

MORAL DAMAGES IN ACCIDENT INSURANCE (RCA INSURANCE) ARE THERE SUFFICIENT CRITERIA?

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Abstract

The objective of this study is a synhtetical discussion of the Romanian judicial practice regarding the moral damages in accident insurance(RCA insurance or civil liability for cars insurance), with a focus on the objective determination of the prejudice for the affected parts in Court decisions.This effort is motivated by the limitations of the Romanian legislation:arguably, the current judicial practice is not unitary, even within the same Court of Appeal.Judges' interpretation of the same normative acts and laws in this domain are often different,as well as imprecise.The aim of this study is therefore to identify the common points of view among the various decisions of the Corts of Appeal in Romania regarding moral damages as a result of a car accident, in the cases when cars are being insured with an RCA Policy). The study also aims to determine if different sums of money should be established according to different types of moral prejudice.e.g. judicial errors, unlawful privacy of liberty etc.Finally, the study proposes that future accident insurance legislation should include more thorough and concrete enactment of the moral damages aspects.

Keywords: Accident insurance, criteria of prejudice, determination of moral damages, Romanian and EU legislation, uneven practice ,future enactment.

1. Introduction

The purpose of this study is to critically discuss the various court decisions that - in the absence of a unified legislation - establish different damages for the same *de facto* and *de jure* situations in accident insurance in Romania.This is why because,in my day to day practice I found various Court solutions in most similar cases,Court solutions that are not always very well motivated.The study is mostly a regard on Romanian various jurisprudence in this field of law more than a thorough scientificall view on these legal aspects.

Arguably, both the injured party and the insurance companies are confused by the various court decisions, so their claims may often be unrealistic. Furthermore,insurance companies do not meet the plaintiff's demands before getting to court (in the amiable procedure) because a court decision may establish a much lower sum of money than the one demanded by the injured parties. Moreover, the duration of a court trial can be two or even three years, thus it may often be more profitable to 'wait and see' what the judge will decide in this matter.

There are two main types of moral insurance damages regarding the accident insurance:

- The injured parties who suffered damages - physical and /or moral- in an accident;
- The injured parties are the inheritors/the affected persons of the victim of the accident.

Arguaby, this field of law is not governed by any general and objective legislative criteria, which

leads to the existence of an uneven judicial practice. As the European Union (EU) legislation merely offers general guidelines, member countries (such as Romania) are in need of developing specific legislation.

The aim of this study is therefore to explore this gap of knowledge and to propose possible directions towards the quantification of the moral damages, based on the analysis of the current judicial practice in Romania.

2. Content

2.1. Motivation

Given the intense road traffic conditions,car accidents are a considerable problem in Romania: there are many automobiles, and drivers' behavior – such as wreckless driving or consumption of alcohol contribute to the high number of car crashes.By law, every car must have its own insurance policy that covers any risks deriving from accidents: this is called the RCA policy, which covers civil liability for cars.

2.2. RCA policies

RCA is a contract with a mandatory character derived from the 136/1995 law¹, signed by both the insured person and the insurer company.According to Vasile Nemes²:*"The two parts can not negotiate the content of the contract,the rights and obligations of the parts are stricly reglemented"*. The insurer company cannot be forced by law to sign the insurance policy unless it had previously obtained

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¹Law No. 136/1995 on insurance and reinsurance in Romania, Official Gazette of Romania („Monitorul Oficial al României”), Part I, No. 303 of 30 December 1995, in force since 01/02/1996; last sanction 19/01/2015, in force since 27/02/2015.

² Nemes, Vasile, *Insurance Law* (4th edition), Hamangiu Publishers, 2012, page 290.

this right from the Financial Supervisory Authority (ASF).

The insured person must also sign this insurance policy but can sign it at any insurance company that was authorised by ASF-as specified by Irina Sferdian³ in „*Insurance.Special regard upon the insurance contract form the Civil code point of view*”. Furthermore,the level of the insurance premium is different: the *bonus-malus* clause,the seriousness and the rapidity of covering damages can be the reasons why a certain insurance company may be preferred.

As previously shown, there are two types of car accidents:

- the ones in which both the driver and/or the passengers of the car suffer injuries;
- the ones in which the driver and/or the passengers die.

An important observation arises: this study solely refersto risks covered by a *valid policy*; as shown by Bradgate and Savage⁴, the insured must establish they have suffered a loss caused by the risks covered by the policy,in order to make any claims.

The insurance policy covers a variety of risks, however the limits within which the insurance companies must pay damages after such an unfortunate event are very flexible and often ambiguous. The main issue, both for the injured parties and for the insurance companies, is thus to be realistic: the two parties very rarely (if ever) reach an agreement before a court decision. Thus,it is the judge’s mission to rule and establish the proper amount of money to compensate the trauma and results of the car accident for the injured parties.

Moreover, these sums of money must not act as unjust punitive measures against the insurance company, as specified by the Romanian High Court of Cassation and Justice’s Decision No. 1179/2011⁵.This decision is of great importance - although not generally binding- because it stipulates that, when moral damages are concerned, neither the national or ECHR framework operate with pre-established criteria, but instead decisions should be made in equity, by subjectively appreciating the different circumstances of every case.

2.3 Specific legislation and authorities

The specific legislation in this domain can be found in the 136/1995 Law⁶ regarding insurances; the articles 49 and 50 specify that „the insurance company offers compensations within the insurance contract for the prejudices done by the insured persons to third parties that are injured in car crashes”. Furthermore,The High Court of Cassation and Justice,in its nr. 1/2005⁷Rule statuates that the insurance companies must be summoned in trial only as insurer because the legal relationship between these companies and the insured ones are on the basis of solidarity.Thus,the persons injured in the car crashes can claim compensations from the persons that are responsible for the crash and also form the RCA insurance company.

Recently,the High Court of Cassation and Justice - via Decision 1/2016⁸regarding the RCA insurance policies in the case of car accidents- stated that the insurance company is a civil responsible part in the trial and bears the obligation to compensate the prejudice alone, within the limits of the insurance contract and the legal dispozitions regarding the RCA.

Furthermore, the relevant article from the Civil Code ruling (article 1391⁹) stipulates that if the integrity of a person is damaged, a sum of money can be offered.This sum of money can be offered for the inheritants of the deceased person and for any person that could prove that a certain prejudice exists.

However, although under Romanian legislation it is mandatory for all cars to be insured, it is not uncommon for cars that are not insured to be subject of accidentsin which persons are injured or deceased. In such cases, according to nr. 3/2010 decision of the High Court of Cassation and Justice¹⁰, given as appeal on a certain point of law matter, The Street Victim Protection Fund will be a part in such civil /penal cases, instead of the insurance company.

2.4. Financial Supervisory Authority (FSA) and EU regulations

The limits of the insurance are established anually by the norms of the Financial Supervisory

³ Sferdian, Irina, *Insurance. Special regard upon the insurance contract form the Civil code point of view*, C.H.Beck Publishers, 2013.

⁴ Bradgate, Robert and Savage, Nigel,*Commercial Law*, Butterworths, London,Dublin,Edinburgh, 1991.

⁵ High Court of Cassation and Justice – Section for civil and intellectual property, *Decision No. 1179/2011*, file 5129/62/2009, public session of 11/02/2011 (unpublished).

⁶ Law No. 136/1995 on insurance and reinsurance in Romania, op. cit., page 12-13.

⁷ High Court of Cassation and Justice – United Sections, *Decision No. 1/2005* on the provisions of Article 54, paragraph 4 and Article 57 of Law No. 136/1995 on insurance and reinsurance in Romania, Official Gazette of Romania, Part I, No. 503 of 14/06/2005, in force since 14/06/2005.

⁸ High Court of Cassation and Justice – Panel jurisdiction to hear the appeal on points of, *Decision No. 1/2016*, public session of 15/02/2016 (unpublished).

⁹ Moroşanu, Vasile (ed.), *The New Civil Code – Republished in Official Gazette No. 505 from 15/07/2011*, Bucharest: Moroşanu and Pedro Publishers, 2011, page 286.

¹⁰ High Court of Cassation and Justice – Panel jurisdiction to hear the appeal on points of law, *Decision 3/2010* on establishing the standing of the Street Victims Protection Fund (Art. 25 paragraph 1) of Law No. 32/2000 on insurance and insurance supervision, as amended and supplemented) and the possibility of coercing them in criminal proceedings in civil damages to people injured in vehicle crashes liability for uninsured, Official Gazette of Romania, no. 866/2010.

Authority (ASF) which was established as an autonomous, specialized, with legal status, independent, self-financed administrative authority, exercising its duties by taking over and reorganizing all duties and powers of the National Securities Commission (CNVM), the Insurance Supervisory Commission (CSA) and the Private Pension System Supervisory Commission (CSSPP).

The ASF is the national authority competent to enforce and monitor the observation of the directly applicable regulatory acts issued by the European Union, in the fields provided by this regulation, and for the transposition into the national legislation of the provisions issued by the EU Council, EU Parliament, European Commission and by other European authorities. Annually, the ASF gives orders (norms) with rules regarding the provisions for the RCA insurance policy as well as its minimal and maximal limits.

For instance, the 2016 upper limits within which the insurance companies pay damages are: 1.000.000 euro for property damages and 5.000.000 euros for personal injuries and deceased persons (for an accident involving one car, no matter the number of the injured/deceased persons)¹¹. This is the only specific regulation that the judges have, regarding such cases.

In the absence of more specific guidelines, some court decisions give even 1.000.000 euros for one person (severely injured in a car crash). Other courts consider 5.000.000 euros as a maximal sum of money and decide that for a person who suffered the same number of health care days, the sum of 100.000 lei (approximately 22.500 euros) is adequate. Therefore, one cannot help wondering which decision is most justified and what exactly constitutes good practice.

2.5. Examples of moral damages

Examples gathered through the author's experience as a practicing lawyer suggested the decision making process of settling moral damages is usually not straightforward. A number of uneven judicial practice cases were observed. Specifically, in the case of the deceased persons, some courts gave low sums of money and others, millions of euros for the inheritans. The criteria that justified these court decisions often included: the age of the deceased; the psychological impact upon the inheritans' future life; the relations between the deceased and other persons beyond the inheritans themselves. However, in a number of cases experienced by the author in her professional activity, court decisions were

ambiguous in motivating why a certain amount of money was given to the relatives of the deceased.

As often shown by the Bucharest Court of Appeal regarding cases when the plaintiffs specified they were affected by the decease of their relative (e.g. son or nephew), this was rarely supported by psychological affective evaluations; documentation also often omitted documents that would prove the alteration of the financial resources, suggesting a future imbalance between the current plaintiffs' life style and the one following the unfortunate event, or the alteration of the professional standards of the plaintiffs. Court decisions thus stipulate that it will not simply approve what the plaintiffs are *saying* – the moral prejudice can not be proved but only ascertained. Following its judicial control role, the Court requested that the plaintiffs indicate evaluation criteria supported by the appropriate evidence included in the documentation; as shown before, these criteria are not prescribed by the law, thus a considerable degree of variation might follow. In order to decide in this matter the Court must compare between similar cases and the solutions from those cases.

In this context the „Guide for resolving moral damage”¹² may possibly be a useful resource. Yet, the High Court of Cassation and Justice from Romania often suggests that this Guide is limited only for ‘amicable litigation’ when the two parts wish to settle the dispute outside the court¹³.

Within the court, the judge must apply the law. This is why the High Court of Cassation and Justice established that when ruling again, the judge must obey the legal framework regarding moral claims, the national and conventional law principles that impose the whole reparation of moral prejudice represented by the negative consequences (both physical and moral) taking into account the importance of damaged values, when they were affected.

Dorina Zeca¹⁴ cites an important decision of the Bucharest Court of Appeal (Dec 110/2013 unpublished), which stipulated that in establishing the adequate amount to be paid in moral damage cases, the court may take into consideration the amount given by juridical practice in similar cases. The judge may take into account the continuous creation of the juridical practice: when determining the average sum of money for similar cases, the principle of *equality of parties before the law* applies, as well as the *non discrimination principle* which also represents an equitable and equidistant

¹¹ Insurance Supervisory Commission, Order No. 14/2011 to implement the Norms concerning compulsory civil deraspundere for damages caused by vehicle accidents, Official Gazette of Romania, Part I, No. 858/2011.

¹² Greceanu, Sorin and Necrelescu, Mihai, *Guide to resolving moral damage: study on national and European practice in the matter, synthesis and recommendations to solve the moral damage suffered due to health and bodily injury or death to persons caused by car accidents*, Bucharest: UNSICAR, 2012.

¹³ Based on the author's direct professional experience as a lawyer.

¹⁴ Zeca, Dorina, *Moral damages in civil and criminal litigation: Recent judicial practice*, Hamagiu Publishers, 2016.

parameter. This parameter could be considered incontestable.

According to Article 1 from Law No. 136/1995¹⁵, the prejudice is the negative effect suffered by the injured person as a result of a production of a risk covered by the public liability contract.

2.6. Plaintiffs' motivations and claims

In most cases, the plaintiffs are distraught when one or more members of their family (e.g. husband, daughter, father, sister etc.) die in an accident. Based on these feeling of loss, the plaintiffs often believe that the insurance company should be obliged by the judge to pay them a large sum of money to 'compensate' for these negative feelings. However, as shown before, in many cases the plaintiffs' documentation folder includes no evidence to indicate that the relationship with the deceased relative was particularly strong or their standard of living had been very high before the unfortunate event.

Another point that has different interpretations in Courts decisions refers to guilt. For instance, when the husband drives a car and causes an accident by reckless driving (e.g. he falls asleep), and the infant dies being kept in his mother's lap (instead of a baby chair), some judges consider that the parents (or mother) are entitled to a substantial sum of money as moral damage. Yet, recently the High Court of Romania¹⁶ stipulated that the husband's (or wife's) right for damages in relation to the infant's death (or the death of other persons raised by the driver of the car, at fault for the accident) should be limited to their own injuries as direct victims of the car accident.

2.7. Difficulties in evaluating moral damages

Nevertheless, guilt is a serious criteria for the judges in establishing the sums of money as moral damages. There are multiple scenarios that involve guilt and the subsequent ethical reasonings – for plaintiffs, insurance companies and judges alike – are often complicated. For instance, in the case of passengers who accept to be driven by a clearly inebriated person, and who subsequently crashes the car, a variety of questions arise:

- Is the passenger at fault for not stopping the driver from drinking?
- Can the passenger claim substantial damages if he or she is injured in the accident?
- What if the passenger is a minor?

In such cases, some courts argue that the insurance company must pay whatever sum was

asked for – even if some of the parties involved could have been more responsible and, in fact, prevented the accident. Yet, such a decision may contradict the overarching principle that everyone must obey the law. Furthermore, one may wonder if it is fair to give different sums of money to different persons taking into account that their life styles are different, that some live in the country side and other in a capital (thus substantially different living costs) although they both lose a close relative. In the absence of a clear and objective legal framework, court decisions can – and, often, do – embrace very different ethical standpoints and the legal and financial outcomes may often seem arbitrary.

Some may argue it should not be expected from the insurance companies to pay large sums of money only because the plaintiff *declares* a close relationship with the deceased one: perhaps, the actual relations were in fact very tense. In such cases – which are often hard to prove or disprove – perhaps it is unethical to draw major financial benefits just for being related to a person deceased in a car accident. The courts' decisions are very different in their ruling and legislative clear criteria should be enforced by appropriate laws in the future.

Let us now suppose a different scenario: a car crash with one deceased person. Their spouse and one of their sons claim and obtain sums of money (as moral damage) under a final court decision. After a while, two more of the couple's children start a trial against the insurance company, at a different court, obtaining much larger sums of money. One may wonder how will the first decision influence or inform the second court ruling - does and should it have *res judicata*?

This refers to Article 28 from the Criminal Procedure Code¹⁷ that stipulates that the definitive decision of the criminal court is *res judicata* before the civil court that judge the civil action in the matter of the existence of the criminal deed, and the person who is responsible for it. If by any chance both the first court sentence and the final decision (usually from the Court of Appeal) are not thoroughly motivated, the case might be brought to the High Court of Cassation and Justice. If both rulings are superficial, and the relevant legislation is neither specific nor clear, there may be sufficient legal reasoning to attack those decisions because they were given „with the violation or wrongful application of the law”, as stated in the New Code for Civil Procedure¹⁸.

Another issue that may be of interest is the comparison of moral damages, specifically how can

¹⁵ Law No. 136/1995, op.cit..

¹⁶ High Court of Cassation and Justice – Panel jurisdiction to hear the appeal on points of law, Decision 23/2015 on interpretation of Article 50 paragraph 3 of Law No. 136/1995, public session of 26/10/2015 (unpublished).

¹⁷ Law No. 255/2013 for the implementation of Law no. 135/2010 on the Criminal Procedure Code and amending and completing certain normative acts with criminal procedure dispositions, Official Gazette of Romania, Part I, No. 515/2013;

¹⁸ Moroşanu, Vasile, Moroşanu, Raul and Moroşanu, Petre, The New Code for Civil Procedure: Law No. 134/2010 republished in Official Gazette of Romania, No. 545/2012, Bucharest: Moroşan and Pedro Publishers, 2012, page 193.

they be measured, quantified, taken into account etc. It is often hard to tell what is more important for a person's wellbeing and how can these moral damages compensate a loss, an injury, a personal restriction of private life or rights. Considering all of these delicate aspects of life, a crucial role can (and *should*) be played by the judicial system, by the courts in their rulings.

The wrongful arrest of a person; the restriction of liberty; the duration of these measures, the detention conditions; the stopping of mail in prison, the separation from one's family; the length of the criminal case in court - all of these may be elements that produce physical and mental trauma, which determine a moral prejudice that must be repaired. The purpose of moral damages repair being to obtain a moral satisfaction of the same order, in a particular example¹⁹, the High Court stated that a sum (e.g. 55.000 euro) was capable to act as a correct satisfaction for the wrongful arrest for 8 months and a half, and to offer an equitable satisfaction for the plaintiff taking into account the principle of proportionality between the judicial error and its consequences. The same idea is stressed by another High Court decision²⁰.

Thus, the ECHR jurisprudence doesn't offer a specific rule in the determination of these moral damages. The principle that can be extracted from its jurisprudence is the situation in equity on moral damages regarding the particular differences of each case. Also, the sum of money must be reasonable, equitable and proportioned with the plaintiff's prejudice as a result of the arrest measures that were imposed for him. Still, this leaves many room for interpretation and unfair judicial practice.

4. Conclusions

Unsurprisingly, it may be very difficult to establish objective criteria in determination of moral damages. As stated before, the relevant legislation doesn't contain any strict standards. Furthermore, the specific insurance norms given by the Financial Supervisory Authority (ASF) are also lacunary:

Article 49 paragraph 1 point f and paragraph 2 point d from the 14/2011 ASF Norm both say that the moral damages will be paid: "according with the legislation and the jurisprudence from Romania"²¹.

In the absence of coherent criteria regarding moral damages compensations, Romanian courts are forced to make decisions supported by different assumptions and motivations. The compensation of moral damages through sums of money rises the difficult problem of the modality and the criteria of appreciation of moral prejudices. In appreciation of the importance of the moral prejudice, one must envisage the repercussions of the moral prejudice on the general state of mind, the possibilities of social and professional achievements etc. As no objective criteria of determination of prejudice are provided by the current law, the judges ultimately have the power to appreciate these compensations taking into account the specific data of each case - the moral damages are determined in appreciation.

The judges must consider the negative physical and psychological consequences, the importance of the damaged values and the measure in which these values were damaged. All these criteria are subordinated to reasonable and equitable standards because the sums of money resulted from moral damages must not be a burden for the insurance company.

The European jurisprudence established that the equilibrium between the injured parties and what the insurance companies can and will pay, should be *de lege ferenda* incorporated in some agreements with maximal sums of money which can be paid regarding different types of injuries/damages. This is how, on one hand the insurance companies can determine the level of the insurance premiums more accurately, and, on the other, the injured persons can ask for a reasonable sum of money that should compensate their loss.

Future work on this topic could include a unique guide for all insurance companies from Romania, which would be useful for the courts in their appreciation of moral damages as no strict and objective criteria exist now.

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¹⁹ Based on the author's experience.

²⁰ High Court of Cassation and Justice – Section I Civil, Decision No. 1874/2014, file 5851/111/2008, public session of 12/06/2014.

²¹ Insurance Supervisory Commission, *Order No. 14/2011 to implement the Norms concerning compulsory civil deraspundere for damages caused by vehicle accidents*, Official Gazette of Romania, Part I, No. 858/2011.

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