensation is not, in and of itself, for a waste of time» [9]. Damages for the loss of time is indeed lost profits. The given definition «damages for the loss of time» employed by Kazakhstan's lawmakers can mislead law practitioners in a court.

Thus, lawyers in both countries, the USA and Kazakhstan, face to different extent uncertainty as to the definition «damages».

The second part of the essay describes the systematizations of damages in both countries. Then, it attempts to explain that differences are results of the historical development of damages. Finally, the essay represents three main types of damages in the USA nowadays.

Unlike in Kazakhstan, academics, lawmakers, courts and practitioners created the ample set of categories of damages in the USA. The broad classification of damages in the USA is a result of long – standing practice in courts and analyses in universities.

One of the oldest classifications of damages represented in Goodson's library of Duke University School of Law is an arrangement given by William Hale. He stated the following classification:

1. Compensatory damages:
 - 1.1. Nominal damages;
 - 1.2. Substantial damages;
2. Exemplary (punitive) damages [11, c. 23].

He also works with terms direct and consequential damages “liquidated damages,” describes damages ex – contract and damages ex delicto, but did not include them in his classification [11, c. 44, 49, 196, 245 and 249]. The Hale's classification of damages based on object and amount of damages.

After almost quarter of the century from Hale, Ralph Bauer highlighted other facets of damages and represented a little bit different classification of them. He emphasizes entire and prospective damages [12, c. 82]. He stresses excessive and inadequate damages [12, c. 89]. He also underlines liquidated, nominal and exemplary damages [12, c. 97, 111 and 117]. Bauer's classification mostly focuses on procedural aspects.

Hale and Bauer exploited different principles of the law of damages. Bauer builds upon a principle that «one injury give rise only one right of action» [12, с. 82]. Hale set classification up to the primary principle of damages called nowadays as Hatahley's rule [1, с. 14]. Hatahley's rule means that «to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party» [13]. Thus, Hale pointed out the material aspect of damages to classify them. In contrast, Bauer emphasizes the procedural aspect of an indemnity in his classification.

Unlike in the USA, Kazakhstan law divides damages directly into two group. The first group is mere damages, while the second set is moral damages. The following arrangement represents the classification of damages in Kazakhstan:

1. Damages:
 - 1.1. Real damages;
 - 1.2. Lost profits;
2. Moral damages
 - 2.1. Mental suffering;
 - 2.2. Physical suffering [6, art. 9 and 951].

Kazakhstan's categories of damages ground on one criterion which is the awarding cause of damages. It is straightforward and, as a consequence, quite convenient to employ it by everyone.

Kazakhstan's legislator splints the primary category of damages into to parts. Damages under the article 9 of the Civil Code of Kazakhstan incorporates real damages and lost profits [6]. Real damages are «the losses, which are incurred or must be incurred by the person whose right is violated, the loss or the damage of his property...» [6, art. 9]. Lost profits embrace «lost profit which this person would have received under the normal conditions of the turnover, should his right have not been violated» [6, art. 9]. Thus, damages contain past and future losses.

Similarly, moral damages in the Civil Code of Kazakhstan also have two parts. They recover mental distress and physical pain. «Moral damage refers to the violation, impairment or deprivation of personal non – property welfare and rights of individuals, including mental or physical suffering (humiliation, anger, melancholy, displeasure, shame, despair, physical pain, lameness, discomfort, etc.) experienced (suffered, experienced) by the victims on the offense, committed against him (her)» [6, art. 951]. Like non – economic damages in the USA, moral damages in Kazakhstan recover pain and suffering [3, с.384]. Thus, Kazakhstan has only four types of damages.

In contrast, the USA's categorization of damages is complex. They ground on different criterions. The several actors like legislators from the half hundred states, the enormous number of judges and academics have developed the law of damages in the USA. The USA's damages have been evolving for the last two centuries. The categorization in the USA embraces a bunch of damages types.

Also, the USA damages types are advanced continuously during the long term. The types of damages expanded in the last centuries. Hale established the pure form of damages classification at the end of the nineteenth century. Bauer expanded the categorization at the beginning of the twentieth century. At the end of the twentieth century, Dan B. Dobbs defines and groups damages by distinguishing them from other remedies [14, с. 277 – 550]. The categorization of damages in the USA always evolve.

In the same time, however, it might be asserted that the number of recognizable types of damages shrinks in the last years. One of the new grouping of damages embraces only

nominal, compensatory and punitive damages, and added presumed damages at the end of the twentieth century [15]. Douglas Laycock, Armistead Dobie and Alice McKean highlighted only punitive and compensatory divided into direct and consequential, in other words, general and special, damages [1, c. 11 – 66, 217 – 262]. These academics focus mostly on choosing remedies rather than the damages classification. They maintain that the distinctions between types of damages are degenerating [1, c. 6, 58]. It reflects that the law of damages in the USA is continuously adapted and insensibly transform.

The USA's law of damages passed development through three stages. Each subsequent level is a derivative of the previous level. The first stage is a formulation specific terms and definitions like «damages in actions against carriers», including some extravagant terms like «damages for breach of promise of marriage» [11, c. 369, 521]. The second stage characterizes the systematization of the growing number of damages variations like «damages in particular classes of tort actions» [12, c. 307; 14, xvii – lxxii]. The modern stage is focusing on choosing the better remedies [1, c. 307]. The progress of the law of damages in the USA is a transition to a higher level of generalization.

Thus, the USA's law of damages inherently has three main categories. They are nominal, compensatory, including direct and consequential damages, and punitive types of damages. It seems necessary at this point to give their description for the further consideration of the law of damages.

Compensatory damages are the main type of damages. The statutory formulation of compensatory damages is absent. The contemporary formula of compensatory damages employed by a court says that they are «those damages that will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury» [16]. This type of damages compensates the plaintiff her actual losses or injury.

Direct damages, which is also called as «general damages», are a part of compensatory damages. The modern case refers general damages as damages «flow directly and necessarily from a breach of [duty], or that are a natural result of a breach» [17, c. 960, 969]. The court referred to an old case and rules as to general damages [18, c. 163, 167]. Thus, general (direct) damages have to have direct cause from wrong action or omission.

Consequential damages or special damages are opposed to general damages. Consequential damages are «those losses that do not arise directly and inevitably from any similar breach of [duty]. Courts award special damages if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of [breaching] (an objective test)» [17, c. 960, 969, 970].

Punitive damages are a kind of punishment. Punitive damages as a remedy oppose to compensatory and nominal damages. Courts define punitive damages as damages «awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future» [19, c. 18]. The aim of these type of damages is retribution to the defendant and deterrence to others.

Nominal damages are the third main type of damages. Courts explain the term as «a small and trivial sum awarded for a technical injury due to a violation of some legal right and as a consequence of which some damages must be awarded to determine the right» [20, c. 354, 360]. Nominal damages delineate the right of a plaintiff and prevent the prescriptive right of a defendant.

Kazakhstan's law does not have terms punitive and nominal damages. A private person may not punish another one. Kazakhstan stated that deterrence is a public function. Retribution is closely related to deterrence. Government agency and courts on behalf of the Republic have the power to impose punishment in the form of fines, suspension or prohibition of the activity, arrest, etc. in the public interest. Thus, a public law like administrative and criminal law embrace preventing measures from outrageous conducts.

Conclusion

The research confirms the hypothesis about the possibility to enhance damages in Kazakhstan by studying US' practices.

There are a lot of similarities. Damages itself as the term has many senses. Lawyers employ several words to replace damages. Academics try to avoid the ambiguity of using the word «damages». Despite the sources and historical distinctions, American's and Kazakhstan's «damages» definitions are quite similar.

Kazakhstan's damages have some common facets with the USA's analogies. Very similar to a dichotomy between non – economic and economic damages in the USA, moral damages in Kazakhstan oppose to mere damages. Kazakhstan's courts award only damages, so – called direct damages in the USA, in overwhelming majority cases.

Both countries employ quite a simple categorization of damages. Their classifications have evolved in different historical ways, reasoning, and actors. However, both countries have quite similar, at least comprehensible for other side, damages conceptions. The revealed similarity in damages' definitions allows continuing research remedies.

But the distinction between the countries is that Kazakhstan does not practice nominal and punitive damages. Kazakhstan recognizes only the compensation function of damages. Courts force the breaching party involuntary redress the plaintiff's loss which would not have been if there was no breach of duty. However, discrepancy like diversity might be used as a source of enrichment law in Kazakhstan. The issue needs further examination.

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