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ASSESSMENT OF MORAL DAMAGES UNDER ETHIOPIAN TORT LAW: CASE ANALYSIS

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I here by declare that this paper is my original work and I take full responsible for any failure to observe the conventional rules of citation.

Name _____

Signed _____

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Introduction

According to <http://www.researchportal.be/en/project>, history of moral damage, may 2009 Tort is defined as a legal term in common law jurisdictions it means a civil wrong and it can be a criminal wrong, that is recognized by law as grounds for a law suit. Its equivalent in civil law jurisdictions is delicate. It is part of the law of obligations but unlike voluntarily assumed obligations on the parties created through a contract, the duties imposed under tort law are mandatory for all citizens in that jurisdiction----- to be have ' tortuously' is to harm another's body, property, or legal rights, or to breach a duty owed under statutory law.

By way of explanation the same above sources says torts are civil wrongs resulting in personal injury or harm that constitutes grounds for a law suet. Thus, tort law addresses conflicts between private individuals or entities and ultimately serves as two fold purpose. To ensure that the injured or aggrieved party receives compensation for their damages and to deter others form committing the same or similar harms.

Tort entails liability on the wrong doer the liability is categorized as material and/ or moral damage. Material damage is a damage to affect the material interest of the person. Moral damage is an injury to the primary and invaluable interest of a person. In forms part of material damage, as the object of civil liability is to pay compensation to be extent of the loss mentioned moral damage is also paid to redress the loss that can be qualified in terms of money.

However, the compensability of moral damage has be came an issue of controversy as it lacks uniformity or standard yardstick to measure what amount to moral damage. Different country employ different yardstick and measure the extent and value of moral damage that a victim of form sustains.

Under Ethiopian law due consideration is given for emotional and physical well being of a person and these interest have got legal protection. Accordingly, the civil code provides for remedies where these interest of a person is injured.

In this term paper, an attempt will be made to legally analyses of moral harms in comparison with some other countries experience in compensability of moral damage. Ethiopian tort law emphasis on pecuniary compensation of moral damage. Chapter one deals with the general overview of tort law, its objects and classifications. Some countries experience with regard to compensability of moral damage provided under chapter two. At the last chapter assessment of moral damage under the Ethiopian tort law, the principle of pecuniary compensation, supported by practical cases and every detailed provisions of the civil code dealing with pecuniary compensation of moral damage under the Ethiopian law are specifically discussed

under this chapter. Finally, conclusion and recommendation are submitted at the last part of this paper followed by end notes and bibliography.

Table of contents

- Acknowledgement	-----
- Introduction	-----

Chapter -1-

Tort laws: An over view

1.1 Historical background and development of tort law.	-----1
1.2 Historical development of tort laws under the Ethiopian legal system.	-----3
1.3 Definition of tort law	-----4
1.4 Scope of tort laws	-----6
1.4.1. The difference between tort and criminal laws	-----7
1.5 Objectives of tort laws	-----8
1.6 Classification of torts	-----10
1.6.1 Intentional torts	-----11
1.6.2 Negligent torts	-----11
1.6.3 Strict liability	-----12

Chapter -2-

Compensation in general

2.1 Countries experience in relation to compensability of moral damage.	----14
2.2 Moral damage under civil law legal system	-----14
2.3 Moral damage under common law legal system	-----15
2.4 Moral damage under Ethiopian legal system	-----16
2.5 Compensation and Nature of moral damage	-----17
2.6 Compensation as a Redress to loss	-----18
2.7 Pecuniary Vs Non –Pecuniary Compensation of moral damage	-----19

Chapter -3-

Assessment of moral damage under Ethiopian tort law

3.1	Rules of pecuniary compensation-----	21
3.2	Limitation regarding cases of moral injury-----	22
3.3	Limitation on the extent of compensation-----	24
3.4	Pecuniary compensability of moral damage for bodily harm under Ethiopian tort law-----	28
3.4.1	Bodily harm or Death -----	28
3.4.2	Defamation -----	32
3.4.3	Unlawful restraint of liberty -----	35
3.5	Discretionary Power of courts -----	36
3.5.1	Awarding compensation -----	36
3.5.2	Fixing the amount of compensation -----	37
4.	Conclusion and Recommendation -----	40
	End Notes for Chapter One -----	44
	End Notes for Chapter Two -----	45
	End Notes for Chapter Three -----	46
	Bibliography -----	49

Chapter One

Tort Laws: An Over View

1.1 Historical Back Ground And Development Of Tort Law

Initially, law can be understood as any rule of human conduct accepted by the society and enforced by the state for betterment of human life. In a wider sense, it governs any rule of human action. Human action may involve it self in social political economic as well as moral matters.” However only those rules of conduct of persons that are protected and enforced by the state do really constitute the law of the land in its strict sense and tort law as branch of private law regulates civil matters of human conduct.”¹ Historically the law of tort passed through four eras.

A. The Era of Private Vengeance (Revenge)

This is the era where primitive societies have lived with out government, laws, etc. Society was organized in clans or tribes under the rule of tribal leaders and classmen.

There were no organized means of maintaining peace and order. Justice was not served by organized institutions. Individuals used to take their own measures against wrongdoers. In other words, justice was at the hands of men.” Only the one who had the power to fight back its enemies or opponents was able to live in peace. The weak had no guarantee for protection of his own or his property. This time was led by the rule was an eye for an eye, a tooth for a tooth. This phase was marked by disruption of peace and order due to decentralized Justice against wrongdoers.”²

B. The Era Of Voluntary Compensation

The next stage of development in relation to liability for harms is the age of voluntary compensation. Since the practice of private vengeance in the earlier period was proved in effective in compensating harms as well as in maintaining the peace and order of the society, members of the society began to solve their disputes amicably through arbitration by village elders.

Under this system, “harm doers began to pay compensation for harms they caused negotiating with through arbitrators acting as an intermediary. At this stage the function of tort law impliedly came to exist as a result the system of blood money or surrender of cattle was developed as a model compensation especially in cases of death in this era.”³

C. The Era Of Merger Of Civil Wrongs With Criminal Law.

At this stage society started to live in a more organized manner than the previous ages. Instead of taking acts of private vengeance or leaning the issue of compensation to the willingness of individuals, societies have started to make wrong doers responsible for their wrongs by use of laws. Wrongs and their sanctions were regulated under the law. However, the law of this age used to focus on punishing wrong doers instead of compensating victims of wrongs. Thus, the law did not properly address the issue of compensation. “Victims of wrong acts of wrong-doers used to get satisfaction by simply seeing wrong doers punished and there were no mechanism, to compensate for the victim’s loss. The issue of compensation had needed to be dealt apart from that of punishment.”⁴

D. The Era Of Development Of Law Of Tort In Separation From Criminal Laws.

Punishment only serves for the purpose of discouraging and condemning bad behaviors but it does not address the issue of losses and damages. During compulsory compensation started to be implemented recently through modern laws by the use of organized law enforcement

mechanisms. At this time, “the issue of compensation was not more left to the will of the wrong doer payment of compensation for harms that one causes has become an obligation under the law and mechanisms were put in place wrongdoer to compensate the victim of his wrong acts.

Therefore, it was during this stage that the real senses of tort law come to exist and compensating the victim as of his right became effective.”⁵

1.2 Historical Development Of Tort Laws Under The Ethiopian Legal System.

Before coming into existence of the 1960 Ethiopian civil code, the Ethiopian legal system has passed through some stages in the development of tort laws. Before the year 1930 the Ethiopian legal system was marked by customary laws and the Fetha Negest, which embodied principles of tort and criminal law together. Crime was not as such of a public concern, it rather took a private concern. Hence, “victims of crime themselves had to take their cases to the public for justice and to claim compensation. Even then private vengeance was rampant though there was a semblance of voluntary compensation by way of giving blood money or property, especially surrender of cattle as compensation.”⁶

For all wrongs: the private victim or his/her relatives had to litigate or prosecute the wrong doer and for all wrongs the end was punishment under the customary as well as in the Fetha Negest, there is no separation of civil and criminal liability.

The period between 1930-1960 was marked by the development of the first Ethiopian criminal law. This introduction of modern codification was “considered a big step ahead in the history of Ethiopian legal system. Even under such law no distinction was yet made between the consequences of civil and criminal wrongs was incorporated, that civil liability was followed by payment of compensation and criminal liability was followed by punishment. Still individuals had to prosecute wrong doers except wrong done against the government are prosecuted by the public prosecutor.”⁷

The period of 1960s was marked by successive acts of codification of modern laws, by the then Ethiopian legislature. It is “during this period that many of the existing laws like the Civil Code, commercial code, Maritime code and others were promulgated. It was in 1952 that the first

Ethiopian civil code was enacted.”⁸ the Civil Code, which was, the first of its kind in Ethiopian legal history has distinctly indicated civil wrongs under articles 2027-2161(154 articles) and cases of unjust enrichment under articles 2162-2178.

1.3 Definition Of Tort Law.

From the very beginning, the word tort is derive from the Latin word “tortum”, which means “twisted, criminal, or immoral and is in contrast to the word rectum, which means straight”.⁹ Every one is “expected to behave in a straight forward manner and when one deviates from this straight path in to crooked ways he has committed a tort”.¹⁰

The area of the law dealing with this type of damage and ensuing liability is called by various names in different legal systems. In common law countries, it is called tort. In France, it is rather dealt with in terms of liability. Accordingly it is called “Ares possibility delictuelle,” i.e. delicate liability. In Ethiopia too, this area of law is regulated in terms of liability and thus it is designated as “extra- contractual liability.”¹¹

“In spite of these various attempts, an entirely satisfactory definition of tort still awaits its master”.¹² In general terms; a tort may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages. In cases of damage arising out of tort the author or the damage and the one suffered it, has no prior contractual relation between them.” Besides the duty breached by the defendant is a duty fixed by the law it self regardless of the will of the parties”.¹³ “Tortuous liability arises from the breach of a duty primarily fixed by the laws; such duty is to wards persons generally, and its breach is redress able by an action for unliquidated damages.”¹⁴ This definition has got much popularity in common law countries. In France delictual liability is “ a liability which arises between the author of the harm fulact and the injured party apart from any contract.” As can be see from these definitions tort and delicate have no substantial difference.”¹⁵ It can also be defined as legal wrong or tort law is a branch of the civil law: the other main branches are contract and property law. “Where as in criminal law the plaintiff is always the state and the defendant, if found guilty of a crime, is punished by the state, in civil law the dispute is typically between private parties (though the government can also sue and be sued).”¹⁶ In the case of torts, “the

plaintiff is the victim of an alleged wrong and the unsuccessful defendant is either directed by the court to pay to desist from the wrongful activity (so-called “injunctive relief”).¹⁷

Generally, there is no universally agreed single definition of torts. The famous law book’s black’s law dictionary defines tort as follows:-

“Tort is a private or civil wrong or injury, including action for bad faith Breach of contract, for which the court (Law) provides a remedy in the form of an action for damage.”¹⁸

The Ethiopian civil code contains no definition of “extra-contractual liability.” However reading of relevant provisions contained in title XIII of the code in particular articles:2027-2037 and 2088 shows us what is included and excluded by the term “extra contractual liability “under. Art 2027 that deals with the sources of extra contractual liability provides that a person in cures this liability if “irrespective of any under taking on this part “ he causes damage to another.”¹⁹ Professor Krzeczunowicz’s translation of this article substitutes the word “irrespective of any under taking on his party “ by words “a party from any promise of his. “²⁰Therefore, this article shows us that here the damage or the liability there of arises out side of any contractual relation or contractual obligation. A gain, “under article 2037 of the civil code, a liability for failure to perform contractual obligation is expressly excluded from extra-contractual liability (tort law). Moreover, the same article further provides that only the law of contract should apply in such cases”.²¹ The cumulative reading of these articles clearly shows us that under our law too tort law (extra-contractual liability) excludes damage arising from contractual relation of parties.

1.4 Scope Of Tort Laws

Tort law involves civil suits, which are actions brought to protect an individual’s private rights. However, “it is difficult to draw the boundary because a single act can be a base for different kind of liability and often over lap. To capture a clear scope of tort is it better to see class of wrongs which stand out side the sphere of tort such as wrong excessively criminal, civil wrongs for unliquidated damage but give rise to some other form of civil remedy, civil wrong which are exclusive breaches of trust or some other merely equitable obligation. To

see the scope of tort law it is better to see the relationship that it has with other fields of law".²²

1.4.1 The Difference between Tort and Criminal Laws.

Initially "criminal law is a field of public law where public prosecution and accusation by state authorities work."²³ "Tort law and criminal laws (more than any other civil law) are related branches of the law; yet in a sense there is a clear cut distinction between them and they are different in their nature, objectives, and procedural aspects."²⁴ The rules of criminal law form part of public law, actions under criminal law are as a rule, public in nature and raised by a public prosecutor, (the state attorney) and they are aiming at sanctions to be imposed by the state. Criminal proceedings are launched in the interest of the state rather than that of the victim. "Whether a victim to a personal injury by negligent wrongdoer has been generously compensated or not has no impact on the criminal proceeding. The aim of sanctions under the criminal law is clearly different from that of tort laws. The primary purpose of criminal law is the prevention of criminal activities. By the threat of punishment in the form of fines and confinement, potential wrong doers shall in harmony for having violated the rules social life".²⁵ On the other hand, the function of tort law is to compensate some one who is injured for the harm he has suffered. In addition, "in bringing court action the injured party himself institutes proceedings to recover damages. With torts, the emphasis's more on affair adjustment of the conflicting interests of the litigant parties to achieve desirable social result with morality taking on less importance. Tort law requires pecuniary damages while criminal law emphasizes immoral behavior, but often does not require actual damage. However, generally, the great differences between

crimes and torts, even with respect to these crimes and torts, which are rather closely related.”²⁶

1.5 Objectives Of Tort Laws

Tort laws are laws that offer remedies to individuals harmed by the unreasonable actions of others. Tort claims are based on the legal premise that individuals are liable for the consequences of their conduct if it results in injury to others. “The law of torts has not only single function (objective), it has some hierarchical plurality there of. The basic objectives of tort laws are compensation, justice, deterrence and loss distribution.”²⁷

A. Compensation

The first and the most important remedy of tort law is to indemnify the person suffering harm and to satisfy his need to compensation of his loss. “The victim shall be put as approximately as possible as in the same position as he would have been in, had damage not been inflicted on him. Here there is a rule that the victim shall not get more than he has lost the priority should be given to “restitution in kind “or “in nature”, the law requires that the damaged good shall be returned to the former state.”²⁸

B. Deterrence

The second function of tort law is to prevent the occurrence of injury. “Potential tort feasons shall be deferred from being careless by the threat that responsibility may be imposed on them. It is this threat that causes people to exercise care in the treatment of other persons and their goods.

It is general anti social conduct that shall be deterred. There is no doubt however that the more important instruments for preventing injurious conduct and antisocial conduct are provided by

criminal law.”²⁹ In any case, the preventive function of tortious liability is significantly mitigated by the fact that for many risky activities that may result in to other person’s injury remedy coverage is available. “A negligent injurer who thus becomes discharged from the risk of submitted to serious expenditures in

compensating the victim will not feel to be strongly deterred from being careless again as a result deterrence could solve future risk.”³⁰

C. Loss Of Distribution

As a principle a wrongdoer is liable to compensate, the injured party for what he has negligently or intentionally causes damage upon the victim.

“Never the less, in exceptional cases the victim himself may contribute for the occurrence of the damage in such a case the loss is distributed between the victim and the wrongdoer.”³¹

Whenever the tort feisor pays the compensation, he is bearing the losses that a victim suffers from his activity. By doing so, the losses could be distributed between the wrongdoer and the victim.

D. Appeasement

It is obvious that if an injured or victim of a certain harm is not compensated he himself or his relatives stand for revenge and this results chaos on the society. At the result tort law come in to being with the idea of compensation to stop appeasers from taking personal measures especially, revenge. It is generally “believed that wrongdoer in any circum stances should not be acquitted because it is happen the social system may fail in to chaos. It is necessary to reach the wrongdoer that the tort does not pay by making him not only compensate the plaintiff for the latter loss but also disgorge any gain, he may have made from his conduct.”³²

E. Efficiency

This is also another function of tort law in that the award or compensation given to the injured party should be efficient or should be equivalent as possible as with the harm sustained. "The compensation must be fair, equal and to the loss sustained by the victim and it should have a capacity to bring back the victim to his original position efficiently".³³

F. Justice

"Justice is a broad sense but as being the one objective of tort law, every wrongdoer is liable for his act and must pay compensation for the loss he incurred up on others personality or property. Moreover, that compensation should be fair and just. The victim should not be awarded more than he incurred loss".³⁴

Justice has two aspects: first, retribution against a wrongdoer and secondly compensation for the victim. The notion of retribution on tort is not a well-adapted mach the penalty to the degree of wrongdoing, to produce a level of retribution that could be described as just. "Retribution is subordinate to the compulsory function of an award of among which dictated by the measure of the plaintiff's loss, whether large or small, so the justice of proving compensation in ambiguous".³⁵

1.6. Classification of Torts

Tort law is a streamline of law, which covers issues of civil wrongs like defamation, trespassing and other actions involving law violations. In case a person has under gone a physical, legal or any economic harm, then he can file a suit under the tort law. "If the suit is valid and the defendand of the case losses the case, the in such a case the complainant can be compensated with the damages for the loss, which he has faced. Tort laws are : negligent torts, intentional torts and the strict liability".³⁶

1.6.1. Intentional Torts

Intentional torts are usually offenses committed by a person who attempts or intends to do harm. For intent to exist, the individual must be aware that injury will be the result of the act. "Sometimes a person sustain on another wrong deliberately to harm that person. It is not simply having a willingness to harm but a tort feasor should also appreciate the out come of the act or omission. In other words intentional tort is the act that were in tended to bring about the result and it arise from the defendant conscious desire to bring a harm or have a full know ledge as to the result."³⁷

According to Art 2106 of the Ethiopian tort law Intentional offence "where moral harm has been inflicted up on the plaintiff deliberately, the court may, by way of redress, order the defendant to pay fair compensation to the plaintiff or to a charity named by the plaintiff".³⁸

1.6.2. Negligent torts

There is no universal definition of tort of negligence although many definitions have been given by legal writers, judges and legislatures but, it can be defined as negligence is failure to exercise due care when there is a foreseeable risk of harm to others. "Holding parties liable for negligence could be arise from the angle that every person should not be careless in the relation that he could have with the community as a whole.

If an injury is caused by negligence of person he/she should be answerable to the act."³⁹ In order to establish a cause of action for negligence, "the plaintiff is required to prove four elements. Such as:-

- A. Duty to care
- B. Breach of that duty

C. Injury

D. Causation

Generally, negligent torts are the cases which occur due to negligent behavior and the failure to perform any task with due diligence.”⁴⁰

1.6.3. Strict Liability

In some cases, “tort law imposes liability on defendants who are neither negligent nor guilty of intentional wrongdoing such tort are known as, strict liability or liability without fault. This branch of torts seeks to regulate those activities that are useful and necessary but, that create abnormally dangerous risk to society.”⁴¹ “Strict liability is a legal doctrine in tort law that makes a person responsible for the damages caused by their actions regardless of fault or intent.”⁴² Generally, the above main classifications of tort law makes liable the wrongdoer in compensating the victim this bring us to new issue that is “ the issue of compensation” which is going to raise in the next chapter.

Chapter Two

2- Compensation in General

Compensation for damage is cardinal principle under lying civil liability. “The objective of civil liability, as mentioned earlier is to redress or restore the injured or wronged person in to

aposition which he would have been if the event causing the liability had not occurred.”¹This objective is best achieved through compensation.

“As to the scope of coverage of the term,“ compensation” there does not seem to be a general agreement. Some legal writers confine the scope of compensation to cover primarily monetary reparation and at all times include compensation in kind only.”²

“The basic principle upon which compensation operates is that it is an indemnity to the person injured or rehabilitate the plaintiff as far as possible to the original position to the original position.”³ However in exception Cases particularly in common law countries, compensation is used to punish the defendant. “In such a situation compensation plays not only the role of punishment but also deferring others.”⁴

The Ethiopian civil code uses the term” compensation” in a very broad sense so as to cover every kind of civil remedy for damage. This apparently is demonstrated by section XII; Book IV of the civil code. Under this section, all civil remedies for damage are comprehended under broad topic i.e. “Modes and Extent of compensation”.

2.1. Countries Experience In Relation To Compensability Of Moral Damage.

From the very beginning, moral damage is called by variety of names in different legal systems or countries, sometimes it is called” immaterial damage”⁵ or” non material damage. “⁶The most frequently used synonymous for moral damage, is however non- pecuniary harm. “⁷

“In addition to these variations the precise meaning, scope of moral and the scope of coverage and the requirements for assessment (assessment of moral damage) varies in different countries, More over, some countries fix the meaning and scope of it by statutory definitions.”⁸ Therefore, this writer is interested to examine the expertise of same counters regarding moral damage here under. This writer has also chosen France, Ethiopia on the one side and England

from the other side. This is because England and France are from the two legal system extremes France from civil law legal system and England from the common law legal system .while that of Ethiopia from the civil law legal system and their laws relating to moral damage laws to same extent are similar with that of the Ethiopian moral damage. Having put in place this conceptual framework lets see the compensability of moral damage under the two legal systems especially French and England.

2.2. Moral Damage Under Civil Law Legal System

France:

France is on the civil law countries, which accepted pecuniary compensability of moral damage on equal footing with material damage. i.e. “with out restriction on its compensability.”⁹ The French civil code never explained what is meant by “dommage”(damage). i.e. whether moral harm is include or whether only personal injury and property damage is to be compensated. It is this and

other many issues that the legislature left to the discretion of courts. It should therefore come as no surprise to learn that the modern French law of torts including moral damage is pure judge made law.

However,” from one relevant provision it is understood as reflecting the drafter’s (legislatures) wish to allow compensation for all kinds of loss irrespective of their nature.”¹⁰“In light of this provision, no argument can be derived that “dommage moral”(moral damage) is regard less favorable than” dommage material” (material damage). Both are equally compensated if they are certain, personal and legitimate.”¹¹

“Certainty is one of the harem or damage is the main requirement for compensability of moral damage under France moral damage law.”¹²

“Legitimate is to mean that the interest harmed should not be un lawful or immoral .Accordingly, the plaintiff should not be compensated for moral damage he has suffered if the interest harmed is illegitimate.”¹³

“Personal is also the requirement for compensability of moral damage. The plaintiff himself must personally suffer the damage. i.e. he should be the victim of such damage.”¹⁴

2.3. Moral Damage Under Common Law Legal System.

England:

The civil law “moral damage” (dommage moral) and the common law “non-pecuniary harm” are substantially the same. And “there is a general and common understanding that moral damage or non-pecuniary harm applies to damage or injury which can not be measured in monetary terms.”¹⁵ Under England tort law moral damage refers to an injury to the feelings, or to person’s non-pecuniary interests, this includes an injury caused to the honor, reputation or considerations or personal feelings of a person.”¹⁶

In contrast to the Ethiopian principle of non-pecuniary redress for moral damage, in England, pecuniary constitutes the sole remedy for making good the moral damage. Some countries like France “accept pecuniary compensation of moral damage in general with out restriction but, England allows the reparation of moral damage only under certain preconditions or in certain kinds of cases as a result England adopts a restrictive principle with regard to monetary compensation for moral damage.”¹⁷ Thus they specifically enumerate, by the law, “the causes where pecuniary compensation for moral damage can be obtained. “¹⁸ The position of Ethiopia is some what similar in this case i.e. pecuniary compensation is allowed under certain cases.

2.4. Moral Damage Under Ethiopian Legal System.

The Ethiopian law of moral damage allows pecuniary compensation and non-pecuniary compensation of moral damage. This is a provision regarding moral injury stating from article 2105 and the following provision of the civil code. These provision show or order how courts give diction to cases in relation to moral damage. In these regard both form of compensation are available under Ethiopian legal system. What is more with the Ethiopian civil code is courts can ordered any kind of civil remedy if it is appropriate, subject only to the rights and freedoms of the defendant and that of the third parties. Generally, the Ethiopian law on the moral

damage has similarity with the English moral damage law in pecuniary compensation. These will be discussed in the next chapter, which specifically deals with the rules of non-pecuniary compensation and provisions dealing with pecuniary compensation of moral damage.

2.5 Compensation And Nature Of Moral Damage

Originally, the term "compensation" is derived from a Latin word "compensatio" meaning "weighing together" i.e. weighing the harm against its equivalent in value.¹⁹ The functional definition of compensation is given by Black's law dictionary.

"Compensation is indemnification; payments of damages: making amends; making whole given in an equivalent or substitute of equal value. That which is necessary to restore an injured party to his former position---- remuneration or satisfaction for major or damage of every description-----."²⁰

We can understand from the above definition that something which is given or paid to the plaintiff in order to make the whole damage."It also includes any thing done to counter balance the damage or to satisfy the injured party."²¹ Obviously, money is the basic means of compensation. However, compensation is not confined to money. As can be inferred from the definition compensation is not confined even to things with exchange value.

Whereas moral damage can be defined as an injury to a person's non-pecuniary interest, it is an injury affecting the emotional and physical well-being of a person. In other words, moral damage or non-pecuniary harm is an injury caused to the honor, reputation or consideration, or personal feelings of the victim." The term also covers injuries to personality rights. i.e., the collection of values enjoyed by the individuals within a negative society which he is a member.²²

Moral damage may consist exclusively of interference with the victim's individual or personal sphere or it may affect his family and social relations.

Therefore, moral damage occurs whenever the non-pecuniary interests of a person are negatively affected. What constitutes specific moral damage varies

from country to country and it may vary from custom to custom. What is more moral damage is also caused by words, writings, gestures and by different outrages to reputation of individual.

2.6. Compensation as a Redress to Loss.

Art 2105 of our civil code consists of two major rules regarding compensation. Sub article one of this article deals with compensability of moral damage in general context. Sub article two of the same article provides for pecuniary compensation of moral damage by way of exception. Based on this article and from the view point of compensation there are two kinds of moral damage under Ethiopian law. These are pecuniary compensation and non-pecuniary compensation.

Art 2116/3 of our civil code also shows the pecuniary compensation of moral damage. The amount fixed by this provision as an upper limit seems very low in particular in creation of moral damage.

According to the Ethiopian civil code the maximum amount of money compensation for moral damage is 1000.00 Ethiopian birr. This amount is too small to redress the damage the victim suffered due to the harm inflicted upon him by the wrong doer, Birr 1000.00 of the time when the civil code was enacted is not comparable to the value of Birr 1000.00 of today.

Nowadays inflation has reduced the purchasing power of our legal tender, hence requiring adjustment of the amount payable for moral damages in the future. Therefore, I believe, 1000.00 Ethiopian birr does not redress the loss. The writer would like to recommend that the law maker without delay create the opportunity to amend this particular provision.

2.7. Pecuniary Vs Non-pecuniary Compensation Of Moral Damage

The concept of moral damage and in particular its compensability is called differently under different legal systems or different countries. The problem of compensability of moral damage primarily arises from the very nature of moral damage itself because it is immeasurable in money due to the invisibility of the moral or it is in assessable with precision and exactitude, unlike material damages which have capability of measurements such as principle of equivalence.

“But incase of moral damage this principle of equivalence is in operative since it is difficult to get such equivalence between money and moral damage.”²³

Basically,” moral damage can be remedied in different ways, accordingly the modes of compensation differs in this regard. There are two main forms of compensation namely pecuniary and non-pecuniary. Pecuniary compensation is reparation of the harm by means of payments of money.”²⁴

“Non-pecuniary compensation can be any civil remedy other than pecuniary redress and this principle of non- pecuniary redress for the compensation of moral harm can be justified by the fact that the equivalence between damage and its pecuniary compensation which is applicable incase of material damage, is impossible to attain in cases of moral damage.”²⁵ And it includes restitution in kind, injunction, publicity and declaration of judgment, declaration of right, etc

Art2120 of the Ethiopian Civil code supported the above statement.

It says:- Art 2120- Honour and reputation.

In the case of wrongs directed against the Honour or

reputation of a person the court may order
such publicity to be made at the defendant's expense
as is likely to counter the effect of these wrongs.

Therefore, when X caused material damage to Y by spoiling his good name, he can demand pecuniary compensation. But for his moral damage, a media publication may be the appropriate mode of compensation may also be allowed. But don't you think that Art 2120 provides a better compensation for his moral damage?

Hence, where ever adequate procedure exists then you have to grant such kinds of compensation i.e. other than compensation in terms of money. The rule is non-pecuniary compensation.

Chapter Three

Assessment Of Moral Damage Under Ethiopian Tort Law

3.1 Rules Of Pecuniary Compensation

From the very beginning Article 2105 of the civil code of Ethiopia is a controlling article laying the basic rule on compensability of moral damage. This article governs compensation for moral damage provided for by different areas of the law.

Article 2105 has two major rules, sub article (1) of this article deals with compensability of moral damage in general context while sub article (2) of the same rule provides for pecuniary compensation of moral damage by way of exception. Based on this article and from the view point of compensation two kinds of moral damage can be distinguished with Ethiopian law: those which are pecuniary compensable. When we look at article, 2105(1) provides that:

“The author of a wrong shall make good the moral harm resulting from the wrong whenever adequate procedure exists for such redress.”

According to this article every person who by his wrong or misdeeds causes amoral damage to the other, has the duty to compensate the victim.

However, “there are exceptions to the above provision (principle). The first exception is contained with in the same sub-article, which says; “whenever adequate procedure exists” interpreting a contraries moral damage is not compensable where there exists no adequate procure.

The second exception restricts the mode of compensation by excluding pecuniary compensation from the general principle of compensation laid down by article 2105(1) and reserves it only for certain kinds of conduct causing moral damage.”¹ There fore by deducting the exceptions we can arrive at a

conclusion that under Ethiopian law every kind of moral damage which results from a wrong of the defendant is compensable and sub article(2) of 2105 Provides that pecuniary compensation may only be a warded for those cases of moral damage which are specifically mentioned by the law. There fore, one can conclude that non- pecuniary compensation for moral damage is the principle under Ethiopian law.

3.2 Limitation Regarding Cases of Moral Injury

Not all moral injuries are pecuniarily compensable under Ethiopian law. The law limits or enumerates the cases where moral harms can be compensable with money. Article 2105(2) provides that pecuniary compensation for moral damage can be awarded only in cases expressly provided by law. Accordingly, only moral harms which are explicitly provided will be pecuniarily compensable. Where there is no such express mention by the law, moral damage is not pecuniarily compensable, or to be pecuniarily compensable the moral damage should expressly be provided by the law to this effect. In this way the Ethiopian law limits the scope or number of cases of moral damage which deserve monetary reparation. Cases of moral harms that are expressly authorized by the law to be pecuniarily compensable are those contained in articles 2105 to 2115 of the civil code and those which specifically mentioned else where in the code of other laws (proclamations). For example article 2110 of the Ethiopian civil code and proclamation No 410/96 Art 8.

Art 2110 injury to the rights of spouses

Fair compensation may be awarded by way of redress to the plaintiff or to a charity named by him, where the defendant has injured his or her rights as a spouse.

Art 8 proclamation No 410/96 says.

“Copy right” means an economic right sub stituting in a work and where appropriate

Includes moral right of an author.

Let see cases relevant to the subject matter of article 8 of the proclamation (410/96) and compensation theory.

Case-1-

Cassation division of the federal supreme court Addis Ababa, Reporter News paper Sunday Jan 2,2002 E.C.

Appellant Artistic Printing Press Vs Applicant D/r Getahun Shebru.(Annex-I-)

The applicant had instituted the case against the appellant claiming that he had translated a book under a pen name and had claimed from the appellant company Birr 14,929.50 which is half of the agreed price for the printing of 5000 copies. The appellant claims that he found the book being sold in the book market before the time the appellant would submit the book to the appellant. The appellant had demanded for Birr 160,079.50 as material and moral damage.

After lots of litigation, the case reached the court of cassation and the cassation court after analyzing both arguments of both sides had decided that the appellee should be paid the amount he demanded, including both material and moral damage; through the case was silent as to the exact amount of money awarded by way of compensation with regard to moral damage. In other words, the court did not specify in its decision, the amount of money granted for the moral damage sustained by the applicant.

3.3 Limitation On The Extent Of Compensation

“Unlike material damage, “which has no such limitation pecuniary compensation for moral damage, has an upper limit”² and this is another feature which distinguishes Ethiopian law on moral damage from the majority of other countries of the world. This limitation is enshrined in Article 2116(3) of the code.

“The compensation awarded for moral damage shall in no case exceed 1000.00
Ethiopian dollars”.

Therefore, compensation for any moral damage cannot exceed this ceiling. No matter how immoral or outrageous the act may be, no matter how heart breaking sorrow or mental suffering the victim may feel, his civil remedy can not exceed in any case one thousand Ethiopian birr.

Article 2116(3) shows the second limitation on the pecuniary compensation of moral damage; however the amount fixed by this article as an upper limit seems very low in particular in

certain cases of moral damage which could, at times, even lead to an extreme insanity. Can this amount really heal the wounded feeling, lost pride, deep sorrow of the morally injured person? The answer, in the opinion of this writer seems to be in the negative.

In addition to this, the period of the 1960 during which this article 2116/3 was formulated in entirely different from the reality of today. For Ethiopia of those days, this amount might make sense, since life was as cheap as words can express, but to day the situation is different. As Change is un avoidable, there is a tremendous economic and social dynamism that has taken place since then. Cost of living has escalated high enormously and there is an inflation of money too. All these make the said ceiling very low. Therefore, this writer submits that the upper limit fixed by article 2116/3 should be lifted to grant compensation even in excess of the ceiling in extra ordinary and exceptional cases of moral damage. In the following case (decision of the court) the writer would like to give the reader the opportunity to see the amount of money awarded to moral damage sustained.

Case -2-

Federal Supreme Court, Addis Ababa, file No. 6798/94 E.C. the appellant Ato Abdi Mohammed Vs respondent Ato Meteku Woledede.(Annex No 2)

The respondent had accused the appellant for the moral and material damage caused to him because of the death of his wife who had been using the transportation vehicle of the appellant and had demanded that he should be paid 40,000.00 birr for moral damage.

The cassation court, after closely studying the proceedings had decided that the lower courts decision that granted 40,000.00 birr damage to the respondent had a basic error of law and had decided the appellant is to pay to the respondent only the sum of 1000.00 birr for moral damage and the respondent to pay 1000.00 birr rot the appellant's expenses.

As we can see from the case, the Diredawa High court had decided that the respondent should be paid 40,000.00 birr for moral damage. When the appellant appealed to the cassation

division, the latter revoked the decision of the lower court and decided that the respondent should pay only 1000.00 birr for moral damage.

According to Art 2116/3, the compensation awarded for moral injury may in no case exceed 1000.00 Ethiopian birr. But the lower court has decided 40,000.00 birr. The decision lacks any legal backing except personal sympathy of the judge. From the Judge's point of view, we can see that the court believes that the damage that had morally hurt the respondent is worth 40,000.00 birr. On the contrary the cassation division decided 1000.00 birr for moral damage. The relevant provision also provides that the amount should be up to 1000.00 birr.

The lower court has the mania to extend the amount of moral damage beyond what is provided by the law. The provision is clear that it leaves no room for interpretation. Therefore, from the wording of the law the cassation division of the Federal Supreme Court is correct to reject the decision of the lower court. The lower court did cite the correct legal provision but erred in its interpretation of the provision. I believe the lower court was carried out by feeling of sympathy to the victim but this is not shared by the legislature. Hence, there is no way to correct what should have otherwise been provided under the law with regard to the maximum amount (the upper limit) of moral damage (in terms of money) to be granted to the victim. So how do we reconcile these two opposite views?

The amicable solution to be sought should underscore the message to be passed to the law maker (the legislature) to make the required amendment which the changing circumstances dictate. Unless some kind of amendment in this regard is made, the writer believes that the Judges continue to award a sum of money which does not commensurate with the extent of moral damage suffered (owing to the nature of the pertinent provision which leaves no room to meddle in to in the name of interpretation).

Case-3-

A similar case was also addressed the Federal Courts division (file No.14185/97 E.C.) The applicant was Walija Caross Country transport Enterprise while the respondent were Ato Melse Habte and Ato Andualen Melese.(Annex No. 3). the respondents had instituted a case against the appellant for the moral damage and material damage caused to them and their family because of the death of the first respondents wife and the second respondent's mother and the first respondent's daughter and the second respondents sister. The victim was killed during the accident that took place by transportation but wounded by the appellant. They had demanded 110,000.00 birr for material damage and 2000.00 birr for moral damage. Though the lower courts had decided that the respondent should receive 45,999.99 for both material and moral damage, the cassation court, after thoroughly examining the case, had decided that the respondents be paid 2000.00 birr each for moral damage.

The case shows us that the lower court decided that the respondents should be paid 12,000.00 birr for moral damage. But the cassation court had revoked the decision. The literature of the case does not provide legal provision to support this decision. How the lower court calculated the sum of 45,999.99 birr out of which 12,000.00 birr is for moral damage is anomalous.

Once again the court of cassation has reversed the decision by giving correct interpretation to article 2116. In the case at hand the number of person dead was two- the mother and her baby child. The court of cassation was correct in allowing 1000.00 birr in the form of moral compensation to be paid to the respondents. The writer's over ride the clear provision of the law. Hence, until the provision is repealed, replaced by a new provision addressing the need of the day, there is no way the court can deviate from the correct rules of legal interpretation.

3.4 Pecuniary Compensability of Moral Damage for Bodily Harm

under Ethiopian Tort Law.

3.4.1 Bodily Harm or Death

Moral damage arising from bodily harm or death makes the defendant strictly liable. This can be clearly seen from the reading of article 2067/1 of the civil code which figures in the section of the code dealing with “liability irrespective of fault”. “Thus in case of bodily harm or death the defendant will be held liable strictly to pecuniarily compensate the victim of moral damage without the need of establishing fault on the part of the former”³.

Bodily harm or injury comprises injury to the body, or diseases contracted by the injured because of the injury. It includes any physical impairment of the condition of the body.

In case of bodily harm, moral and material damage are intermingled. The victim of bodily harm experiences physical pain and suffering from the injury to his body as well as moral suffering due to loss or impairment of some parts of his body.

For instance “X” loses his right hand as a result of bodily harm inflicted upon him by “Y”, “X”’s moral damage is not only the actual physical pain and suffering. But it includes the mental suffering i.e. humiliation caused by his appearance. There is also nervous shock, anguish and feelings of oneself incapacitated either physically or mentally.

“The civil code of Ethiopia provides that a victim of bodily harm may be pecuniarily compensated for the moral damage he suffered”⁴. This is of course in addition to his compensation of material damage, if the immediate victim did not survive the bodily harm, his family could be compensated for the moral damage, i.e. for the mental suffering sustained by the loss of a dearer or a

loved one. Nevertheless, not each member of the family is going to be compensated severally. There will be a family representative for the purpose that the court elects based on local custom. However, in the absence of any local custom person listed down in Article 2117 of the civil code are considered as the case may be to be representatives of the family.

The other type of bodily harm to deal with this title is the bodily harm to wife as provided under article 2115 of the civil code. Under this article, the reason is simple and clear, since any person who suffered bodily harm can be compensated under Article 2113 any women either married or not can invoke this article. Accordingly, the husband of a wife who sustained bodily injury

can be awarded pecuniary compensation for the moral damage he suffered from the bodily injury of his wife. "In order for the husband to be compensated, the bodily harm sustained by his wife should be such that it renders her companionship less useful or less agreeable to him".⁵ This can happen for instance, where the arm of the wife has been broken or cut and as a result she could not embrace her husband as she used to do or if one of her leg is amputated she can't walk properly. Never the less, as to what kind of bodily injury on what specific part of the body of he women should the injury occur to make "the companionship of the wife less useful of less agreeable" to the husband is a question seemingly to be answered subjectively. In any event, once it is established that the bodily harm is the one envisaged by article 2115/1 of the civil code, the husband can get pecuniary compensation and his wife too has independent claim for compensation for the moral damage she suffered.(article 2115/2)

However, there is no legal provision entitling the wife to similar right where her husband sustained bodily harm, which produces effects envisaged by article 2115/1 of the code. It is the writer's opinion that this article be amended in such

away that it gives similar right to the wife. Because its short coming has gone denying the wife the same right, i.e. it is discriminatory.

Finally, in all cases of bodily harm or death there is no compensation where the act causing bodily harm was ordered by law or was committed in legitimate self defense, of the harm was due sourly to the victim's fault.

Let see cases relevant to the subject matter of Article 2115 and compensation theory.

Case -4-

Cassation division of the Federal Supreme Court of Addis Ababa, (file No 21296/2000 E.C.)

The applicant Alether Lands Development Organization Vs Respondents Ato Wubet Adbaru.(Annex 4).

The material facts of the case runs as follows:-

The respondent had initiated a case against the appellant claiming that he should be reinstated mentally for the moral physical and material damage caused to him by the appellant's car and had claimed the amount of 31,000.00 birr all together.

The lower courts had decided that the respondent was entitled to the requested amount, the appellant had them appealed to this cassation division of the Federal supreme court.

The cassation court reversed the decisions of the lower courts on grounds of basic error of law and set free the appellant from liability both material and or moral. From my observation, the writer believes that the court does not mean that the respondent had not sustained moral damage because of the

accident. If so why the cassation court denied the appellant to get moral compensation is not clear. As long as all condition making a victim eligible for grant of moral compensation are met, the court should have awarded the sum of money to be paid in the form of compensation for moral damage.

Again let us see another similar case to the above.

Case -5-

Cassation division of the Federal Supreme Court Addis Ababa, (file No.22509/2000 E.C.) The appellant Ato Germa H/giorgis Vs the respondent Derege Semero.(Annex 5).

The respondent had initiated a case against the appellant earlier claiming 149,820.00 birr for moral, material and physical damage that he suffered because of an accident caused by the appellant's car.

The lower courts had decided that the respondent should be paid 16,000.00 birr for moral, material and physical damage all together.

The lower courts in this case had decided that the respondent should be paid 1000.00 birr for moral damage yet the cassation division, claiming that the respondent doesn't have any legal grounds to be compensated had reversed the decision. The court of cassation, again has

disallowed the respondent to the right to claim moral, material and physical damage that he sustained by the property of the applicant. In this case, the court did not make effort to establish the fact that the respondent had suffered bodily injury by the car of the injured respondent. In fact it rejected his claim on the ground that the evidences produced did not have relevance to the case. Even then, it was adequately established that the respondent suffered injury by the property of the applicant. Thus, the court to may under standing has erred to deny the respondent compensation for moral and material damage.

3.4.2 Defamation

“Defamation causes moral damage by hurting the feelings of the victim and by impairing or negatively affecting the reputation and social consideration of the plaintiff. Defamation is a criminal offence as well as a civil wrong under Ethiopian law.”⁶

Under article 2109 of the civil code moral damage caused by defamation is capable of pecuniary compensation. However, this article should be read in conjunction with article 2044 of the civil code.

“Pursuant to article 2044 of the civil code of a fault of defamation is committed when a person acts in such a way to make another living person detestable disgraceful or ridiculous or to Jeopardize his credit, his reputation or his future.”⁷

“Defamation consists of three basic elements. The defamatory statement or conduct, the reference to the plaintiff of the alleged defamatory facts and publicity. By publicity we mean that the statement or conduct has been communicated to others or at least to third party other than the victim. Article 2044 of the civil code seems to comprehend these three basic elements.”⁸

Intention is not required to commit defamation except in certain situations. As a result, a person commits defamation with out need of any intention. What is required is fault not an intention.

Hence, pecuniary compensation for moral damage resulting from defamation may be awarded only where the defamation tends to show that the plaintiff has committed an offence punishable under criminal law.

Art 613 of the criminal code says:-

Whoever, addressing a third party, imputes to another,
with the intent to injure his honour or reputation, an act,
a fact or a conduct, where the allegation accords with the truth,
is punishable, upon complaint, with simple imprisonment
not exceeding six months, or fine.

Let's see a case in relation to defamation.

This case was decided by the cassation division of the federal supreme court.

Case-6-

Cassation division of the Federal Supreme Court of Addis Ababa, file No 22558/2000 E.C. the applicant Ethiopian Telecommunication corporation Vs respondent W/rt Frehiwot Erke.(Annex. No 6)

The respondent had instituted a case against the applicant on the ground of defamation. The lower court then had decided that the respondent deserves a moral damage of 3000.00 birr.

The cassation court reversed the decisions of the lower court and decided that the applicant /appellant/ doesn't have to pay for moral damage.

As I can see from the case given, the lower court had decided that the respondent gets compensation the amount of which is 3000.00 birr for moral damage. But the cassation division had decided that the respondent does not deserve even the 1000.00 birr standard compensation amount for moral damage because it stated that there was no defamation. Why should there be

this much difference in opinion between courts? Once again, I come to the conclusion that it is the law that should be revised. There should be definite criteria as to the payment for moral damages.

“basically, not all alleged defamation makes the defendant liable. There are different grounds of exoneration from liability. Thus a person commits no defamation if what he said is proved to be true, unless he acts solely with intent to injure the other person. A person commits no fault of defamation also where he expresses his opinion on matters of public concern unless he make imputation concerning the plaintiff which he know to be false.”⁹ (from Art 2046 – 2047)

“like wise, one is not liable for his utterance, which he made, in parliamentary debate or judicial proceedings. The reproducer of such utterance is not liable unless he acted with sole intent to injure. So too, the defendant is not liable for defamation committed by way of press, periodical and the like where he has acted with out intention or gross negligence and he publishes forth with a withdrawal and apology up on the request of the defendant.”¹⁰ (from Art 2048 – 2049)

There is appending case relating to defamation where moral damage is pleading.

Kirkose Federal First Instance Court. Plaintiff – Ato Fasika Sidelel Vs Dfendant Ato Tesfaye Riste.

Name of the book “ •••• ”

Fasida is pleading:-

- Cessation of sale of the book
- Letter of apology in the national news paper
- Claim material and moral damage

There is also another pending case in the federal supreme court of Addis Ababa. (file No 48448/2002)

Appellant Ayat Share Company Vs Applicant Fortune News paper.

3.4.3 Unlawful Restraint Of Liberty

Unlawful restraint of liberty causes moral damage that is pecuniarily compensable; article 2108 of the civil code provides that “where the plaintiff’s liberty has been unlawfully restrained by the defendant,” the court could order the defendant to compensate the moral damage there of Art 2040 also shares the same opinion with Art 2108. “From the cumulative reading of articles 2108 and 2040, it can be understood that the fault under discussion has three basic elements. First, there should be an existing restraint .Restraint here means to limit, confine a bridge, stay, restrict or hinder.”¹¹ Restraint as defined in black’s law dictionary is, “confinement, abridgement or restriction, limitation, prohibition of action, hindrance or restriction of liberty. However, as provided under article 2040 of the civil code the liberty or freedom is with reference to movement.

Secondly, such restraint of liberty should be inflicted upon the plaintiff and finally such restraint of liberty should be unlawful. The element of unlawfulness, here, is very important overall, “ a person commits this fault and is liable for moral damage there of if he unlawfully restrains the liberty of another person and thirdly, prevents him from moving as he is entitled to the plaintiff must have

been deprived of his personal liberty of movement”¹² for the purpose of Article 2108 or 2040 it is enough that the defendant has compelled the plaintiff not to move as he

likes, or compelled him to be have in certain manner by the treat of danger and this threat of danger caused fear and ane-xiety upon the plaintiff. By so doing, the defendant infringes the plaintiff's morality as well his mentality, and thus, shall became liable for his fault. Bodily contact is not required to commit the fault of restraint of liberty. In addition, the shortness of time to commit the act does not matter. However, not all restraints of liberty make a person liable. "Thus, a person commits no fault where the restraint is lawful. Or done by a person exercising legal authority. A fault is also not committed where the defendant has done it by believing that the plaintiff had committed a penal offence or if he immediately handed over the plaintiff to the police. Again no fault of restraint of liberty is committed where a bail has lawfully restrained the liberty of the person on bail. However, the guarantor should have a good reason to be live that the person on bail is preparing to escape.(Arts 2042 and 2043)"¹³

3.5 Discretionary Power Of Courts

One of the basic aspects of Ethiopian law on moral damage is the wide discretionaty power it gives to courts. Courts have discretionary power with regard to awarding compensation in two ways to moral damage.

3.5.1 Awarding Compensation

In all cases of moral damage that are supposed to be pecuniarily compensable the plaintiff can not as of right get the amount of compensation. He clams Art 2105/2 of the civil code which provides for monetary compensation of certain cases of moral harms states that pecuniary compensation "may be" awarded. It does not speak in terms of mandatory

words like "shall". Like wise all individual articles dealing with pecuniary compensation of moral damage each contains the word "may be" or an expression which says "the court may" there is not even a single article by way of exception that provides in a mandatory language. In cases of non- pecuniary compensation, a contrarily the plaintiff has no immediate remedy as of right; rather it is on the discretion of the court to fix or not fix monetary compensation to the claimant. That is to say it is the court, which determines whether a victim of certain moral

damage gets the said compensation, or not. A categorization of a given type of moral damage to be compensated pecuniarily or other wise does not mean that the plaintiff automatically obtains such compensation. The courts are not obliged to grant compensation to the victim even where they accepted the fact of existence of the alleged moral damage. The only thing which “obliges” the court to award compensation to the victim of moral damage is equity or sense of justice, other wise there is no mandatory provision obliging them. The victim has the right of bring in court action or demanding pecuniary compensation but he can not get the alleged compensation as of right.

Generally, “this exclusive discretion of courts is a little bit irrational; at least with respect to certain conducts causing severe moral damage (such as bodily injury, rape) mandatory provisions could have been inserted to entitle the victim to obtain compensation as of right, with out subjecting him to the discretion of the judge.”¹⁴

3.5.2 Fixing the Amount of Compensation

The courts discretionary power is not limited to the grant of compensation only but also to the fixing of the amount of compensation to be granted. Accordingly, courts have been given the power to fix the amount of compensation to be given to the victim of certain moral damage. “ this can be

inferred from Article 2116/1 of the civil code, which partly reads,” in fixing the amount of the equitable compensation under the preceding articles----- the court shall have regard to local usages”---- therefore it is in the discretion of the court to decide what amount a victim of certain moral damage should get as compensation there of. Since there is no commensurability between moral damage and its pecuniary redress a victim has no right to demand certain fixed amount of compensation which, of course he could have done, had the damage been material. Thus fixing the amount or extent of compensation for moral damage is an exclusive right of the court before which the case is brought.”¹⁵

However, “ the discretionary power of courts is not with out limitation. The first limitation is that the court should have regard to local custom in fixing the amount”¹⁶ therefore, “courts

have a duty to comply with the local custom in fixing the amount in assessing the compensation unless such custom is manifested unreasonable or immoral.”¹⁷

“The second by far the major restriction upon the discretion of courts in fixing the amount of compensation is the legal limitation of ceiling of the compensation.”¹⁸ limitations on the discretionary power of the judge can be summarized into two main parts.

- a) When the judge grants the moral damage compensation, she is supposed to follow local custom is the law talking about? Is it the victim’s, the harm doer’s or the place of occurrence: it is vague.
- b) There is a maximum ceiling for the amount to be granted. We have seen these previously.

The last point that may be regarded as a limitation on the courts discretionary power is that the amount of compensation to be fixed should be “equitable”.

The term “equitable” is used through out almost all articles of moral damage providing for pecuniary compensation. “The insertion of this word in all these articles seems to reduce the arbitrariness of courts in fixing the amount of compensation and to balance as far as possible the compensation with the gravity of the harm. Nevertheless how fair and equitable a given amount is going to be determined, still, by individual judge, upon subjective criteria.”¹⁹ Concerning fixing the amount of compensation for moral damage one basic question should necessarily be raised. i.e, what factors should be taken in to account in fixing the amount of compensation for moral damage? “Except for a compliance with custom and equity there is no clear and express mention, as such as to what factors the courts should take in to account in fixing the amount of compensation. In case of material damage, there are factors the court should take in to consideration in assessing the compensation.i.e the degree of fault intention of the defendant the fault or good faith of the victim e.t.c.”²⁰

In relation to moral damage Article 2158(1) of the civil code provides that the court deciding the case: if any, should consider the degree of gravity of fault and the author’s good desire: although article 2158(2) prohibits considering the financial position of the parties, this writer is

of the opinion that it would have been better if the financial position of the parties too, were considered, for reason that social and economic adjustment and this may narrow the wealth gap between poor and rich. What is more is, this writer thinks that factors which the courts have to consider in case of material damage, as said before, should where necessary, apply by an analogy to moral cases too.

4. Conclusion And Recommendation

1- Conclusion

Moral damage is one of the two kinds of damages to the interest of an injured person. Although the phrase “moral damage” suffers from vagueness, the general understanding is that it refers to harms which are incapable of measurement in terms of money. Accordingly, moral damage embraces all injuries caused to pecuniary interest of a person i.e. an injury to the emotional and physical well being of a person. It is a harm to the different feelings or reputations of a person and as such it has much to do with mental or thinking of a person.

Once moral injuries are admitted as damage by the law, it is logical that some sort of legal remedy should exist to redress it, and no better remedy to this effect could have appeared than compensating here too.” The incommensurability of monetary compensation to the harm and the immeasurability of this damage in money terms resulted in controversy and differences in approach. Thus France and England adopted different methods of remedying moral damage”²¹ this in turn resulted in lack of uniform and universally accepted general principles of compensating moral damage. Never the less, in one or the other way, one or the other sort of remedy, be it restrictive or not, has been used by different countries to redress moral damage.

Under the present Ethiopian law, pecuniary interest of a person has a wider protection and moral damage there to is compensable. From view point of compensation two categories of cases of moral damage can be distinguished under Ethiopian law. The first category comprises those cases or conduct causing moral damage, which could be pecuniarily compensable. The second category embraces those cases or conducts causing moral damage, which are

not pecuniarily compensable but which could be remedied by means other than monetary compensation. In the case of the latter i.e. non- pecuniary compensation which is the principle under Ethiopian law it is in the discretion of the judge to determine whether the complainant has sustained moral damage or not. The categories of cases of moral damage that are pecuniarily compensable being an exception this category embrace only the main cases of moral damage with a view to restrict pecuniarily compensability of moral damage, the law enumerates the cases where moral damage deserves monetary compensation. Furthermore, the law fixed the upper limit for pecuniary compensation for moral damage. Thus doubling the restriction on compensability of moral damage in money. Nevertheless, even in case of pecuniary compensation of moral damage the courts have been given wide discretion to award or not to award the victim, the said monetary compensation, and in fixing the amount of such compensation. The only limitation to this discretionary power of courts is local custom and the ceiling of 1000.00 birr fixed by the law. Whether adherence to local custom is a better means of remedying moral damage and achieving justice, in itself is questionable: and the ceiling fixed by the law is intolerably low, as it lagging behind the economic reality of the time.

Moreover, other than what I dealt with herein above no elaborate rules have been laid down to guide and assist courts in fixing the amount of compensation for moral damage. Lack of mandatory provisions commanding courts to award compensation as a right to the victim, makes not only the discretion of courts excessive, but also the fate of the victim dependent upon the will of individual judges. And also there are no clear and expressed pre- requisites or requirements to be considered by the court while awarding the victim of moral damage unlike that of material damage. In general, however in order to adduce the protection required to pecuniary interests of a person and the means provided to remedy damage, much have to be done to do away with the apparent shortcomings of this area of law.

2- Recommendations

To this end this writer would like to forward the following as points of recommendation.

- 1- Some kind of consistent manual must be put in place so that some sort of uniformity in the amount of compensation for similar causes of moral damage, to reduce the arbitrariness or burden of courts in fixing the amount of compensation and to indicate what factors should be considered to reduce or not, or to totally deny the compensation for moral damage, clear and express guiding rules, similar to those of material damage, should be laid down by the law.
- 2- To minimize excessive discretion of courts in granting compensation for moral damage and lest the fate of the victim be wholly dependent up on the will of the judge, some mandatory rules at least with respect to grave cases of moral damage, commanding the judge to award compensation to the victim of moral damage, as of right, should be provided.
- 3- The ceiling of pecuniary compensation which is contained under article 2116/3 of the civil code, should be lifted up to some extent, which can fit with the development (in all its facts) states of the world reaching general, and Ethiopia attained in particular so that it can cope up with the economic reality of the current situation.
- 4- Moreover, courts should be given power to go beyond the upper limit fixed by the law in exceptional and extra- ordinary cases of moral damage.
- 5- It has been discussed time and again that granting monetary compensation for moral injuries not a rule. An entitlement to compensation(fair) is not automatic, not all moral injury (injuries) entitle compensation. But this, in the writer's view, does have the effect of exacerbating the first mental harm felt as a result of the act caused damage. Once moral injury (damage) is established, there should not exist any cogent argument which could be able acceptable to deny an entitlement to fair compensation being expressed in terms of money. Thus, the writer of this research firmly believes that a sort of uniform

approach should be sought with regard to manner (mode) of compensating the victim of moral injury and extent (amount) of compensation to be awarded.

- 6- A provision of the law on moral injury article 2115 of the Ethiopian civil code which discriminates between men and women in clear contravention of the FDRE constitution article 35 shall soon be amended.

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