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Genesis of Harm and Losses in Civil Law Doctrine. The Factor of European Science

Abstract. The works of the first Russian jurists on the problem of compensation for damages in civil law are not sufficiently used in scientific works on this topic. This article can fill in the gaps and be of interest to specialists in this field of research. The author has studied and compared the main works on civil law compensation published before the revolution of 1917. It was found that the science of civil law has moved away from the consideration of universal claims for damages as a remedy and focused on the interpretation of damages as a sanction for an offense. Modern authors repeat the four-level structure of consideration of compensation cases adopted and developed in the Soviet period and the influence of the following conditions: illegality, causality, guilt, proven material damage, lost profit. The author comes to the conclusion that it is necessary to return to the ideas that existed before the Russian Revolution and use them to improve the existing theory of compensation for damages and losses.

Russian pre-Soviet civil law initially proceeded from the concept of responsibility only for behavior, since the category of «illegal actions» was introduced in Article 684 of the Code of Laws of the Russian Empire. Due to the developing industry, separate laws provided for payment as the equivalent of property losses for any material damage from dangerous activities, that is, for the materialized risk. In the Draft civil code of the Russian Empire, branched norms on responsibility for lawful actions appeared. A proper scientific generalization of this approach and phenomenon has not yet been made. The Civil Code of the Russian Federation has a norm on compensation for damage due to lawful actions, when it is specified in the law, but not on recovery of damages.

Keywords: civil law; liability; losses; damage; fault harm; obligation.

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Генезис проблемы возмещения вреда и убытков в доктрине гражданского права. Фактор европейской науки

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Аннотация. Работы первых российских правоведов по проблеме возмещения ущерба в гражданском праве недостаточно используются в научных работах по данной тематике. Данная статья может восполнить пробелы и быть интересна специалистам в данной области исследований. Автор изучил и сопоставил основные труды о гражданско-правовых возмещениях, опубликованные до революции 1917 г. Было установлено, что наука гражданского права отошла от рассмотрения универсальных требований о возмещении ущерба как средства правовой защиты и сосредоточилась на толковании возмещения ущерба как санкции за правонарушение. Современные авторы повторяют принятую и разработанную в советский период четырехуровневую структуру рассмотрения дел о возмещении и влияние следующих условий: неправомерность, причинность, вина, доказанный материальный ущерб, упущенная выгода. Автор при-

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ходит к выводу о необходимости вернуться к представлениям, существовавшим до русской революции, и использовать их для усовершенствования существующей теории возмещения ущерба и убытков.
Российская досоветская цивилистика сначала исходила из концепции ответственности только за поведение, так как в ст. 684 Свода законов Российской империи была внедрена категория «недозволенные действия». В силу развивающейся промышленности отдельными законами предусматривалась выплата в качестве эквивалента имущественных утрат за любое материальное повреждение от опасной деятельности, то есть за материализовавшийся риск. В Проекте гражданского уложения Российской империи появились разветвленные нормы об ответственности за правомерные действия. Надлежащее научное обобщение этого подхода и явления в настоящее время до сих пор не произведено. В ГК РФ есть норма о возмещении вреда вследствие правомерных действий, когда это указано в законе, но не о взыскании убытков.
Ключевые слова: гражданское право; ответственность; убытки; ущерб; вина; вред; обязательство.
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1. Introduction

Despite the abundance of legal literature, there has been no publications discussing all arguments and viewpoints on the topic of adjudication for the reimbursement of damages prior to the first civil law codification in 1922.

Considering the views of the Russian Empire's scholars on reimbursement of damages and marking their contribution to the modern doctrine of damages, one should note that there was no authoritative scientific theory underlying the judicial recovery of damages in the Russian Empire. Legal regulation of damages recovery became significant no earlier than in the second half of the 19th century.

General legal principles were developed in the works of the prominent Russian civil law scholars who taught at the leading Russian universities. When writing conceptual works they relied, first of all, on the research of German scholars, as well as on the legislative process in the latter's states, and, later, in united Germany.

2. Materials and methods

Theory and practice in Russia lagged behind those of advanced European countries. The author has found only two books, about ten articles, and several collections of the Cassation Department of the Governing Senate (the adjudicative body in the Russian Empire), which contained rulings on cases involving damages, harm, and loss of profit, and proposed a legal classification of damages claims.

The Senate faced a constantly increasing number of cases involving damages. In 1910, their share reached one third of all the cases heard by the Senate.

In Russia, this number was between 3 and 5 % even in the recent years.

For this reason, the author considered it reasonable to, first of all, turn to the history of the notion of damages. One may see how, as doctrines evolved under the influence of the rapidly growing number of transactions in commerce, transport, and of production forces, such legal categories as «damages», «harm», «proceeds», and «expenditures» ceased to be used as synonyms, and gradually assumed their own distinct meanings.

The comparative approach allowed to juxtapose the opinions of authoritative scholars on the discussed topic in order to comprehend and use their ideas.

3. Results

The author concludes that the wording of provisions on liability contained in the Code of Laws of the Russian Empire (Art. 684 et al.) are not suitable for regulating damages recovery today, as they use the key notion of «impermissible action», i.e., unauthorized action; this contradicts the fundamental principle of private law «everything which is not explicitly forbidden by the law is allowed», stipulated in Article 9 of the Russian Civil Code. Not all conceptual ideas of authoritative scholars of that time were developed in the Soviet period and later, for example, the conception of liability due to an accepted risk. In disputes over recovery of real damage and loss of profit, courts did not rely on unified principles and issued contradictory decisions. That is why, the Civil Code of the Russian Empire was drafted for publication and adoption — it was to

be the first codification of laws in the country in which the legal rules were to become unified and consistent. All representatives of the Russian Empire's scientific community followed the example of German-speaking scholars from Austria, Switzerland, and, most of all, Germany, considering their opinions to be most authoritative. This explains the historical and genetic links between the Russian and the German legal systems and, in particular, both countries' similar treatment of the institution of damages. This topic has not yet been referred to.

4. Discussion

4.1. Important works and sources

The adjudication bodies before and after the 1864 reform followed Articles 683 and 684 of vol. X, part 1 of the Code of Laws of the Russian Empire (Civil Laws)[1], and Article 574 of general character, which said: «Since according to the general law no one can be deprived of their rights except in court, any property lesions, harm and damages shall be recoverable by one party and can be demanded to be compensated by the other party»[2]. This wording was elaborated through the fruitful activity of the supreme judicial institution of that time — the Governing Senate. Before the second half of the 19th century, when industrial development resulted in the increase of damages claims, cases involving the application of those Articles were rare. The Senate heard up to 130 cases a year. Of them, damages claims constituted about 10 % in 1871, while in 1910 — about one third. These claims arose both from delicts (torts) and transactons, mostly of household and small business character. Thus, there was no doctrine on damages; moreover, Senate decisions sometimes directly cited the works by German authoritative jurists and the achievements of the German legislature[3].

Scientific summarizations on the topic of damages started to appear in textbooks on civil law in the second half of the 19th century. The first belonging to distinguished statesman K. P. Pobedonostsev[4]. Later, outstanding theoreticians G. F. Shershenevich[5], I. A. Pokrovskiy[6] and D. I. Meyer[7] touched upon the topic in university textbooks. Also, dam-

[1] Article 683 vol. X, part I of the Code of Laws of the Russian Empire: «The persons who suffered damages or harm due to death or injury obtain reimbursement from the owners of railroad or steamship companies based on the following rules: 1 the owners of railroad or steamship companies (the state, companies or individuals) shall reimburse any person who suffered damages or harm due to death or injury, inflicted during exploitation of railroads or steamship transportations. Reimbursement is adjudicated based on Articles 657–662 and 675, in compliance with the rules stipulated in the following clauses…» (*Tyutryumov I. M.* (comp.) (2004). Zakony grazhdanskiye s razyasneniyami Pravitelstvuyushchego Senata i kommentariyami russkikh yuristov. Kniga vtoraya [Civil laws with explanations of the Governing Senate and comments of Russian lawyers. Book 2]. Moscow: Statut. P. 437–438) ; Article 684 vol. X, part I of the Code of Laws of the Russian Empire: «Any person must reimburse for damages and harm inflicted on someone by action or negligence, even though those action or negligence did not constitute a crime or offense, if it is proved that the said person was not obliged to those actions by demand of law, or government, or necessary personal defense, or confluence of such circumstances which they could not prevent» (Ibid. P. 477).

[2] *Tyutryumov I. M.* Op. cit. P. 338.

[3] *Zmirlov K. P.* (1908). Voznagrazhdeniye za vred i ubytki, vsledstviye smerti ili povrezhdeniya zdorov'ya, prichinennykh zheleznodorozhnymi i parokhodnymi predpriyatiyami, po resheniyam pravitel'stvuyushchego Senata [Reimbursement for damages and harm due to death or health injuries incurred by railroad and steamship companies, according to the decisions of the Governing Senate]. Saint Petersburg: Senatskaya Tipographiya. P. 5.

[4] *Pobedonostsev K. P.* (1868–1880). Kurs grazhdanskogo prava. V trekh chastyakh [Course in civil law. In three parts]. Saint Petersburg.

[5] *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava: V 2 t. T. 2 [Textbook of Russian civil law: In 2 vols. Vol. 2.]. Moscow: Statut.

[6] *Pokrovskiy I. A.* (1917). Osnovnyye problemy grazhdanskogo prava [Main issues of civil law]. Petersburg: Yuridicheskiy knizhnyy sklad «Pravo». See also: *Pokrovskiy I. A.* (1901). Obyazatelstva iz deliktov v proyekte Grazhdanskogo Ulozheniya (prilozheniye k protokolam sobraniya Kievskogo yuridicheskogo obshchestva za 1899 g.) [Liabilities out of delicts in the draft of the Civil Code (appendix for Protocols of a meeting of Kiev Juridical Society in 1899)]. Kiev: Typography of Imperial University named after Saint Vladimir (URL: https://dlib.rsl.ru/viewer/01003557731#?page=1).

ages as monetary equivalent of losses are discussed in the work «Civil law of Ancient Rome» by S. A. Muromtsev[8].

Besides, we should mention such important doctrinal works as those by E. E. Privits[9] and Professor K. P. Zmirlov[10] (the latter was vice-prosecutor of the 2nd Department of the Governing Senate), and Professor of Perm and Kazan Universities V. P. Domanzho[11].

The most detailed work on the topic of damages recovery was published in 1902 by a lecturer of Yuryev (Tartu) University A. S. Krivtsov[12]. In 1911, a famous scholar T. M. Yablochkov published a two-volume work «Influence of the victim's fault-fault on the amount of damages reimbursed to them».

Before the Russian Revolution, the following works devoted to the said problem were published: A. A. Knirim «On recovery of damages due to incorrect judicial decisions» (1862), A. G. Yarotskiy «Liability of entrepreneurs for accidents with workers» (1888), M. B. Gorenberg «Principle of civil liability for damages and harm caused by impermissible actions» (1892), G. L. Verblovskiy «Reimbursement of damages caused by impermissible actions» (1900), A. A. Simolin «Bases of civil liability for damages and harm» (1905), P. N. Gussakovskiy «Recovery of damages caused by impermissible actions» (1912) and «Liability for non-fulfillment of contracts» (1913), S. A. Belyatskin «Reimbursement of moral (non-material) harm» (1913).

Thus, we can see that the theory of damages was formed not earlier than in the beginning of the 20th century, and it is since then that comparison of various scholars' viewpoints on the issue became possible. Their works influenced the draft of relevant provisions in the Civil Code of the Russian Empire, which was not adopted because of the World War I.

The achievement of a small group of law theoreticians in the imperial Russia was that they imparted new meaning to the norms on damages. The Russian Empire's scholars, first of all E. E. Privits[13] and A. S. Krivtsov[14], convincingly advocated the principle of faultfault when discussing the issue of whether to award compensation at all, though nothing was said about faultfault in legislative texts.

4.2. The issue of fault (culpa)

A new round in the society development demanded doctrinal summarization of the cases on damages due to «dangerous» activity of industrial entities. A book by Professor K. P. Zmirlov was entitled «Reimbursement for damages and harm caused by death or health injuries inflicted by railroad and steamship companies according to the decisions of the Governing Senate». The industrial level of that time, its significance and the social expectations caused by the progress, on the one hand, and on the other hand the lack of firm political will to establish standards of labor and social protection of employees in the country with illiterate and poor, mostly peasant population, gave rise to considering plants and factories as tortfeasors, liable only for the faultfault action[15]. Such practice was established in the beginning of the 20th century. Then, on the eve of the Soviet era, employers started to be liable for personal damages without

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7 *Meyer D. I.* (2003). Russkoye grazhdanskoye pravo (v 2 ch.). Po ispr. i dop. 8-mu izd., 1902 [Russian Civil Law (in 2 parts). By the revised and supplemented 8th ed. of 1902]. Moscow: Statut.

8 *Muromtsev S. A.* (2003). Grazhdanskoye parvo Drevnego Rima [Civil law of Ancient Rome]. Moscow: Statut. P. 466.

9 *Pirvits E. E.* (1895). Znacheniye viny, sluchaya i nepreodolimoy sily v grazhdanskom prave (iz zhurnala Ministerstva yustitsii) [The importance of fault, case and force majeure in civil law (from the Journal of the Ministry of Justice)]. Saint Petersburg: Biblioteka Pravitelstvuyushchego Senata.

10 *Zmirlov K. P.* Op. cit. P. 6.

11 *Domanzho V. P.* (2005). Vopros ob otvetstvennosti za vred, prichinennyy pri osushchestvlenii prava, v proyekte nashego Grazhdanskogo ulozheniya [Issue of liability for harm inflicted during right implementation in the draft of our Civil Code] // Sbornik statey po grazhdanskomu i torgovomu pravu. Pamyati professora Gabrielya Feliksovicha Shershenevicha [Collection of articles on civil and commercial law. In memory of Professor Gabriel Shershenevich]. Moscow: Statut.

12 *Krivtsov A. S.* (1902). Obshcheye ucheniye ob ubytkakh [General doctrine of damages]. Yur'yev: Tipographiya K. Mattisena.

13 *Pirvits E. E.* Op. cit.

14 *Krivtsov A. S.* Op. cit. P. 8.

15 *Zmirlov K. P.* Op. cit. P. 9.

faultfault, as we call it today; moreover, they started to be liable for any property harm caused by a source of increased danger.

Wordings of Articles 574 and 684 of the Code of Laws of the Russian Empire seemed to require that damages be reimburse irrespective of fault under any circumstances[16]. Gradually, the Governing Senate departed from such interpretation of this postulate. E. E. Privits[17] summarized the relevant practice (see further in more detail).

To favor the developing industry, K. P. Zmirlov advocated the principle of faultfault and the rule of strict causal link in all cases of involving injuries inflicted by railroad and steamship companies; at that, if harm was not caused by the actions of the tortfeasor, the faultfault and the causal link was to be proved by the victim. In the last edition of a «Textbook of the Russian civil law», G. F. Shershenevich[18], and later I. A. Pokrovskiy already stood for the presumption of faultfault and strict (i.e., even regardless of carelessness) liability of enterprises.

Authoritative Russian civil law scholars, such as K. P. Pobedonostsev (1827–1907), G. F. Shershenevich (1863–1912), I. A. Pokrovskiy (1868–1920), devoted special chapters in their textbooks to damages. In his «Course on civil law», K. P. Pobedonostsev wrote of a special obligation to reimburse damages caused by impermissible actions and crimes. He asserted that the punitive function of these requirements was transferred to criminal law, while the task of civil law is to arrange for the reimbursement of the incurred harm[19]. G. F. Shershenevich also wrote of «obligations», based on civil breach of law, which the scholar defined as «impermissible action violating another person's subjective right by incurring property damage»[20].

K. P. Pobedonostsev, followed by all representatives of the Russian doctrine before 1917, gave the following qualification to *quod recuperet*: reimbursement of damages caused by impermissible actions — law breaches and crimes. The most significant aspect here is that, within property circulation, contract non-fulfillment and intentional damages to property were put on the same plane as impermissible actions, enabling the reimbursement of damages. For these cases, in his opinion, there should be different conditions for imposing sanctions — fault entailed liability only in criminal cases.

K. P. Pobedonostsev more often than the later authors turned to analyzing the decisions of the supreme judicial instance of the Russian Empire — the Governing Senate, which handled, among others, small household cases and interpreted, according to the dominant civil law conceptions, such important legal categories as, for example, «objective fault», estimating it with the criteria of diligence (equal to involvement into own affairs). Its lack was equated to recklessness. Proper degree of diligence characterized «a good owner», who never allows even a slight carelessness[21].

As we can see, the notion of fault lacked the «psychological» feature, which appeared in the Soviet period[22]. However, the establishing of fault in civil cases played an important role in determining damages since ancient times. K. P. Pobedon-

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16 T. M. Yablochkov wrote in this regard: «Fault… is just subjective-causal relation of a person's behavior to the known harmful event, regardless of who bears the factual and juridical consequences of the action» (*Yablochkov T. M.* (1910). Vliyaniye viny poterpevshego na razmer vozmeshchayemykh yemu ubytkov. T. 1 : Chast teoreticheskaya [Influence of a victim's fault on the amount of damages compensated to them. Vol. 1: The theoretical part]. Yaroslavl: Tipographiya Gubernskogo pravleniya. P. 306).

17 *Pirvits E. E.* Op. cit.

18 *Shershenevich G. F.* (1911). Uchebnik russkogo grazhdanskogo prava. 9-e izdaniye [Textbook of Russian civil law. 9th edition]. Saint Petersburg: Br. Bashmakovs Publishers.

19 *Pobedonostsev K. P.* (2003). Kurs grazhdanskogo prava. Chast tretya : Dogovory i obyazatelstva [Course in civil law. Part Three: Treaties and Commitments]. Moscow: Statut. P. 567.
Not bounded by the strict legislative terminology in the absence of the finalized codification act, K. P. Pobedonostsev defined damage rather unusually: «Any deterioration, decrease of values and powers, any harm of property is a damage. Damage is interpreted in double sense: either in the sense of positive damages of the available things and values, or in the sense of the lost profit, lost income, which could have been obtained from the property… Any person, having actual legal interest in the property, also has the right to demand reimbursement of damages in this interest» (Ibid. P. 559).

20 *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava. P. 202.

21 See: *Yablochkov T. M*. Op. cit. P. 299–300.

22 For example, O. S. Ioffe gave such definition of this category: «Fault is understood as psychological attitude of a person to the action or non-action committed by them, as well as to the unlawful consequences taking place

ostsev noted that the amount of reimbursement was often the same for criminal actions and ordinary breaches of law. Besides, masters were not liable for the behavior of their servants, if from the servants did not carry out the masters' instructions[23]. If harm was caused by actions, it could not be accidental, as the actions include intentional goal-setting, under which *casus* could not happen. K. P. Pobedonostsev wrote: «The action for damages has a special economic significance. It is necessary that those who were offended and suffered damages should have a practical opportunity to hope for a satisfaction of their legal requirements… it is necessary both for the firmness of the property right and for maintaining credit and good faith in mutual personal property relations»[24].

The scholar considered it important to have broad court discretion in cases on damages. They also believed that an action could be brough only where there was a direct connection between damages and the action of a tortfeasor. K. P. Pobedonostsev mostly used the term «neglect» to denote a cause of damages.

4.3. 20th century

In his fundamental «Textbook of the Russian civil law», G. F. Shershenevich also did not distinguish between delict and contract variations of liability, not mentioning the latter at all. The scholar spoke of damages for impermissible actions violating another person's subjective right. For the obligation «to reimburse for the damages» to arise, there should be a corpus of illegal action.

Disagreeing with K. P. Pobedonostsev, who said that there are no accidental actions, i.e., that the tortfeasor must always reimburse damages if their will was aimed at committing a harmful action, G. F. Shershenevich emphasized the firmness and fundamental character of the fault criteria and the unlawfulness of the demand to reimburse lesions (harm) and damages caused by accidental actions. Further he wrote: «Civil breach of law implies that an unlawful action violating an objective and subjective right causes *property damage*, which can be reimbursed in monetary form and, hence, subject to reimbursement by the tortfeasor»[25].

G. F. Shershenevich had a non-standard opinion on the meaning of fault in impermissible behavior: in case of a crime, fault is the measure of liability; in case of a property breach of law, it is an ordinary condition of reimbursement. A sanction for harm in a crime is punishment, while in a civil breach of law it is amendment of evil caused by the person at fault fault. He asserted that «a civil breach of law and a crime are often two sides of the same phenomenon» and that «one and the same action often infringes upon both social interest and private property interest»[26].

Discussing the causality of damages caused by impermissible actions, G. F. Shershenevich was the only one among the Russian civil law scholars to speak about adjudication of such damages which could have been reasonably foreseen: «From the viewpoint of the essence of law as a means of social impact on people's behavior, it should be admitted that civil liability for unlawful action cannot go further than an average reasonable person could foresee at the moment of committing the breach of law, based on the common everyday experience». However, this should not refer to the cases of intentional infliction. In that case, both remote and unforeseen damages are reimbursed[27].

as a result of such» (*Ioffe O. S.* (1975). Obyazatelstvennoye pravo [Right of obligation]. Moscow: Yurid. lit. P. 128). On the fault of a creditor according to the Soviet law, see: *Agarkov M. M.* (1940). Vina poterpevshego v obyazatelstvakh iz prichineniya vreda [Fault of a victim in liabilities out of inflicting harm]. Sovetskoye gosudarstvo i pravo [Soviet state and law]. No. 3. P. 70–79 ; *Sobchak A. A*. (1968). O nekotorykh spornykh voprosakh obshchey teorii pravovoy otvetstvennosti [On some contentious issues of the general theory of legal liability]. Pravovedeniye [Jurisprudence]. No. 1. P. 49–57 ; *Antimonov B. S.* (1950). Znacheniye viny poterpevshego pri grazhdanskom pravonarushenii [Importance of a victim's fault in case of a civil offense]. Moscow: Gosyurizdat.

23 However, «neglect in supervising servants… is the own fault of the master». For example, if client's things were stolen from a tavern, the client, certainly, «is free to seek satisfaction from the direct offender — a thief or a servant whose negligence allowed the theft; but they also have the undoubted right to demand satisfaction from the owner of the tavern» (Decision of the Civil Cassation Department of the Governing Senate No. 79 of 1900 (cited by: *Tyutryumov I. M*. Op. cit. P. 507).

24 *Pobedonostsev K. P.* Op. cit. P. 574–575.

25 *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava. P. 207.

26 *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava. P. 212.

27 *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava. P. 215.

The scholar has a very interesting opinion on liability without fault at the times when the notion of «source of increased danger» did not exist. It was stipulated by a special law for enterprises. According to G. F. Shershenevich, «it would be most correct to consider the extreme liability of enterprises as an insurance function imposed by the state on the enterprises which it considers capable of carry that burden»[28]. The Senate formulated it differently: «…the damages must be imposed on those who acquire profit»[29].

It should be added that, according to G. F. Shershenevich, the moral harm as suffering, for which the person at fault is punished by reimbursement, differs from a broader notion of personal offence. It can also entail a claim for damages, but only «if… it indirectly impacted on material interests, for example, on the credit of the offended»[30].

I. A. Pokrovskiy spoke of the universal significance of fault for determining liability and of impracticability of the principle of infliction. Though he did not state it directly, the scholar came to a valuable conclusion that the fault factor is a very useful component of regulation, allowing the court to consider cases flexibly, with due account of the case peculiarities; while an alternative method would reduce everything to unjust and mechanistic approach, as damages would be adjudicated equally to those who inflicted harm intentionally and involuntarily. Relying on the idea of enduring significance of fault and the functions of civil law «to reimburse and amend», I. A. Pokrovskiy came to the conclusion that the degree of fault should not influence the completeness of reimbursement, i.e., in his understanding, the intention, not associated with the social danger when inflicting damage, coincides with light carelessness in terms of the size and conditions of liability.

4.4. Thesis on the limits of subjective law

Analysis of texts and arguments of the past epochs shows the logical struggle between the two conceptions on the freedom of commercial activity. The Roman wordings *Neminem laedit, qui suo jure utĭtur* («Who uses one's right, offends no one») and *Qui jure suo utĭtur, nemini facit injuriam* («Who uses one's right, violates nobody else's right») created a powerful impulse for developing private initiative. But it soon became obvious that in an industrial society the actors' *modus operandi* depends on the further judicial establishment of the limits of subjective authority. A cautious attempt was made to establish the limits of lawful use of right by introducing the category of abuse of rights, or chicanery.

The intellectual product of the German jurists was defined as follows: no one is entitled to exercise their subjective authority with the exclusive aim of inflicting harm to another person. This legislative solution did not correspond to the level of society development as early as in the 19th century. Apparently, individual commercial freedoms naturally competed with each other, and constraint of one of them could take place not only with evil intentions, but also due to the non-fulfillment of the principles of honesty, morals and openness.

That is why the limitation was formulated as exclusion of intentional harm and actions contradictory to good morals. At the same time it is clear that the former is the sequence of the latter. Chicanery is the main case of immoral behavior. However, from the modern point of view it is a bad example of LegalTechnique. The Senate Decision dated 1902 No. 126 (see further in more detail) appears to be much more progressive. In our opinion, its advantage was that more opportunities for the court's discretion arose when the content of individual property freedoms was established; also, there was less need to use extra-legal tools, in particular ethical attitudes expressed by the term «good morals».

When debating the wording of the draft Civil Code of the Russian Empire, the provision stipulating that no one should be liable for acting within one's civil rights was criticized. Commentators discovered a consistent legal refutation of that maxim in a number of cases heard by the Cassation Department of the Governing Senate. The Senate pointed out that the natural limit exercising one's right was harm to other subjects.

A well-known scholar, Associate Professor of the Law Department of Kazan University V. P. Domanzho, said that exercise of rights must not be allowed (this idea was developed in the chicanery doctrine of the German law), if its single

[28] *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava. P. 217.

[29] Decision of the Civil Cassation Department of the Governing Senate No. 7 of 1894. Cited by: *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava. P. 218.

[30] *Shershenevich G. F.* (2005). Uchebnik russkogo grazhdanskogo prava. P. 225.

aim was to inflict harm to another person and if it was done intentionally[31]. But then a question arises: can there be abuse committed unintentionally or not with the single aim to inflict harm? Conclusion *a contrario* implies a positive answer, but, in the author's opinion, such reasoning is only suitable for rhetorical exercises and not for a serious legal analysis.

It appears that the Senate elaborated a correct conception, which consists in the following: there is no boundary to one's subjective civil rights. Quite probable are situations when mutual violations take place, entailing mutually reimbursed damages. Each case should be examined by a court separately. At that, the legality of particular actions matters only for assessing the property expectations of the parties.

During the drafting of the Civil Code of the Russian Empire, the issue of liability for harm inflicted by exercise of rights was raised. In 1915, V. P. Domanzho wrote: «The life experience did not fail to point out that there can be a lot of diametrically opposite views on the limits of particular rights, and that in searching these boundaries the courts, having no common principles, can easily be involved into a range of errors, fatal for private individuals and threatening the very stability of civil rights»[32].

In 1902, the Governing Senate in its Decision in case No. 10 presented the following wording: «No one is free to use their right so as to deprive another person of using their right»[33]. In the author's opinion, this wording was ahead of its time in many aspects and anticipated the correct comprehension of the notion of damages. Later, many scholars criticized that wording and advocated, echoing the German scholars, the chicanery theory, which entered our legislation under the name of «right abuse».

The founder of «Civil Law Bulletin», a prominent figure of the Constitutional Democratic Party M. M. Vinaver wrote about the Senate's doctrine: «The conditional and artificial character of this construct, seemingly so attractive and popular, is indubitable. For the right here is the very unknown relative notion, the volume of which is to be determined versus the degree of constraint of "my freedom"»[34].

That sounds fine but let us analyze that maxim. First, the scholar's identification of a subjective right and a notion of freedom is unclear. Such rationale is almost provocative. This is quite understandable, though, as M. M. Vinaver was an eminent revolutionary-reformer. Can a law-protected right be equated to freedom? Apparently, a possibility of economic operation cannot be called so.

The key meaning of that term is the absence of constraints, limitations and rules, which is unthinkable in a developed society. Exercise of civil rights cannot be equal to their passive operation. The phenomenon requires a broader comprehension, involving safety and increase of property, improvement of material well-being and living standards. The author considers it wrong to think that if the relevant authority of the owner to use or alter an object is declared, then it is considered an exercise of the right underlying it, and if, for example, arable land lies fallow, then there is no exercise of right.

Subjective civil right consists in the lawful interaction of persons concerning goods in all possible manifestations. The task of objective right is not to maintain freedom, but to constrain it on the basis of the following postulate: what is not prohibited is allowed. At that, the quintessence of regulation consists in reacting to subjective rights, giving the idea of the limits of their exercise by the subjects. Such categories as abuse and bad faith actually provide a possibility for courts and arbitral tribunals to use their discretion with regard to the issue of subjective right and, what is extremely important, to the issue of its violation and reimbursement of damages if, for instance, the risk lies with the respondent and not with the person on whom it was inflicted.

The search for wording to become the prototype of Article 15 of the Civil Code of the Russian Empire took over ten years[35]. It was based on routine cases with the content which was marginal from the viewpoint of the limits on exercise of

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[31] He wrote: «Indeed, one must admit that the use of a right aimed exclusively at inflicting harm to another person, without any use for oneself, is, actually nothing but distortion of the right, contrary to its economic and historical purpose, i.e., in other words, an apparently unlawful deed» (*Domanzho V. P*. Op. cit. P. 435).

[32] *Domanzho V. P*. Op. cit. P. 427.

[33] Cited by: *Domanzho V. P*. Op. cit. P. 430.

[34] *Vinaver M. M.* (1913). Grazhdanskaya khronika [Civil Chronicle]. Vestnik grazhdanskogo prava [Herald of Civil Law]. No. 3. P. 106.

[35] See: *Vinaver M. M*. Op. cit.; *Domanzho V. P*. Op. cit. P. 107.

rights. For example, correcting lower courts, the Senate recognized such cases as using nails in the back crossbeam of a carriage to prevent children from jumping onto it[36], or planting trees shading neighboring land lot from sunlight[37] to be *beyond the limits of permissible exercise of rights*. Whereas using snow barriers by a railroad company on its own territory entailing the detention of snow and its melting with further flooding of agricultural lands to be an action *within the limits of subjective exercise of rights*[38].

M. M. Vinaver thus proved these conclusions: planting trees on the boundary of one's land lot without the obviously reasonable foreseeing that in a few years they would be a threat, is an unlawful action. On the contrary, constructing of the above mentioned barriers is lawful[39].

Clause 1 of Article 15 of the Civil Code of the Russian Federation reads: «A person whose right is violated, may demand full reimbursement of the damages inflicted on them…» Notably, the victim may demand imposing liability not only on the tortfeasor, but also on those who were legally obliged to repair the damage. Moreover, when damage is inflicted through legal actions and events, accidents or natural disasters, a victim may get compensation covering all kinds of damages, and these circumstances are included into the above mentioned provision of the Civil Code of the Russian Federation.

According to the predominant viewpoint, in the literal interpretation, the loss of profit is not implied by the term «damage». Indeed, imagine someone driving to a charity handout of Christmas presents and getting into a traffic jam due to negligence of some driver. Probably, one may say that the cost of the present is damage, but this notion implies only two objects: a person and property (material items, to be more exact).

The loss of profit is obvious here, but there is no damage. Thus, for the Russian Empire's scholars the term «damages» as any decrease of property[40], including expenses for conducting other people's affairs without commission and damages groundlessly enriching another person. However, then the term changed its meaning and now refers to the monetary equivalent of actual harm, suffering, physical deterioration, etc.

As was already mentioned, in the beginning of the 20th century a significant shift took place in the doctrine and the law-enforcement practice; its essence was that railroad and steamship companies had to deal with presumption of fault when harm was inflicted in the course of their operation. This entailed a number of dipustes, in which the victims of those enterprises' obtained fair compensation. At the same time, claimants had to prove fault when harm was inflicted not during the operation of the enterprises, but, for example, when unequipped hostels for workers were put into operation. The same was true for other incidents; for example, when stones were thrown at passing trains and passengers were injured, claimants had to prove fault of a railroad company for not taking necessary safety measures.

Plenty of cases with tragic outcomes, loss of health, deaths, etc. were left without due legal response. This was until prominent scholars persuaded the Governing Senate that dangerous activity should imply liability without fault. Later, this tradition was stipulated and became a principle of delict liability. As for contract regulation, non-performance of a contract was initially governed by Article 684 «On reimbursement of damages and harm due to the actions not recognized as crimes or breaches of law». Although initially this norm was intended mainly for the cases of inflicting various property harm and damages outside deals, later it started to be used for contract damages as well.

The degree of development of the damages reimbursement in the Russian Empire correlated to the demands of the society and the level of economic links of that time.

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36 The case heard in the Civil Cassation Department of the Governing Senate on 22 January 1903 (Judicial Review. 1903. No. 5. P. 92). See also: *Yablochkov T. M*. Op. cit. P. 443–445.

37 The Governing Senate decision No. 51 of 1912. See: *Vinaver M. M*. Op. cit. ; *Domanzho V. P.* Op. cit.

38 The Senate decision No. 81 of 1910. See in detail: *Vinaver M. M.* Op. cit.
Also, the actions of municipal authorities who raised the street level, which entailed the necessity to repave a yard of a tavern owner, were considered lawful (The Senate decision No. 126 of 1902) (see: *Vinaver M. M.* Op. cit.).

39 *Vinaver M. M.* Op. cit. P. 21.

40 For example, decisions of the Civil Cassation Department of the Governing Senate No. 90 of 1880, No. 8 of 1883, and No. 2 of 1884 read that a damage subject to reimbursement is understood not only damage per se but also loss of possible profit (*Tyutryumov I. M*. Op. cit. P. 375, 495).

4.5. The greatest doctrinal contribution

During many years, only two books and a few articles, mainly on narrow issues, were devoted to damages[41]. On the verge of 1917 October Revolution, brilliant legal textbooks were published; but they failed to elaborate on the topic in question. The scholars did not agree concerning the basic legal categories, as well as in what range of cases and by what permissible means the claims on the reimbursement of harm and damages should be legally formulated.

As early as by 1895, due to authoritative work by E. E. Privits[42], understanding of the fault principle was formed in cases involving claims for damages, although Article 684 of the Code of Laws of the Russian Empire stipulated the grounds for release from liability. Earlier, opposite opinions were expressed, that a person causing damages was always liable to reimburse it and that fault should not have any significance in civil law, but in criminal law only. The leading role in establishing the postulate of fault was played by an authoritative member of the Governing Senate S. V. Pakhman, who in his work «On the modern movement on the science of law»[43] brilliantly described the essence of the relevant legal dogmas. The significance of fault was derived from the idea that, in his opinion, «law is a means to implement the ideas of good and fairness» (Latin *Ius est ars boni et aequi*) and that it should be moral itself.

It is essential to speak about the contribution to improving the theory of damages made by A. S. Krivtsov (1896–1910). His work «General doctrine of damages» was written in 1902, when he taught Roman Law at Yuryev University, though he started collecting material when studying at Berlin University (1890–1894). A number of new, for the first time promulgated ideas of the scholar were not disseminated and supported in the academic circles; at the same time, some of his qualifications appeared to be rather useful for the theory of damages, which developed alongside with the economic reality.

For example, A. S. Krivtsov asserted that claims for damages originated in monetary punishment. The natural transformation of remedies took place when an obligation transferred to new persons through inheritance. At the same time, liability for damages as a punishment is not subject to succession. A. S. Krivtsov commented that this approach was also applicable to actions which, «not being offenses per se, are accompanied by harmful consequences for other persons»[44].

He repeatedly emphasized that the adjudication of claims for damages is required under broader circumstances than just property violations and that «it [violation] is free from this connection and is discussed alongside with the doctrine of risk distribution in juridical deals, which is very poorly developed in the Roman law…»[45].

Further, A. S. Krivtsov wrote that the lesion entailing a claim for damages should consist in developing a situation contradicting to a right in the subjective sense. In his opinion, the correlation between the notions of fault and cause is that fault is one of the elements of proving the existence of causal connection. He wrote: «For the damages reimbursement obligation to exist, the fact of harmful activity should be proved. Non-fulfillment of a contract *per se* does not obligatorily indicate that such harmful activity took place»[46]. Thus, A. S. Krivtsov stated that one should not distinguish damages due to contracts and outside contracts, as they imply liability, the grounds for which are indifferent[47]. According to him, damages occur under abnormal course of commercial activities, and this is when the issues of compensation should be solved.

Not only prominent Soviet but modem scholars, too, agree that evidence of unlawful behavior is necessary to succeed on a claim for damages[48]. Here, A. S. Krivtsov's ideas are valuable because he interprets the above remedies not only as a civil law sanction for, for instance, the non-performance of obligations, but as a more universal tool.

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41 *Krivtsov A. S.* Op. cit. P. 6 ; *Yablochkov T. M*. Op. cit. P. 15.

42 *Pirvits E. E.* Op. cit. P. 9.

43 *Pakhman S. V.* (1882). O sovremennom dvizhenii v nauke prava [On the modern movement in the science of law]. Saint Petersburg: Tipographiya Pravitelstvuyushchego Senata. P. 2–4.

44 *Krivtsov A. S.* Op. cit. P. 13.

45 *Krivtsov A. S.* Op. cit. P. 47.

46 *Krivtsov A. S.* Op. cit. P. 39.

47 *Krivtsov A. S.* Op. cit. P. 40.

48 See: *Sadikov O. N.* (2009). Ubytki v grazhdanskom prave Rossiyskoy Federatsii [Damages in civil law of the Russian Federation]. Moscow: Statut.

The Civil Code of the Russian Federation provides for a similar approach. Damages can be claimed for a violation of a subjective civil right, which may be caused by lawful actions. Accidental use of another person's intellectual property, resulting in the proved loss of profit of a right holder warrants a claim for damages, as a businessperson becomes liable without fault, i.e., regardless of his or her good faith, care and diligence.

Lawfulness as a legal characteristic of behavior acquires great significance when committing delicts in the narrow sense, i.e., when inflicting harm to a person or property. Nevertheless, it allows to recover damages in cases of necessary defense; emergency confirmed by the court as the reason to impose consequences on the tortfeasor; dangerous activity and any accidental harm during business activity.

The above mentioned polemics before 1917 cleared the ground for the codification of the civil law in 1922 and for the adoption of the Civil Code as the legislative basis for New Economic Policy. In this sense, the developments of the Russian Empire's scholars were not wasted, and some scholars, like I. B. Novitskiy, M. M. Agarkov, L. A. Lunts, T. M. Yablochkov, A. G. Goykhbarg, M. Ya. Pergament, Ya. M. Magaziner, E. A. Fleyshitz and others, worked in Soviet research and educational establishments remaining true to civil law and making an invaluable contribution to the development of legal doctrine in Russia[49].

5. Conclusion

The present research attempts to show that legal doctrine on the issue of damages in Russia was adequate to its time; it cannot be called advanced, but it rapidly progressed with the development of industries, commercial, trade and general economic circulation in the world, which underwent an economic revolution in the second half of the 19th century and was the fifth world greatest economy by GDP in 1913 with the largest growth rate among the developed countries. That is why the ideas and polemics of the prominent scholars of the Russian Empire as representatives of European science retain their enduring and great significance. The improvement of damages recovery regulations reproduced the ideas of the Russian Empire's scholars. A number of the Decisions issued by the Governing Senate of Russian Empire stated that the precise amount of losses may not be evidenced, and that it was sufficient to ascertain them according to principles of reasonability, proportionality, reliability. The same text was introduced by the amendments to the Civil Code of Russia on 8 March 2015. Prominent scientist and ober-prosecutor of Synod, the highest clerical institution in the Russian Empire, K. P. Pobedonostsev made a perfect definition of civil law damages as any «depreciation, aggravation of values and forces» in 1890. That formula proved to be universal, accurate, and mostly compatible with modern demands of the named civil law institution.

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