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COMPULSORY LIABILITY INSURANCE FOR PAIN AND SUFFERING DAMAGES IN RUSSIA: BRINGING JUSTICE TO ACCIDENT VICTIMS

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ABSTRACT

This thesis critically examines the current tort system of compensation for pain and suffering caused by accidents in Russia. The central argument is that this system does not secure justice for victims due to the extremely low level of damages, inconsistency of awards, complicated claims procedure, and difficulties with the enforcement of awards. Liability insurance would mitigate these problems and benefit potential victims. However, insurance for pain and suffering damages is not widely used in Russia. This thesis argues that the legacy of the Soviet tort culture largely contributed to this situation. The research demonstrates that monetary compensation for pain and suffering was considered a bourgeois legal institution incompatible with socialist values. This is because the right to such compensation was conceived as a form of individualism and unjustified enrichment. This remedy, therefore, was not available throughout the entire Soviet history. It was only recognised by Russian law in 1992. Furthermore, liability insurance was prohibited in the Soviet Union as an inappropriate way to shift personal liability. It was believed that tort law has a disciplining and preventive effect which liability insurance would erode. As a result, it became available only after the collapse of the Soviet regime. Compulsory motor vehicle liability insurance was implemented even later, in 2003.

The remnants of this restrictive approach are still evident today in the Russian legal system. Compulsory liability insurance for road traffic accidents and social insurance for workplace accidents, for example, do not cover damages for pain and suffering. Indeed, Russian insurance law expressly precludes inclusion of these damages in these insurance schemes. Moreover, while voluntary liability insurance for pain and suffering is available in principle, demand is low. There is, however, one exception. Railroad accidents are the only category of cases where such liability insurance is utilised ubiquitously in Russia. Nevertheless, as this research demonstrates, presence of liability insurance does not bring justice to victims of railroad accidents, largely due to its voluntary form. In addition, the railroad state corporation (Russian Railways) and insurance companies tend to put their business interests ahead of the victims' needs. Consequently, the limits of insurance pay-outs are low and not standardised. The claims procedure remains complex, and settlements are rare in these cases.

A comparative analysis of the British and continental jurisdictions shows that compulsory liability insurance covering pain and suffering damages is more beneficial to the accident victims. Liability insurance can also stimulate an increase in award sums, making them more consistent and simplifying claiming and enforcement. This thesis proposes, as a result, the implementation of a compulsory liability insurance scheme for pain and suffering caused by road traffic, railway and workplace accidents in Russia. To succeed, this reform must be accompanied by further steps aiming to change judicial attitudes towards pain and suffering damages, promote settlements, and provide access to justice for accident victims. The latter can be achieved by enabling direct claims against insurers and enhancing contingent and conditional fee agreements. Potential social costs such as moral hazard, insurance fraud, and development of compensation culture should be taken into account but not exaggerated. There are no substantial grounds to believe that these social costs would increase considerably if the proposed reforms take place.

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CHAPTER ONE. INTRODUCTION

This thesis research was driven by the wish to improve the situation of accident victims in Russia. When accidents occur, the suffering of victims must be mitigated by an adequate compensation in order to help them resume their normal lives. This is a matter of justice for accident victims. David Allen, John Hartshorne, and Robyn Martin, for example, define compensation for torts as ‘an amount of money which will make the victim feel that she or he has been justly treated’.¹ This is currently not the case in Russia. While recovery is possible in relation to physical injury, damages for pain and suffering are severely limited. This causes deep injustices to victims of accidents who are often dragged through complex court procedures in order to obtain a minuscule award for their pain and suffering.

This thesis explores the social and cultural background of these problems. It argues that the Russian tort system does not function properly in this area. It makes recommendations as to how to ensure justice for victims. The key recommendation is the introduction of compulsory liability insurance for pain and suffering damages caused by road traffic, railroad and workplace accidents. In contrast to most jurisdictions across the world, there is no such insurance in Russia. This has a significant impact on the amount and availability of compensation for accident victims. This is problematic. As Joanne Conaghan and Wade Mansell argue, providing adequate compensation is a primary function of modern tort systems and an issue of social justice. This conception of justice shifts from individual to collective forms of responsibility for torts:

Modern reconceptualisations of tort as a mechanism of accident compensation invoke a conception of justice which assumes a certain social or community responsibility for accident victims. Tort becomes part of a model of justice concerned, not simply with assigning individual responsibility and safeguarding the supremacy of freedom of choice, but with ensuring that losses in society are fairly distributed and not borne disproportionately by some individuals over others.²

Compulsory liability insurance is a scheme which embeds collective responsibility for accident victims. It distributes losses across population or certain segments of population, for example,

¹ David Allen, Robyn Martin, and John Hartshorne. *Damages in Tort* (Sweet & Maxwell 2000) 4.

² Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (Pluto Press 1998) 117.

motor vehicle owners or employers. This enables sufficient compensation for victims irrespective of the financial situation of a particular defendant. The current lack of compulsory liability insurance for pain and suffering damages hinders performance of this function in Russia. The tort system does not, therefore, bring justice to victims of accidents. This is my chief concern in this research.

1.1 Justice and Compensation for Pain and Suffering

This thesis is based on the understanding of justice for accident victims as fair and reasonable damages for their pain and suffering awarded consistently through a simple procedure that is fully enforced. However, the issue of what is 'fair and reasonable' amount of pain and suffering damages needs some further clarification. The basic principle of tort law is that compensatory damages are intended to make a victim whole by returning him or her to their position prior to the accident.³ That means a full indemnification of the harm caused. There is no problem with applying this principle to pecuniary harm which can be easily calculated. However, if we look at pain and suffering damages, the relevance of this principle becomes less evident. As Steven Smith puts it:

In such instances, a monetary award expresses the strength of society's commitment to the norm that the tortfeasor has violated and acknowledges the fact and magnitude of the plaintiff's injury. The award also ensures that the tortfeasor will not profit from violating the norm. Thus, an award for intangible injuries makes the plaintiff 'whole' not by restoring the plaintiff to her former condition, but by re-establishing her belief in the reliability of the normative order and thereby alleviating the sense of injustice which is the basis of the dispute.⁴

Indeed, objective measuring of pain and suffering by money is problematic. It is hardly possible to distinguish with any certainty what is 'full' and what is only 'partial' compensation for pain and suffering. Therefore, it is argued in scholarly literature that such compensation should be rather

³ Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 447.

⁴ Steven D Smith, 'Critics and the Crisis a Reassessment of Current Conceptions of Tort Law' (1987) 72 *Cornell Law Review* 765, 788.

understood as a solace which is supposed to bring victims at least some satisfaction for their pain and suffering. This function of satisfaction is recognised in the German tort law doctrine.⁵ The same approach is adopted in Canada after three landmark judgments of the Supreme Court.⁶ The same vision of compensation for pain and suffering can be found in Russian literature.⁷ This is not explicitly admitted in English common law. However, as Peter Cane and James Goudkamp note, this is the only sensible meaning which can be applied to this remedy: ‘Damages for pain and suffering can really only be understood as providing solace’.⁸

This leads us to the question of what is a fair and reasonable amount of pain and suffering damages if we look at them from this theoretical perspective. One of the most compelling arguments is that this level must be in accordance with society’s views on what sum of money is satisfactory enough to redress pain and suffering caused by a certain type of personal injury. As Frederick Levin states:

Just compensation in the context of pain and suffering represents society’s measurement of the gravity of plaintiffs’ physical pain and accompanying mental suffering attributable to the wrongfully inflicted injury.⁹

The reference to society’s views is how the issue of just compensation has been addressed by the members of the Law Commission in their report on non-pecuniary damages.¹⁰ Their proposal to uplift the level of damages was largely based on the results of the sociological surveys. This thesis shares a similar understanding of a just level of compensation for pain and suffering. As will be

⁵ Ulrich Magnus and Jörg Fedtke, ‘Germany’ in WV Horton Rogers (ed), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Springer 2001) 112-113.

⁶ *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229; *Arnold v Teno* [1978] 2 SCR 287; *Thornton v Board of School Trustees of School District No. 57* [1978] 2 SCR 267.

⁷ ‘Suffering as such does not have a monetary equivalent, and moral damages is a sum of money which is supposed to solace a negative impact on the victim’s mental state’ in Aleksandr Erdelevskiy, *Compensation of Moral Damage [Kompensacija moral’nogo vreda]* (Consultant Plus 2013) 103. This volume was prepared specifically for the legal database Consultant Plus <<http://www.consultant.ru>> accessed 17 January 2022 (subscription required).

⁸ Cane and Goudkamp (n 3) 394.

⁹ Frederick S Levin, ‘Pain and Suffering Guidelines: A Cure for Damages Measurement Anomie’ (1989) 22 *The University of Michigan Journal of Law Reform* 303, 305.

¹⁰ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No 257, 1998).

discussed in Chapter 3, sociological surveys of Russian people suggest that pain and suffering damages ought to be substantially higher. If actual judicial awards strongly contradict the prevailing social views on what is fair and reasonable compensation, it can be said that accident victims face injustice.

Justice also requires a consistent approach to awards of pain and suffering damages. As Randall Bovbjerg, Frank Sloan and James Blumstein note, ‘the inability to achieve sufficiently similar results in similar cases tends to erode *general confidence in justice*’.¹¹ More specifically, the inconsistency of awards for pain and suffering relates to the principles of vertical and horizontal justice. As Giovanni Comandé defines these principles:

The principle of horizontal justice or equality imposes the avoidance of unjustified variations within levels of injury seriousness; the principle of vertical justice requires differentiation according to injury seriousness and duration.¹²

A substantial variation of awards would mean a violation of these two principles of justice.

It is clear that obtaining compensation through a fast and low-cost procedure is in the interests of accident victims. Settling cases directly with the insurance company is faster and less costly than trials. But does this procedure also meet the principle of corrective justice? The idea of corrective justice is far from new and dates back to the Aristotelian philosophy.¹³ Corrective justice means that tortious liability should be imposed on a person who is at fault or – in the context of strict liability – at least causes damage.¹⁴ In more theoretical terms, the principle of corrective justice relates to the second-order duties of tort law. First-order duties prescribe duties to avoid causing harm to others whereas:

¹¹ Randall R Bovbjerg, Frank A Sloan and James F Blumstein, ‘Valuing Life and Limb in Tort: Scheduling Pain and Suffering’ (1988) 83 *The Northwestern University Law Review* 908, 924. Italics are used in the original text.

¹² Giovanni Comandé, ‘Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States’ (2005) 19 *The Temple International and Comparative Law Journal* 241, 245.

¹³ Stephen R Perry, ‘The Moral Foundations of Tort Law’ (1992) 77 *Iowa Law Review* 449, 452.

¹⁴ Susan Randall, ‘Corrective Justice and the Torts Process’ (1993) 27 *Indiana Law Review* 1; Richard Epstein, ‘A Theory of Strict Liability’ (1973) 2 *The Journal of Legal Studies* 151.

Second order duties in torts are duties of *repair*. These duties arise upon the breach of first-order duties. That second-order duties so arise follows from the *principle of corrective justice*, which (in its most influential form) says that an individual has a duty to repair the wrongful losses that his conduct causes.¹⁵

However, compulsory liability insurance implies that it is not the actual harm-causer who pays compensation but rather the insurer. There is a school of thought that tends to see it as a violation of corrective justice, as for example Patrick Atiyah does.¹⁶

This thesis, however, takes an alternative view on this issue agreeing with those scholars who argue that corrective justice is still performed even if cases are settled and damages are paid by insurance companies. As for example, Ernest Weinrib argues in his now classic book:

Corrective justice goes to the nature of the obligation; it does not prescribe the mechanism by which the obligation is discharged. Liability insurance presupposes liability, and it is that liability which is intelligible in the light of corrective justice. Nothing about corrective justice precludes the defendant from anticipating the possibility of liability by investing in liability insurance.¹⁷

Similarly, Allan Beever states that liability insurance does not undermine the principle of corrective justice as the latter only prescribes that ‘the loss falls on the defendant’s rather than the claimant’s shoulders’.¹⁸ It is true that some legal remedies may imply a personal element as for example an injunction or specific performance. But when we talk about monetary compensation, as Tony Honoré argues, it becomes largely irrelevant for the purposes of corrective justice who actually pays it – a defendant, her insurer or generous friend.¹⁹ A similar opinion is expressed by Richard Posner who

¹⁵ Jules Coleman, Scott Hershovitz and Gabriel Medlow, ‘Theories of the Common Law of Torts’, *The Stanford Encyclopedia of Philosophy* (Winter edn, 2015) <<https://plato.stanford.edu/archives/win2015/entries/tort-theories/>> accessed 13 January 2023. Italics are used in the original text.

¹⁶ Patrick Atiyah, *The Damages Lottery* (Bloomsbury Publishing 1997).

¹⁷ Ernest J Weinrib, *The Idea of Private Law* (Revised edn, Oxford University Press 2013) 135-136.

¹⁸ Allan Beever, ‘Corrective Justice and Personal Responsibility in Tort Law’ (2008) 28 *Oxford Journal of Legal Studies* 475, 494.

¹⁹ Tony Honoré, ‘The Morality of Tort Law – Questions and Answers’ in David G Owens (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 79.

argues that liability insurance does not contradict the idea of corrective justice as what really matters is ‘the rectification, rather than the form it takes’.²⁰ Furthermore, Andrew Burrows states that the issue of whether the defendant pays damages personally or through insurance is not important for securing justice since: ‘Tort does not say, “the defendant must pay” but rather “the defendant must ensure that payment is made”’.²¹ As Richard Wright points out, the principle of corrective justice does not imply the duty to pay compensation personally because such a duty is relevant only if the function of damages is punishment.²² This means that when we talk about purely compensatory damages, such as pain and suffering damages, corrective justice does not require their payment directly by the defendant. This can be done through liability insurance. Importantly, Alexander Lemann puts forward a similar argument in relation to the system of *compulsory* liability insurance:

There are reasons to think that the thrust of corrective justice — that it consists of primary duties to avoid wrongfully injuring others and secondary duties to provide compensation for those injuries when they occur—is not inherently incompatible with a system of coercive insurance. If what truly motivates corrective justice is the idea that a tortfeasor ‘corrects’ the wrong he has done by compensating a victim, corrective justice offers no reason to think that the compensation must be provided directly from tortfeasor to victim in one lump sum payment made after the injury has occurred.²³

It can be argued, therefore, that compulsory liability insurance for pain and suffering damages being implemented in Russia will not contradict the principle of corrective justice. This principle is important as a strong moral and social foundation lies behind it. For example, Lord Sumption notes that the most significant reason why the fault-based tort system will survive and not be replaced by no-fault schemes is because ‘it responds to widespread public notions about personal responsibility and the proper function of law’.²⁴ Furthermore, as Leslie Bender suggests:

²⁰ Richard A Posner, ‘The Concept of Corrective Justice in Recent Theories of Tort Law’ (1981) 10 *The Journal of Legal Studies* 187, 198-199.

²¹ Andrew Burrows, ‘In Defence of Tort’ in Andrew Burrows (ed), *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart Publishing 1998) 123.

²² Richard W Wright, ‘Right, Justice and Tort Law’ in David G Owens (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) 178.

²³ Alexander B Lemann, ‘Coercive Insurance and the Soul of Tort Law’ (2016) 105 *The Georgetown Law Journal* 55, 89.

²⁴ Lord Sumption, ‘Abolishing Personal Injuries Law - A Project’ (2018) 34 *Professional Negligence* 113, 120.

Giving people who are injured compensation from their harm-causers is one way our social order can help promote their dignity and their ability to be social equals. Legally requiring harm-causers to compensate the parties they injure rectifies the social harm of permitting one person to injure another with impunity and prevents one party's well-being from being valued more highly than another's.²⁵

A no-fault social insurance scheme would miss these important social functions of tort law. As Steven Smith notes, 'it would lack the tort process's comprehensiveness and sensitivity to the full scope of the victim's injury'.²⁶ That is why introducing a completely no-fault scheme for pain and suffering damages is not considered as a viable option in this thesis.

The last aspect of justice for victims is the enforcement of awards. The inability of some defendants to pay makes judgements in favour of victims a bare formality. They do not receive compensation in the end. That means corrective justice is not achieved. As Stephen Gilles notes when discussing the 'judgment-proof' problem (the lack of assets to pay the tort judgment in full or part) in the US:

A tort system that reliably and consistently achieves corrective justice is a better tort system than one that unreliably and inconsistently does so. From this perspective, the barriers to collecting tort judgments are plainly undesirable because they insulate millions of Americans from accountability in corrective justice.²⁷

In that sense, justice for victims means an opportunity to obtain full compensation for their pain and suffering regardless of the defendants' financial situation. Compulsory liability insurance is capable of addressing this issue and thereby securing justice for victims.

This key role of compulsory liability insurance explains why the reform proposals are limited to road traffic, workplace and railroad accidents. Compulsory liability insurance means imposing a

²⁵ Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 Washburn Law Journal 249, 251.

²⁶ Steven D Smith, 'Critics and the Crisis a Reassessment of Current Conceptions of Tort Law' (1987) 72 Cornell Law Review 765, 785.

²⁷ Stephen G Gilles, 'The Judgment-Proof Society' (2006) 63 Washington and Lee Law Review 603, 678.

duty to purchase an insurance policy. This is a serious measure which limits freedom of choice and implies sanctions for its violation. It is normally worth introducing in areas where the number of accidents is high and the reform, therefore, would affect many victims. The most common areas of such a kind are road traffic and workplace accidents. The other reason for introducing compulsory liability insurance in these two particular areas is the pool of potential wrongdoers who can be obliged to insure. So, it is easier to organise and administer a compulsory liability insurance scheme in these areas. Moreover, compulsory liability insurance for road traffic accidents already exists in Russia, albeit only for pecuniary damages. Its extension to pain and suffering damages would not require a substantial transformation of the current system. Therefore, the proposed reform is easier to implement in this area. As will be discussed in Chapter 5, the railroad accident is a special case. The number of accidents is smaller but the consequences for victims are the most severe. Compulsory liability insurance could ensure compensation proportional to their pain and suffering.

Now, after clarifying the meaning of justice in relation to pain and suffering damages, we can move on to the research problem of this thesis which is the lack of such justice in Russia.

1.2 Research Problem, Aim and Objectives: Lack of Justice for Victims of Accidents

The civil remedy of the award of damages for pain and suffering is relatively novel in Russia. It was completely unavailable in the Soviet period. It emerged only at the beginning of the 1990s, just prior to the collapse of the communist regime, in the period of democratisation known as *Perestroika* (reconstruction).²⁸ Initial expectations for this remedy were high among legal practitioners and the wider public. Its implementation was seen as a part of the general democratisation process and movement towards more respect for human rights. It was assumed that this newly created legal institution would better suit victims by providing fair and reasonable compensation for their non-material losses caused by personal injuries. Indeed, one of the drafters of the Russian Civil Code characterised the article on pain and suffering damages as a

²⁸ Art 131 of the Fundamentals of Civil Law of the Soviet Union of 31 May 1991.

‘norm of a constitutional significance’ and ‘one of the greatest successes’ of the new Code.²⁹ Unfortunately, these expectations did not materialise.

This thesis identifies four key problems with compensation for pain and suffering which render the existing system unjust to victims. First, the level of damages awarded by Russian courts is extremely low, when compared to victims’ expectations, public opinions on fair and reasonable compensation, and average award sums in European jurisdictions. Secondly, there is no consistency in the amount awarded for similar injuries at a regional or national level. This issue reduces legal certainty and predictability for those claiming such damages. Thirdly, the process of claiming such damages is overly complex. Accident victims, in most cases, need to go through the formal court procedure in order to obtain very modest compensation for their pain and suffering. Lastly, a court judgment in favour of the victim does not guarantee actual payment of damages awarded as the enforcement of awards is highly problematic in Russia.

This thesis asks: what factors are responsible for the problems listed above and how can these problems be resolved? In simple terms, ‘who is to blame?’ for the current state of affairs and ‘what is to be done about it?’³⁰ In so doing it seeks to contribute to the Russian and Western literature on pain and suffering damages and liability insurance. It also aims to make a contribution to socio-legal literature on post-socialist Russian tort law. The key research objective can be formulated as follows: To identify, analyse and explain the problems with pain and suffering damages in Russia and to suggest solutions which would ensure justice for victims of accidents on the roads and railways and in the workplace.

To achieve this, the following research questions are addressed:

- 1) What are the current problems with pain and suffering damages in Russia? (Chapter 3)

²⁹ Alexander Makovskiy, *On Codification of Civil Law (1922-2006) [O kodifikatsii grazhdanskogo prava (1922-2006)]* (Statut 2010) 189.

³⁰ It is widely considered in Russia that any questions, one way or another, come down to these two eternal and basic questions. This now common opinion refers back to the publication of two noticeable novels that implied criticism of the Russian political and social system in the 19th century. See Alexander Herzen, *‘Who Is to Blame?’* (Cornell University Press 1984, first published 1847) and Nikolai Chernyshevsky, *What Is to Be Done?* (Cornell University Press 2014, first published 1863), both brilliantly translated into English by Michael R. Katz.

- 2) Why are there these problems? (Chapter 4)
- 3) What are potential solutions to address the identified problems and thereby bring justice to accident victims? (Chapter 5-7)

Answering these questions allows me to make original contributions to the existing academic literature.

1.3 Literature Review and Original Contributions

This thesis focuses on difficulties with pain and suffering damages in Russia that bring injustice for accident victims. It considers the implementation of compulsory liability insurance for this type of damages as a potential solution. Therefore, the literature review below focuses mainly on the Russian and Western literature on pain and suffering damages and liability insurance. It also covers studies of the socialist and post-socialist tort law. The purpose of this literature review is to map the relevant fields of study, identify the gaps and suggest the potential contribution of this thesis to these fields.

1.3.1 Russian Literature on Pain and Suffering Damages and Liability Insurance

Most of the Russian legal literature addressing pain and suffering damages is written from a doctrinal perspective. These doctrinal studies focus mostly on substantive law which influences the kind of arguments they raise and solutions they propose. These studies argue that the difficulties with calculation of pain and suffering damages and broad judicial discretion in assessment of damages are the main challenges to be overcome.³¹ Consequently, their goal is to

³¹ Olga Kuznetsova, *Compensation for Non-Pecuniary Damage: a Practical Guide [Vozmeshcheniye moral'nogo vreda: prakticheskoye posobiye]* (Yustitsinform 2009); Zunaida Pogossova, Vladimir Sidorov and Maria Redchits, 'Compensation for Non-Pecuniary Damage Caused by a Crime [Kompensatsiya moral'nogo vreda prichinennogo prestupleniyem]' (2014) 4 Law [Zakon] 165; Irina Fast, 'Compensation for Moral Harm in the Event of Harm to Life and Health: Practical Results of 25 Years of the Institution's Existence in the Russian Federation [Kompensaciya moral'nogo vreda pri prichinenii vreda zhizni i zdorov'ju: prakticheskie itogi 25 let sushhestvovaniya instituta v Rossijskoj Federacii]' (2018) 5 Eurasian Advocacy [Evrazijskaja Advokatura] 58; Olga Papkova, 'Reparation of Moral Damages and Judicial Discretion in Russian Civil Legislation' (1998) 24 Review of Central and Eastern European Law 269.

propose the best options possible for the calculation and standardisation of awards. The typical research method utilised in Russian studies on pain and suffering damages is the doctrinal analysis of cases and legislation.³² There can be found, nevertheless, empirical research on pain and suffering damages based on quantitative analysis and sociological surveys.³³ The main findings of these studies demonstrate that pain and suffering damages are unreasonably low and inconsistent. This thesis draws heavily on this literature to inform the analysis of the current problems with pain and suffering damages. It also identifies these two problems among the key issues with compensation for pain and suffering in Russia. Nevertheless, this thesis goes beyond these studies and demonstrates that complex claims procedure and poor award enforcement are other two problems which prevent accident victims from accessing justice.

However, the main difference of my research is that it looks at pain and suffering damages from socio-legal perspective. This entails looking beyond formal law to take into consideration such factors as legal culture and insurance. The role of insurance for pain and suffering damages is not covered in Russian studies or political discourse. The lack of standards for award sums is recognised as the main issue to be addressed but politicians and scholars are mute when it comes to compulsory liability insurance for pain and suffering damages.³⁴ Consequently, proposed reforms to date have focused on the implementation of agreed standards in the form of either legislative tariffs or judicial guidelines both of which would set compensation at a higher level. This

³² See, for example, Ekaterina Dobrikova, 'Compensation for Moral Harm: the Trends of Russian jurisprudence [Kompensatsiya moral'nogo vreda: tendentsii rossiyskoy sudebnoy praktiki] (August 24, 2016) Garant <<http://www.garant.ru/article/864733/>> accessed 17 January 2022.

³³ Igor Nikolaev and Olga Tochilkina, *The Economy of Moral Damages [Ekonomika moral'nogo vreda]* (Analytical Report, Institute of Strategic Analysis FBK 2013); Irina Fast, Alexey Nesterov and Maria Sokolova, *Compensation of Moral Damages in Personal Injury Cases: Practical Results after 25 Years of the Institution's Existence in RF [Kompesatsiya moral'nogo vreda pri prichinenii vreda zhizni i zdorov'yu: prakticheskie itogi posle 25 let sushhestvovaniya instituta v RF]* (Analytical Report, 2018) <<https://platforma-online.ru/upload/medialibrary/d5d/d5d59ddff1111fa619f8c2d5e753cc6e.pdf>> accessed 25 January 2023.

³⁴ The issue of insurance was not raised, for example, at the round table at the All-Russia Civil Forum in 2019 which was dedicated to pain and suffering damages <<https://civil-forum.ru/news/podgotovlenna-rezolyutsiya-kruglogo-stola-kompensatsiya-moralnogo-ushcherba-za-prichinenie-vreda-zhiz.html>> accessed on 17 January 2022. It was also not mentioned at the round table on pain and suffering damages in the upper house of the Russian parliament (the Federation Council) held on 29 October 2020 <<http://council.gov.ru/events/news/120979/>> accessed 17 January 2022.

research largely supports the former option but only as an additional measure. This thesis argues that such standards will not work without compulsory liability insurance for pain and suffering damages. Compulsory liability insurance is a principal way to tackle the problems with pain and suffering damages in Russia. If there are no financial sources for payments, higher awards in accordance with newly adopted standards will remain on paper only, to be never enforced.

Generally, there is very limited discussion on the relationship between liability insurance and pain and suffering damages by Russian academics. In particular, most Russian scholars fail to recognise that liability insurance could enable higher, consistent, and enforceable compensation in most cases through settlements. This is the way liability insurance functions in Europe. Even the most influential Russian treatises on pain and suffering damages³⁵ and insurance law³⁶ do not cover this subject. The rare exception is an article by Vladimir Kochev in which he compares the regulation of motor vehicle liability insurance in post-Soviet countries.³⁷ The article notes, *inter alia*, the rarity of compulsory liability insurance for pain and suffering damages across the region (Ukraine is the only exception). Kochev speculates that the expansion of compulsory liability insurance for pain and suffering would entail the risk of higher insurance premiums. This thesis addresses this issue briefly in Chapter 7 but argues that potential benefits of liability insurance for accident victims outweighs a slight increase of insurance premiums.

Furthermore, Ludmila Rogovich criticises the exclusion of pain and suffering damages from the social insurance for workplace accidents in a collective volume on Russian tort law.³⁸ She suggests that social insurance in its current form 'does not provide a full protection of the insured's

³⁵ Erdelevskiy (n 7).

³⁶ Yurii Fogelson, *Insurance Law: Theory and Practice [Strakhovoye pravo: Teoreticheskiye osnovaniya i praktika primeneniya]* (Norma 2012).

³⁷ Vladimir Kochev, 'Comparative and Legal Analysis of the Legislation on Compulsory Insurance of the Civil Liability of Owners of Vehicles in the Countries of the CIS' [Sravnitel'no-pravovoj analiz zakonodatel'stva ob objazatel'nom strahovanii grazhdanskoj otvetstvennosti vladel'cev transportnyh sredstv v stranah SNG] (2010) 8 Perm University Herald: Juridical Sciences 118.

³⁸ Ludmila Rogovich, 'On Compensation for Wrongful Death and Personal Injuries Caused to the Employee by the Employer (a Historical Aspect)' [O vozmeschenii vreda prichinyonnogo zhizni i zdorov'yu rabotnika rabotodatelem (istoricheskii aspekt)] in A Schevchenko (ed), *Tortious Obligations According to Russian Civil Law [Deliktnye obyazatel'stva po rossiiskomu grazhdanskomu pravu]* (Far East University Press 2005).

interests'.³⁹ This thesis similarly argues that pain and suffering damages should be covered by insurance. However, contrary to Rogovich who is more concerned with the interests of employers and their ability to pay for the uninsured's pain and suffering damages, this thesis is concerned with accident victims. This thesis suggests that compulsory liability insurance provides better protection to victims than social insurance does as the cover of the latter is more limited in Russia.

Another relevant source is an article by Alexander Mokhov and others which assesses the ability of liability insurance to improve the situation with pain and suffering damages.⁴⁰ It states that widespread promotion of liability insurance for pain and suffering damages is beneficial for the defendants (higher protection of their financial interests), claimants (adequate and prompt compensation), and the insurers (a new market niche). This would require standardisation of awards so that insurers could calculate insurance premiums. To this point, this reasoning is in line with the arguments in this thesis. However, the article focuses specifically on *professional* liability insurance for pain and suffering damages. This subject is outside the scope of the present research. Moreover, the article does not consider *compulsory* forms of liability insurance. Accidents and personal injuries are the areas where discussion of compulsory liability insurance for pain and suffering damages is most needed. The extent of problems and consequences for victims in these cases are far more serious than in professional negligence cases. As will be demonstrated further, road traffic accidents and workplace accidents are statistically the largest categories of tort cases in Russia. A substantial share of these cases includes severe injuries and deadly occupational diseases. Nevertheless, the potential of liability insurance for pain and suffering damages in this area remains unexplored in the Russian literature. This thesis, therefore, aims to fill this gap and analyse the role of compulsory liability insurance in resolving the problems with compensation for pain and suffering in Russia. This is where the chief academic and practical contribution of this thesis lies.

³⁹ *ibid* 109.

⁴⁰ Alexander Mokhov et al, 'Professional Liability Insurance and Moral Damages' [Strahovanie professional'noj otvetstvennosti i kompensacija moral'nogo vreda] (2006) 6 Lawyer [Yurist] 25.

1.3.2 Western Literature on Pain and Suffering Damages and Liability Insurance

This research also draws insights from Western scholarship. It focuses on three specific areas: the relationship between liability insurance and pain and suffering damages; the criticism of pain and suffering damages; and, finally, the criticism of liability insurance.

A. *The Relationship between Pain and Suffering Damages and Liability Insurance*

There is a large body of literature on pain and suffering damages published by Western tort scholars.⁴¹ The lack of objective criteria for determining the quantum of these damages is frequently seen as a problem in this literature. Therefore, the bulk of the publications on this issue are dedicated to the technical issue of how to calculate these damages in the best way possible.⁴²

⁴¹ eg Robert L Rabin, 'Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss' (2006) 55 DePaul Law Review 359; Mark A Geistfeld, 'Due Process and the Determination of Pain and Suffering Tort Damages' (2006) 55 DePaul Law Review 331; Steven P Croley and Jon D Hanson, 'Non-Pecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law' (1995) 108 Harvard Law Review 1785; Stathis Banakas, 'Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape' (2015) 10 Journal of Comparative Law 291; Philip L Merkel, 'Pain And Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses' (2005) 34 The Capital University Law Review 545; Paul V Niemeyer, 'Awards for Pain and Suffering: The Irrational Centerpiece Of Our Tort System' (2004) 90 Virginia Law Review 1401.

⁴² eg Leandro M Zanitelli, 'Determining Pain-and-Suffering Awards Accurately: General or Case-by-Case Law' (2009) 28 The Queensland Law Reporter 183; James F Blumstein, 'Making the System Work Better: Improving the Process for Determination of Noneconomic Loss' (2005) 35 New Mexico Law Review 401; Vaia Karapanou and Louis Visscher, 'Towards a Better Assessment of Pain and Suffering Damages' (2010) 1 Journal of European Tort Law 48; Santo Davide Ferrara, Rafael Boscolo-Berto and Guido Viel (eds), *Personal Injury and Damage Ascertainment Under Civil Law: State-of-the-Art International Guidelines* (Springer 2016); Ronen Avraham, 'Estimating Pain-and-Suffering Damages' in F Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law* (Oxford University Press 2017) 99; Ronen Avraham, 'Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change' (2006) 100 Northwestern University Law Review 87; Hillel J Bavli, 'The Logic of Comparable-Case Guidance in the Determination of Awards for Pain and Suffering and Punitive Damages' (2017) 85 The University of Cincinnati Law Review 32; Randall R Bovbjerg, Frank A Sloan and James F Blumstein, 'Valuing Life and Limb in Tort: Scheduling Pain and Suffering' (1988) 83 The Northwestern University Law Review 908; Mark Geistfeld, 'Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries' (1995) 83 California Law Review 773; Frederick S Levin, 'Pain and Suffering Guidelines: A Cure for Damages

In this sense, the interests of Russian academics in relation to pain and suffering damages are not very different from the interests of their colleagues abroad. There are, however, many more quantitative studies looking at this problem from an empirical perspective in Western literature. The main aim of these studies is to examine various factors influencing assessment of pain and suffering damages. Some of these studies focus on psychological factors arguing that juries or judges are susceptible to cognitive biases while awarding pain and suffering damages.⁴³ Sofia Amaral-Garcia and Nuno Garoupa, for example, examined the impact of the court procedure on quantum of damages by comparing awards in civil and administrative courts.⁴⁴ They argue that there is no systemic bias which would depend on the type of court procedure. Other empirical studies argue that severity of injuries and amount of medical costs,⁴⁵ fault attribution,⁴⁶ and involvement of lawyers⁴⁷ are the factors that influence the level of compensation for pain and sufferings.

In contrast, my research argues that liability insurance and tort law culture are the main factors which shape pain and suffering damages. It is true that the relationship between tort law and liability insurance is a well-established area of studies in the English-speaking academic world. Martin Davies, for example, argues that the common law concept of duty of care has been developing largely under influence of liability insurance,⁴⁸ while Tracey Carver argues that liability

Measurement Anomie' (1989) 22 *The University of Michigan Journal of Law Reform* 303; Joseph Sanders, 'Reforming General Damages: A Good Tort Reform' (2008) 13 *Roger Williams University Law Review* 115.

⁴³ Jeffrey Rachlinski, Andrew J Wistrich and Chris Guthrie, 'Can Judges Make Reliable Numeric Judgments: Distorted Damages and Skewed Sentences' (2015) 90 *Indiana Law Journal* 695; Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Inside the Judicial Mind' (2000) 86 *Cornell Law Review* 777; Mollie Marti and Roselle L Wissler, 'Be Careful What You Ask For: The Effect of Anchors on Personal-Injury Damages Awards' (2000) 6 *Journal of Experimental Psychology* 91; Gretchen Chapman and Brian H Bornstein, 'The More You Ask For, The More You Get: Anchoring In Personal Injury Verdicts' (1996) 10 *Applied Cognitive Psychology* 519.

⁴⁴ Sofia Amaral-Garcia and Nuno Garoupa, 'Do Administrative Courts Favour the Government? Evidence from Medical Malpractice in Spain' (2015) 6 *Journal of European Tort Law* 241.

⁴⁵ Yun-Chien Chang et al, 'Pain and Suffering Damages in Personal Injury Cases: An Empirical Study' (2017) 14 *Journal of Empirical Legal Studies* 199.

⁴⁶ Roselle Wissler et al, 'Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions' (1997) 21 *Law and Human Behaviour* 181.

⁴⁷ Magdalena Flatscher-Thöni, Andrea M Leiter and Hannes Winner, 'Are Pain and Suffering Awards (Un-)Predictable? Evidence from Germany' (2019) 10 *DANUBE: Law, Economics and Social Issues Review* 199.

⁴⁸ Martin Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 *Legal Studies* 67.

insurance is relevant for setting standard of care in negligence cases.⁴⁹ Kent Syverud argues that ‘an increase in the consumption of liability insurance tends inevitably to cause an increase in legal liability’.⁵⁰ All these scholars examine how the development of liability insurance leads to a substantial transformation of tort law and tort doctrine.

Yet, there is less scholarly literature that discusses the role of liability insurance specifically for pain and suffering damages. Richard Lewis, for example, acknowledges that insurance sometimes becomes relevant for judicial decision-making in relation to this type of damages in England and Wales.⁵¹ Furthermore, Peter Thalmer argues that liability insurance in Germany ‘has a considerable influence in court decisions on compensation for pain and suffering’.⁵² But these are general, although accurate and profound, observations. There is lack of empirical studies which would examine the effect of insurance on pain and suffering damages in practice. One of the rare examples is an article by Stacy Burns on the role of liability insurance in awarding these damages in the US.⁵³ This article focuses on judicial mediation proceedings and analyses one particular case where liability insurance was at the centre of attention. Burns argues that the availability of insurance is taken into account in the negotiations between parties and mediator on the amount of compensation for pain and suffering. However, there is an evident lack of studies considering this issue systematically (as opposed to anecdotal evidence).

There is also a lack of literature on the role of liability insurance in settlement negotiations and court proceedings rather than mediation of disputes over pain and suffering damages. This role requires special consideration if we look at settling claims and judicial consideration of personal injury cases. There are several features which contribute to this specificity. First, as Peter Cane and James Goudkamp note, litigation and settlement are more typical for personal injury cases than mediation.⁵⁴ Second, awards of pain and suffering damages, in contrast to more straightforward

⁴⁹ Tracey L Carver, ‘Insurance and the Law of Negligence: an Influential or Irrelevant Persuader?’ (2011) 22 *Insurance Law Journal* 51.

⁵⁰ Kent D Syverud, ‘On the Demand for Liability Insurance’ (1994) 72 *Texas Law Review* 1629.

⁵¹ Richard Lewis, ‘Insurance and the Tort System’ (2005) 25 *Legal Studies* 85.

⁵² Peter Thalmer, ‘The View of an Insurer: The Impact of Liability Insurance on Tort Law’ in G Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 277.

⁵³ Stacy Lee Burns, ‘Pursuing “Deep Pockets” Insurance-Related Issues in Judicial Settlement Work’ (2004) 33 *Journal of Contemporary Ethnography* 111.

⁵⁴ Cane and Goudkamp (n 3) 257.

pecuniary damages, are less predictable for insurance business.⁵⁵ Third, the availability of insurance potentially influences a more generous judicial approach to awards.⁵⁶ This makes pain and suffering damages especially problematic for insurance companies. Notwithstanding this, these damages are covered by compulsory motor liability insurance in most European jurisdictions. Moreover, in some jurisdictions (for example, the UK and Cyprus), pain and suffering damages are also covered by compulsory insurance against workplace accidents.⁵⁷ In other jurisdictions, such damages are normally covered by voluntary insurance purchased by employers (most widely in Scandinavian countries).⁵⁸ The Russian situation is unusual in this regard since insurance companies are not involved in compensation for pain and suffering in most cases.

B. The Critique of Pain and Suffering Damages

In offering a detailed examination of the peculiarly Russian approach to pain and suffering damages (non-involvement of insurers) and its implications for accident victims, this thesis is a socio-legal study of the current system of compensation for accidents in Russia. More specifically, the research seeks to offer potential solutions to the problems with pain and suffering damages, underpinned by an assumption that fair and adequate compensation for pain and suffering would ensure justice to accident victims. Yet, critical views on pain and suffering damages can be found in Western literature. This criticism tends to put into question the very idea of these damages as they supposedly do not bring comfort and satisfaction to victims.

⁵⁵ Randall R Bovbjerg, Frank A Sloan and James F Blumstein (n 11) 908.

⁵⁶ Kenneth S Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era To 9/11* (Harvard University Press 2008) 3-4.

⁵⁷ Christopher Parsons, 'Liability Rules, Compensation Systems and Safety at Work in Europe' (2002) 27 *The Geneva Papers on Risk and Insurance-Issues and Practice* 358, 367.

⁵⁸ Bill W Dufwa, 'Liability in Tort and Liability Insurance: Sweden' in G Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 168; Sonia Macleod, Matti Urho and Christopher Hodges, 'Nordic Injury Compensation Schemes: Finland' in Sonia Macleod and Christopher Hodges (eds), *Redress Schemes for Personal Injuries* (Bloomsbury Publishing 2017); Bjarte Askeland, 'Basic Questions of Tort Law from Norwegian perspective' in WH Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) 102.

For example, Joseph King suggests the elimination of pain and suffering damages as they are ‘conceptually and operationally incompatible with the policy goals of modern tort law’.⁵⁹ In his view, this tort remedy, contrary to its proclaimed goal, cannot make claimants whole as ‘money damages cannot nullify past or future pain’.⁶⁰ Moreover, these damages do not, and cannot, deter potential wrongdoers. King gives four reasons for this. First, actual defendants rarely pay out of their pockets due to the widespread liability insurance; second, most cases are settled and their outcome cannot be known to potential defendants; third, pecuniary damages are more efficient in deterring than pain and suffering damages; and fourth, there are other measures to deter wrongdoers such as criminal liability or safety requirements.⁶¹

Richard Abel goes even further. He argues that pain and suffering damages are ‘incoherent’, ‘incalculable’, ‘incommensurable’, and ‘inegalitarian’.⁶² This means that awards are often arbitrary and unpredictable, any objective criteria for their calculation are hardly possible, money in principle cannot compensate victims for their pain and suffering, and victims’ social status can influence awards. As a result, he proposes the complete abolition of pain and suffering damages as a radical but necessary step.

This thesis shares some of the concerns of these critical arguments. As it demonstrates, the Russian tort system includes some of the problems with pain and suffering damages listed by Abel, notably, the problem of incoherence and lack of standards. At the same time, these problems are not so intractable that the only way is a complete elimination of pain and suffering damages. In fact, Abel’s view is at odds with current practice. Pain and suffering damages are well-established worldwide.⁶³ More and more countries, where pain and suffering damages were previously unknown, are beginning to recognise this remedy at the level of legislation or doctrine, including

⁵⁹ Joseph H King, ‘Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law’ (2004) 57 Southern Methodist University Law Review 163, 208.

⁶⁰ *ibid* 173.

⁶¹ *ibid* 187-192.

⁶² Richard Abel, ‘General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)’ (2006) 55 DePaul Law Review 253, 302-303.

⁶³ A broad geographical spread of jurisdictions recognising these damages can be found in WV Horton Rogers (ed), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Springer 2001).

post-Soviet countries (for example, Belarus, Kazakhstan, Ukraine, and Uzbekistan),⁶⁴ China,⁶⁵ and Islamic countries.⁶⁶ Vitaly, survey data shows that accident victims need adequate remedies for their pain and suffering alongside remedies which address their material needs.⁶⁷

Thus, the implementation of pain and suffering damages in Russia in the 1990s was in step with the times. It was intended to provide enhanced protection of accidents victims' interests in line with global trends. The only problem is that the new institution does not perform this role properly in Russia (does not secure fair and reasonable compensation) for the reasons discussed further in this thesis. Nonetheless, it does not mean that the institution as such is ineffective and worthless. It is not pain and suffering damages themselves that are problematic but rather their socio-legal framework in Russia. This thesis therefore supports the position that pain and suffering damages would alleviate the situation of accident victims, subject to successful resolution of the main problems in this area.

⁶⁴ For example, this remedy is currently available according to the provisions of the Civil Code of Belarus of 7 December 1998 (articles 968-970), the Civil Code of Kazakhstan of 1 July 1999 (articles 951-953), the Civil Code of Ukraine of 16 January 2003 (article 23), the Civil Code of Uzbekistan of 29 August 1996 (articles 1021-1022).

⁶⁵ Helmut Koziol and Yan Zhu, 'Background and Key Contents of the New Chinese Tort Liability Law' (2010) 3 *Journal of European Tort Law* 328; Xiang Li and Jin Jigang, *Concise Chinese Tort Laws* (Springer 2014); Hao Jiang, 'Chinese Tort Law: Tradition, Transplants and Some Difficulties' in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law: Global Perspectives* (2 edn, Edward Elgar Publishing 2021); Xinbao Zhang, *Legislation of Tort Liability Law in China* (Springer 2018).

⁶⁶ For example, consider '*Darar ma'nawi*, as it is known, refers to abstract kinds of injury, which are unseen, untraced, but felt and suffered by the victims. These include nervous shock, pain and suffering, loss of amenities of life, *darar mus taqbal*, such as loss of future earnings, loss of expectation of life and earning capacity. Mainstream traditional *fuqaha*' are of the view that this kind of 'injury' is non-claimable because of its nature: invisible to the naked eye and, therefore, cannot be estimated in monetary terms. However, contemporary scholars view that these types of injury should also be weighed by the court should there be evidence adduced before them' in Siti Zubaidah Ismail, 'The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries' (2012) 26 *Arab Law Quarterly* 361, 375-376.

⁶⁷ For example, a survey of 761 accident victims in the UK demonstrated that most of them support the inclusion of pain and suffering damages in compensation for personal injuries. Among the most frequently mentioned reasons were that victims 'can no longer enjoy life as before', victims 'should be compensated for another person's mistake', and this payment 'softens the blow'. See Law Commission, *Personal Injury Compensation: How Much is Enough? A Study of the Compensation Experiences of the Victims of Personal Injuries* (Law Com No 225, 1994).

C. The Critique of Liability Insurance

It is not only the institution of pain and suffering damages that has been criticised in Western literature, but so too has the insurability of damages. Perhaps, the most prominent critic in this regard is Patrick Atiyah who notes that the omnipresent liability insurance makes any understanding of tort law as a compensation system problematic.⁶⁸ If, he argues, defendants do not in fact pay, the issue of whether they were liable becomes largely irrelevant. In lieu of tort liability he suggests a first-party insurance scheme which would cover the majority of the population. A similar view of the role of liability insurance in changing the tort system can be also found in the recent article by Steve Hedley.⁶⁹ As he argues, ‘many areas of tort – negligence especially – have been quietly transformed into insurance regimes, where individual liability is a mere façade’.⁷⁰ But in contrast to Patrick Atiyah, he supports a social security scheme rather than first-party insurance as a substitute for the tort system.

The justice-based argument in response to this criticism has been extensively discussed in Section 1.1. The other, and perhaps more important, argument is a pragmatic one. The introduction of such a system in Russia is a project which is very unlikely to succeed. It would mean a restructure of the whole tort system, not only the system of compensation for pain and suffering. This could be realised only in a far distant future, if realised at all. Meantime, victims suffer injustice now which can be addressed within the current tort system. Moreover, there are very few jurisdictions where a no-fault system for personal injuries has been established. The most well-known example is New Zealand, but it is arguable whether this system has been successful given that it is currently working at a substantial deficit.⁷¹ Importantly for this thesis, pain and suffering damages were soon excluded from this scheme to minimise costs. In general, no-fault systems tend to exclude non-pecuniary damages. As Stephen Kiholm notes:

⁶⁸ Atiyah (n 16).

⁶⁹ Steve Hedley, ‘Tort: The Long Good-Bye’ (April 8, 2020) <<https://ssrn.com/abstract=3571950> or <http://dx.doi.org/10.2139/ssrn.3571950>> accessed 17 January 2022.

⁷⁰ *ibid* 3.

⁷¹ Nicholas J McBride, ‘The Cost and Value of Personal Injury Law’ (2022) 6 <<https://ssrn.com/abstract=3761404>> accessed 15 January 2023.

One of the principal shortcomings of the various non-fault automobile compensation plans is that accident victims are denied recovery for some types of injury; namely, intangible items like pain and suffering, loss of consortium, and lost earnings. By dispensing with case-by-case adjudications (in order to avoid lengthy delays in compensation), non-fault plans have the disadvantage of denying victims of their common law right to sue for full rectification of their injuries.⁷²

This thesis agrees that it is indeed a serious shortcoming and disadvantage of no-fault schemes. Therefore, these systems are not considered as a solution of the problems with pain and suffering damages in Russia. The existing tort system, subject to the adjustments suggested further in this thesis, will better ensure justice for accident victims.

It should also take into account the underdevelopment of liability insurance for pain and suffering damages in Russia. The background for Atiyah's and Hedley's critiques is the extensive involvement of insurers in personal injury litigation. This makes possible high awards in such litigation. For example, Hedley notes that 'to sue an uninsured individual for any substantial amount would strike most lawyers in most circumstances as a mad endeavour'.⁷³ This is not the case in Russia. Though, as will be demonstrated, mad or otherwise such endeavours are rarely successful. Liability insurance could help to address this.

It is not easy for Western scholars to imagine a tort system without liability insurance since it has been widely available for almost a century. Kenneth Abraham's attempt to describe, as a thought experiment, a counter-history of a tort system without liability insurance suggests that this hypothetical system would entail negative consequences:

In the face of modern tort liability, liability insurance is essential for individuals and small businesses. Without liability insurance, merely being named the defendant in a tort suit would be a potential disaster to such parties, and could bring financial catastrophe in the event that the suit is successful.⁷⁴

⁷² Stephen A Kiholm, 'Justice and the Optimal Deterrence of Accidents' (1988) 19 Pacific Law Journal 271, 287.

⁷³ Hedley (n 69) 4.

⁷⁴ Kenneth S Abraham, 'Tort Luck and Liability Insurance' (2017) 70 Rutgers University Law Review 101, 138.

However, Abraham's focus is on the consequences for *defendants*. He does not take into account the fact that the disadvantages of an underdeveloped compulsory liability insurance system for *claimants* are no less serious. In fact, the situation in Russia can be viewed in part as a 'natural experiment' of how a tort system without liability insurance operates in practice, at least in relation to pain and suffering damages. As this research will show, it does not operate very well. This thesis, therefore, can contribute to the Western literature by demonstrating all the problems which accident victims face under the tort system without compulsory liability insurance for pain and suffering damages.

1.3.3 Socio-Legal Literature on Russian and Post-Socialist Tort Law

Finally, this thesis aims to contribute to the socio-legal literature on the practical functioning of Russian law. A number of socio-legal studies focused on various areas of Russian private and criminal law have been published.⁷⁵ These studies, as with my research, emphasise the importance of the cultural and political context for the operation of Russian law. So far, however, tort law has been largely unconsidered by socio-legal accounts of Russian law, partly because litigation is not intensive in this area. The salient exception is Kathryn Hendley's empirical study of disputed road traffic accidents.⁷⁶ However, this study concentrates largely on the motivation of victims to submit or not submit a claim after the accident. In contrast, this thesis concentrates on practices of professional lawyers and judicial decision-making specifically in relation to pain and suffering damages. It examines how Russian courts resolve tort cases involving claims for pain and suffering damages and what changes to the tort system are needed to address the current problems with these damages. In so doing, it seeks to contribute to the socio-legal literature on the 'internal' Russian tort law culture, which focuses on legal institutions and professionals, rather than the 'external' tort law culture, which focuses on lay views and attitudes towards tort law.⁷⁷

⁷⁵ To get an idea of these studies, see Marina Kurkchian and Agnieszka Kubal (eds), *A Sociology of Justice in Russia* (Cambridge University Press 2018).

⁷⁶ Kathryn Hendley, *Everyday Law in Russia* (Cornell University Press 2017).

⁷⁷ The division between external and internal legal cultures was first suggested in Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975).

This thesis also aims to contribute to the studies of tort law cultures in post-socialist Eastern European countries and Russia. The European Centre of Tort Law and Insurance has been publishing a series of comparative volumes on various topics related to tort law and insurance for many years. It is worth mentioning, in particular, special volumes on non-pecuniary damages⁷⁸ and liability insurance.⁷⁹ Nevertheless, these comparative volumes include very few contributions dedicated to the particularities of post-Socialist countries. Most comparative articles dedicated to pain and suffering damages to date have focused on the US or Western European countries.⁸⁰ This underrepresentation might give the impression that there is nothing in other jurisdictions to merit academic attention. This is far from being the case. The culture of tort law in Eastern Europe was strongly influenced by ideological values and attitudes in the socialist period. The democratisation process in these countries removed the most evident manifestations of ideology. But, as this thesis demonstrates in its exploration of the continuing relevance of the socialist tort law culture to the current problems with pain and suffering damages in Russia, it has not eliminated all the remnants of the socialist tort law.

This raises the question of whether there ever was a single socialist tort law culture. Usually comparative legal scholars identify a separate socialist legal system of which the Soviet Union was only a part.⁸¹ Within these, three features common to tort law cultures in socialist countries are typically identified. The first is the resistance towards precedents. As Ngoc Son Bui notes, the very idea of precedent contradicted 'Marxist legal positivism, socialist legality, democratic centralism,

⁷⁸ Rogers (n 63).

⁷⁹ Gerhard Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005).

⁸⁰ eg Stephen D Sugarman, 'A Comparative Law Look at Pain and Suffering Awards' (2006) 55 DePaul Law Review 399; Anthony J Sebok, 'Translating the Immeasurable: Thinking about Pain and Suffering Comparatively' (2006) 55 DePaul Law Review 379; Giovanni Comandé, 'Towards A Global Model For Adjudicating Personal Injury Damages: Bridging Europe And The United States' (2005) 19 The Temple International and Comparative Law Journal 241.

⁸¹ Harold J Berman, 'What Makes Socialist Law Socialist' (1971) 20 Problems of Communism 24; AG Chloros, 'Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought' (1978) 9 Cambrian Law Review 11; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998); John Quigley, 'Socialist Law and the Civil Law Tradition' (1989) 37 The American Journal of Comparative Law 781; Christine Sypnowich, *The Concept of Socialist Law* (Clarendon Press 1990); Thomas H Reynolds, 'Socialist Legal Systems: Reflections on Their Emergence and Demise' (1992) 20 International Journal of Legal Information 215; Hualing Fu et al (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press 2018); William Elliott Butler, 'What Makes Socialist Legal Systems Socialist?' (2019) 3 Law of Ukraine Legal Journal 131.

and the simplicity of the “socialist life” and substantive law’.⁸² It is only recently, he argues, the precedent-like features started to infiltrate socialist legal systems (for example, in China, Vietnam, and Laos). Indeed, as this thesis demonstrates, Russian judges are still antipathetic towards the notion of precedent. This is particularly evident in their refusal to consider the quantum of pain and suffering damages awarded in similar cases.

The second feature is a major role of procurators in court cases. In Western countries, their role is normally restricted to criminal prosecution. This is not the case in the former socialist countries. The competency of procurators is much wider as they operate also as ‘public watchman over the universal application of the law’.⁸³ Such expanded ambit of procurators can be observed in Russian personal injury cases. Procurators participate in these cases and provide their opinion on the issues of fault as well as the quantum of pain and suffering damages.

The third feature is extreme legal formalism.⁸⁴ This ultra-formalism means that ‘judges are seen as agents mechanically “applying” legal texts to facts’ whereas ‘more sophisticated methods of legal reasoning, such as the common-law reasoning *per rationem decidendi*, reasoning by balancing of interests or by reference to underlying policies are unknown’.⁸⁵ This feature can be seen in the judgments of Russian courts on pain and suffering damages. These judgments largely consist of references to statutes and rarely provide detailed justification of the sums awarded as compensation for pain and suffering.

However, it would be a mistake to combine all Eastern European countries into a single category, even though there were some shared elements. There were, in fact, different sources of influence on national legal cultures, only one of which was socialist ideology. As Anders Fogelklou mentions, the so-called socialist system was not a unified being rather ‘a mixture of Soviet/Russian Communist legislative practices and institutions, of domestic pre-Communist traditions, and

⁸² Ngoc Son Bui, ‘The Socialist Precedent’ (2019) 52 Cornell International Law Journal 421, 424.

⁸³ Inga Markovits, ‘The Death of Socialist Law?’ (2007) 3 Annual Review of Law & Social Science 233, 240.

⁸⁴ Gianmaria Ajani, ‘Formalism and Anti-Formalism under Socialist Law: The Case of General Clauses within the Codification of Civil Law’ (2002) 2 Global Jurist i.

⁸⁵ Rafal Manko, ‘Survival of the Socialist Legal Tradition: A Polish Perspective’ (2013) 4 Comparative Law Review 1, 6.

various political, legal, and social circumstances in the states of Eastern and Central Europe'.⁸⁶ This thesis shares this description of the socialist jurisdictions as relatively autonomous and separate systems and draws on this scholarship when applying it to tort law.

Understanding how and to what extent tort law should contain 'socialist components' varied significantly from one socialist country to another. The uniqueness of some elements of the Soviet tort law culture helps us understand why the current Russian situation with pain and suffering damages is problematic. This situation differs now not only from the Western European countries, but also from the former members of the socialist block. In fact, we are dealing with various socialist tort law cultures, at least in relation to liability insurance and pain and suffering damages. The diversity of views on liability insurance and pain and suffering damages in the former socialist camp that will be demonstrated in this thesis strongly supports this point. The analysis from this angle will make a contribution to the literature on post-socialist tort law cultures.

1.4 Chapter Outlines

This thesis is composed of eight chapters. Apart from this chapter which contains an introduction, the remaining chapters are six substantial chapters and conclusion. The outline below sets out a brief summary of these seven chapters.

Chapter 2 provides the thesis' theoretical and methodological framework. It argues that the current problems with pain and suffering damages in Russia are best understood by applying a socio-legal approach to tort law culture. The chapter starts with a brief overview of Russian tort law in relation to pain and suffering damages and liability insurance. This overview demonstrates that the roots of current problems with pain and suffering damages lie largely beyond black-letter law. Therefore, the socio-legal approach to tort law culture is the most effective research tool for this research as it focuses on the social and cultural context of tort law. However, there is no consistent meaning of 'tort law culture'. This chapter will overview the most authoritative approaches to this subject and suggest that a definition which includes practices, institutions and cultural values is the most relevant for the purposes of the research.

⁸⁶ Anders Fogelklou, 'The Regional Ombudsman as a Western (Swedish) Legal Transplant: Experiences from the Legislative Process in St Petersburg' (2003) 13 *Transnational Law and Contemporary Problems* 537, 538.

This chapter also presents an overview of the methods used in the thesis. As this research project focuses on the problems with judicial awards of pain and suffering damages, the chosen methods are: a qualitative analysis of court judgments (in Russia) using NVivo; semi-structured interviews of lawyers in the UK and Russia, a detailed analysis of online professional communication on legal blogs and Internet forums; and analysis of secondary sources (judicial statistics, media materials, and scholarly literature).

Chapter 3 argues that there are four key problems with pain and suffering damages in Russia: i) low level of awards; ii) inconsistency of awards, iii) complex claims procedure, and iv) poor enforcement of rulings. Together these problems lead to injustice for accident victims seeking compensation for pain and suffering.

Firstly, awards are low in comparison to the victims' expectations, the estimations of the legal professionals and members of the society, and awards for similar injuries in Europe. A recent survey of general population demonstrates that fair and reasonable compensation of pain and suffering damages is several times higher than the existing awards.⁸⁷ The median level of compensation awarded is extremely low compared to other European jurisdictions. The claimant is obliged to specify and justify the requested amount of compensation in the statement of claim. However, there is only a minimal chance that the requested sum will be fully awarded. Russian judges tend to reduce the requested damages dramatically and without justification.

Secondly, awards are inconsistent. Pain and suffering damages awarded for similar injuries vary significantly even in the same region since there are no guidelines or tariffs. This makes it difficult to predict the outcome of the case for lawyers and litigants-in-person.

Thirdly, accident victims typically have to go through a court procedure in order to obtain compensation for pain and suffering. This procedure is more complex, time-consuming and costly

⁸⁷ 'The Russians Have Indicated Just Compensation of Moral Damage for Personal Injury and Bereavement' *Advocate Gazette* (22 November 2019) <<https://www.advgazeta.ru/novosti/rossiyane-nazvali-spravedlivyy-razmer-kompensatsii-moralnogo-ushcherba-za-vred-zdorovyu-ili-poteryu-blizkikh/>> accessed 17 January 2022.

for claimants compared to out-of-court dispute resolution. However, settlements and mediation are rare in this category of cases.

Lastly, there is a serious issue with the enforcement of personal injury damages. Car insurance, for example, though compulsory, does not cover pain and suffering damages. As a result, these damages must be paid personally by the individual defendants rather than insurance companies. The bailiff state service is ineffective in enforcing judgments against individuals in Russia. The bailiffs' statistics suggest that the chance to obtain full compensation, especially if it is higher than average, is low in these cases.⁸⁸

Chapter 4 argues that the Soviet tort law culture is the context for these problems. This is particularly true in relation to the negative views held Soviet legal academics and practitioners about both pain and suffering damages and liability insurance. The most evident remnant of this approach can be seen in the exclusion of pain and suffering damages from compulsory insurance schemes for road traffic accidents and workplace accidents. The Soviet approach to pain and suffering damages and liability insurance was unique not only in comparison to Western jurisdictions but also to other Eastern European socialist countries. The chapter goes on to discuss prohibition of liability insurance in the Soviet Union and the impact of this approach on the current position relating to pain and suffering damages. This feature very much distinguishes Russia from all other European jurisdictions where insurance has become the primary source for compensation for pain and suffering damages. This approach is particularly unusual in light of the existing strict liability for road accidents in Russian tort law. In Europe, the burden of liability without fault was balanced by the possibility to shift it to the insurance company at the earliest stages. Thus, the chapter goes on to argue that the increased use of liability insurance for pain and suffering damages could be a viable option for improving the situation of accident victims in Russia.

⁸⁸ Timur Bocharov, Alexey Knorre and Katerina Guba, *Execution of Court Decisions and Organisation of Bailiff's Work [Ispolnenie sudebnyh reshenij i organizacija raboty sudebnyh pristavov]* (Analytical Report, Centre for Strategic Research 2017) <<https://www.csr.ru/upload/iblock/4a6/4a643249f8744ba95cde958eee9ac0ee.pdf>> accessed 25 January 2023.

Chapter 5 suggests that this option can be achieved by either the extensive use of voluntary liability insurance or implementation of compulsory liability insurance against pain and suffering damages. The chapter argues that *voluntary* liability insurance cannot solve all four problems with pain and suffering damages in Russia. It demonstrates that although voluntary liability insurance resolves the problem of awards enforcement, it does not resolve the problems of low damages, inconsistency of awards, and the complex claims procedure. The chapter demonstrates this based on the analysis of railroad accident cases where voluntary liability insurance is widely applied. It shows how this insurance fails to provide justice to victims of accidents due to its voluntary form and on-going judicial scepticism toward pain and suffering damages. As a result, awards are still low despite the severity of injuries caused by railroad accidents. The relevant background for low awards, according to my interviews with lawyers, is a 'budget-protecting' logic of the judiciary. The chance to obtain sufficient compensation is lower, according to their experience, in those cases where public bodies or commercial companies partly owned by the state are involved. Moreover, since the insurer does not pay without a judgment, victims need to navigate a complicated court procedure to obtain even this very moderate money since the insurer does not pay without a judgment. This condition is even included in insurance contracts with the Russian Railways. The latter typically object to the claim (arguing quantum or raising a contributory negligence defence) despite the strict liability regime applied in most cases. Finally, the position of state procurators in these cases largely prevents fair compensation for victims.

Chapter 6 argues that compulsory liability insurance for pain and suffering damages is more effective for addressing the four problems and therefore can ensure better justice for accident victims. The chapter draws on the experience of European countries in support of this claim. Compulsory liability insurance for road accidents began to spread in Europe in the first half of the 20th century and now is implemented in all jurisdictions. Compulsory work accident insurance has been adopted in some European countries, for example, in England and Wales. Importantly, insurance covers pecuniary damages as well as all pain and suffering damages related to the accident. This explains why the bulk of personal injury cases are road or employment accidents. In these fields, there is a requirement of compulsory insurance and therefore a high probability of payment. The judiciary is more ready to award generous damages if they are covered by insurance. The awards are more or less consistent because either the judiciary and lawyers use the insurance tables (for example, Sweden) or insurance companies, courts and lawyers rely on judicial guidelines (for example, England and Wales). Most cases are settled with the insurer at the

pre-trial stages so obtaining compensation is unproblematic. This chapter will concentrate mainly on England and Wales where the impact of liability insurance is the most substantial and the level of pain and suffering damages is the highest. It will also provide, where appropriate, some valuable comparisons with other European jurisdictions.

Chapter 7 argues that while compulsory liability insurance can solve most problems with pain and suffering damages and brings justice to accident victims in Russia, the mere implementation of compulsory insurance will not succeed in doing so without changes in the approach of the judiciary. There is currently a heated debate in the Russian legal community on the direction of possible reforms to pain and suffering damages (but not in conjunction with liability insurance).⁸⁹ The most frequently mentioned ways to improve the situation is to limit judicial discretion through guidelines with brackets of compensation. This measure will result in similar awards for similar injuries. The minimal levels of compensation in these guidelines must be higher than the average damages awarded by Russian courts. This thesis supports this measure along with the implementation of compulsory liability insurance for pain and suffering damages. Such insurance will guarantee justice for accident victims defined as receiving fair and enforceable damages through an effective and convenient system. The awards will be higher since there is no need to take into account the financial consequences for the defendant and reduce damages accordingly. The procedure of claiming will be simplified, occurring mainly out of court, as insurance companies normally prefer to settle cases to avoid legal costs. Recovery will be guaranteed since in the case of the insurer's bankruptcy the claimant can claim from the Russian Association of Motor Insurers.

There is also a need to promote culture of settlements and to introduce mediation procedures. The institution of state procurators in personal injury case should be abandoned to facilitate the move away from the 'pro-State' approach. Securing a change in the attitudes of the judiciary is the most complicated issue. This can be done by the wider co-optation of practising lawyers in the

⁸⁹ See, for example, the round table at the All-Russia Civil Forum in 2019 on this issue, in which took part the representatives of the Bar, academia, the Constitutional Court, ombudsman office, and human rights organisations. <https://civil-forum.ru/news/podgotovlena-rezolyutsiya-kruglogo-stola-kompensatsiya-moralnogo-ushcherba-za-prichinenie-vreda-zhiz.html?sphrase_id=7417> accessed 17 January 2022.

judicial profession. They have a much more generous view on the level of damages (according to surveys) compared to the judges so would better reflect the expectations of the society.⁹⁰

Finally, there is a need for changes in attitudes of legal practitioners who are currently not interested in taking personal injury cases. In particular, the development of conditional and contingency fees is needed. Otherwise insurance companies will have a stronger position in settling cases, and victims are likely to continue to be under-compensated. There are also certain legal cultural factors that could accompany the reform and must be taken into account: 'compensation culture', insurance fraud, and moral hazard. The first risk should not be exaggerated because there are no legal and cultural grounds for its dramatic increase in Russia. This thesis suggests possible ways on how to minimise the remaining two issues.

Chapter 8 summarises key findings of the thesis research. First, this thesis has identified four problems with the award of pain and suffering damages: the low level and inconsistency of awards, a complex claiming procedure, and poor enforcement of judgments. Second, it has demonstrated that the legacy of Soviet understandings of pain and suffering damages and liability insurance largely contributes to these problems. Third, this thesis has suggested drawing on the analysis of railroad accident cases that voluntary liability insurance will not improve the situation for accident victims. Fourth, it has found that compulsory liability insurance could be more effective, as the European experience shows, in resolving the four problems with pain and suffering damages.

This chapter sums up policy recommendations on how to address the problems with pain and suffering damages and improve the situation of accident victims in Russia. The key measure is the implementation of compulsory liability insurance for pain and suffering damages in Russia caused by road traffic, railroad and workplace accidents. There is also need in standardisation of awards of pain and suffering damages. The other measures include changing judicial attitudes, excluding state procurators from participating in personal injury cases, and recognising conditional and contingent fees. This chapter also discusses the development of compensation culture, insurance

⁹⁰ Zinaida Pavlova, 'The Lawyers Have Indicated a Just Quantum of Moral Damages for Harm to Life and Health' *Advocate Gazette* (10 December 2019). <<https://www.advgazeta.ru/novosti/yuristy-nazvali-spravedlivyy-razmer-kompensatsii-moralnogo-vreda-pri-prichinenii-vreda-zhizni-ili-zdorovyu/>> accessed 17 January 2022.

fraud, and moral hazard as potential concerns about the social costs of the reform. It has assessed the validity of these concerns and suggested possible ways on how to reduce some of the social costs.

The chapter summarises key theoretical contributions of the thesis. First, this thesis contributes to Russian scholarly literature by examining the potential of compulsory liability insurance in improving the current compensation system for pain and suffering in Russia. Second, it contributes to the Western scholarly literature by suggesting a more positive view of liability insurance (especially its compulsory form). Third, it contributes to the literature on the post-socialist tort law culture by showing that the most basic features of the Soviet approach to tort law still prevail.

This chapter also discusses the limitations of the thesis. First, the collected expert interviews are not representative of the entire Russian legal profession. Second, the scope of the analysis is limited to the European jurisdictions. Third, the data on the Soviet tort law culture is limited to academic literature and doctoral dissertations prepared by legal scholars.

Finally, this chapter proposes potential areas for further research. The first area is the study of the social construction of whiplash injuries in Russia in comparison with European countries. The second area is the development of the specialisation in personal injury cases among Russian lawyers. The third area is the activity of state procurators in Eastern European countries, especially their participation in civil cases.

CHAPTER TWO. RESEARCH APPROACH AND METHODS

2.1 Introduction

This chapter presents the methodological approach adopted in this thesis. It starts with an introduction to Russian tort law and civil procedure. This introduction shows that the law *per se* cannot explain why accident victims suffer injustice when it comes to compensation for pain and suffering. It suggests that in order to understand this injustice, one needs to look at the social and cultural context which shapes this compensation. This chapter demonstrates that Russian substantive tort law does not prevent judges from taking insurance into account and award higher damages for victims. Russian substantive tort law also does not prevent insurers from cooperating with accident victims to settle cases out of court. It is the Russian tort law culture, however, that often determines how victims are compensated for pain and suffering in Russia.

This chapter considers different meanings of 'tort law culture'. It suggests that a definition which includes practices, institutions and cultural values is the most relevant for the purposes of the research. This definition allows me to understand, analyse and reflect on Russian tort law within a much broader social and cultural context of Russia. In particular, this chapter argues that compensation for pain and suffering is shaped by the socio-cultural context of Russia, and thus cannot be effectively studied without engaging with that context.

The socio-legal perspective, therefore, helps me to identify the main problems with pain and suffering damages in contemporary Russia, discuss the social and cultural background of these problems, and suggest potential solutions. As this research focuses on judicial issues with pain and suffering damages, the applied methods were intended to examine how personal injury cases involving claims for pain and suffering damages are resolved in Russian courts. Therefore, the empirical part of the research includes qualitative textual analysis of court judgments, expert semi-structured interviews, and desk-based analysis of online professional communications (for example, on legal blogs and Internet forums) and secondary sources.

2.2 A Brief Introduction to Russian Tort Law and Civil Procedure

This section provides an overview of Russian tort law and civil procedure. Its focus is on the legal situation of victims seeking pain and suffering damages, operation of liability insurance and court procedure in personal injury cases. It demonstrates that the origins of most problems with pain and suffering damages lie not in tort law but rather in how it operates within the Russian social and cultural context.

2.2.1 Russian Tort Law: Statutory Provisions

The system of Russian tort law is based on the notion of general civil liability for causing any form of harm. It is known as a system of general tort (*general'nyj delikt*). This means that Russian tort law, in contrast to common law, is not an accumulation of various civil wrongs loosely connected with each other. Rather the Russian tort system is built on the basis of a short section of the Civil Code. This section states that any harm caused to the person or property shall be indemnified in full.¹ This is supplemented by the special provisions for specific types of wrongs in further sections of the Civil Code, for example, for product liability or personal injuries and wrongful death cases. The basic requirement is that the defendant must be at fault in order to be found liable. There are two noticeable features of the Russian approach to the issue of fault.

The first feature is a strict liability regime for the sources of increased danger. The meaning of the concept of 'sources of increased danger' is extremely broad. Although the Civil Code provides some examples such as a motor vehicle, electric energy of high voltage, atomic energy, explosives, potent poisons, and construction activity,² this list is not exhaustive. The court is free to interpret any other means of causing harm as a source of increased danger depending on the particular circumstances of the case. Perhaps, the most noteworthy characteristic is the classification of motor vehicles as sources of increased danger. As a result, a strict liability regime is partially applied to road traffic accidents. The applicability of this regime depends on the status of the injured victim: a driver, a passenger, or a pedestrian. The defendant's liability will be based on the general principle of fault in cases where another driver suffered personal injuries. The regime of

¹ Art 1064 of the Civil Code of the Russian Federation of 30 November 1994.

² Art 1079 of the Civil Code of the Russian Federation of 30 November 1994.

strict liability is applied in road traffic cases when pedestrians or passengers suffered personal injuries. The only available defence for the owner of the source of increased danger is to prove *force majeure* circumstances or the explicit intention of the injured to suffer harm (for example, a suicide attempt).

The reverse burden of proof is the second distinctive feature of Russian tort law.³ Unlike in other jurisdictions, where the reverse burden of proof is applied as an exemption,⁴ in the Russian tort system it is applied as a general rule. This rule reflects a pro-claimant approach to evidence in Russia as it places a burden of proof on the defendant to disprove the presumption of fault. Therefore, defendants, and in strict liability cases in particular, often choose to contest the quantum of damages rather than the fault itself. In other words, most cases are ruled in claimants' favour. More than 90% of civil claims are fully or partially upheld by Russian courts.⁵ Despite this, however, claimants fail to obtain adequate compensation and/or enforce the judgment.

A claimant's contributory negligence is often used in Russian courts to reduce the award of damages.⁶ It should be noted that only *gross* contributory negligence is a possible defence. However, gross negligence is not defined in the Civil Code. This results in ambiguity in interpreting what gross and mere contributory negligence is and how it should be applied in practice. Although there is a special directive of the Russian Supreme Court that provides some clarification on the interpretation of contributory negligence, it still lacks detail to be useful for trial courts. The directive refers to judicial discretion when interpreting contributory negligence but fails to provide

³ Gert Brüggemeier, 'European Civil Liability Law outside Europe. The Example of the Big Three: China, Brazil, Russia' (2011) 2 *Journal of European Tort Law* 1; Jewoo Lee, 'Two Defining Features of Russian Tort Law: Their Rationale and Legal Effect' (2014) 39 *Review of Central and East European Law* 109.

⁴ For example, consider the doctrine *res ipsa loquitur* in American and English tort law. It means that the context of the incident makes the fault of the defendant so evident ('things speak for themselves') that it becomes the defendant's procedural obligation to prove its absence. See in Patrick Atiyah, 'Res Ipsa Loquitur in England and Australia' (1972) 35 *Modern Law Review* 337.

⁵ For example, there were considered overall 18,804,923 civil claims by Russian first instance courts in 2019 of which 18,403,912 (97%) were fully or partially satisfied. Hereinafter Russian court statistics are taken from the Judicial Department official website <<http://www.cdep.ru/index.php?id=79>> accessed 17 January 2022.

⁶ The approach in England and Wales is similar, except there is no distinguishing between mere and gross contributory negligence there. See in James Goudkamp and Donal Nolan, *Contributory Negligence in the Twenty-First Century* (Oxford University Press 2019).

any further guidance: '[e]ach case should be decided taking into account the actual circumstances of the case (the nature of the activity, the situation of the harm, the individual characteristics of the victim, his condition, etc.)'.⁷ As a result, first instance courts treat the same actions (for example, crossing railroad tracks in an inappropriate place or a roadway out of zebra) sometimes as gross negligence reducing damages accordingly and sometimes as mere negligence without any reduction (discussed in more detail in Chapter 5).

2.2.2 Liability Insurance and Social Insurance in the Russian Tort System

Road traffic accident cases are the most common type of personal injury cases in Russia. The most likely reason for this is not only the absolute number of accidents per se (the number of accidents is currently declining in Russia), but rather the availability of compulsory liability insurance in these cases. The court statistics show that road traffic accident cases prevail in Russia over other types of torts. There were, for example, 1,184 court cases for injuries and wrongful deaths (*vozmeshhenii vreda, prichinennogo uvech'em i smert'ju kormil'ca*) caused by road traffic accidents, 460 cases caused by workplace accidents, and 498 other unspecified personal injury cases in 2019.⁸ These numbers are low compared to the number of road traffic accidents. For instance, there were 164,358 road accidents in Russia in 2019 in which 210,877 people were injured.⁹ A possible explanation for the low absolute number of road accident cases is the operation of compulsory liability insurance in this area. It is likely that most of these claims were considered

⁷ Section 17 of The Resolution of Plenum of the Supreme Court of the Russian Federation 'On Application by Courts the Legislation Regulating the Obligations Based on Causing Harm to Health and Life' of 26 January 2010.

⁸ The Report on Considering Civil and Administrative Cases in First Instance Courts of General Jurisdiction for 2019 (Section 2 lines 101-103) in Judicial Department (n 5).

⁹ Official statistics of the Russian Road Traffic Police <<http://stat.gibdd.ru/>> accessed 17 January 2022. For comparison, there were 153,158 casualties in reported road traffic accidents in Great Britain in 2019 in which 25,945 people were seriously injured. See Department for Transport, 'Reported Road Casualties in Great Britain: 2019 Annual Report' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/922717/reported-road-casualties-annual-report-2019.pdf> accessed 18 January 2023. In 2019, there were issued 113,654 personal injury claims in the county and magistrates' courts of England and Wales. See Ministry of Justice, 'Civil Justice Statistics Quarterly: October to December 2019 Tables' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/870185/civil-Justice-stats-main-tables-Oct-Dec.xlsx> accessed 18 January 2023. The report does not break this figure down by types of claims, but it can be assumed that road traffic accidents constitute a substantial portion.

within insurance companies. This means that the victims obtained payments from the defendant's insurance policy out of court.

However, these insurance payments do not cover pain and suffering damages. The most distinctive feature of compulsory motor third-party liability insurance in Russia is the explicit exclusion of pain and suffering damages from the insurance coverage. The Law 'On Compulsory Motor Third Party Liability Insurance' stipulates that liability for causing moral harm is excluded from the risks which can be covered by compulsory insurance scheme.¹⁰ This clause means that Russian drivers cannot add pain and suffering damages to their compulsory liability insurance policy (*Objazatel'noe strahovanie grazhdanskoj otvetstvennosti vladel'cev transportnyh sredstv or, in short, OSAGO*), even if they wish so, and reach an agreement with an insurer on this issue. In the latter case, they would need to purchase a separate voluntary liability insurance policy in addition to OSAGO which would cover material damages above the OSAGO maximum limits and/or pain and suffering damages.¹¹ This extra insurance policy is called DSAGO (*Dobvol'noe strahovanie grazhdanskoj otvetstvennosti vladel'cev transportnyh sredstv*), and it is not a popular product in the Russian insurance market. In contrast to OSAGO, insurers are free to set any premiums for this insurance scheme or not offer it at all if they do not see sufficient prospects for profit. Indeed, key Russian insurance market players recently either stopped offering these policies or continue offering them on a small scale (only for new motor vehicles or only as a part of comprehensive car insurance).¹² Even if some insurers do offer DSAGO, these voluntary insurance schemes often cover only material damages above the OSAGO limits but still exclude pain and suffering damages. As a result, victims seeking compensation for pain and suffering have to submit claims against individual defendants to the court. This creates additional challenges for victims seeking compensation for pain and suffering, as Chapter 3 will demonstrate.

¹⁰ Art 6 para 2b of The Law of the Russian Federation 'On Compulsory Motor Third Party Liability Insurance' of 1 July 2003.

¹¹ Art 4 para 5 *ibid*.

¹² Denis Yumabaev and Anna Tretyak, 'The Additional Protection to OSAGO Experiences a Shortfall' [Dopolnitel'naja zashhita po OSAGO prevratilas' v deficit]. *Vedomosti* 22 July 2018 <<https://www.vedomosti.ru/finance/articles/2018/07/23/776211-dopolnitelnaya-zaschita-osago>> accessed 17 January 2022.

Compared to other European countries, compulsory motor third-party liability insurance was implemented relatively late in Russia, only in 2003.¹³ It covers car damage and personal injury damages for up to 500,000 roubles (£5,000) each¹⁴ capping the total possible claim up to 1 million roubles (£10,000) only. It should be pointed out that personal injury damages (called 'indemnification for damage to life and health' in the Law on Compulsory Motor Third Party Liability Insurance) do not include pain and suffering damages.¹⁵

The second large category of personal injury cases (setting aside unspecified claims) are workplace accidents. The absolute number of these cases is low. For example, there were only 460 such cases in 2019. Most likely, this is due to the existence of state social insurance for workplace accidents and diseases. All employers in Russia are obliged to pay monthly premiums to the Social Insurance Fund. Employees can claim compensation from this fund in the case of workplace accident or disease. Importantly, the workers are entitled to these payments regardless of the employer's fault. In the case of the injured worker's gross negligence, the insurance payments can be reduced to up to 25%. However, as in the case of motor third party liability insurance, the distinctive feature of this scheme is the explicit exclusion of pain and suffering damages from the insurance coverage. The statutory provision states that the worker needs to claim pain and suffering damages directly from the employer on the basis of fault.¹⁶ There is currently no compulsory insurance that would cover employers' liability for pain and suffering caused to their employees in Russia.

2.2.3 Pain and Suffering Damages in the Russian Tort System: Definition and Assessment

The Civil Code of the Russian Federation uses the term 'moral damage' (*moral'nyj vred*) to refer to all kinds of non-pecuniary harm. The Russian Civil Code was influenced by the French Civil Code, which sets out a general concept of '*dommage morale*' to categorise non-pecuniary

¹³ The Law of the Russian Federation 'On Compulsory Motor Third Party Liability Insurance' of 1 July 2003. For comparison, it operates in the UK since 1930 and in Germany since 1939.

¹⁴ The exchange rate fluctuates around 1 GBP = 100 roubles. See the official site of the Russia Central Bank <https://www.cbr.ru/currency_base/daily/> accessed 17 January 2022.

¹⁵ Hereinafter, the term 'personal injury damages' in discussion of the Russian situation means only pecuniary losses related to the injury: lost earnings, medical services, transport costs, medicines, prosthetics, and so on.

¹⁶ Art 8 para 3 of the Law of the Russian Federation 'On Compulsory Social Insurance against Workplace Accidents and Professional Diseases' of 24 July 1998.

damage. The same broad definition of non-pecuniary damage can be found in other civil law jurisdictions built on the Code of Napoleon such as, for example, Belgium or Spain.¹⁷ The only exception among the members of the Roman legal family would be Italy where a special category of 'biological harm' (*danno biologico* or *danno alla salute*) for non-pecuniary harm caused by personal injuries is used along with the general concept of '*danno morale*'.¹⁸

Civil legislation for moral damages was introduced in Russia after the collapse of the Soviet regime. The scope of this remedy was initially very narrow. The statute of 1990 on the regulation of mass media made it possible to claim for the violation of honour and dignity caused by defamation or libel published or translated in mass media providing moral damages as a possible remedy.¹⁹ The list of torts for which moral damages could be awarded was widened significantly with the implementation of The Fundamentals of Civil Law ('The Fundamentals') in 1991. According to this act, it became possible to claim moral damages for any wrongful act which caused physical (personal injuries) or purely moral harm.²⁰ Importantly, the remedy was not only money but also other material forms (for example, 'the provision of a gift or tickets to a health resort'),²¹ which the court would consider appropriate for covering moral harm.

The basic definition of moral harm adopted in the Fundamentals has been almost entirely imported to the new Russian Civil Code of 1994 with two substantive modifications. The ground for claiming moral damages has been confined to non-material harm only (personal injuries, violation of human rights, false imprisonment, libel, and so on). It became possible to claim moral damages for material losses in cases specified in specific laws. However, statutory law allows these claims only in very rare occasions, for example, in cases when consumer rights are violated. In

¹⁷ Stasis Banakas, 'Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape' (2015) 10 *Journal of Comparative Law* 291.

¹⁸ Giovanni Comandé, 'Compensation for Personal Injury in a Comparative Perspective: The Need to Bridge Legal and Medicolegal Knowledge' in SD Ferrara, R Boscolo-Berto and G Viel (eds), *Personal Injury and Damage Ascertainment Under Civil Law: State-of-the-Art International Guidelines* (Springer 2016).

¹⁹ Art 39 of the Statute of the Soviet Union 'On Press and other Mass Media' of 12 June 1990.

²⁰ Art 131 of The Fundamentals of Civil Law of the Soviet Union of 31 May 1991.

²¹ Konstantin Golubev and Sergey Narizhniy, *Compensation for Moral Harm as a Way of Protecting Immaterial Interests [Kompensatsiya moral'nogo vreda kak sposob zashchity neimushchestvennykh blag]* (Legal Centre Press 2017).

these cases, a consumer is entitled to claim pain and suffering damages along with or independent of the claim for material losses under the contract.²² Another example is a property crime for which a victim can also claim moral damages since such crimes ‘in fact always violate the dignity of the person’.²³ The second major change was the exclusion of non-monetary forms of compensation. It may be assumed that initial allowance of these forms was in continuity with the socialist tort law culture which could not easily accept the idea of paying money for human suffering (discussed in more detail in Chapter 4). Nevertheless, after the implementation of the Civil Code in 1994, money became the only means to remedy moral harm.²⁴

The current regulation of moral damages is based on the provisions of the Civil Code which do not contain any substantial changes in this area since 1994.²⁵ The only definition of ‘moral damage’ which can be identified in the Russian Civil Code is a broad expression ‘physical and moral suffering’.²⁶ The Code does not provide any sub-division of categories of moral damage. Nevertheless, some examples can be found in one of the directives of the Supreme Court²⁷ where the following list has been suggested: moral damages for personal injuries, moral damages for the death of a relative, moral damages for a disclosure of a family or medical secret, moral damages for the loss of employment, moral damages for violation or deprivation of rights, and moral damages for libel and defamation. The list is not exhaustive.

²² Art 15 of The Law ‘On Consumer Rights Protection’ of 7 February 1992.

²³ Para 4 of The Judgment of the Constitutional Court of the Russian Federation N 45-P of 26 October 2021 (on the appeal from S.F. Shilovsky).

²⁴ A certain step back to the pre-Code approach can be found in the recent directives of the Supreme Court on moral damages. These directives state that the defendant can voluntarily compensate moral harm in non-monetary form out of court. But this does not exclude the claimant’s right to submit a claim to the court. If the court finds that non-monetary compensation is not sufficient, it should award monetary damages. See para 24 of Resolution of Plenum of the Supreme Court of the Russian Federation N 33 ‘On Court Practice of Application Rules on Moral Damages’ of 15 November 2022.

²⁵ Art 151 of The Civil Code of the Russian Federation of 30 November 1994. There were though some slight changes in wording introduced by The Federal Law N 142 of 2 June 2013. These changes included the replacement of the word ‘person’ by ‘citizen’ and removing the word ‘other’ in mentioning violation of ‘non-property rights’ and ‘other intangible benefits’ as a ground for claiming moral damages.

²⁶ *ibid.*

²⁷ Para 2 of the Resolution of Plenum of the Supreme Court of the Russian Federation ‘On Some Issues of the Application of Legislation on Moral Damages’ of 20 December 1994.

This thesis is focused entirely on the first example from this list (moral damages for personal injuries) as the situation with moral damages is the most problematic in personal injury cases. Therefore, the subject of the research can be defined as ‘pain and suffering damages’ or ‘compensation for pain and suffering’ (these two terms are used interchangeably throughout the thesis). This terminology allows me to compare Russian ‘moral damages for personal injuries’ with similar institutions in other jurisdictions. For example, specific concepts for indemnification for pain and suffering caused by personal injuries are widely used in common law (‘pain and suffering damages’) and traditionally in German law (‘Das Schmerzensgeld’) and Dutch law (‘Smartengeld’). The general meaning behind all these terms and Russian moral damages for personal injuries is more or less similar – monetary compensation for negative emotions caused by physical injuries.

The assessment of pain and suffering damages, according to the Civil Code, should be based on judicial discretion taking into account the requirements of ‘reasonableness and justice’.²⁸ It is noteworthy to mention three important features of the Russian approach to assessment of pain and suffering damages. First, the final award must reflect the degree of the defendant’s fault, the depth of physical and moral suffering, the factual context of causing harm, and the individual characteristics of the victim. Second, the financial situation of the defendant is taken into account (only in relation to individuals) and damages can be reduced by the court accordingly, excluding cases of intentional harm (discussed in more detail in Chapter 6).²⁹ Third, as mentioned above, the claimant’s gross contributory negligence is a possible defence.

The burden of proof in cases on pain and suffering damages is as follows. The claimant is not required to prove the fact of pain and suffering as it is presumed in personal injury cases since 2010.³⁰ Nevertheless, the depth of pain and suffering must be proved by claimants since it directly relates to the quantum of pain and suffering damages. However, the burden of proof in relation to the fault issue is always on the defendant. As was mentioned above, this is the standard allocation of the burden of proof in any tort case in Russia, not only in cases involving personal injuries.

²⁸ Art 1101 of the Civil Code of the Russian Federation of 30 November 1994.

²⁹ Art 1083 of the Civil Code of the Russian Federation of 30 November 1994.

³⁰ Para 32 of the Resolution of Plenum of the Supreme Court of the Russian Federation ‘On Application by Courts the Legislation Regulating the Obligations Based on Causing Harm to Health and Life’ of 26 January 2010.

2.2.4 Court Procedure in Personal Injury Cases in Russia

Claims for pain and suffering damages, like any other civil claims, can be settled by parties before court proceedings. There is also an option to resolve a dispute through mediation. However, most claims for pain and suffering damages are considered in court. This is significantly different from England and Wales where most claims are settled out of court. In Russia, personal injury claims are considered by federal district courts or by lower justice of peace courts depending on the value of claims. Lower courts deal with claims up to 50,000 roubles (£500).³¹ Judges are normally more experienced and proceedings are more formal in district courts than in courts of peace. It is also more common for the parties to be represented by professional lawyers in district courts. However, this allocation of competence is not applicable to claims involving pain and suffering damages.³² There is a special competence of district courts to consider these cases regardless of how small the value of the claim is. This procedural rule makes the treatment of accident victims seeking pain and suffering damages caused by minor injuries more complicated. They are required to partake in a more formal court procedure which is more time-consuming and entails more legal costs.³³ Although the losing party pays the winning party's legal costs, Russian courts are empowered to check the reasonableness of these costs and reduce them substantially.³⁴

A distinctive feature of the civil procedure in personal injury cases is the participation of state procurators in cases on pain and suffering damages. They provide their opinion on liability and quantum of damages as a third party.³⁵ They can also participate in personal injury cases on behalf of the claimants who cannot afford legal representation, but these cases are rare, as will be shown in Chapter 5. The prominent role of procurators is an evident vestige of the Soviet tort system. In that period, the majority of tort cases included the interests of the state (as there were no private

³¹ Art 3 of the Federal Law of 17 December 1998 N 188-FZ 'On Justice Courts in the Russian Federation'.

³² Art 23 of the Civil Procedural Code of the Russian Federation of 14 November 2001.

³³ Personal injury claims can be also considered in a criminal procedure if the wrongdoing amounts to crime. This happens most frequently with road traffic accident cases with severe consequences. However, the claim will be considered under the rules of civil procedure, ie it would be a separate civil trial within criminal proceedings.

³⁴ Timur Bocharov et al, *Proposals for Improving the Judicial System in the Russian Federation and Amending Legislative Acts for their Implementation* (Analytical Report, Centre for Strategic Research 2018) 50-51 <<https://www.csr.ru/upload/iblock/1a2/1a2f21d0e9d165a80ab4de7d6a8f5f3c.pdf>> accessed 25 January 2023.

³⁵ Art 45 of the Civil Procedural Code of the Russian Federation of 14 November 2002.

companies) which required the involvement of procurators. Chapter 5 will discuss in detail how this is reflected now in the jurisprudence.

The party can appeal the first instance judgment in the regional appeal court and further to the cassation court. The main difference between the competence of the appeal and cassation courts is the scope of the review of the case. The appeal court is competent to review the assessment of facts and application of rules by the trial court. The cassation court is competent to review only the matters of law. The quantum of pain and suffering damages in most cases is a matter of fact, which makes their reassessment normally the prerogative of the appeal courts. The appellant does not need permission of the first instance court to submit the appeal. This simplified submission procedure along with low administrative fees makes the appeal process relatively accessible for potential appellants. However, the chances to change the decision are not high since most of the appeals are dismissed, as will be demonstrated in Chapter 5.

There is no requirement for professional legal representation in civil cases at any level of the court system. The parties can participate in litigation personally or through legal representation depending on their preference and financial capacity. The only formal requirement for legal representatives is to hold a law degree. That requirement is applicable to representation in appeal and cassation proceedings. This lax regime makes the market of legal services in civil cases extremely saturated.³⁶ There are many lawyers, qualified and non-qualified,³⁷ offering their services in this market. And yet, with some rare exceptions, there is no established specialisation of law firms and sole practitioners in personal injury cases. There is no professional association of personal injury lawyers or any other institutional form of their self-organisation.

As can be seen from this overview, Russian tort system contains a number of distinctive features. For example, the issues of fault and financial situation of the defendant are relevant to damages

³⁶ Ekaterina Moiseeva and Dmitry Skougarevskiy, *The Market of Legal Services in Russia: What Statistics Tells Us [Rynok juridicheskikh uslug v Rossii: chto govorit statistika]* (Analytical Report, Institute for the Rule of Law 2016) <https://enforce.spb.ru/images/lawfirms_report_e_version.pdf> accessed 17 January 2022.

³⁷ The qualified lawyers are called 'advocates' (*advokaty*). The non-qualified lawyers do not bear a specific title. They are normally called just 'lawyers' (*yuristy*). For more details, see Ekaterina Moiseeva and Timur Bocharov, 'The Professional Portrait of Russian Advocates: Market Challenges and Boundary Work' in R Abel et al (eds), *Lawyers in Society 30 Years On* (Hart Publishing 2020).

assessment. There are many areas where a strict liability regime is applicable in Russia. Furthermore, there is a distinction between gross and mere contributory negligence in Russia. However, these legal differences alone cannot explain why the situation with pain and suffering damages is problematic in Russia. The current Russian tort system does not prevent Russian judges from awarding adequate and consistent pain and suffering damages. Parties are also free to settle cases out of court, and defendants can choose to pay out compensation to victims on time and in full via voluntary insurance. In practice, this is not the case. This thesis argues that the Russian tort law alone cannot fully explain why victims continue to face injustice when accessing compensation for pain and suffering. It suggests that the approach of the judiciary to pain and suffering damages and the lack of liability insurance – factors which are termed here as the tort law culture – contributes to and reinforces such injustice. The next section presents in detail this methodological approach.

2.3 Socio-Legal Approach to Tort Law Culture

Despite the evident growth of popularity of the socio-legal perspective on torts, the doctrinal approach still appears to prevail in legal research on tort law. The doctrinal focus, however, is limited in helping understand how tort law operates in real life. For example, Richard Lewis notes:

[M]any more tort academics are pre-occupied with finding theoretical bases for tort liability. Those who espouse corrective justice as the foundation for their citadel are failing to take account of how personal injury litigation is actually conducted. They accentuate the gap between what is taught in theory and what happens in practice.³⁸

There are no substantial differences between Anglo-Saxon and continental legal traditions, including Russia, in this regard. As Reza Banakar and Max Travers argue:

³⁸ Richard Lewis, 'Humanity in Tort: Does Personality Affect Personal Injury Litigation?' (2018) 71 Current Legal Problems 245, 278.

[T]he image of law as a highly rationalised rule-based activity, i.e., as a system of rules, norms and principles designed to guide legal analysis and justify decisions, occupies a central position in both common law and civil law discourses.³⁹

Indeed, as discussed in the previous chapter, the majority of Russian and Western studies dedicated to liability insurance and pain and suffering damages are doctrinal.

This in effect means that the doctrinal method is deployed to study tort law. More specifically, the doctrinal method is used to collect and analyse legal texts, which can be divided into primary sources (case law or legislation) and secondary sources (academic publications discussing case law or legislation).⁴⁰ A clear focus on legal rules is the distinctive feature of doctrinal studies. As Reza Banakar and Max Travers point out, these studies ‘use interpretive methods to examine cases, statutes and other sources of law in an attempt to seek out, discover, construct or reconstruct rules and principles’.⁴¹ In contrast, the socio-legal approach to tort law entails looking at the social and cultural context beyond the black-letter law. According to Mauro Bussani and Marta Infantino:

[T]he set of rules, notions, and procedures which are produced by official legal actors may only provide the starting point of research about the disputes managed by tort law mechanisms, and the ways in which these mechanisms actually work.⁴²

Some socio-legal scholars have noted the importance of understanding and analysing what is frequently called tort law culture⁴³ or the culture of tort law.⁴⁴ This socio-legal scholarship defines the concept of tort law culture differently. The wide spectrum of different understandings of this concept can be found in *Fault Lines: Tort Law as Cultural Practice*.⁴⁵ This was the first attempt to

³⁹ Reza Banakar and Max Travers, ‘Law, Sociology and Method’ in Reza Banakar and Max Travers (eds) *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing 2005) 21.

⁴⁰ Ian Dobinson and Francis Johns, ‘Legal Research as Qualitative Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).

⁴¹ Banakar and Travers (n 39).

⁴² Mauro Bussani and Marta Infantino, ‘The Many Culture of Tort Liability’ in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law: Global Perspectives* (2 edn, Edward Elgar Publishing 2021) 13.

⁴³ Kenneth Oliphant, ‘Cultures of Tort Law in Europe’ (2012) 3 *Journal of European Tort Law* 147.

⁴⁴ Richard Lewis and Annette Morris, ‘Tort Law Culture: Image and Reality’ (2012) 39 *Journal of Law and Society* 562.

⁴⁵ David Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009).

combine the ideas of prominent tort law scholars working within the cultural paradigm. And yet, the contributions to this volume were focused on very different subjects – insurance companies,⁴⁶ attitudes of jury members,⁴⁷ professional practices of personal injury lawyers,⁴⁸ and judicial decision-making.⁴⁹ The same can be said about the special issue of the *Journal of European Tort Law* dedicated entirely to tort law cultures in European countries. The authors have documented different ways in which tort law cultures operate in Germany,⁵⁰ Scandinavian countries,⁵¹ France,⁵² and the UK.⁵³ They examined and assessed various factors pertaining to tort law cultures, such as court statistics, the activity of insurance companies, social insurance schemes, attitudes of ordinary people, judgments of higher courts, and the historical context.

Furthermore, Mauro Bussani and Marta Infantino in their work on cultural dimensions of tort law discuss such things as the selection of tort disputes, fault and non-fault liability regimes, specific groups of accident victims (for example, children), and the notions of injury and remedy.⁵⁴ They argue that ‘tort law notions, ideas, categorizations, and perceptions influence and, reciprocally are influenced by, the cultural framework’.⁵⁵ David Engel in his research on lumping in tort cases (victims’ decisions not to submit claims) focuses on the cultural interpretation of injury and

⁴⁶ Tom Baker, ‘Liability Insurance and the Tort-Crime Boundary’ in David Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009).

⁴⁷ Valerie P Hans, ‘Juries as Conduits for Culture’ in David Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009).

⁴⁸ Lynn Mather, ‘Lawyers and Solicitors Separated by a Common Legal System: Anti-Tobacco Litigation in the United States and Britain’ in David Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009).

⁴⁹ Takao Tanase, ‘The Role of the Judiciary in Asbestos Injury Compensation in Japan’ in David Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009).

⁵⁰ Jörg Fedtke, ‘The Culture of German Tort Law’ (2012) 3 *Journal of European Tort Law* 183.

⁵¹ Håkan Andersson, ‘The Tort Law Culture (s) of Scandinavia’ (2012) 3 *Journal of European Tort Law* 211.

⁵² Jean-Sébastien Borghetti, ‘The Culture of Tort Law in France’ (2012) 3 *Journal of European Tort Law* 158.

⁵³ Richard Lewis and Annette Morris, ‘Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation’ (2012) 3 *Journal of European Tort Law* 230.

⁵⁴ Bussani and Infantino (n 42).

⁵⁵ *ibid* 10.

causation.⁵⁶ He argues drawing on his comparative analysis of personal injury cases in the US and Thailand that these decisions are largely determined by the cultural context.⁵⁷

Kenneth Oliphant, a leading scholar on tort law culture, has developed and suggested useful conceptualisations of tort law culture. According to Oliphant, tort law culture may refer to one or more of these phenomena: 1. 'societal attitudes towards tort law'; 2. 'the practice of tort law'; 3. 'the practical experience of those involved in tort claims'; 4. 'tort law's institutional context'; 5. 'the cultural values embedded in substantive tort law'.⁵⁸ This thesis draws insights about tort law culture from Oliphant's work. In particular, it focuses on 'the practice of tort law', 'tort law's institutional context', and 'the cultural values embedded in substantive tort law' – the second, fourth and fifth phenomena set out by Oliphant in his conceptualisation of tort law culture. The analysis of these three phenomena in particular allows me to understand and explain how Russian specific socio-cultural and socio-political factors shape, frame, affect, and determine the development of tort law in Russia. To explain in greater detail how Oliphant's observations are used to analyse Russian tort law culture, it is important to provide a more detailed account of the second, fourth and fifth definitions.

The practice of tort law, meaning 'what tort lawyers do' (the second definition), includes the modes of behaviour, norms, and expectations of different participants in tort cases.⁵⁹ As David Nelken notes, '[t]he culture of tort law looks different when we consider the part played by legislatures, judges, lawyers, juries, or textbook writers'.⁶⁰ This understanding of tort law culture has influenced my decision to collect data on different groups of legal professionals and their views on Russian tort law culture. These groups include judges, personal injury lawyers, insurance lawyers, and state procurators.

⁵⁶ David M Engel, 'Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation' (2010) 44 *Loyola of Los Angeles Law Review* 33.

⁵⁷ *ibid* 37.

⁵⁸ Oliphant (n 43).

⁵⁹ Oliphant (n 43) 148.

⁶⁰ David Nelken, 'Law, Liability and Culture' in David Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009) 27.

Tort law's institutional context (the fourth definition), according to Oliphant, concentrates on 'how the principles of tort law and their application are affected by other institutions'.⁶¹ He emphasises social security and liability insurance as the most impactful institutions. Social security schemes do not cover pain and suffering damages. This thesis focuses, therefore, primarily on liability insurance as a way to resolve problems with pain and suffering damages and secure justice for accident victims. Studies have shown that liability insurance has important influence on the ways in which tort law operates in real life:

How claims are resolved in practice thus turns on the strategies adopted by liability insurers - reflecting bureaucratic considerations of cost and administrative efficiency as well as (arguably, more than) strict legal entitlements. Where the claim is brought by an individual, how the liability insurer exploits the undoubted inequality of bargaining power between them is another determinative factor.⁶²

The significance of liability insurance on the development of tort law cultures have been observed by other scholars too. For example, Richard Lewis and Annette Morris in their study on the UK tort system emphasise the role of liability insurance as one of the key elements of tort law culture.⁶³ They argue that 'in the absence of insurance, we are less inclined to think of seeking a remedy in tort'.⁶⁴ Erhard Blankenburg, for example, has found that the approach to road traffic claims taken by insurance companies is an important institutional factor that shapes and even determines tort claim rates. He has suggested that the evident difference in tort claim rates in the Netherlands and Germany could be attributed to different approaches taken by insurance companies, rather than to differences in substantive law.⁶⁵ Similarly, this thesis considers liability insurance as an important institutional context of compensation for pain and suffering in Russia.

⁶¹ Oliphant (n 43) 148.

⁶² *ibid* 155.

⁶³ Lewis and Morris 'Tort Law Culture: Image and Reality' (n 44).

⁶⁴ *ibid* 565.

⁶⁵ Erhard Blankenburg, 'The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behaviour in the Netherlands and West Germany' (1994) 28 *Law & Society Review* 789; Erhard Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighbouring Germany' (1998) 46 *The American Journal of Comparative Law* 1.

The focus on institutional context is particularly useful in those areas where historical and comparative parallels are needed to be drawn. This focus allows me to explore the relevance of the Soviet background to the current problems with pain and suffering damages in Russia. It also helps to reveal the basic features of European tort systems which lead to a higher level of pain and suffering damages. Socio-legal scholars explain the differences in awards for pain and suffering damages across countries by reference to tort law culture. For example, the clear difference between levels of these damages in Europe and US was found to be largely determined by the specific institutional context in the latter: 'civil juries, contingency fees, punitive damages, and, most importantly, broad principles such as informed consent for medical treatment, or strict "enterprise" liability for defective products'.⁶⁶ The differences between Russia and Europe are even more substantial in this area. The level of pain and suffering damages awards in Russia is significantly lower than in Europe. Oliphant's fourth definition is helpful in explaining this difference in awards and providing possible solutions.

And finally, cultural values (the fifth definition) refer to the fundamental principles on which the tort system is based and which can be expressed among other things in the assessment of damages.⁶⁷ Pain and suffering damages have a particularly evident cultural dimension. Marc Galanter emphasises this aspect in his discussion of the relationship between injuries and remedies:

We recognize that remedies are cultural constructs: it is not a natural given that an injury is adequately erased or cancelled or balanced by revenge, payment, condemnation, or apology. What satisfies our sense of an appropriate and adequate remedy clearly depends on the cultural presuppositions that we bring to the question.⁶⁸

Harry Zavos, for example, suggests that 'noneconomic damages symbolically affirm that the plaintiff has been wrongfully deprived of something of value, even though that value cannot be

⁶⁶ Efstathios K Banakas, 'The Method of Comparative Law and the Question of Legal Culture Today' (1994) 3 *Tilburg Law Review* 113, 136.

⁶⁷ Oliphant (n 43) 149.

⁶⁸ Marc Galanter, 'The Dialectic of Injury and Remedy' (2010) 44 *Loyola of Los Angeles Law Review* 1, 2.

expressed at its fair market equivalency'.⁶⁹ A similar idea is expressed by Margaret Radin, who writes that 'compensation can symbolize public respect for rights and public recognition of the transgressor's fault by requiring something important to be given up on one side and received on the other, even if there is no equivalence of value possible'.⁷⁰ Furthermore, the symbolic meaning of non-pecuniary damages is explained in the article by Lars Noah who argues that 'in addition to providing a form of consolation, non-pecuniary damages may serve a symbolic purpose in expressing society's acknowledgement of (and respect for) the victim's right to bodily integrity and disapproval of the harm caused by the tortfeasor'.⁷¹ The definition of cultural values allowed me to uncover the importance of Soviet cultural attitudes towards pain and suffering damages and liability insurance. These attitudes, as will be demonstrated, have largely shaped the practice of awarding pain and suffering damages in Russia.

The fifth definition demonstrates that changes in legislation are not sufficient without changes in cultural values. This approach is able 'to show how extra-legal social processes construct dynamic meanings and legal norms, complicating the latter, which implies that law is fixed and defined'.⁷² This dynamic perspective can demonstrate that legal rules frequently do not work as originally planned due to the social and cultural context. This context must be taken into account when providing policy recommendations. The doctrinal approach is rightly criticised for its stagnant and rigid view of law 'as an autonomous system (independent of political, economic, cultural, religious, racial or gender interests) capable of operating as an instrument of regulation and as an impartial arbiter of disputes'.⁷³ In contrast, the socio-legal approach to torts is more prepared to explore legal transformation influenced by changing cultural values. This capacity of socio-legal studies to reflect transformation, for example, is mentioned by David Engel in his cultural analysis of torts:

⁶⁹ Harry Zavos, 'Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages' (2009) 43 *Loyola of Los Angeles Law Review* 193, 197.

⁷⁰ Margaret Jane Radin, 'Compensation and Commensurability' (1993) *Duke Law Journal* 56, 69.

⁷¹ Lars Noah, 'Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages' (2008) 42 *University of Michigan Journal of Law Reform* 431, 440.

⁷² Hajar Yazdiha, 'The Relationality of Law and Culture: Dominant Approaches and New Directions for Cultural Sociologists' (2017) 11 *Sociology Compass* 1, 2.

⁷³ Reza Banakar, *Normativity in Legal Sociology* (Springer 2014) 159.

The challenge for the socio-legal analysis of tort law, then, is to view both injuries and remedies as cultural constructs and to theorize how these constructs evolve and transform over time and in different social and economic circumstances.⁷⁴

Socio-legal studies demonstrate how social and cultural dimensions of tort law become significant when market values start to infiltrate communities or societies previously not familiar with this system of values.⁷⁵ This is strongly relevant to the issues discussed in this thesis. The transition from the socialist to the market economy after the collapse of the Soviet Union revealed the role of cultural values in the development of tort law. The implementation of a new institution of pain and suffering damages in the 1990s was intended to model the remedy available for a long time in the developed Western societies. The changes of official rules, however, did not lead automatically to the changes in the realm of tort law culture. This contributes to the problems with pain and suffering damages which accident victims currently face in Russia.

For the reasons discussed above, the socio-legal approach to tort law culture is applied throughout the thesis. It allows me to examine the current problems with the system of compensation for pain and suffering in Russia: low level and inconsistency of damages, complex claims procedure, and poor awards enforcement. Moreover, the concept is also useful in providing policy recommendations on how to improve the current situation and bring justice to accident victims in Russia. The understanding of tort law culture in this thesis is largely based on the definitions suggested by Kenneth Oliphant. So viewed, the key elements of tort law culture relevant to the research are liability insurance, practices of legal professionals and cultural attitudes towards pain and suffering damages.

2.4 Methods and Data

The use of the socio-legal approach requires a corresponding set of research methods. The research is based on qualitative methods including the textual analysis of judgments, expert

⁷⁴ Engel 'Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation' (n 56) 37.

⁷⁵ David M Engel, 'The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community' (1984) 18 *Law and Society Review* 551; David Engel and Jaruwat Engel, *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand* (Stanford University Press 2010).

interviews with legal practitioners, and online communication on professional blogs and forums. A variety of secondary sources were also used in the thesis research: official court statistics, sociological surveys, media materials, and scholarly publications.

2.4.1 Analysis of Judgments

The primary qualitative method employed in the research is the textual analysis of Russian court judgments. It is different from the traditional doctrinal approach to analysis of judgments. The qualitative textual analysis employed in this thesis is focused mostly on first instance court decisions and regular patterns in the litigation behaviour of judges, claimants, lawyers, and insurers expressed in these documents. The attention is paid, therefore, to typical rather than extraordinary cases. The doctrinal analysis, instead, would be most interested in higher courts' decisions where a binding legal position is formulated. Another distinctive feature of the thesis approach to the examination of court judgments is its attention to personal stories of victims in these materials.

For this analysis, several samples of judgments have been collected through public databases of Russian civil cases. The first sample includes 674 appeal judgments for the 2016 year. The analysis of these judgments helped identify the problems with pain and suffering damages in Russia. It gave me the idea of how these damages are awarded in various categories of cases. The search was made by the key terms 'moral damage' (*moral'nyj vred*) and 'personal injury' (*vred zdorov'yu*) in the database Consultant Plus.⁷⁶ This database provides access to its archives of appeal judgments on a non-commercial basis at weekends and between 8-12 pm during working days. The sample was prepared after filtering out irrelevant cases such as moral damages for wrongful deaths and for moral harm caused to the relatives of the injured victims. These two categories of cases are out of the scope of the thesis research as it is dedicated to pain and suffering damages caused by personal injuries.

The second sample includes judgments on railroad accident cases. This is the only area where voluntary liability insurance for pain and suffering damages is applied systematically in Russia. The

⁷⁶ The Legal Database Consultant Plus < <https://www.consultant.ru/online/> > accessed 17 January 2022.

analysis of these judgments helped to understand whether this insurance scheme addresses the problems with pain and suffering damages. More specifically, this sample includes judgments on railroad accidents rendered by Russian appeal and first instance courts in 2017-2019. This period allowed observing recent trends in court practice. The idea to collect the most recent decisions for 2020 had to be abandoned due to potential distortions in court caseload caused by COVID-19 pandemic.

These judgments have been obtained from the official database called The State Automated System of the Russian Federation 'Justice'.⁷⁷ This database contains full-text judgments and some basic information about the court case (names of judges and parties, dates, procedural actions, and appeals). The search was performed by the key words 'moral damage' (*moral'nyj vred*) and the full name of the defendant 'Russian Railways' (*Rossiyskie Zheleznye Dorogi*) or its commonly used acronym 'RZD'. There was no need, as for the first sample, for adding the key words 'personal injury' since almost all cases involving RZD were personal injury cases. The search was limited by the closely stated words, otherwise the system gives thousands of cases that contain any of the key words. There is no option to search by both exact terms using the operator 'and' between them. This limitation could exclude some potentially relevant cases from the analysis. However, their number is unlikely to be large for the following reasons. The introductory section of judgments normally contains the name of the defendant and the subject matter of the claim (moral damage) right after it or close to it. This is the standard way of structuring judgments adopted in the Russian court system. Therefore, the search by the closely stated words covers almost all relevant cases.

The search following these criteria gave 3,296 judgments. However, a substantial proportion of these judgments duplicated each other. The reason is that the full and short versions of the defendant's name frequently were used simultaneously in the same judgment. That is why the same judgment could be listed on the database more than once. All these extra judgments were filtered out of the sample. At the next stage, all irrelevant cases were sorted out from the analysis. First, I excluded all fatal cases which constituted the majority of the collected cases. In contrast to the UK approach,⁷⁸ a claim for personal injuries, including pain and suffering, does not survive

⁷⁷ The State Automated System of the Russian Federation 'Justice' <<https://bsr.sudrf.ru>> accessed 17 January 2022.

⁷⁸ Law Reform (Miscellaneous Provisions) Act 1934.

victims under the Russian tort system. That means there is no option to claim for pre-death pain suffered by the deceased. Nonetheless, the relatives can claim compensation for the emotional harm caused to them by the wrongful death of their family member (also called 'moral damages'). However, this remedy is not the subject of this thesis. I also excluded cases where the victims were the defendant's employees as they are not covered by the insurance for pain and suffering damages. Finally, I excluded cases where the victims were passengers aboard the train as this category of victims is also not covered by the insurance for pain and suffering damages. Thus, the categories of victims left were trespassers and passengers who were injured outside the train. These limitations significantly reduced the number of relevant cases leaving only 279 judgments for further analysis with the aim to look at how voluntary liability insurance operates in these cases.

The judgments were analysed with the assistance of the software NVivo.⁷⁹ The use of this software facilitates significantly the analysis, but it could not replace the researcher's interpretative work completely. The software can only make this process faster and more convenient. The researcher still needs to read the transcripts or documents carefully and to determine whether a certain segment of the text is relevant or not to the research problems.⁸⁰ The basic method implied attribution of the relevant parts of the judgments to categories ('nodes'). The number of categories was initially limited to few basic topics broadly defined such as the participation of the insurer, interpretation of the insurance contract, defendant's objections and arguments, settlements, and the role of lawyers. The relevance of these topics was revealed during the initial analysis of appeal judgments discussed above and by reading scholarly literature. However, more detailed categories and sub-categories were created during the study. It can be said that the data itself frequently guides the analysis in qualitative research.⁸¹ As a result, more issues and topics

⁷⁹ Free tutorials were found on the official NVivo site <<https://www.qsrinternational.com/nvivo-qualitative-data-analysis-software/support-services/customer-hub/getting-started/>> accessed 17 January 2022.

⁸⁰ Alan Bryman and Robert G Burgess, 'Reflections on Qualitative Data Analysis' in Alan Bryman and Robert G Burgess (eds), *Analysing Qualitative Data* (Routledge 2002).

⁸¹ For example, consider 'You may be asking yourself: How do I decide what is relevant? The answer is that there is no rule. Relevance is subjective. Passages are relevant if they seem so to you <...> In fact, as you continue to read the transcripts and become more and more familiar with the data, you will develop a sense of what is important and what is not.' in Carl Auerbach and Louise B Silverstein, *Qualitative Data: An Introduction to Coding and Analysis* (New York University Press 2003) 48.

than initially anticipated were revealed during the analysis as, for example, the prominent role of state procurators or resistance of Russian judges towards precedents.

The number of collected cases was not considered to be sufficient for a full-scale statistical analysis, for example, regression modelling. However, it was decided to utilise the method of content analysis which is understood as a qualitative method of textual analysis. This involves counting certain categories within the analysed documents. This method is relatively popular in legal research that is based on the analysis of court cases. As Lisa Webley explains the gist of this research method: 'It reduces text to codes by categorizing items in the text and then counting occurrences of those items to allow inferences to be drawn from the document'.⁸² The main reason for utilising this method was its usefulness in identifying the most typical patterns in the analysed cases.

Twenty-six analytical categories were created, among which the most important were the name of the region; the dates of the claim submission and decision; participation of state procurators and their position towards damages; professional legal representation; the gender of judges, lawyers, claimant, and procurators; the status of a minor-victim; the appeal submission and its outcome; the quantum of pain and suffering damages claimed and awarded. These topics are covered by Oliphant's definitions of tort law culture discussed above. This data is widely used in Chapter 5 in the discussion of railroad accident cases for addressing the question of whether voluntary liability insurance solves the problems with pain and suffering damages and improve the situation of victims.

2.4.2 Professional Blogs and Forums

The further source of data was online communication on professional legal forums, blogs, and social media. With the rapid development of Internet platforms and social networks in recent times, online communication has become a very promising source of data for qualitative sociological studies:

⁸² Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 941.

As a communication medium, a global network of connection, and a scene of social construction, the Internet provides new tools for conducting research, new venues for social research, and new means for understanding the way social realities get constructed and reproduced through discursive behaviours.⁸³

The socio-legal qualitative studies are no exception. The professional communication between lawyers, as well as between lawyers and their clients, is gradually shifting to the Internet space. This is even more valuable data than interviews since this communication is not influenced by the researcher. As Annette Markham notes, 'Internet communication gives qualitative researchers an intriguing opportunity to witness the social construction of reality as it occurs textually'.⁸⁴ Access to online data is easier for a researcher than participant observation of real-life communication, without any risk of the potential influence of a researcher's presence on the content and structure of communication:

Observing Internet use as it constructs social reality can be accomplished easily; obtaining access to online groups is a straightforward process, as is downloading and archiving the interactions of these groups.⁸⁵

There were three online resources from which the data has been collected. They are all professional online platforms of practising lawyers. The data from these sources provides opinions of lawyers on the main issues they come across in personal injury cases. In addition, this data was helpful in finding rare cases where defendants were covered by voluntary liability insurance for pain and suffering damages. It was also particularly useful for examining how parties reach settlements in the cases on pain and suffering damages. That occurs infrequently in the Russian tort law culture.

The first resource is a social network of lawyers *Zakon* ('Law')⁸⁶ with mandatory status verification for opening an account and publishing posts there. This means that the website administration

⁸³ Annette N Markham, 'Internet Communication as a Tool for Qualitative Research' in David Silverman (ed), *Qualitative Research: Theory, Method and Practice* (SAGE Publications 2004) 95.

⁸⁴ *ibid* 116.

⁸⁵ *ibid* 118.

⁸⁶ Social Network for Lawyers 'Zakon' < <https://zakon.ru/> > accessed 17 January 2022.

requires a confirmation that the applicant is actually a lawyer. The main active audience of this network consists of lawyers from prominent law firms, often a branch of a foreign firm, and legal scholars. Access to communication and all materials is public.

The audience of the second forum *Pravorub* ('Law-Teller', the play of words out of similarly sounded 'Truth-Teller' in Russian)⁸⁷ also contains confirmed lawyers, but they practise in less commercially attractive areas such as, for example, road traffic accidents. The data on this forum was extremely valuable for this research as personal injury cases fall exactly within this area of legal practice. The search for relevant materials was made by the tags 'moral damages', 'road traffic accidents', and 'personal injuries'. The communication and all materials are also public.

The third resource is the forum *Yurclub* (Legal Club)⁸⁸ which does not require mandatory verification of the status. Therefore, the data from this resource was used cautiously in the research. This data was triangulated by the information from two other platforms as well as by other empirical data. The same as in the previous two cases, online communication and all materials are public on this resource.

The approach to the analysis was similar to the analysis of judgments and interviews. The relevant posts and comments were saved in a PDF format and uploaded to the NVivo database. The materials obtained were coded in a similar fashion as the interviews and judgments. I created the categories which reflected the main problems of this research and then attached the relevant parts of the texts to these categories. The primary focus was on the role of liability insurance for assessing pain and suffering damages. This data was particularly helpful for assessing potential impact of compulsory liability insurance on the problems with pain and suffering damages (discussed in Chapter 7). In particular, the analysis of this data helped me to understand how Russian courts take decisions on pain and suffering damages in cases involving a defendant who is covered by liability insurance for such damages (discussed in more detail in section 7.2.2). Moreover, this analysis allowed me to estimate whether claimants are prepared to settle cases on pain and suffering damages if defendants make an offer (discussed in section 7.2.4).

⁸⁷ Professional Forum for Lawyers 'Pravorub' < <https://pravorub.ru/> > accessed 17 January 2022.

⁸⁸ Professional Forum for Lawyers 'Yurclub' < <http://www.yurclub.ru/> > accessed 17 January 2022.

2.4.3 Secondary Sources: Official Statistics, Sociological Surveys, and Media Materials

The official statistics of the Russian Judicial Department was widely used in this research. It is publicly available in the form of Excel tables, which provide aggregated data about civil cases on the annual basis.⁸⁹ The relevant statistics include the number of personal injury cases, the number of cases on pain and suffering claims, the total amount of pain and suffering damages awarded in personal injury cases over the year, the total amount of pain and suffering damages claimed by victims, and the total legal costs awarded in personal injury cases. This data was particularly helpful for the analysis of the first and third problems with pain and suffering damages in Russia, i.e. low level of damages and a small number of settlements (discussed in Chapter 3). It must be noted that although the data allows calculating the average awards, it cannot provide the median sums of damages or legal costs. In addition, the official statistics of the state bailiff's service was used to evaluate the efficiency of the enforcement of awards in civil cases, i.e. the fourth problem (also discussed in Chapter 3).

The surveys of public opinion performed by the Finance University were used as secondary data in the research.⁹⁰ The sample included around 600 respondents from different regions of the Russian Federation. The official statistics of road traffic accidents⁹¹ and insurance companies⁹² were also utilised in the study. This data was most helpful for discussing the prospects of the development of compensation culture and the demand for liability insurance in Russia.

Finally, articles from newspapers and magazines were used in the research as supplementary material. The potential of these sources should not be underestimated. Newspaper materials were, for example, productively utilised by Lawrence Friedman and his colleagues in their now

⁸⁹ Judicial Department (n 5).

⁹⁰ The detailed summary of the survey is available in 'The Russians Have Indicated Just Compensation of Moral Damage for Personal Injury and Bereavement' Advocate Gazette (22 November 2019) <<https://www.advgazeta.ru/novosti/rossiyane-nazvali-spravedlivyy-razmer-kompensatsii-moralnogo-ushcherba-za-vred-zdorovyu-ili-poteryu-blizkikh/>> accessed 17 January 2022.

⁹¹ Road Traffic Police (n 9).

⁹² The official web site of the Russian Central Bank <https://cbr.ru/insurance/reporting_stat/> accessed 17 January 2022.

classic study of criminal justice in the US.⁹³ Similarly, the Russian newspaper and magazine articles contained stories and case reports that differ from typical cases. It is obvious that media are more interested in atypical and sensational cases (the notorious McDonald's coffee case is a telling example)⁹⁴ and sometimes tend to exaggerate and misrepresent facts. A comparison with actual judicial practice (i.e. typical cases) compensated for possible journalistic exaggeration and misrepresentation. This approach helped to understand what is a norm and what is a departure from the norm in relation to pain and suffering damages awards. Newspapers and magazines also contained materials of a more analytical nature such as interviews or expert opinions of interested parties on the problems with pain and suffering damages. This all justifies the use of these sources in the research.

Therefore, the analysis of media material was largely focused on personal injury cases where abnormally high or small compensation was awarded. For example, I found the information about unprecedentedly high compensation awarded by St Petersburg court in a magazine article. This information helped me to understand in which circumstances Russian courts tend to increase the award of pain and suffering damages compared to median and mean awards (discussed in more details in section 3.2.1). Furthermore, newspaper and magazine articles were extremely valuable for analysing the judicial approach towards pain and suffering damages in Russia. As mentioned above, the primary source for understanding this approach was the analysis of judgments on pain and suffering damages. It was not possible to collect interviews with judges since the Russian judiciary is a closed professional group to which researchers normally have not access. However, media interviews with ex-judges (Sergei Pashin and Sergei Savostyanov) and active judges (Alexandr Tranzlov) helped me to gain an insight into the judicial practices related to pain and suffering damages. The information from these interviews, for example, was used in the analysis of the difference between senior and younger judges in their approach to pain and suffering damages, the role of appeal courts in setting the level of pain and suffering damages, and the resistance of Russian judges towards precedents (discussed in section 4.4).

⁹³ Lawrence M Friedman, 'Lawrence Friedman and the Roots of Justice' in Simon Halliday and Patrick Schmidt (eds), *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press 2009).

⁹⁴ Kevin G Cain, 'The McDonald's Coffee Lawsuit' (2007) 11 *Journal of Consumer and Commercial Law* 14.

2.4.4 Expert Interviews

The analysis of expert interviews is a supplementary method that was intended to illustrate the information obtained from other sources. The excerpts from the interviews are helpful in the sense that they can exemplify from a first person's perspective some findings of the thesis. Nevertheless, all key conclusions were made drawing on other evidence, primarily, the database of court judgments. Moreover, I specifically address the cases when the opinions of the interviewees are inconsistent with the data from judgments as, for example, in assessing the role of appeal courts in Chapter 5. The main limitation of the interviews is the small sample. Overall, interviews were conducted with only 11 respondents of which four were from England and seven were from Russia. The sample is too small for treating it as representative of Russian and English legal practitioners. Clearly, more interviews would give a broader picture. For example, Richard Lewis' research project draws on 29 interviews in his analysis of lawyers' tactics⁹⁵ and the role of claimants' personality⁹⁶ in tort cases. However, it is worth emphasising that the expert interviews were not the primary method in the thesis research. The reader should keep that in mind when coming across the interview excerpts in the text.

The method of sampling these interviews can be described as a mix of 'convenience sampling' and 'snowball sampling'. The former means 'recruiting whomever you access to' whereas the latter means 'starting with a convenience sample of a few research participants and asking them to select others'.⁹⁷ The first respondents were found through personal contacts. They recommended, in turn, further respondents. The interviewees are not representative of the Russian and English legal professions. However, that is not critical for the chosen research design in which semi-structured expert interviews focused on professional practices and expert opinions of the respondents. There was no intention to prepare a large-scale survey of legal professionals which would require a more complicated random sampling or reveal their phenomenological inner world which would require in-depth interviews.

⁹⁵ Richard Lewis, 'Tort Tactics: an Empirical Study of Personal Injury Litigation Strategies' (2017) 37 *Legal Studies* 162.

⁹⁶ Richard Lewis, 'Humanity in Tort: Does Personality Affect Personal Injury Litigation?' (2018) 71 *Current Legal Problems* 245.

⁹⁷ Auerbach and Silverstein (n 81) 18.

As Amir Marvasti notes, 'it is important to keep in mind that your choice of interview technique should be in synch with the topic of your interest and the questions you wish to answer'.⁹⁸ Therefore, the main principle of sampling was to recruit at least a few participants which would represent different interested groups involved in personal injury litigation: defendant lawyers, claimant lawyers, insurance lawyers, and state procurators. This approach to sampling in a way resembles 'stratified sampling' which is particularly helpful in studying the legal profession. As Lisa Webley describes this sampling technique:

I[[f the research concerns the views of legal professionals, the sample may include a certain number of judges, a certain number of advocates, and a certain number of transactional lawyers in order to capture a full range of views among legal professionals.⁹⁹

However, the size of the sample was not sufficiently representative for the full adoption of this method. In particular, it was not possible to organise interviews with judges since it is an extremely closed and impenetrable professional group in Russia. Therefore, the judicial approach to pain and suffering damages is discussed in this thesis based on the Russian judges' statements in open sources (in most cases, retired judges who are more willing to speak in media) and in official court judgments.

Overall, expert interviews with 11 respondents were conducted: four in the UK: 2 defence personal injury lawyers, 1 claimant personal injury lawyer, 1 personal injury lawyer with a mixed specialism; and seven in Russia: 4 claimant personal injury lawyers, 1 insurance company lawyer, 1 advocate, and 1 state procurator regularly participating in personal injury cases. The full list of interviewees with some background information can be found in Appendix 1. In regard to the interview settings, the main principle implied 'finding a space that is available for use, convenient and accessible to participant and researcher, where you could avoid interruption and make an adequate sound recording of the conversation'.¹⁰⁰ The interviews, therefore, were held in different circumstances depending on the preference of the respondents and the appropriateness of places. They were organised in the informants' offices as well as in cafés or pubs nearby.

⁹⁸ Amir Marvasti, *Qualitative Research in Sociology: An Introduction* (SAGE Publications 2003) 36.

⁹⁹ Webley (n 82) 934.

¹⁰⁰ Rosalind Edwards and Janet Holland, *What is Qualitative Interviewing?* (Bloomsbury Academic 2013) 43.

Two lawyers were found through the working group of the Association of Russian Lawyers for reforms in the area of pain and suffering damages. They practise in Moscow and Nizhny Novgorod (a large Russian city with a population above 1 m). The other two lawyers were recruited based on their previous participation in the research on the Russian legal profession.¹⁰¹ They practice in Ekaterinburg (population also above 1 m) and specialise mostly in road traffic accident cases. The insurance lawyer was found through personal contacts. He has been working for various insurance companies in St. Petersburg for about ten years dealing mainly with personal injury claims. The advocate from Vladimir specialising in criminal law (mostly), civil and family law as well as the state procurator handling civil cases (including personal injury cases) were found through personal contacts.

The interviews lasted about an hour and a half each and were audio-recorded. The design of the interviews can be characterised as semi-structured. The interview guide with some variations for different groups of informants can be found in Appendixes 2 and 3. It was suggested, for example, to describe the interviewees' typical professional practices, to identify main problems with pain and suffering damages or to characterise the approach of judges and procurators to the quantum of damages. However, our conversations sometimes deviate significantly from the prepared questionnaire which is expected during a semi-structured interview. The technique of semi-structured interview combines the advantages of structured and in-depth interviews. According to Bill Gillham: 'One of the strengths of the semi-structured interview is that it facilitates a strong element of discovery, while its structured focus allows analysis in terms of commonalities'.¹⁰²

The obtained recordings were then transcribed and translated. The translation from Russian to English of the excerpts from the interviews with Russian lawyers is mine. The main strategy was to make a literal translation wherever it was possible. However, colloquial expressions, wordplay, and special terminology were translated by the most appropriate English substitutes. As Bogusia Temple notes, 'when accounts are translated into different languages it may be necessary try to convey meaning using words other than literally translated equivalents'.¹⁰³ Moreover, Herbert

¹⁰¹ Timur Bocharov and Ekaterina Moiseeva, *Being a Lawyer in Russia: Sociological Study of the Legal Profession [Byt' advokatom v Rossii: Sociologicheskoe issledovanie professii]* (European University Press 2017).

¹⁰² Bill Gillham, *Research Interviewing: The Range of Techniques* (Open University Press 2005) 72.

¹⁰³ Bogusia Temple, 'Watch Your Tongue: Issues in Translation and Cross-Cultural Research' (1997) 31 *Sociology* 607, 610.

Phillips suggests explaining separately phrases which contain meanings other than literal translation.¹⁰⁴ This approach to translation was used in this thesis. So, the most complicated and multilayer Russian terms and expressions were specifically clarified in parenthesis or footnotes.

Similarly to the court judgments, the collected interviews were analysed with the assistance of NVivo software. For that purpose, the transcripts and audio recordings of the interviews were uploaded to the NVivo database. Then, the parts of the interviews were attributed to the topics which are relevant to the research problems of this thesis. These topics include the views of lawyers on the current level of pain and suffering damages, the approach of the judiciary to pain and suffering damages, the role of liability insurance in personal injury litigation, settlements, the impact of the defendant's financial situation on damages assessment, specialisation of lawyers in personal injury cases, the views on the potential reforms of pain and suffering damages, the involvement of procurators in cases on pain and suffering damages (only for interviews with Russian lawyers), and the existence of compensation culture (only for interviews with British lawyers). In the course of coding, some other categories were added if they were mentioned during the interviews. Such categories include, for example, the role of defendant's apologies in personal injury litigation or evidence used for claiming pain and suffering damages. However, these categories were not used in further analysis as proved to be only peripheral to the main problems of this research.

The analysis of the interviews largely focused on the role of liability insurance in the UK and Russia. It facilitated a better understanding of the specifics of the Russian approach in contrast to the situation in the UK. However, other relevant components of personal injury litigation (such as legal funding, appeals or settlements) were also discussed in interviews as they constitute important elements of tort law culture. And finally, all Russian interviewees were asked to provide their expert opinion on how the problems with pain and suffering damages could be addressed. This data was particularly helpful for the discussion of potential solutions to these problems in Chapter 7.

It should be noted that the results of the interviews were analysed cautiously taking into account that participants' perspectives can be determined by their professional interests. Their opinion

¹⁰⁴ Herbert Phillips, 'Problems of Translation and Meaning in Field Work' (1959) 18 *Human Organization* 184, 191.

could be also limited by their personal experience and location of practice which might vary from the general picture. The analysis in Chapter 5 will specifically address the cases when the opinions of the interviewees are inconsistent with the data from judgments (as, for example, in assessing the role of appeal courts). Nevertheless, the attitudes and opinions of lawyers is a valuable research source since they demonstrate how social actors see and present the situation, even if it does not always match the reality.

In sum, the analysis of interviews helped me to compare the views of different respondents on the same subjects such as, for example, liability insurance, settlements, conditional and contingent fees, and the level of pain and suffering damages. These are the key elements of tort law culture which this research has examined in great detail.

2.4.5 Ethical Considerations

The data from online blogs and social media is publically accessible. Therefore, there was no need for obtaining formal consents from the participants. The rule of the SLSA Statement of Principles of Ethical Research Practice¹⁰⁵ concerning this situation is the following: ‘Where data is gathered through observation of behaviour occurring in public there may be no expectation of privacy and hence no need for consent from all of the observed people’ (para 7.1.3). This provision is applicable to online communication. The ethical guidelines of the Association of Internet Researchers suggest taking into account whether the Internet resource is explicitly public or based on the implicit assumption of confidentiality:

[I]f the research focuses on publicly accessible archives; inter/actions intended by their authors/agents as public, performative (e.g., intended as a public act or performance that invites recognition for accomplishment), etc.; venues assigned the equivalent of a ‘public notice’ that participants and their communications may be monitored for research purposes; ... then there may be less obligation to protect individual privacy.¹⁰⁶

¹⁰⁵ The SLSA Statement of Principles of Ethical Research Practice

< https://www.slsa.ac.uk/images/2019summer/SLSA_Ethics_Statement_Final_2.pdf > accessed 17 January 2022.

¹⁰⁶ Charles Ess and the AoIR Ethics Working Committee, ‘Ethical Decision-making and Internet Research: Recommendations from the AoIR Ethics Working Committee.’ Approved by AoIR, November 27, 2002. <www.aoir.org/reports/ethics.pdf> accessed 17 January 2022.

The professional legal forums and networks are intentionally public. Russian lawyers use these resources to share professional news, discuss legal problems and recent cases, attract clients, and so on. However, it is possible that some sensitive data could be occasionally discussed on social media and blogs despite its open access. That is why the names of victims or any other potentially sensitive data were anonymised in this thesis.

Court judgments in Russia are also openly accessible and already anonymised in most cases. Where a judgment contained personal data, it was anonymised for the purposes of the research. The reason is that personal injury cases usually include such private information as clinical record or financial situation of victims which is potentially sensitive. The collected empirical data was stored strictly in accordance with the requirements and standards of the European Union General Data Protection Regulation 2016/679.

Concerning expert interviews, formal approval from the Kent Law School Ethics Committee had been granted prior to starting their collection. The interviews were not performed until explicit oral consent to participate in an interview had been obtained from the respondent. It is considered important in socio-legal studies for the consent to be informed. This means disclosing to the interviewees as fully as possible the following information:

In most circumstances, researchers must provide potential participants with information about the purpose, methods, demands, risks, inconveniences, discomforts and possible outcomes of the research, including whether and how the research results might be disseminated.¹⁰⁷

The common convention is that 'informed consent is given when there has been no pressure exerted and no manipulation in obtaining consent'.¹⁰⁸ Following these principles, the interviewees were informed about the focus and aims of the research and its potential outcome in the form of a doctoral dissertation. They willingly agreed to participate in the interviews. Full anonymity was guaranteed to all participants before the start of the interviews. The collected data is stored in line

¹⁰⁷ Mark Israel, 'Research Ethics and Integrity in Socio-Legal Studies and Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 187.

¹⁰⁸ Andrew Boon, 'The Formalisation of Research Ethics' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing 2005) 275.

with the University of Kent guidance on that issue.¹⁰⁹ The recorded voice files, as well as text transcripts of interviews, are kept on a hard disk of the laptop secured by a password. None besides me has access to the laptop. There was no use of cloud services or any other data depositories vulnerable to computer hacking and personal data leakage. The research materials on the laptop will be deleted within the year after finishing my research project.

2.5 Conclusion

The chapter has introduced the research approach and methods used in this thesis. The research approach is a conceptual framework through which this thesis looks at the topic of the study, whereas methods are concrete techniques of collecting and analysing empirical data. The research approach employed in this thesis is the socio-legal perspective on tort law culture. In contrast to doctrinal studies of tort law that focus on black-letter law, this approach helps to examine the relevance of the social, cultural, and political context to the situation with pain and suffering damages in Russia. The problems with these damages in Russia are largely determined by this context. The main topic of this research is whether compulsory liability insurance is a solution to the problems with pain and suffering damages in Russia. This thesis examines this topic using the concept of tort law culture. The socio-legal perspective on tort law culture is also helpful in discussing the implementation of compulsory liability insurance for pain and suffering damages drawing on the European experience in this area. This perspective facilitates the understanding that successful transplanting of a legal institution from one jurisdiction to another is possible only if cultural issues are taken into account.

This research approach required specific empirical methods of studying Russian tort law culture. The key element of tort law culture examined in this thesis is liability insurance. Therefore, qualitative textual analysis of court cases involving liability insurance was the principal method. It allowed me addressing the issue of how effectively voluntary liability insurance operates in railroad accident cases. The main aim of the research includes suggesting the most optimal solutions which would bring justice to victims of accidents. In searching this solution, a comparison of tort law cultures in Russia and other jurisdiction (England and Wales) is helpful. The situation

¹⁰⁹ The University of Kent Guidance on how to manage research data <<https://www.kent.ac.uk/guides/manage-your-research-data>> accessed 17 January 2022.

with pain and suffering damages is significantly better there compared to Russia in large part because the compulsory liability insurance scheme is one of the most extensive across Europe. With that in mind, the interviews with Russian and English lawyers were used for discussing the different role of liability insurance in the two jurisdictions. The expert opinions of Russian lawyers were also helpful in proposing recommendation on how to improve the current situation with pain and suffering damages in Russia. The online communication on professional blogs and forums gave a spectrum of opinions on the main problems with pain and suffering damages in legal practice. It was also particularly helpful for analysing the role of liability insurance and settlements in the claims for pain and suffering damages.

The above-described research approach and methods allowed me to reveal the key problems with pain and suffering damages in Russia, to identify the factors responsible for these problems and to propose the ways of addressing these problems. These problems are discussed in detail in the next chapter.

CHAPTER THREE. PAIN AND SUFFERING DAMAGES IN RUSSIA: THE PROBLEMS OF QUANTUM, INCONSISTENCY, CLAIMING, AND ENFORCEMENT

3.1 Introduction

This chapter will argue that the current situation with pain and suffering damages for personal injuries in Russia is deeply problematic, unjust to victims, and needs to be changed. Four main issues are identified: low level of award sums, inconsistency of awards, practical difficulties in claiming compensation and the enforcement of judgments. While first two problems are discussed in Russia relatively often, the remaining two problems are largely ignored. This chapter will offer an in-depth analysis of each drawing on secondary data (official statistics, expert reports, and sociological surveys) as well as interviews with Russian legal practitioners. In order to illustrate the identified problems, two vignettes of a typical road traffic and workplace accidents case will be provided in the final section. These vignettes help us understand how accident victims seeking compensation deal with the four problems at hand. Special attention will be given to the role of insurance in these scenarios.

3.2 First Problem: Low Level of Damages for Pain and Suffering

According to the opinions of practising lawyers, legal scholars, and the general public, the average quantum of pain and suffering damages is extremely low in Russia.¹ The quantum of pain and suffering damages in a given society is largely a result of the judges' views on what is adequate compensation. These views may correspond or not with the views of the practising lawyers, claimants, and ordinary people. Serious discrepancies between these groups in their estimations suggest that court awards can hardly be considered fair and reasonable from the society's point of view. Furthermore, the awards can be compared to the awards for analogous injuries in other

¹ For example, the resolution after the recent round table at the All-Russia Civil Forum 2019 emphasised two major problems with pain and suffering damages: 1. The low level of average awards; 2. Inconsistency of awards. Among the participants were representatives of the Bar, academia, the Constitutional Court, ombudsman office, human rights organisations, etc. <https://civil-forum.ru/news/podgotovlena-rezolyutsiya-kruglogo-stola-kompensatsiya-moralnogo-ushcherba-za-prichinenie-vreda-zhiz.html?sphrase_id=7417> accessed on 17 January 2022.

jurisdictions. A considerable gap in this area in a given country (*ceteris paribus*) means that accident victims are in a less advantageous position.

Bearing this in mind, this section starts with the estimation of average and median awards of pain and suffering damages in Russia drawing on official statistics and expert opinions. It will move on to compare these with the awards in other jurisdictions. A comparison will also be drawn with the views of the claimants, legal professionals, and members of the general public on what just and reasonable compensation should be.

3.2.1 Mean and Median Awards

The Russian Judicial Department provides court statistics detailing cases on moral damages caused by personal injuries from 2016. The data on the general number of these cases and the total amount of damages awarded is available. Therefore, mean award sum can be identified based on this data. The analysis of these statistics shows that the *mean* award sum of moral damages for personal injuries was 193,209 roubles (£1,930)² in 2019. Drawing on official judicial statistics, it is not possible to deduce a *median* award which would be a more accurate figure. The limitation of the average figure compared to the median is the effect of atypical high compensation in a particular case,³ while the awards in the majority of cases would be relatively moderate.

The median awards, nevertheless, can be found in research based on the survey of practising personal injury lawyers on their cases which involved pain and suffering damages.⁴ Their

² For contextualising this figure, the median monthly salary in Russia is 32,422 roubles (£324). See Russian Federal Agency of State Statistics <https://rosstat.gov.ru/labour_costs> accessed 17 January 2022.

³ These exceptional cases are mostly clinical negligence cases. For example, Primorskiy District Court of St Peterburg awarded 15 m roubles (£150,000) for the loss of child and severe birth-related injuries caused to mother in 2015. This award is far from typical. See in Nikita Aronov, 'Life at the Price of an iPhone: How the Russian System of Compensation for Material and Moral Harm Works [Zhizn' po cene 'ajfona' Kak ustroena rossijskaja sistema kompensacij material'nogo i moral'nogo vreda]' (2020) 7 Spark [Ogonjok] <<https://www.kommersant.ru/doc/4242286>> accessed 17 January 2022.

⁴ Irina Fast, Alexey Nesterov and Maria Sokolova, *Compensation of Moral Damages in Personal Injury Cases: Practical Results after 25 Years of the Institution's Existence in RF [Kompesatsiya moral'nogo vreda pri prichinenii vreda zhizni i zdorov'yu: prakticheskie itogi posle 25 let sushhestvovaniya instituta v RF]* (Analytical Report, 2018)

responses to the survey provided information about awards in 2,236 personal injury cases from 29 regions of the Russian Federation. The median award of pain and suffering damages was 140,000 roubles (£1,400) for a severe injury; 70,000 roubles (£700) for a medium injury, and 40,000 (£400) roubles for a minor injury. The allocation of median figures according to the categories of cases is as follows: road traffic accidents – 70,000 roubles (£700), work accidents – 80,000 roubles (£800), and criminal injuries – 170,000 roubles (£1,700).

Other data supports these estimations. For example, awards of moral damages varied from 5,000 (£50) to 70,000 roubles (£700) for small and medium degree of injuries and from 70,000 (£700) to 110,000 roubles (£1,110) for severe injuries according to the judicial practice of the Perm Regional Court.⁵ Another study of court cases shows that the awards for medium and severe injuries are from 25,000 (£250) to 200,000 roubles (£2,000).⁶ In tort cases where defendants were minors, pain and suffering damages awarded often did not exceed 100,000 roubles (£1,000).⁷

3.2.2 Views of Claimants on Just and Reasonable Compensation

A claim submitted to the Russian court must include 1) the quantum of pain and suffering damages sought and 2) its justification. The claimant's monetary estimation of suffering is information that is material for the correct resolution of a dispute and must be considered by Russian trial courts.⁸ However, the figure suggested by the claimant does not limit judicial discretion in awarding lower damages. In fact, in most cases, Russian courts awarded much less

<<https://platforma-online.ru/upload/medialibrary/d5d/d5d59ddff1111fa619f8c2d5e753cc6e.pdf>> accessed 25 January 2023.

⁵ Olga Kuznetsova, *Compensation for Non-Pecuniary Damage: a Practical Guide [Vozmeshcheniye moral'nogo vreda: prakticheskoye posobiye]* (Yustitsinform 2009).

⁶ Zunaida Pogosova, Vladimir Sidorov and Maria Redchits, 'Compensation for Non-Pecuniary Damage Caused by a Crime [Kompensatsiya moral'nogo vreda prichinennogo prestupleniyem]' (2014) 4 Law [Zakon] 165.

⁷ Igor Kornev, 'Children as Tortfeasors under Russian Law' in Miquel Martín-Casals (ed), *Children in Tort Law Part I: Children as Tortfeasors* (Springer 2006).

⁸ Para 1 of The Resolution of Plenum of the Supreme Court of the Russian Federation 'On Some Issues of the Application of Legislation on Moral Damages' of 20 December 1994.

than claimed by claimants. For example, in 2019, courts lowered pain and suffering damages claimed by claimants in 72% of judgments.⁹

The analysis of the quantum of pain and suffering damages claimed in Russian courts indicates that there is a significant gap between what claimants expect from the judicial system and how the judicial system responds to these expectations. For example, the average quantum of claimed pain and suffering damages in 2019 was 1,261,514 roubles (£12,615) which is much higher (six-fold) than the average damages actually awarded by Russian courts. This gap demonstrates that there is a clear difference between claimants' and judges' perceptions towards what they consider justified and reasonable quantum of pain and suffering damages to be. The allocation of cases by the quantum of claimed damages also illustrates this gap.

Table 1. The quantum of claimed pain and suffering damages in personal injury and fatal accident cases in 2016-2019

	<₽50K	₽50K-₽100K	₽100K-₽300K	₽300K-₽500K	₽500K-₽1m	>₽1m
2019	1,585	1,583	3,387	1,426	2,147	2,929
2018	2,350	2,128	3,436	1,335	1,920	2,671
2017	1,951	1,514	3,147	1,192	1,917	2,689
2016	648	656	1,254	465	709	904

As can be seen from *Table 1*, the largest category of claims for pain and suffering damages (26%) ranged from 100,000 roubles (£1,000) to 300,000 roubles (£3,000) which were close to the average award in 2019. This is a more or less 'realistic' approach. However, the second largest category (22%) included claims which were more than 1 m roubles (£10,000) and which could be described to represent an 'idealistic' approach. These claims are very unlikely to be fully satisfied but claimants continue to claim these damages in court.

However, the amount of claimed damages should be considered with caution. Sometimes it is a deliberate strategy that claimants use to 'anchor bias' of judges ('the more you ask, the more you

⁹ The Official Judicial Statistics for 2019 on the Judicial Department website <<http://www.cdep.ru/index.php?id=79>> accessed 17 January 2022.

get'), rather than their real views on what a just and reasonable amount of compensation should be. The effect of 'anchoring' on numerical estimations was firstly elaborated in the works of cognitive psychologists.¹⁰ This model was mostly applied to everyday life situations or their experimental simulations. However, there are several studies elaborating on this phenomenon in legal settings. For example, research by Gretchen Chapman and Brian Bornstein confirms a significant influence of damages estimations made by claimants' attorneys (*ad damnum*) on jury verdicts in the US.¹¹ Further studies explored this effect in combination with the impact of rebuttal sums suggested by defence attorneys.¹² They found that defence attorneys' recommendations influence jurors in their decisions and slightly reduce awarded compensation but cannot entirely exclude the effect of *ad damnum*. It was suggested that 'judges might avoid some of the unwanted effects of anchoring if they are aware of awards in comparable cases and can use this information as a source of anchors'.¹³ However, the 'anchoring' bias was also observed in the study of professional judges.¹⁴

It is possible that claimants in Russia take into account this effect. They could think that if they claim more, they will receive compensation higher than average. The large proportion of claims for pain and suffering damages of more than 1 m can be explained by this line of reasoning. Therefore, it would be reasonable to compare these figures with the opinions of laypeople who do not have a practical interest in overestimation.

3.2.3 Views of Lay People on Just and Reasonable Compensation

There is currently a substantial imbalance between ordinary people's expectations and how the court system actually operates in relation to pain and suffering damages. This discrepancy

¹⁰ Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124.

¹¹ Gretchen Chapman and Brian H Bornstein, 'The More You Ask For, The More You Get: Anchoring In Personal Injury Verdicts' (1996) 10 *Applied Cognitive Psychology* 519.

¹² Mollie Marti and Roselle L Wissler, 'Be Careful What You Ask For: The Effect of Anchors on Personal-Injury Damages Awards' (2000) 6 *Journal of Experimental Psychology* 91.

¹³ Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Inside the Judicial Mind' (2000) 86 *Cornell Law Review* 777, 826.

¹⁴ Jeffrey Rachlinski, Andrew J Wistrich and Chris Guthrie, 'Can Judges Make Reliable Numeric Judgments: Distorted Damages and Skewed Sentences' (2015) 90 *Indiana Law Journal* 695.

indicates that the current judicial approach to awards is not adequate and deprives accident victims from just compensation for their pain and suffering. One of the interviewees describes this difference between expectations and reality in the following way:

Well, you know, we all watch TV and American films where everyone just comes and gets millions as compensation. Everyone has this in mind because we do not show on TV a Russian legal series where compensation for pain and suffering is 1,000 [£10] roubles, thank you and goodbye. As a result, everyone has millions in their minds, but in fact, it is not true.¹⁵

The recent sociological survey performed by the Finance University and the Association of Russian Lawyers confirms that there is a significant difference between the current judicial practice and public views on the reasonable and just quantum of damages.¹⁶ The sample contained 600 respondents from 76 cities with a population of more than 250,000 citizens across the country. The participants were given seven scenarios of personal injury cases and fatal accidents and suggested to provide their estimation of just and reasonable compensation for pain and suffering. The average compensation for all situations was 8.8 m roubles (£88,000) with significant variations depending on the facts and degree of injuries. For example, the highest average quantum of pain and suffering damages (15.6 m roubles or £156,000) was suggested by the respondents for quadriplegia. The scenario was as follows: The young man fell from a height during the construction of the stadium, received severe spinal injuries and remained disabled. His arms and legs are completely paralyzed. The accident occurred due to the lack of fences at the facility due to the fault of the employer. Now the man is 34 years old, he needs constant care because due to an injury he cannot serve himself. A man is forever deprived of the opportunity to move around, and also to have a family and children.

A much lower award (2.8 m roubles or £28,000) was given for temporary brain injury along with fractured ribs. The following scenario was suggested: The bus driver, not making sure that all passengers entered the passenger compartment, began to move. At the same time, a woman (55 years old) fell out of the bus and suffered a fracture of 2 ribs, lacerated wounds to her arms and

¹⁵ Interview with a personal injury lawyer from Ekaterinburg.

¹⁶ 'The Russians Have Indicated Just Compensation of Moral Damage for Personal Injury and Bereavement' *Advocate Gazette* (22 November 2019) <<https://www.advgazeta.ru/novosti/rossiyane-nazvali-spravedlivyy-razmer-kompensatsii-moralnogo-ushcherba-za-vred-zdorovyu-ili-poteryu-blizkikh/>> accessed 17 January 2022.

legs, and a concussion. After treatment for 4 weeks, the condition improved markedly. However, after this incident, there was a fear of public transport, which is forced to use daily.

Interestingly, the lowest figure (2.3 m roubles or £23,000) was given to the injured in a strict liability case with the following scenario: In 2019, a 64-year-old man died under the wheels of a car. He crossed the road in the dark outside the pedestrian crossing. By law, car owners are liable even if they are not to blame. The wife-pensioner was left alone. Adult children live separately. Feeling of loneliness and fear of coming old age worsen the health of a woman. The estimated award demonstrates that ordinary people tend to take into account the issue of fault in assessing damages.

The highest figures were given by the members of the following social groups – businessmen, students, managers and professionals, while the lowest by the military, law enforcers, service and labour workers. This allocation represents some obvious class distinctions: a businessman whose financial situation is better than the labourer's, tends to also produce higher assessment of damages. Furthermore, people working in private and public sectors share different views on this issue. Those working in the private sector tend to attribute higher value to pain and suffering damages compared to those working in the public sector. This tendency can also be observed in court practice, where the attitudes of the judiciary and procurators towards pain and suffering often translate into low quantum of damages awarded to claimants.

3.2.4 Views of Lawyers on Just and Reasonable Compensation

All Russian personal injuries lawyers interviewed during the research characterise the current level of compensation as deeply problematic:

There are many problems. There is, firstly, a problem with low compensation for pain and suffering, that is, the median value is very low. It is impossible to predict the amount to be recovered, and in many categories of cases, this is the only compensation to which the victim is entitled.¹⁷

¹⁷ Interview with a personal injury lawyer from Nizhniy Novgorod.

Yet, lawyers being fully aware of the typical amount of damages in contrast to their clients still claim damages substantially higher than this amount. The rationale for that is the wish to change the current situation with pain and suffering damages:

I said [to the claimants], let's claim higher compensation. Because I have a professional interest, as a lawyer, in raising the level of compensation, for my clients and in the region as a whole. Because the current amounts are inadequate, simply inadequate.¹⁸

Secondary sources confirm these attitudes among legal practitioners. For instance, a sociological survey of lawyers indicates that the situation with the quantum of pain and suffering damages is not satisfactory in Russia.¹⁹ 1,200 participants with different legal background were surveyed: the majority was private practising lawyers (in-house or advocates) and only 7% of respondents were from the public sector (judiciary – 1%, court clerks and assistants – 2%, other state officers – 4%). However, this data should be treated with caution. The main limitation of this survey in comparison to the survey of public views discussed above is 'self-selection' of respondents: the questionnaire was published on the Internet and the link was distributed across social media and professional blogs. This approach is potentially vulnerable to self-selection bias, i.e. those respondents who were willing to participate in the survey could share similar characteristics. This could make the sample not representative for the whole group.

Most of the respondents (72%) identified the current situation with pain and suffering damages as a problem and argued for the increase of the level of damages. The design of the questions about the respondents' views on just compensation was similar to the survey of public opinions but the suggested vignettes were slightly different. The median award of pain and suffering damages for severe injuries, according to the survey, was 3 m roubles (£30,000) which is much higher than the actual median awards but almost three times lower than the ordinary peoples' views on just and reasonable compensation. The lawyers, similar to laypersons, tend to take into account the issue of fault in their estimation. The key distinction is between intentional fault and negligence. For example, the median award in the case of intentional harm rises to 5 m roubles (£50,000). The

¹⁸ Interview with an advocate from Vladimir.

¹⁹ Zinaida Pavlova, 'The Lawyers Have Indicated a Just Quantum of Moral Damages for Harm to Life and Health' Advocate Gazette (10 December 2019). <<https://www.advgazeta.ru/novosti/yuristy-nazvali-spravedlivyy-razmer-kompensatsii-moralnogo-vreda-pri-prichinenii-vreda-zhizni-ili-zdorovyu/>> accessed 17 January 2022.

most surprising findings relate to the defendant's financial status and 'deep pocket' rationale. In the scenario where the defendant was a corporation, the median award soars to 10 m roubles (£100,000).

To sum up, the current judicial awards for pain and suffering are extremely low according to claimants, lawyers, and a wider public. In addition to this, pain and suffering damages are also low when compared with the awards in other European jurisdictions.

3.2.5 Comparisons with European Jurisdictions

The differences between European and Russian awards can be partially explained by reference to the differences in wealth. Indeed, a study of the European Court of Justice demonstrates that judges from Eastern Europe tend to support the idea that non-pecuniary damages should be lower for the claimants from this region due to the specific economic conditions:

Some judges (from Scandinavian and Socialist backgrounds) felt that compensation awards in cases from Eastern European countries which had lower per capita income should be different from awards in other countries <...>.²⁰

However, the gap between Russian and European awards is so dramatic that is unlikely to be attributed solely to income disparities. The comparative report on the average quantum of pain and suffering damages for tetraplegia in Russia and other European jurisdictions prepared by Artyom Karapetov, the member of the Commission for the reform of pain and suffering damages (Association of Russian Lawyers), helps to better understand the true extent of the discrepancy.²¹ The judicial average award for tetraplegia is 700,000 roubles (£7,000) in Russia. In the report, all award sums were converted to US dollars using purchasing power parity conversion factor for a more accurate comparison. The comparison shows that the average award for tetraplegia in

²⁰ Nina-Louisa Arold, *The Legal Culture of the European Court of Human Rights* (Martinus Nijhoff Publishers 2007) 78.

²¹ Artyom Karapetov, 'Comparison of the Typical Award of Moral Damages for Personal Injuries in Russia and Foreign Countries' [Sravnenie razmerov obychno prisuzhdaemyh kompensacij moral'nogo vreda pri posjagatel'stvah na zdorov'e cheloveka v rossii i zarubezhnyh stranah] (2019) <<https://zakon.ru/Tools/DownloadFileRecord/24250>> accessed 18 January 2023.

Russia is 7 times less than in Poland, 13 times than in Denmark, 25 times less than in Greece, 38 times less than in England, 57 times less than in Germany, and 69 times less than in France. In terms of the average annual salaries required to cover the average award for tetraplegia, Russia also remains far behind other European jurisdictions. The average award for tetraplegia, according to the report, amounts to around one average annual salary in Russia. For reference, this award amounts roughly to five annual salaries in Poland, two annual salaries in Denmark, fourteen annual salaries in Greece, eight annual salaries in England, fourteen annual salaries in Germany, and eighteen annual salaries in France. This data shows that claimants who suffered severe injuries are substantially under-compensated in Russia compared to Europe.

However, the situation is not better in the case of less serious injuries. The comparison of awards for less serious injuries also demonstrates significant differences between Russia and other European jurisdictions. The median award for a minor personal injury, as was mentioned above, is 40,000 roubles (£400 or €387). The Judicial College Guideline brackets for minor personal injuries can give some sense of this discrepancy. For example, it sets the brackets from £2,210 to £12,770 for a minor head injury considering that the bottom line reflects complete recovery within a few weeks.²² The guidelines adopted by appeal courts in France set the brackets from €2,000 to €4 000 for suffering from slight ('léger') injuries.²³ As we can see, there is a four-fold difference between the median award for minor injury in Russia and the bottom line of awards for minor injuries in Europe.

Under common law, compensation is intended to bring the victim back to the pre-accident position (the principle *restitutio in integrum*).²⁴ The Russian legal doctrine, despite its civil law basis, adopts a similar approach to the aims of tort law. Compensatory damages are supposed to make full reparation for the loss or injury caused by the defendant:

²² Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, 16th edition, 2022.

²³ Référentiel indicatif de l'indemnisation du préjudice corporel des cours d'appel <<https://clementcousin.files.wordpress.com/2017/03/referentiel-indicatif-de-l-indemnisation-du-prejudice-corporel.pdf>> accessed 17 January 2022.

²⁴ Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 447.

Damage caused to the person or property of a citizen, as well as damage caused to the property of a legal entity, shall be *fully* compensated by the person who caused the harm.²⁵

In the case of pain and suffering damages, a precise quantification is hardly possible but the amount of compensation should at least alleviate the negative emotional consequences of the injury suffered.²⁶ To meet this requirement and ensure justice, the quantum of awards must be perceived as fair and adequate by accident victims and society in general. As feminist legal scholar Martha Chamallas wryly observed discussing pain and suffering damages, ‘the only thing worse than having one's pain reduced to money is having one's pain reduced to very little money.’²⁷ The data above demonstrates that the average level of pain and suffering damages in Russia is much lower than claimants and society think should be awarded. They are also much lower than the damages awarded in other European countries.

3.3 Second Problem: Inconsistency of Awards

Another major problem with pain and suffering damages in Russia is the inconsistency of awards which vary significantly across different regions as well as nationally. This problem was articulated, for example, by one of the Russian lawyers I interviewed:

The first problem is a low level of damages and the second is their imbalance. For example, higher compensation is awarded sometimes for less serious injury than for a more serious injury, and lower compensation is awarded for intentional tort than for negligence.²⁸

The gap between the maximum and minimum awards of pain and suffering damages is more than 3000 times for severe personal injuries, 100 times for medium injuries, and 67 times for minor

²⁵ Art 1064 of the Civil Code of the Russian Federation (*italics added*).

²⁶ The German Civil Code, for example, explicitly mentions satisfaction (*Genugtuung*) among the functions of compensation for pain and suffering. The same approach is adopted in the Swiss, Czech or Turkish legislation modelled after the German legal system. See more details in Stasis Banakas, ‘Non-Pecuniary Loss in Personal Injury: Topography Architecture and Nomenclature in the European Landscape’ (2015) 10 *Journal of Comparative Law* 291.

²⁷ Martha Chamallas, ‘Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss’ (2005) 38 *Loyola of Los Angeles Law Review* 1435, 1438.

²⁸ Interview with an advocate from Vladimir.

injuries.²⁹ One of the reasons for this is the lack of standards or guidelines. This complicates significantly the work of practising lawyers who find it difficult to predict the outcome of the case and advise their clients accordingly:

Indeed, today it is impossible even to make a preliminary forecast of how much compensation can be received. It's like a roulette game. Only when I submit a claim and see which judge got it, what cases considered before and what judgments made, then I start to roughly understand what to expect. Everything comes down to the human factor.³⁰

A brief reference to the principle of reasonableness and fairness is frequently considered as a sufficient justification of the awarded damages. As one of the practising lawyers describes a typical judgment on pain and suffering damages: 'The wording is pretty straightforward, meaning if you think they bother and write a lot ('this is not reasonable because of this' and 'this is reasonable because of that') – then no.'³¹ The judges widely use clichés and the same brief wordings justifying the quantum of damages like, for example, the following:

Taking into account the provisions of articles 151, 1100, 1101 of the Civil Code of the Russian Federation and the specific circumstances of the case, as well as the nature and degree of the physical and moral suffering of the claimant, the requirement of reasonableness and justice, the court concludes that the claim for pain and suffering damages should be satisfied in the amount of N roubles.³²

This is often the only justification in cases. A detailed explanation of reasons for awarding a particular sum of money can be rarely found in court practice.

The references to the analogous cases frequently made by claimants for justifying the claimed damages are not taken into account by courts. The typical reason which can be seen in court

²⁹ Fast, Nesterov and Sokolova (n 4).

³⁰ Interview with Anastasia Kopteeva (Trans-Baikal Human Rights Centre) in 'Why Do the Life, Health and Liberty of Russians Cost So Little?' Lenta (17 June 2019) <<https://lenta.ru/articles/2019/06/17/zhizn>> accessed 17 January 2022.

³¹ Interview with a personal injury lawyer from Nizhniy Novgorod.

³² Maria Pribytkova, 'Justification for the Amount of Non-Pecuniary Damage' [Obosnovaniye razmera moral'nogo vreda] <<http://m-logos.ru/wp-content/uploads/2019/11/obosnovanie-razmera-moralnogo-vreda-m.-pribytkova.pdf>> accessed 17 January 2022.

decisions is that Russia is not a common law jurisdiction and precedents are therefore not recognised:

The defendant's reference to judicial practice in deciding on the amount of compensation for pain and suffering is found untenable by the judicial board, since the amount of compensation in each case is determined individually, based on the particular case, and cannot be made dependent on the amount of such compensation determined by other courts resolving other matters. Moreover, judicial precedent is not a source of law in the Russian Federation.³³

This rationale, however, contradicts the actual practice of other civil law countries. The tendency to rely on previous decisions in awarding pain and suffering damages is strong in many continental European jurisdictions. For example, in Germany, there are tables of typical *Schmerzensgeld* awards based on the systematised personal injury cases collected by private organisations.³⁴ Although these tables are not binding, and German courts enjoy relatively wide discretion, it is still a conventional practice to motivate decisions by reference to the abovementioned tables. Similar tables or guidelines can be found in the Netherlands,³⁵ Belgium,³⁶ and Austria.³⁷ The reluctance of the Russian judiciary to follow previous cases seems exceptional in this context.

The lack of standards contributes to the unjust approach to victims in the sense that it does not ensure equal treatment of victims who suffer similar injuries in similar circumstances. This compromises the basic principles of tort law. As Richard Abel notes discussing the variability of pain and suffering damages awards:

Law claims to treat like things alike – one of its most fundamental reasons for existing. But without a metric we cannot say which experiences are alike or quantify the differences

³³ Civil case n 33-16487/2017 (Appeal Decision of 12 October 2017), Sverdlovsk Regional Appeal Court.

³⁴ Jörg Fedtke, 'The Culture of German Tort Law' (2012) 3 Journal of European Tort Law 183.

³⁵ The annual guidelines (*Het Smartengeldboek*) are available by this link (subscription required) <<https://www.smartengeld.nl/het-smartengeldboek-0>> accessed 18 January 2023.

³⁶ The annual tables (*Indicatieve tabel*) are available by this link <<https://www.schadeweb.be/indicatieve-tabel>> accessed 18 January 2023.

³⁷ The table (*Schmerzensgeldtabelle*) for 2016 is available by this link <<https://widab.gerichts-sv.at/website2016/wp-content/uploads/2016/09/Sach-2016-117-117-Schmerzensgeld.pdf>> accessed 18 January 2023.

between those that are dissimilar. Under those circumstances, state action is arbitrary and unjust, not deserving the title of law.³⁸

The unlimited judicial discretion results in the situation when minimal damages can be awarded for serious injuries. For example, anecdotal data from practising lawyers demonstrate that the level of damages sometimes can be purely symbolic like, for example, 1,000 roubles (£10) for a road accident led to 21 days of hospitalisation.³⁹ On the other hand, there can be found cases where awards were substantially higher (almost tenfold) than average without any observable factual deviations in these cases.⁴⁰ Therefore, the current inconsistency of awards makes the whole system of compensation for pain and suffering in Russia a pure 'lottery', which is contrary to the principles of justice and fairness. In regards to pain and suffering damages, these principles mean fair, consistent, enforceable awards through a prompt and convenient procedure. This argument is similar to Patrick Atiyah's critique of the English tort system as a 'damages lottery',⁴¹ but with one major exception. Atiyah criticised chiefly inequality between different categories of accident victims. Some victims who suffered injuries because of somebody's fault, he argued, are entitled to compensation but others remain totally uncompensated. Yet, in Russia, inequality is more problematic since even the victims from the same category (for example, road traffic accident victims) obtain different awards for similar injuries regardless of the fault issue.

3.4 Third Problem: Complex Claiming Procedure and Small Number of Settlements

As was described earlier, pain and suffering damages caused by road traffic accidents and work accidents are not covered by the compulsory insurance. Voluntary liability insurance and out-of-court settlement agreements for these damages are rare. Therefore, the most likely option for claimants seeking these damages is to submit a claim to the court and go through the court proceedings. The very necessity of going through the court proceedings in order to obtain

³⁸ Richard Abel, 'General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)' (2006) 55 DePaul Law Review 253, 302-303.

³⁹ Ekaterina Dobrikova, 'Compensation for Moral Harm: the Trends of Russian jurisprudence [Kompensatsiya moral'nogo vreda: tendentsii rossiyskoy sudebnoy praktiki] (August 24, 2016) <<http://www.garant.ru/article/864733/>> accessed 17 January 2022.

⁴⁰ Aronov (n 3).

⁴¹ Patrick Atiyah, *The Damages Lottery* (Bloomsbury Publishing 1997).

moderate compensation does not contribute to the victims' recovery, rather the opposite. Some studies of accident victims, for example, demonstrate that participation in court proceedings negatively affects their physical and psychological condition.⁴² This is compounded by the generally low opinion of courts prevailing in Russian society.⁴³ The prospect of going through court proceedings discourages a large number of victims from claiming pain and suffering damages even if they are entitled to that:

The costs of legal representation in litigation may frequently exceed compensation for moral and material damage imposed by the court. <...> According to Olga Vakina, a lawyer for the Union of Pedestrians, this leads to the fact that victims, 'exhausted after hospitals' prefer not to mess with the court, especially if they understand that they suffered a 'light damage'.⁴⁴

Therefore, a significant number of claimants are not merely under-compensated but not compensated at all. Victims who suffer medium or relatively minor personal injuries, as well as the members of the most economically vulnerable social groups who cannot afford legal counsel, are most likely to be under-compensated or non-compensated altogether.

The current court procedure is complicated for claimants since defendants usually dispute the quantum of damages (liability is rarely an issue) or raise a contributory negligence defence and are not ready to settle. Out-of-court procedure allows victims to avoid court proceedings and therefore save time and costs. More importantly, it eliminates, as far as possible, potential inequalities between the victims who can afford legal costs and who do not have sufficient financial resources to cover them. In contrast to court procedure, claiming from insurance companies is faster and more accessible to victims with different income levels. However, settlements of claims for pain and suffering damages are not common in Russia. There is no

⁴² Andrea Cotti et al, 'Road Traffic Accidents and Secondary Victimization: the Role of Law Professionals' (2004) 23 *Medicine and Law* 259; Nieke A Elbers et al, 'Do Compensation Processes Impair Mental Health? A Meta-Analysis' (2013) 44 *Injury* 674.

⁴³ According to the survey conducted by the Fund of Public Opinion (FOM) in 2018, only 24 % of respondents assessed the work of Russian judicial system positively, and only 31% of them were prepared to bring their claim to the court while 57 % treated it as a last resort. FOM Report (05 August 2018) <<https://fom.ru/Bezopasnost-i-pravo/14080>> accessed 17 January 2022.

⁴⁴ Interview with Olga Vakina (The Union of Pedestrians) 'Why Do the Life, Health and Liberty of Russians Cost So Little?' *Lenta* (17 June 2019) <<https://lenta.ru/articles/2019/06/17/zhizn>> accessed 17 January 2022.

separate statistics of settled claims for pain and suffering damages but the number of ‘terminated’ cases is available. This number can be treated as a rough equivalent to the proportion of settled cases since the main legal grounds for terminating a case without trial are the following: a) a formal settlement agreed between parties and confirmed by the court; b) the claimant refused to proceed further which in most cases would mean that damages were paid voluntarily; c) another competency (commercial, administrative, arbitration, etc.) which is exceptional in practice.⁴⁵ The proportion of terminated (most likely settled) claims for pain and suffering damages is approx. 10% which is significantly lower than in other European countries where most personal injury cases are settled. For example, the most recent study of settlements in the 23 largest economies demonstrates that Russia has one of the lowest rates of settlements (below 15%) among these countries.⁴⁶

Alternative dispute resolution (mediation) is also very uncommon in Russia. There were only 6 personal injury and fatal accident cases in 2016-2018 resolved through the mediation procedure in Russia.⁴⁷ This reluctance towards mediation could partially be explained by the specific legal culture that dominates Russian judicial decision-making. This manifests in the excessive control over the court procedure as well as active role that Soviet judges take in trials (‘parental approach’) – tendencies well documented by Western scholars.⁴⁸ The vestiges of this approach remain in post-Soviet civil litigation. Kathryn Hendley, for example, who conducted observations of Russian court proceedings and interviews with judges, has argued that mediation can be treated as a risk: ‘Even if a judge is intrigued by mediation, she may shy away from promoting it out of fear of losing control over her docket’.⁴⁹ The loss of control may lead to delays and exceeding procedural time limits, which negatively affects judicial career prospects.⁵⁰

⁴⁵ Art 2020 of the Civil Procedural Code of the Russian Federation of 14 November 14 2002.

⁴⁶ Yun-chien Chang and Daniel M Klerman, ‘Settlement around the World: Settlement Rates in the Largest Economies’ (2021) 21-8 USC Legal Studies Research Paper Series 1.

⁴⁷ Judicial Department (n 9).

⁴⁸ For example, see James L Hildebrand, ‘The Sociology of Soviet Law: The Heuristic and Parental Functions’ (1971) 22 Case Western Reserve Law Review 157; Harold J Berman, ‘The Educational Role of the Soviet Court’ (1972) 21 International and Comparative Law Quarterly 81.

⁴⁹ Kathryn Hendley, ‘Judges as Gatekeepers to Mediation: The Russian case’ (2014) 16 Cardozo Journal of Conflict Resolution 423, 451.

⁵⁰ Volkov V and Dzmitryeva A, ‘Recruitment Patterns, Gender, and Professional Subcultures of the Judiciary in Russia’ (2015) 22 International Journal of the Legal Profession 166, 175.

Perhaps, the only exception is the area of work accident cases where the settled cases can be found occasionally. There is a well-established practice of industry branch agreements between companies and trade unions in which a fixed amount of compensation for moral damage is defined. This approach is normally adopted by those companies where the risk of work accidents and occupational disease is the highest such as coal, asbestos, metal, and chemical industries. The payments usually amount to multiple of industry average salary or fixed sums multiplied by degree of incapacitation (see how it works in practice in section 3.6). The injured worker has an option to take this moderate compensation or submit a claim to the court and potentially obtain higher compensation. However, the path of litigation attracts very few workers. The majority prefer to take compensation guided by the following reasons:

Look, let's estimate who goes to court – labourers, right. That is, a very rare labourer having received from the company a substantial sum of money, according to his standards, would get to court since he needs to find a lawyer, to formulate a claim somehow, which is to say, none of them go to [the court].⁵¹

The situation described above demonstrates that settlements as such, without an adequate increase of compensation, are not necessarily advantageous for victims. Aware of the current low level of damages awarded by Russian courts, the defendants are likely to offer insignificant compensation for pain and suffering. Thus, an extension of settlements in this area should be accompanied by an increase in awards.

3.5 Fourth Problem: Poor Judgment Enforcement

The fourth problem is ineffective enforcement of judgments which is the most pressing in cases where severe damage was inflicted. It can be assumed that the higher the award, the more difficult it is to collect it from a defendant. As repeatedly emphasised in this thesis, pain and suffering damages above insurance limits are not covered by compulsory insurance. In most cases, individual defendants pay these sums out of pocket. If moderate compensation can be paid from current income (salary or pension), higher compensation requires further income in addition to

⁵¹ Interview with a personal injury lawyer from Nizhniy Novgorod.

the defendant's annual income. Moreover, some debtors frequently try to avoid paying damages, according to my interviews with practising lawyers:

For example, according to the statistics of the Union of Pedestrians, compensation to pedestrians for moral and material harm suffered in road accidents comprises from 10,000 [100] to 700,000 [£7,000] roubles. Maximum sums, as a rule, are awarded to those who became disabled as a result of an accident. However, in 90 per cent of cases, this money cannot be obtained – the perpetrators of accidents evade payments. Some sell their property or transfer it to relatives, friends. The bailiffs say they are not able to do anything with this.⁵²

The official bailiffs' statistics demonstrates that only 23% of civil judgments against individuals were fully enforced in Russia in 2018.⁵³ The work of the state bailiffs' service is ineffective. Moreover, Russian law prohibits seizing the defendant's residence (so-called 'enforcement immunity').⁵⁴ This means that if the defendant does not possess any other property or if they are not formally registered as possessing other property, requesting for monthly deductions from their salary is often the only option for the claimant (cannot be more than 50% of the salary, according to the law). The median salary in Russia is 34,000 roubles (£340), 50% of it amounts to 17,000 roubles (£170). Thus, it could take up to a year to pay even the median award, let alone a higher award. This is assuming, of course, that the defendant is employed and is not imprisoned or incapacitated in any other way.

The latter is highly possible in road traffic accident cases with serious personal injuries. The provisions of the criminal legislation stipulate up to 3 years of imprisonment for negligent driving which caused severe injuries to a person, up to 7 years if it is a 'hit-and-run' case or drunk driving or if injuries are caused to 2 or more persons, and up to 15 years for causing severe injuries to 2 or more persons if it is a 'hit-and-run' or drunk driving case.⁵⁵ As mentioned above, median awards of

⁵² Interview with Olga Vakina (n 44).

⁵³ The official statistics of the Federal Bailiffs' Service of the Russian Federation for 2018 <<http://fssprus.ru/statistics/>> accessed 17 January 2022. This statistics includes civil cases in general without breakdown by categories. However, there is no reason to suggest that defendants are more willing or less willing to pay pain and suffering damages than any other damages.

⁵⁴ Art 446 of the Civil Procedural Code of the Russian Federation of 14 November 2002.

⁵⁵ Art 264 of the Criminal Code of the Russian Federation of 13 June 1996.

pain and suffering damages are almost twice as high in criminal cases as compared to civil cases. However, the chances of getting compensation from a convicted person are low. There are no other sources to cover these damages since there is no insurance coverage or public funds (like, for example, the Criminal Injuries Compensation Scheme in the UK) which would provide compensation to victims of criminal acts:

Moral damages are awarded, but if they are awarded, and it is just an individual not performing official functions during which he committed a crime, meaning that he is not a police officer or a company worker but simply a criminal Vasya [the most common Russian name], then you can be awarded a million, but you understand that the victim will never see this million.⁵⁶

Therefore, the most under-compensated categories of claimants are those who suffered the most severe injuries. They may submit a claim and pass all the stages of the court proceedings but finally are not able to obtain compensation. This is because they are the least likely to be able to enforce any award in the absence of insurance. Thus, the fact that a substantial proportion of defendants are judgment-proof due to the lack of assets and insurance coverage makes the whole claiming process meaningless. The expert interviews strongly support this conclusion:

What is the point to go to court? Even if you have passed through all these hellish circles, even after having received a judgment in your favour, after all appeals, you finally realise that it will not be enforced anyway. Because the defendant is either a beggar, as poor as a church mouse, or is so sneaky that already gets rid of everything while the court proceedings were under way.⁵⁷

Therefore, the current situation with judgment enforcement violates the principle of corrective justice which stipulates that wrongs must be compensated. Stephen Gilles emphasises this point while discussing the problem of judgment-proof defendants:

⁵⁶ Interview with a personal injury lawyer from Nizhniy Novgorod.

⁵⁷ Interview with a state procurator.

Even when a tortfeasor has enough collectible assets to make litigation worthwhile, insofar as those assets are smaller than the expected judgment, corrective justice cannot be done fully.⁵⁸

Compensation for pain and suffering in Russia is thus ineffective and creates injustice to accident victims. Justice on paper where the defendant's liability is established and damages for victims are awarded is not real justice if judgments cannot be enforced. This thesis argues that real justice means when the compensation awarded to accident victims for their pain and suffering can be collected from defendants. Yet, this is currently not the case in Russia because of the problems with judgment enforcement.

3.6 How These Problems Are Manifested in Practice: Two Typical Scenarios of Personal Injury Cases

To illustrate the issues discussed above, I provide two hypothetical scenarios below. These scenarios will facilitate a better understanding of the situation of accident victims who are to face the problems with pain and suffering damages. The scenarios include a road traffic accident case and a workplace accident case since they constitute the largest categories of personal injury cases.

Scenario 1. Road Traffic Accident (Brain Injury)

Oleg is a university student. He was a passenger in his friend's car when it collided with another car. Oleg suffered a brain injury and had to give up his studies. The most probable scenario is as follows. The road traffic police would come to the scene and write a report to record all the details of the accident. The road traffic police is a body entitled to determine which party is at fault and charge them with an administrative offence (most cases) or initiate a criminal proceeding (in the case of severe injuries or a death). However, if it is not possible to establish fault, the road traffic police can leave this to be established in court. A party can contest the police's conclusion in court. If it is no one's fault, it would be also reflected in the police report.

⁵⁸ Stephen G Gilles, 'The Judgment-Proof Society' (2006) 63 Washington and Lee Law Review 603, 610.

Since it is not a minor injury, the police would send the victim to the state expert organisation which would determine the severity of the injury. As mentioned above, this is needed to define whether the accident is a mere administrative offence or a crime. Let's say, the injury is of medium gravity, meaning Oleg has suffered a brain injury but without permanent disability. This does not amount to a crime. There are three degrees of harm to health recognised by Russian law: minor harm, harm of medium gravity, and grave harm. Grave harm is a necessary condition of criminal prosecution for road traffic accident.⁵⁹ The medical services would normally be provided by the state hospital under Oleg's compulsory first-party medical insurance, but he can obtain extra services of better quality privately.

Oleg then would seek compensation from the defendant's insurance company. If the defendant is uninsured or impossible to trace, the claim would be submitted to the Association of Motor Insurers (analogous to the UK Motor Insurance Bureau). The required documents for making a payment would include copies of road traffic police protocols and a statement from the state expert organisation provided by the claimant. The limit for insurance payment is 500,000 roubles (£5,000). Payments do not depend on real losses (medical costs, lost earnings, etc.). Instead, there are fixed tariffs of insurance payments for material losses resulted from personal injuries (percentage to the maximal pay-out) implemented by the government which correspond to the severity of injuries. Most severe brain injury (without permanent disability) amounts to 25%, i.e. 125,000 roubles (£1,250).⁶⁰ This is the money Oleg is entitled to claim from the insurance company. This money is supposed to cover his material costs. It is unlikely that the insurance company would argue fault or degree of injuries if all the required documents (police protocols

⁵⁹ See Art 264 of the Criminal Code of the Russian Federation: 'Violation of Traffic Rules and Rules for Operation of Transport Vehicles 1. Violation by a person driving a motor vehicle, a tram or another mechanical transport vehicle of the traffic rules or rules for operation of a transport means which has, by negligence, entailed the causing of grave harm to human health - shall be punishable by limitation of freedom for a term of up to three years, or by compulsory labour for a term of up to two years with deprivation of the right to drive a transport vehicle for a term of up to three years or without such, or by arrest for a term of up to six months, or by deprivation of freedom for a term of up to two years with deprivation of the right to drive a transport vehicle for a term of three years or without such.' <<https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru080en.pdf>> accessed 17 January 2022.

⁶⁰ The Resolution of the Government of the Russian Federation N 1164 'On Approval of the Rules for Calculating the Amount of Insurance Recovery for the Harm to the Victim's Health' of 15 November 2012.

and expert statements) are in place. Insurance companies are bound by the facts established in these documents. The procedure is fairly straightforward and unproblematic.

Suppose, however, Oleg would wish to claim pain and suffering damages. He would have to submit a claim to the district court against the defendant. The claim would be considered over a period of several months. It is likely that Oleg would need a professional lawyer to represent his interests in court. However, it is unlikely to be easy to find a lawyer in that case. Most lawyers are willing to take such cases only if damage to the claimant's car can be established. Since insurance payments for car damage are straightforward, it is commercially viable for lawyers to take these cases on. However, given that Oleg was not a car owner, his case is unlikely to attract a lot of interest from lawyers. Even if Oleg finds a lawyer willing to take this case, he would have to pay them fees in advance. Conditional or contingent fees are not prohibited, but it is not possible to claim these fees from clients in the case of claimant's non-payment or from the defendant as legal costs. A party that loses the case normally covers other party's legal costs but not conditional or contingent fees. For these reasons, lawyers frequently avoid this scheme of legal funding or combine it with fixed fees. It is likely that Oleg would need to find a lawyer charging lower fees (e.g. through personal contacts) or be prepared to cover regular fixed fees. The average fees for legal representation in this case would be somewhere between 50,000 (€500) and 70,000 roubles (€700).⁶¹

Oleg then would need to specify the requested damages and justify this quantum by describing the degree of pain and suffering. There is no need to prove that non-pecuniary harm in principle was suffered since it is presumed in personal injury cases. He will though be required to prove its degree for assessment of damages. Therefore, it is likely that Oleg would need to attend the court personally and testify about the extent of his pain and suffering. Written statements are possible in principle but courts often prefer hearing from the claimants personally. This is not a pleasant experience taking into account his medical condition (brain injury which is likely to have psychological consequences). The awarded pain and suffering damages would be around 70,000

⁶¹ See, for example 'The Monitoring of the Fees Practice' of the Advocates' Chamber of the Krasnodar region where the average fees for such legal services was 55,000 roubles (€550) in 2019 < <https://apkk.ru/documents/attorneys/apkk/monitoring/> > accessed 17 January 2022. This sum would be slightly higher in St Petersburg and Moscow.

roubles (£700) (a median award for medium injuries, see in section 3.2.1 above). If, for example, the driver at fault was a retired person without substantial income, it is likely that damages would be reduced. Oleg would be unlikely to find the award satisfying. So, the judgment will be probably appealed by Oleg. The entire court procedure including appeal can take therefore about one year. The most typical outcome of the appeal is upholding the first instance decision. This means that Oleg will have to cover the defendant's legal costs if they were incurred at the appeal stage. Then, Oleg will need to enforce the award by applying to the state bailiffs' service. The chances to obtain real money are not very good in this case. The only asset of the retired defendant is a small apartment that legally cannot be seized and sold.

Scenario 2. Industrial Injury (Loss of Limb)

Elena is an industrial worker. She is a single mother with two kids. Elena lost her limb while working. She can no longer work at her old job and cannot find a new job in her condition. The most likely scenario is as follows. The employer would form a special commission for investigating the accident that happened. This commission would include the person responsible for the safety rules at that site, a representative of the employer, and a representative of the labour union. Since this is a severe injury case, this commission would be supplemented by a state labour inspector and a representative of the social insurance fund. The commission after investigation would issue an official accident report. It would contain a detailed description of the accident and the identification of responsible persons if there was a violation of safety rules. If there is contributory negligence on the part of the injured, it would also be reflected in the report.

The report provides a legal basis for the injured worker to claim social insurance payments for material losses. As was discussed above, social insurance is mandatory for employers in Russia. However, it does not cover pain and suffering damages. Russian labour law stipulates that the pain and suffering damages are paid in the amount determined by the settlement between employers and employees, and only in the absence of agreement this issue is resolved in court.⁶² If, for example, Elena wishes to claim these damages from the employer, it is likely that she would first approach the employer with a claim.

⁶² Art 237 of the Labour Code of the Russian Federation of 30 December 2001.

In practice, parties rarely settle such cases. It is possible that there is a standard quantum of pain and suffering damages set by a collective agreement at the level of a concrete enterprise or a branch agreement at the level of an industry branch. This is particularly true in hazardous industries. Let's say Elena worked in the aluminium industry. The collective agreement in this industry set compensation for pain and suffering at the level of 1,000 roubles (£10) for each per cent of the loss of work capacity.⁶³ Even if the loss of limb resulted in the 100% loss of the work capacity, it would mean only 100,000 roubles (£1,000) towards pain and suffering damages. Most labourers would probably take this sum of money in order to avoid court proceedings. Elena, however, is determined to get more. She believes that her injury was partially caused by unsafe working conditions. She still suffers severe pain after amputation. That means Elena would have to file a claim for pain and suffering damages to the district court. It is even more likely that she would need a lawyer as the defendant is a corporation. The awarded compensation would not be substantially higher than the payment suggested by the employer. It is likely to be around 140,000 roubles (£1,400) (a median award for severe injuries, see in section 3.2.1 above). Elena would probably appeal in order to increase compensation but without any success. The main difference between Oleg's and Elena's cases lies in the area of judgment enforcement. The chances to obtain money from the employer are higher than from personal defendants, especially if the defendant is a large aluminium company.

3.7 Conclusion

The chapter has identified four main problems with pain and suffering damages in Russia. The first problem refers to the prevailing attitudes of the Russian judiciary towards an assessment of pain and suffering damages. In the majority of personal injury cases, compensation for pain and suffering awarded by Russian courts is much lower than in other European jurisdictions. There are also major discrepancies between the expectations of victims, lawyers and society in general of just and reasonable compensation and typical compensation awarded by courts. The claimant, according to procedural rules, is obliged to specify and justify the requested amount of compensation in the statement of claim. However, there is only a minimal chance that the requested sum will be fully awarded as Russian judges tend to reduce the requested damages

⁶³ See, for example, Cassation Judgment N 44Г-11/2017 of 19 April 2017 by Sverdlovsk Regional Court (X v Siberia-Ural Aluminium Company).

dramatically without any justification. The views of the judiciary and society on the appropriate quantum of pain and suffering damages also vary widely. Public opinion polls demonstrate that estimations of society on fair and reasonable compensation of pain and suffering are several times higher than the existing awards.

The second dimension of the problem is the inconsistency of awards. The origins of this problem lie in the lack of any standards, tariffs or guidelines which would orient judges in awarding compensation as well as lack of justification of awarded sums. As a result, the amount of pain and suffering damages for similar injuries can vary significantly across different courts and different regions. The main negative consequence of this situation is overdependence on judicial discretion and therefore poor predictability of the outcome of the case. As a result, some victims are unjustly awarded lower compensation than other victims who suffer similar injuries in similar circumstances.

The complex procedure of claiming pain and suffering damages and a small proportion of settlements in these cases is a third major problem. The complexity means that accident claimants have to go through the formal court procedure, often including appeal, in order to obtain pain and suffering damages. The prospects of litigation discourage some claimants from seeking pain and suffering damages. Furthermore, those victims who cannot afford costs of litigation are hindered from accessing justice. Contingent and conditional fees are not fully recognised by Russian law. This situation creates serious disparities among victims depending on their social and economic status, meaning that members of privileged classes are more likely to make a claim and obtain compensation for their pain and suffering. In contrast, claiming directly from the insurer (currently only for material losses) is more straightforward and accessible for victims requiring only collecting certain documents and filling a standard claim form.

Lastly, even if claimants enjoy a judgment in their favour, it does not guarantee them an actual payment of pain and suffering damages, especially if the awarded sum is high due to the severity of injuries. This is so because individual defendants often are not capable of paying significant sums of money to cover these damages. Additionally, insurance is not available to them. Therefore, the chance of obtaining full compensation is low, according to the statistics of judgment enforcement. The higher the award is, the lower the chance it will be obtained.

The partial reason for moderate awards lies in the realities of the enforcement of the judgment since a large proportion of defendants is not able to pay damages. In fact, the possibility to reduce damages taking into account the financial situation of the defendant is provided by civil legislation and is frequently used in court practice. Compulsory liability insurance could change the situation with the quantum of damages and their payment as well as simplify the claims procedure. However, pain and suffering damages were explicitly excluded from the insurance coverage in statutes on motor vehicle liability insurance and social insurance against work accidents and professional diseases. There are no suggestions or proposals put forward by the legislators or the government for changing these provisions.

The insight into the Soviet legal history can shed a light on the cultural basis of the current problems with pain and suffering damages in Russia. The Soviet provisions on tort law remained practically unchanged in the new Russian civil law. The possibility to reduce damages taking into account the financial position of the defendant, strict liability regime (partial) for road accidents, the reverse burden of proof, and participation of state procurators in personal injury cases are the most obvious remnants of the Soviet approach to torts. However, the most important peculiarities which are largely responsible for the problems discussed above relate to the specific cultural attitudes of the Soviet legal scholars and practitioners towards pain and suffering damages and liability insurance. Throughout Soviet history, these legal institutions were prohibited despite the fact that they were rebuilt soon after the establishment of the socialist regimes in all other Eastern European countries. The next chapter analyses these cultural attitudes and discusses their significance for the current situation with pain and suffering damages in Russia.

CHAPTER FOUR. CONTEXTUALISING THE PROBLEMS: PAIN AND SUFFERING DAMAGES AND LIABILITY INSURANCE IN SOVIET TORT LAW CULTURE

4.1 Introduction

The main purpose of this chapter is to analyse the Soviet tort law culture in relation to pain and suffering damages and liability insurance. Tort law is the area that has not been seriously affected by the transition of Russia to a market economy in the 1990s. This field of law preserves most features of the Soviet period. This chapter argues that the Soviet tort law culture is the relevant background to the problems described in the previous chapter. Specifically, the Soviet approach to pain and suffering damages and liability insurance contributes to these problems. The most evident remnant of this approach can be seen now in the exclusion of pain and suffering damages from compulsory insurance schemes for road traffic accidents and workplace accidents. The chapter is structured into three sections in chronological order.

The first section of the chapter will focus on the approach to pain and suffering damages in the Russian academia and judiciary before the Revolution of 1917 and after the establishment of the Soviet regime. There was a growing movement towards the acceptance of these damages before the revolution, but this changed (for ideological reasons) after the revolution. This attitudinal change can be explained by the prevailing views among Soviet lawyers after the 1920s. These views suggest that monetary compensation for human feelings is not appropriate in a society built on socialist values. The other reason was a view that insurance in general is a means to secure property and directly related interests in a socialist society but not to cover liability or loss of profits. The juxtaposition of the socialist approach and the wide use of pain and suffering damages in Western capitalist society was a frequent argument for the continuing ban of these damages throughout Soviet history. However, the experience of Eastern European countries shows that socialist ideology could easily coexist with such a remedy as pain and suffering damages. That made the Soviet tort law of that time unique in its total rejection of these damages.

The second section will concentrate on the Soviet approach to liability insurance. This form of insurance was completely prohibited. Again, there was an ideological rationale behind this position of the Soviet academics and practitioners. Liability insurance was treated as an

unacceptable way to avoid personal responsibility for wrongdoing which would eliminate the preventive and educational function of the socialist tort law.¹ The role of tort law in creating a new responsible member of the socialist society was seen as equally, if not more, important as compensation or losses suffered by a particular individual.

There was another ideological reason for the absence of liability insurance. Any liability insurance market was impossible in that period due to the planned economy based on state ownership in the Soviet Union. There were no private companies that could offer such insurance services. However, state-governed liability insurance was suggested by some liberal-minded Soviet scholars as an option.² But their prospects were not backed by the legislators. The lack of liability insurance in the Soviet Union is particularly difficult to explain knowing that strict liability for road accidents operated during that period. This regime elsewhere is accompanied with the possibility of shifting liability to an insurance company. This was the case in European countries including those from the socialist camp. The risks of being found liable otherwise would be too high for drivers. Yet, the approach of the Soviet Union was different in this regard. Voluntary liability insurance became available only after the collapse of the Soviet Union, but the demand for it was extremely low.³ Compulsory motor vehicle liability insurance was implemented only in 2003, and that was only for material losses.⁴

The third section will discuss the role of the Soviet legal culture in the current problems with pain and suffering damages will be discussed. The low level of damages is partially explained by the continuing sceptical attitudes of the judiciary towards the possibility to compensate pain and suffering with money. This is particularly evident in the contrast between young judges of trial

¹ Christopher Osakwe, 'Examination of the Modern Soviet Law of Torts' (1979) 54 *Tulane Law Review* 1, 5.

² Sergej Artem'ev and David Polovinchik, 'Life Dictates New Forms of Insurance [Novye vidy strahovanija podskazyvaet zhizn']' (1961) 11 *Soviet Justice [Sovetskaja Justicija]* 3; Nikolaj Malein, 'Civil Liability Insurance [Strahovanie grazhdanskoj otvetstvennosti]' (1962) 11 *Soviet Justice [Sovetskaja Justicija]* 22; Valentin Martem'janov, 'Insurance for Motor Vehicles and Their Owners' Liability [Strahovanie avtotransportnyh sredstv i otvetstvennosti ih vladel'cev]' (1970) 17 *Soviet Justice [Sovetskaja Justicija]* 12; Adolf Pleshkov, 'On Implementation of Civil Liability Insurance of Motor Vehicle Owners [O vvedenii strahovanija grazhdanskoj otvetstvennosti vladel'cev mehanizirovannyh sredstv transporta]' (1970) 1 *Soviet Justice [Sovetskaja Justicija]* 14.

³ Igor Kotlobovsky, 'The Prospects for Motor Insurance in Russia' (2006) 11 *Journal of Risk Management and Insurance* 32.

⁴ The Law of the Russian Federation 'On Compulsory Motor Third Party Liability Insurance' of 1 July 2003.

courts and senior judges of appeal courts educated in the Soviet system. The higher courts frequently reverse first instance decisions and reduce awards making them adopt a more conservative approach to pain and suffering damages (in order to avoid reversals which negatively affect career prospects of judges). The other explanation of low awards is judges' unduly emphasising that an individual is not capable to pay substantial compensation. Liability insurance could improve this situation but was explicitly excluded by the provisions of the legislation on the motor vehicle and work accidents compulsory insurance. There is no developed market of voluntary liability insurance for pain and suffering damages and there is no discussion of the potential implementation of compulsory insurance for pain and suffering damages in the Russian legal community.

4.2. Pain and Suffering Damages in the Soviet Tort Law Culture

4.2.1 Pain and Suffering Damages before the Socialist Revolution

There was an intense debate among Russian legal scholars in the beginning of the 20th century on whether pain and suffering ('moral harm') should be compensated by money.⁵ The scholarship was strongly divided in relation to this issue. One strand of scholarship was critical of moral damages whereas another scholarship treated them as a possible remedy. The former scholars were resistant towards the very idea that personal feelings could be turned into money. As Gabriel Shershenevich argued, if a person suffers real moral harm, it could not be covered by any money; if it could be, it is not 'real' harm.⁶ Furthermore, he emphasised that the main function of moral damages is not compensation but punishment which makes them a subject of the criminal rather than civil law. In that case, compensation should be claimed in favour of the whole public, i.e. the

⁵ See, in particular, Gabriel Shershenevich, *General Theory of Law [Obshchaya teoriya prava]* (Izdanie Br Bashmakovyh 1910) 682; Leon Petrażycki, 'Non-Pecuniary Damages from Perspective of Social Policy' [Vozmeshhenie nematerial'nogo vreda s točki zrenija social'noj politiki] (1900) 16 Law. Weekly Legal Gazette [Pravo Ezhenedel'naja juridicheskaja gazeta] 801; Josef Pokrovskij, *The Main Problems of Civil Law [Osnovnye problemy grazhdanskogo prava]* (first published 1917, Statut 1998) 143; Sergey Belyatskin, *Compensation of Moral (Non-Pecuniary) Harm [Vozmeshhenie moral'nogo (neimushhestvennogo) vreda]* (first published 1913, Gorodets 2005).

⁶ Gabriel Shershenevich, *Russian Civil Law Textbook [Uchebnik russkogo grazhdanskogo prava]* (Izdanie Br Bashmakovyh 1911) 577.

state not the victim. Another reason for objections to moral damages was a wide judicial discretion in awarding compensation. This level of discretion would produce uncertainty among claimants in the outcome of their claims. And finally, as critics argued, compensation of moral harm itself could be treated as a 'moral damage' since it spreads among people a dangerous idea of the possibility to turn human feelings into a monetary form.⁷ As Leon Petrażycki noted:

[M]ental state, its intensity and health, is irreparable, and in that case we have as a result only monetary assessment of 'non-assessable' (truly 'non-assessable', and on deep moral grounds) values and making profit out of the wrongdoings of your fellow human beings.⁸

However, some prominent scholars expressed their support for the implementation of moral damages into legislation in the late Tsarist period (from 1910 to 1917). For example, Josef Pokrovskyj argued that moral damages could be a possible remedy for violation of human rights.⁹ Even such an imperfect remedy is better than the lack of any protection of human rights. From this perspective, 'such protection would have a disciplinary and deterrent effect'.¹⁰ The precise monetary evaluation of suffering is impossible but, as Sergey Belyatskin argued, there is no need for such an accurate estimation.¹¹ Although money cannot be equivalent to negative feelings, they can at least allow victims to buy some goods and services as a partial repair of sufferings. The appropriate amount of compensation, in Belyatskin's view, could be determined depending on the extent of harm, degree of tortfeasor's fault, the sincerity of suffering, the financial situation of parties, local customs and traditions. One of the most popular arguments was a reference to the experience of other European jurisdiction which had allowed pain and suffering damages by the beginning of the 20th century, particularly England:

The English system of compensation for moral harm surprised and keeps surprising with its everyday flexibility and deep practical sense. The strict orientation of judges to give satisfaction to each victim at the expense of wrongdoer, regular collecting money from violators of others personal rights – not only from private persons, but also from the officials –

⁷ Shershenevich, *General Theory of Law* (n 5) 682.

⁸ Petrażycki (n 5) 805.

⁹ Pokrovskyj (n 5) 143.

¹⁰ *ibid* 141.

¹¹ Belyatskin (n 5).

helped to construct in England the ideal citizen and state officer, strengthening the respect to others' rights and others' personality in lawyers as well as in authority representatives.¹²

The implementation of these ideas would have required changes in legislation. In that period, Russian civil legislation did not contain norms on pain and suffering damages except the remedies for dishonour (intentional insult) based on the Statute of 21 March 1851.¹³ It presupposes a very moderate compensation for such acts, from 1 to 50 roubles.¹⁴ Nevertheless, it was considered acceptable to seek this remedy only by the members of low classes without any sense of honour:

The current law deprives those who ask for the remedy of dishonour the right to demand the punishment of the offender so that persons who prefer to recover a sum of money instead of bringing the guilty party to criminal responsibility truly cannot be considered respecting their own moral dignity.¹⁵

However, on 21 January 1909 the Senate, the Russian higher court of the time, implicitly admitted the possibility of moral damages. It was the case on the violation of the author's rights where lower courts refused to award damages since there was no material loss. But the Senate overruled this decision noting that the claimant had the right to seek reasonable compensation.¹⁶ There was another case where damages for non-material harm were recognised by the Senate, this time for personal injuries.¹⁷ Although without expressly referring to moral damages, the Senate stipulated in this case that:

When harm is caused to a person who has been injured, the court while calculating damages not only has the right, but is also obliged to take into account, along with material damage, other harmful, no less serious and often irreparable, damage such as: a disorder of health,

¹² *ibid* 20.

¹³ Art 667-670 of the Digest of Civil Laws of the Russian Empire (implemented by the Statute of 21 March 1851).

¹⁴ Konstantin Pobedonostsev, *The Course of Civil Law [Kurs grazhdanskogo prava]* (Statut 2003, first published 1896) 565.

¹⁵ Motives to the Project of Civil Statute 1905 cited in Tatiana Budyakova, *Individuality of Victim and Moral Damage [Individual'nost' poterpevshego i moral'nyj vred]* (Legal Centre Press 2006) 5.

¹⁶ Belyatskin (n 5) 44.

¹⁷ The *Damba* case n 46 (The Governing Senate, 1909) cited in Belyatskin (n 5) 47.

physical deformity, helplessness of the victim and, in general, more or less serious deterioration in the conditions of his later life.¹⁸

The Senate noted further that money is not a perfect remedy but at least it can compensate for the wrong done by improving the financial situation of the victim. However, the judgment was based on the rules of the Polish Kingdom (*Tsarstvo Polskoye*), part of the Russian empire then but a different jurisdiction.

The efforts of the advocates of reforms were relatively successful. The proposed reform of civil legislation (the Project of Civil Statute 1905)¹⁹ included separate articles on moral damages for some types of delicts. Article 2626 of the Project introduced this remedy for personal injuries and restriction of freedom. In addition, article 2627 maintained the possibility of moral damages for adultery. These norms more or less replicated the relevant articles of the German Civil Code; however, article 1655 of the Project presupposed a revolutionary norm on moral damages for the breach of contract (deliberately or by gross negligence). This could lead to an ambiguous situation, as Joseph Pokrovsky noted, when, for example, a tailor failed to make you a suit would be liable for moral damages but a thief who stole your suit would not.²⁰ It was seemingly more appropriate for pre-revolutionary legal theorists to admit moral damages in contractual relations than in a sphere of pure human emotions.

In addition, there were strong class presuppositions that were responsible for mostly negative views on moral damages since most lawyers were from a privileged noble group (*dvorynstvo*) or the upper-middle class:

Pre-revolutionary Russian jurists, considering personal insult as a possible basis for making a claim for monetary compensation, and treating the insult as an act detrimental to the honour and dignity of a person, most of them considered making such a claim unacceptable. Apparently, this was influenced by the aristocratic, 'knightly' mentality peculiar to the Russian

¹⁸ *ibid.*

¹⁹ The Project of the Civil Statute of the Russian Empire 1905 (online copy) <<http://oldlawbook.narod.ru/proektGU.htm>> accessed 17 January 2022.

²⁰ Pokrovsky (n 5) 141.

nobility - the estate, from among which, as a rule, the corps of pre-revolutionary Russian lawyers replenished.²¹

However, Tsarist Russia was far from unique in these class-based attitudes towards the remedies for non-pecuniary harm.

4.2.2 Comparisons with England

As mentioned above, the English approach served as a model for some proponents for the implementation of pain and suffering damages in pre-revolutionary Russia. However, this remedy was not always welcome in England. Negative attitudes towards pain and suffering damages can be observed among English lawyers in the 19th century. The roots of the English institution of pain and suffering damages can be found in the Middle Age period when there was a fixed compensation for defamation and abuse as well as for suffering of disgrace.²² The main function of these damages was to punish a wrongdoer rather than compensate a victim.²³ However, the first time compensation was explicitly attributed to pain and suffering by the English court was in the case *Scott v. Shepherd*.²⁴ This case was about remoteness of damage, but it was the first time when pain and suffering were recognised as an actionable harm.²⁵ The awarded damages, in this case, were intended to reimburse the claimant for the loss of the sight including the subsequent pain, albeit the court did not put this award under a separate heading.²⁶ As the court found in this case, 'the plaintiff underwent and suffered great and excruciating pain and torment for a long time, (to wit) for the space of six months then next following, and afterwards wholly lost his said eye'.²⁷ That is not to say that personal injury was left without a remedy in the earlier periods of

²¹ Aleksandr Erdelevskiy, *Compensation of Moral Damage [Kompensacija moral'nogo vreda]* (Consultant Plus 2013) 48.

²² Jeffrey O'Connell and Keith Carpenter, 'Payment for Pain and Suffering through History' (1983) 50 *Insurance Counsel Journal* 411.

²³ Giovanni Comandé, 'Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States' (2005) 19 *Temple International and Comparative Law Journal* 241.

²⁴ *Scott v Shepherd* (1773) 95 ER 1124.

²⁵ O'Connell and Carpenter (n 22) 412.

²⁶ *ibid.*

²⁷ *Scott* (n 24) 1124.

English legal history. According to David Ibbetson, 'as early as the fourteenth century English law had provided a remedy for the blameworthy causation of loss, whether through damage to property or injury to the person, in the form of the action of trespass on the case'.²⁸ Thus, a remedy for personal injuries in general existed in English Common Law long before *Scott v. Shepherd*. However, there is no indication that earlier cases separated pain and suffering as a specific type of damage. As Giovanni Comandé notes: 'In the eighteenth century, cases expressly mentioned the physical pain and sorrow of the victim, but it is only in *Scott v. Shepherd* that the expression "pain and suffering" is actually used'.²⁹

One can talk about the full recognition of pain and suffering damages as a separate remedy since 1822 when the court in the case *Pippin v. Sheppard* distinguished this kind of damages.³⁰ Although the main reasoning of the case was on the issue of duty of care, it was the first time when damages were awarded specifically for pain and suffering (itemised).³¹ The problem with this kind of remedy in England was its reputation as a feature of dishonourable behaviour. This was not acceptable for a 'decent' person which is very similar to the position in pre-revolutionary Russia discussed above. As Pollock CB said:

A jury most certainly has a right to give compensation for bodily suffering, unintentionally inflicted. But when I was at the bar, I never made a claim in respect of it, for I look on it, not so much as a means of compensating the injured person, as of damaging the opposite party. In my personal judgement, it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share.³²

Pain and suffering damages became a common remedy in the second half of the 19th century. Specifically, the Law Commission indicates that non-pecuniary damages in personal injury cases

²⁸ David Ibbetson, 'Iniuria, Roman and English' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (Hart Publishing 2013) 43-44.

²⁹ Comandé (n 23) 258. It should be noted for the sake of clarity that the exact phrase in the case report is 'pain and torment'. See *Scott* (n 24) 1124.

³⁰ *Pippin v Sheppard* (1822) 147 ER 512.

³¹ Jeffrey O'Connell and Rita James Simon, 'Payment for Pain & (and) Suffering: Who Wants What, When and Why' (1972) 1 *University of Illinois Law Forum* 1, 93.

³² *Theobald v Railway Passengers' Assur. Co.* (1854) 26 Eng. L. and Eq. R. 438.

had been awarded in England 'since at least the mid-nineteenth century'.³³ In the 1870s, pain and suffering damages were a normal part of compensation for personal injury. The normality of pain and suffering damages as a separate head of damages can be seen, for example, in *Phillips vs London and South Western Railway Co.*³⁴ Although the case was not directly about pain and suffering damages, it was mentioned that they constitute a standard element of compensation for personal injuries. In this case, Lord Justice Bramwell while discussing the assessment of damages for a personal injury noted that:

I have tried as judge more than a hundred actions of this kind, and the direction which I in common with other judges have been accustomed to give the jury, has been to the following effect: 'You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course it is almost impossible for you to give to an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances, what is a fair amount to be awarded to him'. I have never known a direction in that form to be questioned.³⁵

It can be safely assumed that pain and suffering damages became a typical remedy in England by the turn of the century. As Anthony Ogus notes, 'towards the end of the nineteenth century it was put beyond doubt that damages for non-pecuniary loss might properly be awarded'.³⁶ The remark reflecting this state of affairs was made, for example, by Lord Halsbury while discussing *obiter* the problems with the calculation of general damages in *The Mediana* case.³⁷ Although the issue at hand was the damages for a sunken vessel, he considered this issue by taking pain and suffering damages as an example.

Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly

³³ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No 140, 1996) 7.

³⁴ (1879) 5 C.P.D. 287.

³⁵ *ibid* 281.

³⁶ Anthony Ogus, 'Damages for Lost Amenities: For a Foot, a Feeling or a Function?' 35 *Modern Law Review* 1, 4.

³⁷ [1900] AC 113.

mind cares about pain and suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given.³⁸

This discussion demonstrates that awarding pain and suffering damages was very common by that time ('the most familiar and ordinary case'), albeit not without problems with their calculation. However, it is also important to note the judge's rather sceptical views on the possibility of compensation for pain and suffering. As one can see, they do not differ much from Chief Baron Pollock's earlier views on this matter as well as the views of the Russian pre-revolutionary legal scholars who argued against the implementation of pain and suffering damages on similar grounds.

This position of lawyers as members of the upper classes was not uncommon in other European countries, in particular Germany. For example, the drafters of the Baden Code of 1809, although drawing on the concept of general delict from the Napoleon Code, amended it with an explicit exclusion of any awards for pain and suffering.³⁹ Furthermore, sceptical views on non-pecuniary damages were expressed by the authors of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) in their Motives to the Project of the Code⁴⁰ and Protocols of its second reading.⁴¹ As Ulrich Magnus notes, according to the drafters, these damages 'would contradict "the views of the better circles [the upper class] of the population" ("in den besseren Volkskreisen vertretenen Anschauungen') to compensate the violation of "ideal" goods through money'.⁴² Jorg Fedtke also indicates the role of the German upper-class values in the reluctant attitude toward non-pecuniary damages:

There is, for one, a traditional German reluctance to provide compensation for non-pecuniary loss which dates back to the original drafters of the BGB and is still the starting point of the Code today. It was considered highly questionable, at least in the more influential 'upper classes' of society, to claim such compensation due to the perceived moral hazard inherent in

³⁸ *ibid* 116-117.

³⁹ Peter Handford, 'Moral Damage in Germany' (1978) 27 *International and Comparative Law Quarterly* 849, 855.

⁴⁰ *Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs. Vol I* (1897) 622.

⁴¹ *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das Deutsche Reich. Vol II* (1888) 22.

⁴² Ulrich Magnus, 'Damages for Non-Pecuniary Loss in German Contract and Tort Law' (2015) 3 *The Chinese Journal of Comparative Law* 289, 239 citing *Protokolle* (n 40).

human nature; monetary gain, self interest, and greed had to be kept at bay - according to the prevailing sentiment at the time - by limiting non-pecuniary loss to a few exceptions specifically determined by the legislator.⁴³

As Peter Handford explains, 'an idea gained currency that it was somehow alien to true German sensibilities to demand any money for pain and suffering'.⁴⁴ However, the German Civil Code finally allowed, as an exception, a few types of non-pecuniary damages, including pain and suffering damages (*Schmerzensgeld*).⁴⁵ Nils Jansen and Lukas Rademacher summarise this change of social values in Germany as follows:

Whereas at the end of the 19th century, it was regarded as improper, at least for members of the upper classes, to ask for pecuniary compensation for pain or suffering, money today is generally considered an adequate reconciliation of pain and other immaterial losses.⁴⁶

Similarly, as we have seen above, despite the reluctance of English legal professionals (predominately from the upper classes), these damages started to be awarded in the 19th century in England.⁴⁷ These damages started to be awarded more or less simultaneously with the increase of accidents⁴⁸ as a result of which victims were seeking a legal recognition of their pain and suffering. It is not coincidental that most 19th-century cases where pain and suffering damages are mentioned are railroad cases. It could be expected that a similar approach would earlier or later prevail in Russia, with its industrialisation and transport development resulting in a growing number of accidents, as it was in England and Germany. It seems that Russia was on a similar path toward full recognition of pain and suffering damages, albeit being a few decades behind. The prejudices of the upper classes concerning these damages were likely to be overcome in response

⁴³ Jörg Fedtke, 'The Culture of German Tort Law' (2012) 3 Journal of European Tort Law 183, 199.

⁴⁴ Handford (n 39) 855.

⁴⁵ Para 847 (1) of the German Civil Code [*Bürgerliches Gesetzbuch*] of 1900. Two other cases are unlawful restriction of freedom and sexual abuse.

⁴⁶ Nils Jansen and Lukas Rademacher, 'Punitive Damages in Germany' in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 78.

⁴⁷ O'Connell and Simon (n 31).

⁴⁸ For a general discussion of the impact of the Industrial Revolution and its risks on the development of English tort law see Ken Oliphant, 'Tort Law, Risk, and Technological Innovation in England' (2014) 59 McGill Law Journal/Revue de droit de McGill 819.

to the needs of accident victims. It cannot be asserted with absolute certainty, but the inclusion of this remedy in the draft of the new Russian civil legislation strongly suggests a movement in this direction. However, as will be discussed in the next section, the Revolution of 1917 did not make it happen.

That said, one should not conclude that the development of pain and suffering damages was completely unproblematic in England. There was still an issue with the assessment of these damages mentioned by the Earl of Halsbury LC in *The Mediana*. By the middle of the 20th century, English courts came to the conclusion that references to previous awards in similar cases could be helpful in addressing this issue. That is something which Russian courts still cannot accept, as will be discussed in more detail in Chapter 5. In England, on the contrary, that was the first step towards consistency in awarding pain and suffering damages. The Court of Appeal in *Waldon v War Office* allowed judges to award pain and suffering damages basing their assessments on previous awards in comparable cases.⁴⁹ This approach was not applied to the cases considered by juries as it was thought to confuse them and improperly influence their decision-making. However, the use of juries for considering personal injury cases had already shrunk dramatically by that time.⁵⁰ This process had started from the middle of the 19th century. This was either because of the reluctance of judges to allow an application for a trial by jury or the unwillingness of parties to submit such applications in personal injury cases. The final decline of juries in personal injury cases was marked by the decision in *Ward v James*.⁵¹ The rationale behind this decision was that assessment of personal damages by judges is more suitable than by juries as it results in more consistent awards. Lord Denning provided the following reasons for this decision:

We have come in recent years to realise that the award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases.

⁴⁹ [1956] 1 WLR 51.

⁵⁰ See, for example, the comment made by Singleton LJ in *Millikin v Smith* [1951] CA 140: 'In days gone by, most cases of this kind (personal injury cases) were tried with juries; then came a period at which the court were very busy' and Lord Justice Morris' statement in his Presidential Address 'Law and Public Opinion' to the Holdsworth Club of 1958: 'In most cases today damages for personal injuries are assessed by a judge and not by a jury' both cited in David Kemp, Margaret Kemp and CJC McOustra, *Quantum of Damages. Volume I. Personal Injury Claims* (Sweet and Maxwell 1961) 708.

⁵¹ [1966] 1 QB 273.

Yet the jury are not allowed to know what that conventional figure is. The judge knows it, but the jury do not. This is a most material consideration which a judge must bear in mind when deciding whether or not to order trial by jury. So important is it that the judge ought not, in a personal injury case, to order trial by jury save in exceptional circumstances.⁵²

As mentioned above, non-pecuniary damages performed a punitive function in England in the middle ages but compensation became the main function of these damages in modern times. Nonetheless, aggravated and exemplary damages are still allowed in England but they are awarded in exceptional cases. Pain and suffering damages cannot be recovered if the claimant was unconscious but the loss of amenities may be compensated.⁵³ In most cases, however, pain and suffering damages are supplemented with damages for loss of amenity. The common title for both is 'pain and suffering and loss of amenity damages' (PSLA damages) which are awarded as an integral whole.

To summarise, pain and suffering damages in England have become a recognised remedy for personal injuries since the 19th century. The situation with these damages was much more complicated in Russia of that time. There were opponents as well as supporters of this type of damages among legal scholars. Support for this remedy intensified not long before the socialist Revolution of 1917.⁵⁴ The proponents for the implementation of this remedy frequently referred to the English experience as a relevant role model for changes. However, the Revolution of 1917 and subsequent establishment of the Soviet regime did not allow these initiatives to see the light.

4.2.3 Pain and Suffering Damages in the Soviet Times

There was a strong backlash against the idea of moral damages among Soviet legal scholars and judges. Nevertheless, there was a brief period in the 1920s when an alternative position was still

⁵² *ibid* 303.

⁵³ English courts making this distinction are guided by the following reasons: 'The former depend upon the claimant's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation – a substantial loss, whether the claimant is aware of it or not'. Basil Markesinis et al, *Compensation for Personal Injury in English, German and Italian Law: a Comparative Outline* (Cambridge University Press 2005) 47.

⁵⁴ This shift of the views resulted in the inclusion of moral damages in the Project of the Civil Statute 1905 (n 19).

possible. The New Economic Policy (N.E.P.)⁵⁵ led to a partial restoration of some capitalist institutions, including legal institutions.⁵⁶ Therefore, it was possible to keep arguing for implementing moral damages in academic literature. For example, Boris Utevskiy put forward the following arguments for implementation of these damages into the Soviet law:

Money cannot give back a lost body organ, return peace of mind, and make forget about an irreparable loss. But this does not mean that moral harm cannot be compensated somehow, that the victim cannot be provided satisfaction which would redress his suffering. Money can be this means of providing satisfaction, as there is no better means.⁵⁷

Moreover, a district Soviet court had awarded moral damages in 1923, albeit Kharkiv region appeal court reversed this decision.⁵⁸ The appellate judgment explained that in the case of personal injury the task of civil law is to return a person into the previous state, i.e. recover his or her working abilities. That is why only the lost salary could be compensated but not pain and suffering.

By the end of 1920s, there was a consensus against the idea of moral damages among legal scholars and judges. As the Supreme Court summarised this in 1927, 'the conception of monetary redress for moral harm is alien to the Soviet legal conscience'.⁵⁹ At first sight, it seems to be in continuity with the pre-revolutionary doctrinal approach of prohibiting moral damages.⁶⁰

⁵⁵ This was a brief period of the early Soviet history (1921-1928) when market relations were permitted within certain limit. That was considered as an interim measure for restoring economy after World War I and Russian Civil War.

⁵⁶ Rudolf Schlesinger, *Soviet Legal Theory: Its Social Background and Development* (first published 1945, Routledge 2014) 84-91.

⁵⁷ Boris Utevskiy, 'Non-Pecuniary Damages as a Means of Social Protection [Vozmeshhenie neimushhestvennogo vreda kak mera social'noj zashhity] (1927) 35 Review of the Soviet Justice [Ezhenedelnik Sovetskoy Yustitsii] 1073, 1083.

⁵⁸ Cited in A Zeits, 'Moral Damages According to the Soviet Law [Vozmeschenie moral'nogo vreda po sovetskomu pravu]' (1927) 47 Review of the Soviet Justice [Ezhenedelnik Sovetskoy Yustitsii] 1465, 1466.

⁵⁹ The Judgment of the Civil Chamber of the Supreme Court of the Russian Soviet Federative Socialist Republic N 32628 of 17 January 1927 cited *ibid*.

⁶⁰ This position can be found in some studies on Russian tort law by Western scholars. e.g. 'Perhaps the fact that Tsarist law also refused recovery for other than property damage influenced the formation of the Soviet position'. Whitmore Gray, 'Soviet Tort Law: The New Principles Annotated' [1964] *University of Illinois Law Review* 180, 188.

However, the rhetoric shaping the ban on moral damages had changed dramatically, moving away from issues of honour and dignity to issues of 'commodification'. As A. Zeits argued, civil law in socialist society could have only secondary functions in relation to the development of economic productivity.⁶¹ As soon as compensation of moral damages does not provide economic benefits, he noted, the protection of personality should be exclusively in the sphere of criminal law.

Another problem that irritated the Soviet legal scholarship was unavoidable judicial discretion in awarding compensation. As Yakov Kantorovich, one of the leading legal scholars of that time, explains:

[T]he legal order should be based on objective and solid legal norms, which cannot give its place, in any sphere of relations, to the unlimited judicial discretion, subjective and random in its essence. Especially, this subjectivity and randomness appears in regards to such a flexible concept as 'moral damage', and in the sphere of such delicate and sensitive relationships as obligations with non-pecuniary interest.⁶²

Judicial discretion therefore would contradict the basic principle of the statute's priority in the socialist law system. This principle means that all court decisions must be grounded on the existing statutory law; otherwise it would be an arbitrary decision. As a result, the critique of the Western institution of general damages by Soviet legal scholars includes, among other things, equating judicial discretion with arbitrariness.

If in the first decade of the Soviet regime a discussion on moral damages still existed, in the later periods this remedy was entirely identified with the capitalist legal thought. As Soviet legal scholars argued, pain and suffering should not be turned into monetary form ('commodified') in a socialist society, in contrast to the Western legal systems, including the English system:

In contrast, bourgeois law — especially English law, imbued with the spirit of commercialism — permits monetary valuation of so-called 'moral harm'. From the point of view of the bourgeoisie, only that which has exchange value, market value, is valuable. And when bourgeois law provides monetary compensation of 'moral harm', it means the moral harm that

⁶¹ Zeits (n 58).

⁶² Yakov Kantorovich, *Main Ideas of Civil Law [Osnovnye Idei grazhdanskogo prava]* (NKYu USSR 1928) 188-189.

the bourgeois is able to feel: adultery on the part of the merchant's wife can, upon receiving publicity, harm the commercial reputation of this merchant; hence, such 'moral' harm is assessed by money, and the offended spouse gets the right of action.⁶³

There was a solid ideological basis underpinning the prohibition of pain and suffering damages in Soviet law. This linked to the anti-commodification attitudes that tort law tried to develop in common Soviet citizens. As Christopher Osakwe notes, 'to the Soviet legal mind, pecuniary compensation for non-pecuniary harm amounts to unjust enrichment and encourages citizens to engage in the accumulation of unearned income'.⁶⁴ Commenting on this issue, Artyom Karapetov, a leading Russian legal scholar, argues: 'It was believed that it is impossible to attach a monetary value to pain and suffering materially, and that money in general is not the main thing for a Soviet person'.⁶⁵ However, all the examples on general damages proposed by the Soviet scholars were non-typical, like adultery or death of a beloved dog,⁶⁶ rather than personal injuries which number inevitably increased with industrialisation.

Nonetheless, there was one area in Soviet civil law where non-material interest could be expressed. That was Article 142 of the Civil Code which allowed Soviet courts to reduce a penalty for breach of contract but after considering whether this would affect the claimant's non-material interests.⁶⁷ It seems that for Soviet legal scholars, like for their pre-revolutionary colleagues, it was much easier to admit intangible losses in contractual relations than in exclusively personal

⁶³ Ivan Novitsky and Lazar Luntz, *General Doctrine of Obligations [Obshhee uchenie ob objazatel'stve]* (Gosizurizdat 1950), § 49 (11).

⁶⁴ Osakwe (n 1) 12.

⁶⁵ Interview with Artyom Karapetov in Nikita Aronov, 'Life at the Price of an iPhone: How the Russian System of Compensation for Material and Moral Harm Works [Zhizn' po cene 'ajfona' Kak ustroena rossijskaja sistema kompensacij material'nogo i moral'nogo vreda]' (2020) 7 Spark [Ogonjok] <<https://www.kommersant.ru/doc/4242286>> accessed 17 January 2022.

⁶⁶ Ekaterina Fleishits, *Obligations for Causing Injury and for Unjust Enrichment [Obyazatelstva iz prichinenia vreda i iz neosnovatel'no obogashchenia]* (Gosizurizdat 1951) 29.

⁶⁷ Art 142 of the Civil Code of the Russian Soviet Federated Socialist Republic of 31 October 1922: 'If the penalty to be paid is excessively large in comparison with the actual losses of the creditor, the court shall have the right, at the request of the debtor, to reduce the penalty. In doing so, the court must take into account: 1) the degree of fulfilment of the obligation by the debtor; 2) the financial situation of both parties; 3) not only material, but also any other respectable interest of the creditor'.

sphere.⁶⁸ The most likely reason is that the monetary form of these losses in the former case would not mean 'commodification' since in most cases contractual relations *a priori* entail a monetary dimension. The other area where moral harm was mentioned was Criminal Procedure Code, but without any monetary compensation stipulated for this type of harm.⁶⁹

4.2.4 Failed Attempts to Implement Pain and Suffering Damages in the Soviet Union

However, since the 1960s (after the Khrushchev Thaw)⁷⁰ attitudes towards pain and suffering damages started to change. Soviet legal academics and practitioners arrived at the consensus on the necessity of these damages as a mean of human rights protection and punishing a tortfeasor.⁷¹ The proponents of reform referred to the experience of Eastern European countries in which moral damages were recognised despite their socialist legal systems. In some of these countries (for example, Hungary, Poland, Bulgaria, Romania, and Czechoslovakia), there was a ban on moral damages established by legislation or Supreme Court resolutions after communists took the power.⁷² Nevertheless, these restrictive principles were formulated in broad terms so lower courts

⁶⁸ This suggests interesting contrasts with David Engel's study of litigation in American rural community. People there were more prepared to seek compensation for breach of contracts than personal injuries as contractual relations have stronger moral overtones for them than torts. The ability to keep promises and pay debts was a core value in this local community. See David M Engel, 'The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community' (1984) 18 *Law and Society Review* 551.

⁶⁹ According to the Criminal Procedure Code 1960, 'moral harm' was treated as a ground for obtaining legal status of victim and participating in criminal proceeding.

⁷⁰ The period between 1950s-1960s is usually called 'The Thaw' (*Ottepel'*). This period was characterised by extensive liberalisation of cultural and social life in the Soviet Union which includes more freedom of expression in academic debates.

⁷¹ The punishing function was treated as supplementary to compensatory function, and punitive damages were awarded in rare cases in the Soviet Union (torts violating state interest). This approach is different from the American approach where the applicability of punitive damages is defined by the aggravated conduct of the defendant, not by the object of harm. See in greater detail in Osakwe (n 1) 31.

⁷² See more details on pain and suffering damages in socialist Hungaria in László Sólyom, 'Recent Tendencies in the Law of Tort in Hungary' (1981) 23 *Acta Juridica Scientiarum Hungaricae* 201; socialist Poland in Adam Szpunar, 'The Law of Tort in the Polish Civil Code' (1967) 16 *International & Comparative Law Quarterly* 86; socialist Bulgaria, Romania, and Czechoslovakia in H Smith, Book Review: *Ráspunderrea Civilá pentru Daunele Morale* [Civil Responsibility for Moral Damages] by Ioan Albu and Victor Ursa. [Cluj-Napoca: Editura Dacia. 1979] (1980) 29 *International and Comparative Law Quarterly* 535.

started to bypass this ban in their day-to-day practice liberally interpreting the rules. This was a general trend in Eastern European countries after the 1960s when courts began to ignore or reinterpret ideologically based general clauses directed from above, not only in respect to moral damages.⁷³ However, the restrictive approach towards pain and suffering damages, despite the strong pressure from lawyers,⁷⁴ remained unchanged in the Soviet Union.

The real developments in this area occurred only in the 1990s.⁷⁵ Pain and suffering damages were recognised for the first time after the implementation of the Fundamentals of Civil Law of 1991,⁷⁶ just a few months prior to the collapse of the Soviet Union. The Fundamentals can be treated as a transitional step between the Soviet and a new Russian civil law system as their provisions remained applicable in Russia until the adoption of the Civil Code of 1994. The transitional nature of Fundamentals can be seen in the fact that they allowed non-monetary remedies (for example, a gift) for moral harm along with monetary compensation. This seems to be partly in line with the Soviet reluctance to convert human feelings into money. So, the Fundamentals left an opportunity to redress moral harm in the ways other than money. And still, the introduction of a specific remedy for pain and suffering whether in monetary or non-monetary form was a substantial move

⁷³ For example, consider ‘In spite of that tribute to the ideology, however, the examination of operative rules shows that application of general clauses did not follow an “original” pattern, as judges often recovered, through the vehicle of cognitive formulas, traditional “presocialist” solutions’ in Gianmaria Ajani, ‘Formalism and Anti-Formalism under Socialist Law: The Case of General Clauses within the Codification of Civil Law’ (2002) 2 *Global Jurist Advances* 8.

⁷⁴ Consider the following observation: ‘As mentioned above, Soviet law allows no compensation for “moral harm”. Such compensation has been considered “unethical” and violative of “socialist legal consciousness”. But a growing number of voices in the Soviet legal community are advocating a fresh look at the problem. They argue that while it may be impossible to put a price tag on the value of one’s reputation or the suffering caused by being subjected to illegal levels of noise, the perpetrators of such wrongs are breaking the law and some compensation - at least at a nominal level-ought to be possible’. Donald D Barry, ‘Soviet Tort Law and the Development of Public Policy’ (1979) 5 *Review of Socialist Law* 229) 241.

⁷⁵ However, the current tort law in China, one of the few remaining socialist countries, despite some major changes still hardly recognises pain and suffering damages allowing them only in exceptional circumstances. As Helmut Koziol and Yan Zhu mention, ‘The final text (art 22 CTL) removes the strict requirements for non-pecuniary damage and states more generally that serious emotional damage arising from the infringement of personal rights and interests will trigger a claim for non-pecuniary damage. Chinese lawmaker hereby emphasises that only serious emotional damage will lead to a claim for non-pecuniary loss.’ in Helmut Koziol and Y Zhu, ‘Background and Key Contents of the New Chinese Tort Liability Law’ (2010) 3 *Journal of European Tort Law* 328, 343.

⁷⁶ Art 131 of the Fundamentals of Civil Law of the Soviet Union of 31 May 1991.

away from the Soviet approach. One can ask what social and political factors made this radical change possible. John Hazard while discussing the ideological background of the recognition of moral damages in the Fundamentals suggests that this was one of 'the features identified by Gorbachev's philosophers as the new socialism, the socialism of creative humanism'.⁷⁷ Indeed, the reforms of the Perestroika were supposed to transform Soviet-style state socialism into a system which would pay more attention to a particular person and her rights and interests. So, if moral damages were alien to Soviet orthodox socialism, they became fully in line with this newly defined socialism proposed by Mikhail Gorbachev and his team.

This legal novelty was welcomed by most scholars of that time being seen as 'a logical step toward building civil society'.⁷⁸ However, the wording of the provisions on moral damages received some strong criticism right after the adoption of the Fundamentals. One of the main problems of Article 131 was its explicit stipulation that moral damages are awarded on the condition of the defendant's fault. This approach differed from the well-established Soviet approach to pecuniary damages which could be awarded on a strict liability basis if harm is caused by a source of increased danger (including motor vehicles). As Victor Smirnov, a leading Soviet tort law scholar, noted in this regard:

There is no need to argue that the most serious moral damage (physical and moral suffering) is caused to a person in these particular cases, which yet is not recoverable, according to the text of Art. 131 of the Fundamentals, if the defendant is proven not to be at fault. This is a clear inconsistency of the law. Moral damages should be based on the same principles as pecuniary damages.⁷⁹

Indeed, this was seen as a certain inconsistency also by the drafters of the Civil Code of 1994, so they did not include the condition of fault in the Code's provisions on moral damages. Another

⁷⁷ John Hazard, 'Ideological Remnants in Civil Law' in George Ginsburgs, Donald Barry and William Simmons (eds), *The Revival of Private Law in Central and Eastern Europe* (Martinus Nijhoff 1996) 77.

⁷⁸ Elena Mikhno, 'Problems of Moral Damages [Problemy vozmescheniya moral'nogo vreda]' (1992) 5 *Jurisprudence [Pravovedenie]* 89, 90.

⁷⁹ Victor Smirnov, 'The Discussion of the Fundamentals of Civil Legislation. A Round Table of the Journal *Jurisprudence*. Part 2. Presentation of V.T. Smirnov [Obsuzhdeniye osnov grazhdanskogo zakonodatel'stva. Kruglyi stol zhurnala Pravovedenie. Vystuplenie V.T. Smirnova]' (1992) 2 *Jurisprudence [Pravovedenie]* 104, 107-108.

problem was a vague definition of moral damage which includes not only physical but also moral suffering. As Mikhail Braginskii noted, a limitation of the Art. 131 only to bodily suffering would exclude unjustified claims for moral damages which started to be submitted to courts at that period, sometimes for mere distress caused by pecuniary loss or improper work of a state agency.⁸⁰ As the definition remained the same in the Civil Code of 1994, the problem of its vagueness has been partly resolved by the clarification from the Supreme Court.⁸¹ There were two other significant changes compared to the Fundamentals: money became the only form of compensation for pain and suffering,⁸² and such compensation started to be awarded also in strict liability cases.⁸³ Nevertheless, despite these developments, the institution of pain and suffering damages has not yet started functioning properly due to the four problems discussed above.

4.3. Liability Insurance in the Soviet Tort Law Culture

A wide use of liability insurance could help avoid these problems as it enables victims to receive fair, consistent, and enforceable damages through an effective and convenient system. And yet, compulsory liability insurance for pain and suffering damages is absent in Russia. Moreover, voluntary insurance is underdeveloped in this area. The roots of this treatment should be sought in the Soviet tort law culture. In general, the role of insurance and the level of its development are largely shaped by the cultural context of a society. If we look, for example, at the development of life insurance in different societies, we will find large variations in cultural attitudes towards this form of insurance. It is evident that people in the United States,⁸⁴ England,⁸⁵ and China⁸⁶ reflect

⁸⁰ Mikhail Braginskii, 'The General Part of Civil Codification in Russia' in George Ginsburgs, Donald Barry and William Simmons (eds), *The Revival of Private Law in Central and Eastern Europe* (Martinus Nijhoff 1996) 109-110.

⁸¹ Para 2 of the Resolution of Plenum of the Supreme Court of the Russian Federation 'On Some Issues of the Application of Legislation on Moral Damages' of 20 December 1994.

⁸² Art 1101 sec 1 of the Civil Code of the Russian Federation of 30 November 1994.

⁸³ Art 1100 of the Civil Code of the Russian Federation of 30 November 1994.

⁸⁴ Viviana Zelizer, *Morals and Markets: The Development of Life Insurance in the United States* (Columbia University Press 1979).

⁸⁵ Geoffrey Clark, *Betting on Lives: the Culture of Life Insurance in England, 1695-1775* (Manchester University Press 1999).

⁸⁶ Cheri Shun-Ching Chan, *Marketing Death: Culture and the Making of a Life Insurance Market in China* (Oxford University Press 2012).

differently upon death and the perspectives of insuring this risk. Liability insurance is by no means an exception in this regard. Similarly to life insurance, it is intrinsically linked to the society's cultural values. As Tom Baker notes, 'liability insurance must be counted among the sites in which to investigate the relationship between tort law and culture'.⁸⁷ It is not surprising therefore that the Soviet approach to liability insurance, being influenced by 'socialist' cultural values, differed considerably from the approach of Western capitalist countries.

4.3.1 Liability Insurance and the Objectives of the Soviet Tort Law

The general principle supported by the Soviet legal scholars and legislators was that liability insurance is not compatible with the main functions of tort law in a socialist society (compensation, deterrence, and education).⁸⁸ Yet, as in the case with moral damages, there was a brief period in 1920s when the approach to liability insurance was more tolerant. As a part of this general liberalisation process, voluntary liability insurance even became available for accidents caused by road, rail, and water transport in 1926.⁸⁹ However, after only 105 policies were sold in the first year of existence, the new insurance programme was phased out.⁹⁰

However, the attitudes of the Soviet legal scholars and legislators changed after the establishment of the Stalinist regime in the 1930s. The idea of liability insurance was not accepted at that time. Interestingly, similar views against liability insurance can be also found in the Western societies of the 19th century. The possibility to shift responsibility from the tortfeasor to the insurer for a long time was considered to be contrary to the basic principles of tort law.⁹¹ As Martin Davies notes discussing the development of liability insurance in Britain:

⁸⁷ Tom Baker, 'Liability Insurance and the Tort-Crime Boundary' in David Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009) 66.

⁸⁸ Osakwe (n 1) 5-6.

⁸⁹ The Decree of the Labour and Defence Council 'On the Implementation of Civil Liability Insurance on Transport Routes' of 10 February 1926.

⁹⁰ Viktor Ul'janishhev, 'Civil liability insurance [Strahovanie Grazhdanskoj Otvetstvennosti]' (1982) 1 *Pravovedenie* [Jurisprudence] 87.

⁹¹ eg 'At the beginning of the nineteenth century, liability insurance would have been unthinkable. It would have been considered as immoral' in André Tunc, 'Introduction' in *International Encyclopedia of Comparative Law XIX* (1983) 1 cited by Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press 2009).

For most of the period 1835 to 1880, liability insurance was not sold at all in Britain, because it was regarded as being contrary to public policy. The policy objection was simple. Liability in negligence provided an incentive for potential defendants to take reasonable care, an incentive that would disappear if those defendants could shift that liability to their insurers.⁹²

Nevertheless, liability insurance became the context of the tort system in European countries by the beginning of the 20th century. This was in sharp contrast to the situation in the Soviet Union where it was banned.

To better understand this remarkable feature, we need to consider the objectives of tort law according to Soviet legal thought. The prevailing conventional view in Western countries is that compensation is the primary goal of tort law. Deterrence and punishment at best are seen as accompanying supplementary functions.⁹³ The priorities were set differently in the Soviet legal culture. There were identified at least three main goals of the Soviet tort law in academic literature: compensation, deterrence, and education.⁹⁴ The first goal implied compensation of all material losses not covered by social insurance; the second was supposed to deter potential defendants from dangerous behaviour, and the third aimed to re-educate wrongdoers by helping them to become responsible members of the socialist society.

eg 'Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society' in *Ryan v. New York C. R. Co.* (1866) 35 N.Y. 210, 216-217.

eg 'It would be an illegal insurance to insure against what might be the consequences of the wrongful acts of the assured' in *Delanoy v Robson* (1814) 128 ER 827, 827.

⁹² Martin Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 *Legal Studies* 67, 69.

⁹³ Jeffrey O'Connell and Christopher J Robinette, 'The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah' (1999) 32 *Connecticut Law Review* 137.

⁹⁴ Osakwe (n 1) 5.

The discussion of whether tort law deters potential wrongdoers is a familiar debate in the Western literature. Deterrence is frequently recognised as one of the functions of tort law, but which plays only a complementary role.⁹⁵ Moreover, some scholars point out that there is a considerable lack of evidence-based studies which would prove the deterrent effect.⁹⁶ However, in the Soviet legal scholarship, the deterrence task frequently came to the fore. It was considered equally, if not more, important than the compensatory function. The distinction, therefore, lies mainly in the prioritisation of goals. The strong adherence to the deterrence over the loss-distribution ideology was one of the features of the Socialist tort system in the USSR.⁹⁷ This peculiar feature sheds lights on why liability insurance was not available during Soviet history. The possibility to shift responsibility from the defendant to the insurance company would mean, in the view of the Soviet scholars, total elimination of the deterrence function.⁹⁸ In particular, they worried that liability insurance would lead to moral hazard (a propensity to take higher risks if potential liability is shifted to another party) and relaxation of safety standards in the industry and road traffic.⁹⁹ In this way, the Soviet Union differed significantly from Western countries where liability insurance had spread far and wide by that time.¹⁰⁰

The educational and deterrent goals of tort law in the Soviet Union need to be put into a broader political and social context. In general, law in the Soviet Union was grounded in Marxist ideology and principles at the time. The original position of Marxist theory to law dictates its gradual elimination while moving towards communism.¹⁰¹ This theoretical position explains the initial attempts of the Bolsheviks to replace tort law with no-fault social insurance schemes. However, it was soon (towards the late 1920s) realised by the Soviet government that communism and

⁹⁵ Helmut Koziol, 'Prevention under Tort Law from a Traditional Point of View' in L Tichy and J Hradek (eds), *Prevention in Law* (Univerzity Karlovy v Praze 2013).

⁹⁶ Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 405-433.

⁹⁷ Edward Lea Johnson, 'No Liability without Fault – The Soviet View' (1967) 20 *Current Legal Problems* 165.

⁹⁸ Joseph Darby, 'The Influence of Marxian Socialism on the Soviet Law of Torts' (1984) 23 *Columbia Journal of Transnational Law* 373.

⁹⁹ Alice Erh-Soon Tay, 'The Foundation of Tort Liability in a Socialist Legal System: Fault Versus Social Insurance in Soviet Law' (1969) 19 *The University of Toronto Law Journal* 1.

¹⁰⁰ Bernard Rudden, *Soviet Insurance Law* (AW Sijthoff 1966) 196.

¹⁰¹ Evgeny Pashukanis, *The General Theory of Law and Marxism* (first published 1924, Routledge 2017).

therefore the withering away of the state and law is a matter of a distant future.¹⁰² The programme of the 'socialism in one country' as a necessary transitional phase on the way to communism became the Soviet official ideology. This ideology means the cultivation of new members of society in which tort law played an important role. It was supposed to teach people to care about the life, health, and property of others which would become a natural pattern of behaviour without the necessity of any sanctions.¹⁰³

The manifestation of the educational function can be seen in the different treatment of Soviet citizens and foreigners in regards to the liability insurance issue. The only national provider of insurance services in the Soviet Union was a public organisation *Gosstrakh* ('State Insurance' in Russian). This institution operated as a separate entity under the control of the Ministry of Finance with a multitude of local agencies functioning across the country. However, an institution called *Ingosstrakh* ('Foreign State Insurance') was also created whose competency included insurance services for foreign citizens and organisations as well as for the Soviet export companies.¹⁰⁴ The two companies were separate entities.¹⁰⁵ *Ingosstrakh* was a more internationally-oriented company and had branches in London, Vienna, New York, and Finland. The structure and working practices of *Ingosstrakh* were more or less like their Western counterparts.¹⁰⁶ Importantly, the approaches of the two Soviet insurance bodies were different concerning liability insurance. Foreign tourists were free to purchase this kind of policy from *Ingosstrakh*, in contrast to the Soviet citizens who had to deal with *Gosstrakh*. It thus could be inferred that there was no intention of the state to instil socialist values in foreigners.

An additional reason for the prohibition of liability insurance was a strong scepticism by Soviet legal scholars towards the idea of the insurability of immaterial objects. This reluctance was also ideologically motivated. There was a well-established position suggested by the prominent Marxist theoretician Vladimir Raikher that only property and lost working capacity can be objects of

¹⁰² John N Hazard, 'Personal Injury and Soviet Socialism' (1952) 65 *Harvard Law Review* 545, 547.

¹⁰³ As Christopher Osakwe puts it, one of the functions of the Soviet tort law was 'to teach the public at large to refrain from unlawful acts that might result in material damage to others' in Osakwe (n 1) 5.

¹⁰⁴ Bernard Rudden, 'Insurance' in FJM Feldbrugge (ed), *Encyclopedia of Soviet law* (AW Sijthoff 1973) 323.

¹⁰⁵ Paul P Rogers, 'Gosstrakh: Ten Years Later' (1980) 47 *Journal of Risk and Insurance* 534.

¹⁰⁶ Anthony Fitzsimmons and Norair Babadjanian, 'Insurance Law and Regulation in the Russian Federation' (1998) 26 *International Business Law* 9.

insurance in a socialist society.¹⁰⁷ The possibility of insuring intangible objects such as civil liability would lead from this perspective to unjustified enrichment of wrongdoers at the expense of insurance companies, i.e. saving money which would be otherwise paid as compensation. This effectively meant unjust enrichment at the expense of the whole society since insurance companies are public by default in a socialist society. Therefore, liability insurance could be permissible in capitalist countries but certainly not in the Soviet Union. This view was reflected in the Soviet civil legislation where only property insurance and personal first-party insurance were recognised as forms of the insurance contract.¹⁰⁸

The force of ideology is particularly evident in the Soviet approach to strict liability. In continental Europe, the spread of liability insurance, especially its compulsory form, occurred in parallel with the extension of a strict liability regime. Otherwise, this regime would impose a heavy burden on defendants ordered to pay compensation without fault on their part. Furthermore, victims would not obtain compensation if defendants were unable to pay. And yet, this was not considered in the Soviet Union. The absence of liability insurance was particularly extraordinary in view of strict liability for road accidents in the Soviet Union.

4.3.2 The Paradox of Strict Liability and Lack of Insurance

The situation of Soviet motorists was particularly problematic. There was a strict liability regime for high-risk activities and objects (referred to as ‘sources of increased danger’ in Russian law). Despite being a well-established position of Soviet courts that the motor vehicle is a source of increased danger, this was not a unique approach. The same regime operated in relation to road traffic accidents also in European jurisdictions, such as Germany or France.¹⁰⁹ Strict liability is generally seen as a pro-claimant legal regime that imposes liability on defendants without any

¹⁰⁷ Vladimir Raikher, *Socio-Historical Types of Insurance [Obshchestvenno-Istoricheskie tipy sstrakhovaniya]* (Izdatel'stvo Akademii nauk USSSR 1947).

¹⁰⁸ Art 80 of the USSR Act ‘On the Approval of the Fundamentals of Civil Legislation of the USSR and Union Republics’ of 12 August 1961; Art 388 of the Civil Code of the Russian Soviet Federated Socialist Republic of 11 June 1964.

¹⁰⁹ There were numerous attempts, as Peter Bartrip demonstrates, to implement a no-fault regime for road traffic accidents in Great Britain. However, all of them failed due to the conservative government’s concerns about rising fuel prices and insurance premiums as well as the general reluctance to extend social welfare. See in Peter Bartrip, ‘No-Fault Compensation on the Roads in Twentieth Century Britain’ (2010) 69 *Cambridge Law Journal* 263, 285-286.

fault on their part. And yet, the problem is that even this favourable treatment cannot guarantee actual payments of damages. The implementation of strict liability without liability insurance is not helpful for accident victims due to the limited assets of most individual motorists. Therefore, in most European jurisdictions where a strict liability regime operated for road traffic accidents, it is normally accompanied by liability insurance, typically compulsory (discussed in more detail in Chapter 6).

In the Western context, imposing strict liability on some especially dangerous activities is normally justified by the necessity to bear higher risks attached to these activities along with making profits. As Tony Honoré notes: 'While it is permissible to pursue the dangerous activity, it is not in order to refuse to pay for the consequences'.¹¹⁰ This risk-based reasoning can be found, for example, in *Rylands v Fletcher*¹¹¹ where the court imposed strict liability on the defendant for the damage caused by a dangerous construction (a water reservoir) located on his land. However, the idea of risk allocation was alien to Soviet legal scholars in their attempts to justify strict liability for the harm caused by sources of increased danger. According to their views, 'such a risk theory is taken to be incompatible with socialist society'.¹¹² Instead, it was considered that the main purpose of the strict liability regime is 'to bring about greater than normal observation of safety rules and to encourage the development of technological improvements to eliminate the possibility of accidents'.¹¹³ Yet, Bernard Rudden reasonably notes that this logic being convincing in general is not applicable to the situation of private motor vehicle owners.¹¹⁴ Their situation very frequently means the lack of an objective possibility to prevent an accident, even if they try their best. It is not to say that Soviet legal scholars totally neglected this issue with their deterrence-based justification of strict liability. For example, Ekaterina Fleishits admits that the deterrence argument applies primarily to the industrial context, but she still extends this argument to private motorists:

¹¹⁰ Tony Honoré, *Responsibility and Fault* (Hart Publishing 1999) 9.

¹¹¹ (1868) LR 3 HL 330.

¹¹² Tay (n 99) 14.

¹¹³ Donald D Barry, 'Motor-Car in Soviet Criminal and Civil Law' (1967) 16 *International and Comparative Law Quarterly* 56, 73.

¹¹⁴ Bernard Rudden, 'Soviet Tort Law' (1967) 42 *New York University Law Review* 583, 608.

The centre of the struggle for technical safety lies, of course, in the industrial activity. But at the same time, strict liability imposed on private motor vehicle owners cannot but incentive them too to use all available means to improve road safety.¹¹⁵

It is not clear what exactly Fleishits means by 'available means'. They might include an extra care over the technical condition of a motor vehicle or an overcautious style of driving.

Thus, the Soviet approach to strict liability seen from the deterrence perspective did not oppose the fault principle but rather took it to extremes. Indeed, as Alice Erh-Soon Tay notes, the majority of Soviet legal scholars were of the view that strict liability is 'a special application of the general rule [fault-based liability], simply imposing a higher standard of care'.¹¹⁶ How does liability insurance fit into this conception of strict liability? As John Hazard notes, 'since the existence of the strict liability rule is justified in Soviet eyes by the exaggerated care it is presumed to stimulate, no personal liability insurance is permitted to mitigate its effect'.¹¹⁷ The lack of liability insurance in conjunction with strict liability was supposed to promote a higher degree of responsibility. This measure can be explained by the priority given to the idea of deterrence in Soviet tort law doctrine. That feature strongly distinguished the Soviet approach from Common Law tort systems. As Craig Brown notes:

An interesting contrast exists between what appears to be a minimal concern for deterrence in the common-law-liability insurance system and the attitude prevailing in certain socialist countries, particularly the Soviet Union. There the principal purpose of tort law is to deter and to educate the public to avoid injury. Compensation is only a secondary function. In pursuance of this objective, the Soviet Union in a system of strict liability disallows any liability insurance on automobiles. The ban is not restricted to automobile accidents. Employers cannot insure against injury either to employees or strangers. This approach is clearly consistent with the desire to impose the full burden of accident losses, and hence a severe deterrent, upon those deemed most able to avoid accidents in the first place.¹¹⁸

¹¹⁵ Fleishits (n 66) 138.

¹¹⁶ Tay (n 99) 13. The insertion in brackets is mine.

¹¹⁷ John Hazard, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (University of Chicago Press 1969) 392.

¹¹⁸ Craig Brown, 'Deterrence and Accident Compensation Schemes' (1978) 17 *University of Western Ontario Law Review* 111, 115-116.

It can be assumed that supplementing strict liability so understood with liability insurance would have been at odds with the prevailing Soviet tort law doctrine.

The Soviet approach towards liability insurance can be seen as a preference for 'socialist' values over the interests of both defendants and victims. The defendants had to pay from their own pockets despite not being at fault whereas the latter were not guaranteed compensation. This raises the important question of what is meant by 'socialist' values in this context. It would be misleading to talk about a general socialist approach to liability insurance which would be shared by all Eastern European countries in that period. As discussed in Chapter 2, there is no common Socialist legal culture. Consequently, if we look at the experience of other socialist countries, we will not find the same adherence to the deterrent and educational goals of the tort law and therefore a prohibition of liability insurance as in the Soviet Union. The resistance towards this type of insurance was a unique feature of the Soviet tort system.

4.3.3 The Uniqueness of the Soviet Approach Compared to Other Socialist Countries

In the first years after the establishment of socialist regimes, Eastern European legal systems received a substantial injection of the Soviet legal doctrine. Following this doctrine, there were initial attempts to ban liability insurance. The situation resembles the situation with pain and suffering damages discussed in the previous chapter. These damages initially were not permitted in Eastern Europe following the Soviet approach. But courts in these jurisdictions nevertheless soon started to award pain and suffering damages. Similarly, liability insurance was presented as a Western legal institution that in principle was not compatible with socialist values. However, legislators and the judiciary in Eastern European jurisdictions soon concluded that liability insurance did not contradict the basic principles of their tort systems. The explanation is that in most of these countries liability insurance was already in use before the transition to socialist regimes. Therefore, any attempts to transplant the Soviet approach to liability insurance were perceived as alien to the national legal culture and could not survive long.¹¹⁹

¹¹⁹ As for example, László Sólyom notes, liability insurance was implemented in Hungary in the 1970s, despite being 'in opposition to the ideology of the educating role of liability'. See Sólyom (n 72) 203. It is worth recalling that education was one of the three main functions of tort liability according to the Soviet doctrine.

There were some common features that Eastern European socialist countries shared with each other in relation to liability insurance. The first feature was that motor vehicle liability insurance was compulsory in all countries. Only in Romania was it voluntary for a relatively extended period but after 1972 it also became compulsory.¹²⁰ The second common feature of all systems was that insurance payments normally covered strict liability for road traffic accidents. The strict liability regime was established in most jurisdictions of Eastern Europe, at least for cases where passengers and pedestrians were involved. Nevertheless, there were some notable variations in the organisation of insurance schemes across the countries under discussion.

In Hungary, compulsory motor vehicle liability insurance was implemented early in the 1960s. The practical demands there quickly overpowered the negative Soviet cultural and ideological attitudes towards the idea of shifting personal responsibility through liability insurance. The insurance scheme there covered not only private drivers but also state-owned companies and farms.¹²¹ In most Eastern European countries, insurance was not extended to these entities as it was conceived that public funds could cover their potential liability. As Nye Perram notes: 'Because the different State authorities had access to the public purse, they were rarely unable to meet judgment debts. Thus, insurance has been seen as a budgetary consideration and a system of liability insurance was largely unnecessary'.¹²²

In Poland, the organisation of insurance services was similar to the Soviet one: there was a state insurance company that dealt with national clients (the 'State Insurance Establishment') and a separate entity that provided services for foreign clients (the 'Warta' Insurance and Reinsurance Company). However, the former was able to provide liability insurance policies to national citizens, in contrast to the Soviet system.¹²³ As in Hungary, the state companies there, despite the availability of a public budget, could also be covered by liability insurance. Compulsory motor vehicle insurance was introduced there in 1961. The Polish approach was exceptional in the sense that liability insurance and non-fault first-party accident insurance were combined in a single scheme ('communication insurance'). But insurance payments were significantly lower than the

¹²⁰ Adolf Pleshkov, *Motor Vehicle Insurance in the USSR [Avtotransportnoye strakhovanie v SSSR]* (Finansy 1980).

¹²¹ Sólyom (n 72).

¹²² Nye Perram, 'The Law of Torts in Eastern Europe and the Vital Role of Liability Insurance in an Emerging Market Economy' (1992) 18 *Review of Central and Eastern European Law* 253, 254.

¹²³ *ibid.*

court awards that victims could expect after litigation.¹²⁴ If there was no liability, the injured got only payments under accident insurance (much less), which would be treated as a pre-payment in case the driver was found at fault later.¹²⁵ That effectively meant that any victim obtained at least some compensation, regardless of fault on the defendant's part.

An approach like the Polish one can be found in Czechoslovakia. There, liability insurance was provided from 1957 by a state company analogous to the Soviet *Gosstrakh*.¹²⁶ Initially, liability insurance covered only physical injuries but later it was extended to other kinds of losses. The state insurance body after making payment had a recourse action against the defendant in the case of the latter's drunkenness or driving without a licence.¹²⁷ Noteworthy, the need for such a right of action was recognised by those Soviet legal scholars who argued for the implementation of liability insurance in the Soviet Union (discussed in greater detail in the next section).

Liability insurance also became available in socialist countries such as Eastern Germany and Bulgaria by the beginning of the 1970s.¹²⁸ In the former case, a distinctive feature was that liability insurance did not include driver-to-driver claims, and contributory gross negligence or drunkenness was taken into account. There were no claims discounts for lack of accident history, but there were bonuses of five levels paid to the most careful drivers.¹²⁹ In the latter case, the most distinctive feature was that damages for personal injuries were assessed by courts whilst car damage was assessed by insurers.¹³⁰

The above-described experience of Eastern European countries in the implementation of liability insurance demonstrates that this insurance scheme could work in socialist countries. Indeed, this argument was actively used by the Soviet legal scholars who advocated changes in the approach

¹²⁴ Szpunar (n 72).

¹²⁵ Pleshkov (n 120).

¹²⁶ Artem'ev and Polovinchik (n 2).

¹²⁷ Pleshkov (n 120).

¹²⁸ Adolf Pleshkov, 'State Compulsory Civil Liability Insurance of Motor Vehicle Owners [Gosudarstvennoe objazatel'noe strahovanie grazhdanskoj otvetstvennosti individual'nyh vladel'cev mehanizirovannyh sredstv transporta]' (DPhil [Candidate of Sciences] thesis, All-Union Financial and Economic Institute 1971).

¹²⁹ Pleshkov, *Motor Vehicle Insurance in the USSR* (n 120).

¹³⁰ *ibid.*

to liability insurance in the Soviet Union. This resulted in the discussion of the possibility of borrowing something from the Eastern European model in the Soviet academic literature in the relatively 'liberal' 1960s ('The Thaw').

4.3.4 Failed Attempts to Implement Liability Insurance in the Soviet Union

The main platform for discussion was the leading law journal *Soviet Justice*.¹³¹ The discussion was structured around road traffic accidents.¹³² There was a substantial increase in the number of motor vehicles compared to the prior period. Therefore, the need for liability insurance was the most pressing and evident at that moment.¹³³ Arguments of an economic nature were also put forward. Specifically, the growing popularity of car rental in the 1960s had an impact on the views of liberal lawyers. Car rental was more affordable for the Soviet people than buying a private motor vehicle. This rapidly developing service sector simply could not survive in the absence of liability insurance.¹³⁴ The liberal-minded Soviet legal scholars started to discuss the possibility of liability insurance basing their arguments on the demands in this area. They challenged the orthodox views on the prevalence of deterrent and educational functions of tort law over victims' needs. The absence of insurance, as Nikolaj Malein argued, makes compensation problematic in cases of a criminal conviction or poor financial situation of the defendant.¹³⁵ It also places a heavy and unfair burden on the motor vehicle owners who could be liable without any fault on their part due to the strict liability regime.

¹³¹ This journal is called 'Russian Justice' since 1993. The recent issues are available at the official websites < <http://justicemag.ru/> > accessed 17 January 2022. The electronic archive of some Soviet issues is available at < <http://elib.uraic.ru/handle/123456789/3305> > accessed 17 January 2022.

¹³² Artem'ev and Polovinichik (n 2); Malein (n 2); Martem'janov (n 2); Pleshkov, 'On Implementation of Civil Liability Insurance of Motor Vehicle Owners' (n 2); Viktor Rahmilovich, 'On Civil Liability Insurance [O strahovanii grazhdanskoj otvetstvennosti]' (1962) 4 Soviet Justice [Sovetskaja Justicija] 20; Viktor Rahmilovich, 'On Civil Liability Insurance of Motor Vehicle Owners [O strahovanii grazhdanskoj otvetstvennosti vladel'cev mehanizirovannyh sredstv transporta]' (1970) 21 Soviet Justice [Sovetskaja Justicija] 14.

¹³³ Martem'janov (n 2).

¹³⁴ Artem'ev and Polovinichik (n 2).

¹³⁵ Malein (n 2).

Concerning ideological obstacles, the strategy of these scholars was similar to those suggested for pain and suffering damages. The approach of the Eastern European countries demonstrated that liability insurance could work in socialist countries.¹³⁶ Moreover, since these services were provided by state insurance companies, it would bring additional revenues to the budget which could be spent on improving safety on Soviet roads.¹³⁷

Concerning legal obstacles, the arguments referred to the availability of liability insurance for foreign drivers.¹³⁸ As was discussed above, *Ingosstrakh* provided liability insurance policies for material losses caused by motor vehicles owned by foreign citizens. This led Nikolaj Malein to the conclusion that there were no formal hurdles that would preclude the implementation of liability insurance.¹³⁹

The question of how to keep the deterrence function remained. It was considered that the only way to preserve this function and at the same time satisfy the victims' needs was to give a right of recourse to the insurer in all cases involving fault.¹⁴⁰ As Viktor Rahmilovich argued, criminal liability alone could not perform this function.¹⁴¹ His concern was that there were no grounds for criminal sanctions in many cases of traffic violations according to Soviet law, but some of these violations could still be dangerous for the society. According to Vjacheslav Agapeev, a right of recourse in these cases would serve 'the purpose of educational and preventive effect on motor vehicle owners'.¹⁴² This was point where traditional and liberal Soviet lawyers reached agreement.

However, all these prospects were not realised. As has been discussed above, the argument that deterrence and education were among the primary functions of tort law remained strong. It was

¹³⁶ This argument was mentioned in Artem'ev and Polovinichik (n 2); Malein (n 2); Pleshkov, *Motor Vehicle Insurance in the USSR* (n 120).

¹³⁷ Pleshkov, 'On Implementation of Civil Liability Insurance of Motor Vehicle Owners' (n 2).

¹³⁸ Malein (n 2).

¹³⁹ *ibid.*

¹⁴⁰ Martem'janov (n 2).

¹⁴¹ Rahmilovich, 'On Civil Liability Insurance of Motor Vehicle Owners' (n 132).

¹⁴² Vjacheslav Agapeev, 'Insurance against the Consequences of Road Traffic Accidents [Strahovanie ot posledstvij dorozhno-transportnyh proisshestvij]' (DPhil [Candidate of Sciences] thesis, Moscow Higher School of the Ministry of Internal Affairs 1981) 23.

reproduced in the most influential textbooks of that time.¹⁴³ Victor Rahmilovich argued that liability insurance would be nothing but a mean to 'buy off' responsibility for not following socially acceptable modes of behaviour.¹⁴⁴ Liability insurance would contradict the fundamental principles of the Soviet tort law and insurance. The state authorities were also unhappy with the idea of implementing compulsory liability insurance, partly for populist reasons. The concern was that this would impose an extra burden on drivers in the form of regular insurance premiums which could cause social discontent.¹⁴⁵

The situation changed only after the collapse of the Soviet Union. The market of insurance services developed and liability insurance became available in early 1990s. As discussed above, pain and suffering damages were implemented around the same time. However, the remnants of the Soviet approach still influence the situation with pain and suffering damages in Russia.

4.4 The Impact of the Soviet Background on the Current Situation

The regional appeal courts have considerable influence on the level of pain and suffering damages. The interview in the media with the ex-judge of the Moscow appeal court Sergei Pashin, for example, shows that appeal courts strongly influence the level of pain and suffering damages awards in a particular region:

¹⁴³ The detailed discussion with the relevant quotations from the Soviet tort law textbooks see in Tay (n 99).

¹⁴⁴ Rahmilovich, 'On Civil Liability Insurance' (n 132); Rahmilovich, 'On Civil Liability Insurance of Motor Vehicle Owners' (n 132).

¹⁴⁵ There was, for example, a proposal for implementation of compulsory motor vehicle insurance which did not get a permission of the Ministry Council of the Ukrainian SSR. The concerns were expressed that this statute would have a negative impact on the financial situation of the Soviet workers. See in Valerij Shevchuk and Adol'f Pleshkov *Motor Vehicle Insurance (from Origins to the Present) [Avtotransportnoe strahovanie (ot istokov do sovremennosti)]* (Ansel-Press 2001).

On the question of what compensation to award, the tone is set by the regional court. Therefore, in different regions the situation is different. Siberia is one thing - they award less there. Krasnodar is another matter - they award more there.¹⁴⁶

However, despite these regional deviations, the general level of awards is low across the whole country (as discussed in Chapter 3). The appeal courts consist of senior judges who are not prepared to change their policy, most likely due to the existing Soviet attitudes. For example, one of the interviewees suggests this as a probable explanation for their approach to assessment:

Q: How do they calculate these figures?

A: Just randomly. They just decided that this is normal, and that's it. Because they do not correlate with anything else, they do not correlate with aviation legislation, with OSAGO, that is, I understand if they tied it there, at least to something, yes. They don't correlate with anything <...> This, I think, of course, are vestiges of the Soviet system and there are a lot of judges left who are still rooted in this system.¹⁴⁷

As one of the Supreme Court Justices recently described the prevailing Soviet attitudes of the Russian judiciary, 'for us the usual picture is meagre compensation for moral harm because there has always been a view that moral damage cannot be determined materially.'¹⁴⁸ He concluded that Russian courts are still 'one foot in the Soviet system'¹⁴⁹ on this particular issue.

This conservative approach, in its turn, affects decision-making on pain and suffering damages in first instance courts. The interviewed lawyer describes this in the following way:

¹⁴⁶ Interview with Sergey Pashin in Nikita Aronov, 'Life at the Price of an iPhone: How the Russian System of Compensation for Material and Moral Harm Works [Zhizn' po cene 'ajfona' Kak ustroena rossijskaja sistema kompensacij material'nogo i moral'nogo vreda]' (2020) 7 Spark [Ogonjok] <<https://www.kommersant.ru/doc/4242286>> accessed 17 January 2022.

¹⁴⁷ Interview with a personal injury lawyer from Nizhny Novgorod.

¹⁴⁸ The Vice-President of the Russian Supreme Court Victor Momotov in 'The Supreme Court Judge Conceives that the Quantum of Moral Damages Should Be Higher [Sud'ja Verhovnogo Suda schitaet, chto razmery kompensacij moral'nogo vreda dolzhny byt' vyshe] TASS 20/03/2018 <<http://tass.ru/obschestvo/5050216>> accessed 17 January 2022.

¹⁴⁹ *ibid.*

There may be several explanations [for low awards of pain and suffering damages], and for each judge there may be a different explanation. An explanation of the first order is that this is how the practice has developed. 'It 300,000 [£3,000] is awarded for such injuries, so I will award 300, all right, 350,000 [£3,500], but I will never award 800,000 [£8,000] simply because the higher court will result in a quashing of the judgment.' This implies the position that the rails are well-worn so we are driving along them. It is conformist behaviour.¹⁵⁰

It is notable that young trial judges and judges with the experience of practising lawyers are more prepared to award higher levels of compensation. The media interview with Sergey Savostyanov, ex-judge of one of the Moscow district courts, reveals this trend among young Russian judges and suggests the following explanation of this trend:

The youth are prepared, as I see it, to raise this level [of pain and suffering damages]. That is because they see that normal, healthy compensation stimulates more law and order, makes everyone work well, and this has a positive impact on the economy in general and on socio-economic life.¹⁵¹

This citation suggests that the young generation of Russian judges does not share the Soviet negative approach to pain and suffering damages. A survey of Russian judges conducted in February 2020 supports this assumption.¹⁵² The sample included 118 practising federal judges from different age groups with varying lengths of service. The median awards of pain and suffering damages suggested by respondents fluctuate between 70,000 roubles (£700) and 2 m roubles (£20,000) depending on the severity of injuries and circumstances of the accidents. The figures obtained, as can be seen, are less than the median figures suggested by lawyers and the general public but still much higher than the actual judicial awards (these figures were provided in section 3.2). At the same time, absolute numbers vary significantly across the cohorts of respondents. Remarkably, the highest awards were suggested by young judges aged 25 to 40 years with work

¹⁵⁰ Interview with an advocate from Vladimir.

¹⁵¹ Interview with Sergey Savostyanov (Mediazona, 09 Septemeber2019) < <https://zona.media/article/2019/09/09/savostianov> > accessed 17January 2022.

¹⁵² Association of Russian Lawyers and Financial University of the Government of the Russian Federation, *Analytical Report by the Results of the Study of Russian Judges' Estimations of Fair Compensation for Pain and Suffering in Personal Injury and Fatal Accident Cases* (Moscow 2020) < <https://zakon.ru/Tools/DownloadFileRecord/24384> > accessed on 17 January 2022.

experience of lesser than 5 years whereas senior judges, who started their career in the Soviet times, tend to suggest lower figures.

However, the problem is that it is hard for Russian trial judges to change the current pattern in awarding compensation even if they wish to do this:

There is an established track, from which the judges do not risk to deviate. After all, the indicator of the effectiveness of their work is the coefficient of cancellation of decisions in higher courts. And the logic is simple: if other judges awarded compensation of 200,000 for such an injury, and no one cancelled this decision, then why would I award 10 million? It's easier to do like everyone else.¹⁵³

A deviation from the general level of awards would lead to more frequent reversals of first instance decisions in appeal courts. And a high reversal rate can be an obstacle to the judge's promotion or can be even a basis for disciplinary sanctions. The detailed analysis of these issues can be found elsewhere.¹⁵⁴ Therefore, the system of institutional incentives and limitations within the Russian judiciary must be taken into account in reforming the current approach to pain and suffering damages.

Another relevant feature of the Soviet tort law culture is the involvement of state procurators in personal injury cases. It should be noted that all organisations and institutions, that is 'repeat' defendants,¹⁵⁵ were public in the Soviet Union. That, according to Inga Markovits, is the general explanation for a relatively small number of claims in all Eastern European countries.¹⁵⁶ The concerns of the State about excessive damages which would be paid out of public funds can partly

¹⁵³ Interview with Artyom Karapetov in Aronov (n 65).

¹⁵⁴ See, for example, Peter Solomon and Todd S Foglesong, *Courts and Transition in Russia: The Challenge of Judicial Reform* (Routledge 2018); Vadim Volkov and Aryna Dzmitryeva, 'Recruitment Patterns, Gender, and Professional Subcultures of the Judiciary in Russia' (2015) 22 *International Journal of the Legal Profession* 166; Vadim Volkov et al, *Russian Judges: a Sociological Study of the Profession [Rossijskie sud'i: sociologicheskoe issledovanie professii]* (Norma 2015).

¹⁵⁵ Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

¹⁵⁶ Inga Markovitz, 'Law and Glasnost': Some Thoughts about the Future of Judicial Review under Socialism' (1989) 23 *Law & Society Review* 399.

explain participation of procurators in personal injury cases. Another reason for involving procurators, at least in work accident cases, could be potential bias of a factory's administration in awarding compensation. As Donald Barry notes, the factory's administration was allowed from 1962 to consider workers' claims for injuries caused by its fault (albeit with a right of workers to appeal to the courts), so procurators were supposed to control this new procedure:

In discussions by Soviet jurists of this provision, the ability of a factory's administration to make an unbiased decision as to its fault in causing an injury has not been questioned, although doubts as to the fairness of this procedure would seem to be in order. But recommendations have been made that the procurators keep a closer check on these decisions and, in addition, be given the right to bring compensation cases before the administration on their own initiative, which might well be directed against this one-sidedness in the decision mechanism.¹⁵⁷

Procurators still play a significant role in modern Russian civil procedure.¹⁵⁸ They participate in most personal injury cases and provide their conclusion on liability and quantum issues as a third party. They can also participate in personal injury cases on behalf of the claimants who cannot afford legal representation. The absence of a procurator in a trial can work sometimes as an additional argument for overruling the first instance court ruling.¹⁵⁹ The involvement of procurators is likely to be a remnant of the Soviet tort system where the majority of tort cases included the interests of the State as all 'repeat' defendants were State institutions and companies. Procurators were supposed to look after the public interests. This issue is discussed in greater detail in the next chapter on railroad accident cases involving the state-owned railroad monopoly ('Russian Railways').

¹⁵⁷ Barry (n 74) 238.

¹⁵⁸ On the comprehensive role of the procuracy in the Soviet-type legal systems in Europe (still preserved in post-socialist Russia, Hungary and Bulgaria) see Inga Markovits, 'The Death of Socialist law?' (2007) 3 Annual Review of Law and Social Science 233, 240-241.

¹⁵⁹ eg 'In addition, the arguments of the respondent's cassation complaint that the prosecutor was not invited to participate in the case deserve attention, since under Part 3 of Art 45 of the Code of Civil Procedure of the Russian Federation his participation is mandatory in personal injury cases' (Moscow Regional Cassation Court, Cassation Judgment no. 361 of 5 July 2017).

4.5 Conclusion

The analysis above has demonstrated that the approach of the Soviet tort law towards pain and suffering damages and liability insurance was strongly influenced by Soviet cultural and ideological values. The idea that money can compensate non-material losses was seen – and rejected – as a feature of the tort law in capitalist societies. That the potential of this remedy was not recognised is unsurprising given that there was not much attention paid to interests of the individual in Soviet civil law. The approach of the Soviet law was seen as pro-claimant due to the widespread regime of strict liability. However, this cannot be said in relation to damages where the main principle was not only to compensate victims' losses but also not to allow unjust enrichment of the claimant and the worsening of the defendant's financial situation. The most evident manifestation of this principle was the unavailability of pain and suffering damages in Soviet law. Moreover, the court was able to take into account the financial situation of the defendant and reduce damages accordingly. These two features were considered as 'uniquely "socialist" elements'¹⁶⁰ of the Soviet tort system.

It has been argued that these attitudes are still evident among the Russian judiciary. The practice of the appeal courts which consists of senior judges demonstrates the continuity of these Soviet attitudes. The relevance of the Soviet approach to pain and suffering damages can be seen in the current practice of Russian courts which are reluctant to award substantial compensation for pain and suffering. The Russian judiciary, especially in the appeal courts, is mostly from the Soviet generation so negative views on pain and suffering damages can be still strong amongst them. There is also strong institutional inertia in the Russian judicial system which prevents modification in awarding damages.

This approach could be different if liability insurance covered pain and suffering damages. However, the views of the Soviet legal thought on the insurability of civil liability as a whole and of the liability for losses other than purely material were also problematic. The shift of the responsibility to insurance companies was seen as an inappropriate way to eliminate personal responsibility for the harm caused. The approach was eventually relaxed and liability insurance became available after the collapse of the Soviet Union, but the views mentioned above are still

¹⁶⁰ Barry (n 74) 244.

evident in the organisation of compulsory insurance in contemporary Russia. The prevailing opinion is that these damages must be paid out of the defendant's own pocket. In regards to liability insurance, the exclusion of pain and suffering damages from insurance coverage under compulsory insurance for road traffic accidents and work accidents can be seen as the continuation of the Soviet view on insurance as the means to protect only material interests. This approach differs substantially from Western tort law cultures where insurability of intangible losses is not an issue.

At the same time, voluntary insurance for pain and suffering damages is available. However, this leads to the question of whether voluntary insurance would actually facilitate addressing the problems with pain and suffering damages. The market demand and supply for this type of insurance policy is currently low. The only exception is railroad accidents where the monopolist Russian Railways has bought liability insurance for pain and suffering for many years. Therefore, the analysis of this category of cases provides a good opportunity to look at how liability insurance operates in practice and what might raise obstacles to its effective functioning. The next chapter below examines these issues drawing on the analysis of court judgments on railroad accident cases.

CHAPTER FIVE. RAILROAD ACCIDENTS AND VOLUNTARY LIABILITY INSURANCE FOR PAIN AND SUFFERING DAMAGES

5.1. Introduction

The previous chapter demonstrated that the remnants of the Soviet approach to pain and suffering damages are still relevant to the Russian tort system and current judicial practice. These remnants largely contribute to the problems with pain and suffering damages in Russia. This chapter will address the question of whether wider use of voluntary liability insurance can be a viable solution for ensuring fairer awards of pain and suffering damages. The chapter discusses this based on the analysis of railroad accident cases, the only area where voluntary liability insurance for pain and suffering damages is extensively applied. It demonstrates that voluntary liability insurance in this area is not capable of resolving three of the four key problems with pain and suffering damages. The reason is that this insurance scheme serves the interests of the railroad company and insurer rather than accident victims. This chapter argues that voluntary liability insurance is unlikely to improve the situation for accident victims in Russia.

Liability insurance in general is not as widely used in Russia as in Western countries. As it was argued in the previous chapter, there are cultural attitudes inherited from the Soviet past which can explain the current underdevelopment of liability insurance. It was believed that liability insurance contradicts the goals of tort law in a socialist society. Indeed, liability insurance was not available throughout Soviet history. This restrictive approach changed only after the collapse of the Soviet Union. The use of liability insurance continues to be limited. Compulsory motor third party liability insurance was only implemented in Russia in 2003, and it does not cover pain and suffering damages. Nor are these damages included in compulsory insurance coverage for workplace injuries,¹ injuries to military personnel,² or injuries to public transport passengers.³

¹ Art 8 para 3 of the Federal Law N 125-FZ 'On Compulsory Social Insurance against Work Accidents and Professional Diseases' of 24 July 1998.

² Art 5 para 2 of the Federal Law N 52-FZ 'On Compulsory State Life and Health Insurance for Military Personnel, Citizens Called Up for Military Training, Ordinary and Senior Officers of The Internal Affairs Bodies of The Russian

At the same time, the use of liability insurance, be it compulsory or voluntary, continues to be limited. Voluntary liability insurance against pain and suffering damages is available for companies and private individuals to purchase.⁴ However, it is far from a marketable insurance product. The supply and demand are weak in this area as demonstrated the analysis of personal injury cases in Chapter 3 and interviews with insurance lawyers. Perhaps, there are no incentives for purchasing this sort of insurance as the risks are not high for potential defendants. There must be an accident in the first place, the victim then must make a claim for pain and suffering damages, and even in this case, a probable award is not catastrophic. All this is true unless we deal with a ‘repeat’ defendant who has to face a sufficient number of such claims on a regular basis, like the Russian railroad company does. The only category of cases where this type of insurance is widely and systematically applied is railroad accidents. The insurance policy purchased by the state-owned railroad monopoly covers, within limits, pecuniary and non-pecuniary losses of railroad accident victims in Russia. This chapter focuses on this class of cases. As we will see, this type of insurance is subject to significant limitations excluding two major categories of victims – passengers and railroad workers. These categories are covered by separate compulsory insurance schemes which do not include pain and suffering damages. However, even the remaining categories of victims do not benefit from voluntary liability insurance since it fails to address three of the four main problems with pain and suffering damages.

5.2. The General Background: Liability Insurance and Railroad Accidents in Russia

The analysis of railroad accident cases, therefore, provides a good opportunity to consider how liability insurance for pain and suffering damages operates in practice and the obstacles to its

Federation, the State Fire Service, Employees of Institutions and Bodies of the Penal System, Members of the National Guard of the Russian Federation’ of 28 March 1998.

³ Art 16 para 1 of the Federal Law N 67-FZ ‘On Compulsory Insurance of Civil Liability of a Carrier for Causing Harm to Life, Health, Property of Passengers and On the Procedure for Compensation for Such Damage Caused during Transportation of Passengers by Subway’ of 14 June 2012.

⁴ It is presumably easier for the Russian legislators to allow voluntary liability insurance rather than imposing an obligation to purchase liability insurance on a population which is not culturally prepared for that. That was the case, for example, with compulsory motor insurance for material losses which was implemented only in 2003, i.e. more than ten years after voluntary form of such insurance became available on the market.

effective functioning. However, the general background of the situation with liability insurance and railroad accidents in Russia must be provided first. This will help to understand better why voluntary liability insurance fails to address the problems with the level of pain and suffering damages, consistency of awards, and the complex claims procedure.

5.2.1 Compulsory and Voluntary Liability Insurance in Contemporary Russia

The new Civil Code of 1994 for the first time introduced liability insurance as a concept and institution in Russian law.⁵ The relevant provisions of the Code cover compulsory and voluntary forms of liability insurance. Compulsory liability insurance was implemented in some areas such as, for example, public transport accidents⁶ and military accidents.⁷ Surprisingly, it was not implemented in regard to private motor vehicles where the accident rate is much higher. Several legislative proposals were prepared. And yet, all these attempts for a long time remained unsuccessful. Most of the legislative initiatives did not reach the adoption stage in the Russian parliament.⁸ Those that did were blocked for unknown reasons by the president's veto.⁹ As a result, compulsory third party liability insurance for motor vehicles was implemented only in 2003, much later than in other European countries.¹⁰

⁵ Art 931 of the Civil Code of the Russian Federation of 30 November 1994.

⁶ The Federal Law N 67-FZ 'On Compulsory Insurance of Civil Liability of a Carrier for Causing Harm to Life, Health, Property of Passengers and On the Procedure for Compensation for Such Damage Caused during Transportation of Passengers by Subway' of 14 June 2012.

⁷ The Federal Law N 52-FZ 'On Compulsory State Life and Health Insurance for Military Personnel, Citizens Called Up for Military Training, Ordinary and Senior Officers of The Internal Affairs Bodies of The Russian Federation, the State Fire Service, Employees of Institutions and Bodies of the Penal System, Members of the National Guard of the Russian Federation' of 28 March 1998.

⁸ Valerij Shevchuk and Adolf Pleshkov, *Motor Vehicle Insurance (from Origins to the Present) [Avtotransportnoe strahovanie (ot istokov do sovremennosti)]* (Ansel-Press 2001).

⁹ Christopher A Thompson, 'Insuring a Brighter Future: The Emerging System of Russian Insurance Law' (1996) 19 *Houston Journal of International Law* 863, 905.

¹⁰ cf 1927 – Finland, Denmark, Norway; 1930 – England; 1932 – Luxembourg; 1934 – Ireland; 1939 – Germany; 1950s – France, Belgium. Valerij Shevchuk, *Civil Liability Insurance for Motor Vehicle Owners [Strahovanie grazhdanskoj otvetstvennosti vladel'cev avtotransportnyh sredstv]* (DPhil [Candidate of Sciences] thesis, Moscow State Institute of International Relations of the Ministry of Foreign Affairs 1998).

The reform entailed an explicit exclusion of pain and suffering damages from the insurance coverage. It must be noted that the insurability of pain and suffering damages is a debatable issue in Russian academic literature.¹¹ There is a certain continuation of the Soviet view on insurance as a means to protect only material interests. For example, the head of the legal department of a major Russian insurance company supported the view that this object is not insurable at all according to Russian civil law:

<...> under applicable law, the object of insurance can only be property interests. Since the interests associated with compensation for non-pecuniary damage belong to the sphere of non-property interests, they cannot be the subject of insurance.¹²

Such views are possible partly because of a gap in the legislative provisions on insurance contracts. The Russian Civil Code and Insurance Law do not directly mention pain and suffering damages among insurable interests. There was a strong tendency in the Soviet legal thought and judicial practice to interpret most civil law rules on contracts as mandatory norms unless the rule includes an explicit formulation 'unless otherwise provided for in a contract'. This approach means that since pain and suffering damages are not listed among the insurable interests in the legislation, and there is no such a remark there, the parties are not able to include the coverage for these losses into a contract.

This understanding, however, started to change in the last decade. The alternative presumption that most rules of the Civil Code on contracts are dispositive (i.e. applicable unless parties make other arrangements in the contract) even in the absence of the above-mentioned remark is becoming increasingly recognised.¹³ This means that even if pain and suffering damages are not mentioned directly in the Civil Code, they are insurable if parties reach an agreement upon this. Insurance companies, therefore, conclude insurance contracts for pain and suffering in accordance

¹¹ See, for example, a discussion of arguments pro and contra insurability in Alexander Mokhov et al, 'Professional Liability Insurance and Moral Damages' [Strahovanie professional'noj otvetstvennosti i kompensacija moral'nogo vreda] (2006) 6 Lawyer [Yurist] 25.

¹² Aleksandr Solov'ev, 'Moral Damage and Insurance [Moral'nyj red i strahovanie]' *Finansovaja Gazeta [Financial Gazette]* (Moscow 13 January 2011).

¹³ The Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation N 16 'On Freedom of Contract and Its Limits' of March 14 2014.

with this view, but it is still not a regular practice. For example, an experienced personal injury lawyer was clearly surprised to come across this scheme in one of his cases (a slip and fall):

In court, the representative of the defendant said that the claimant herself is to blame [for slipping] and that they have insured moral damage (!) [*the exclamation mark is used in the original text*]and even gave copies of the insurance contract [to the judge]. Immediately on the spot, it was difficult to understand who and what was insured, so it took time to understand how they managed to insure moral damage. No one can, but they do, what a wonderful insurer of moral damage it is.¹⁴

It turned out in this case that it is not liability for pain and suffering damages in general that was insured but rather the defendant's obligation to pay these damages solely on the basis of a court decision. This difference matters and will be discussed in greater detail further in relation to railroad accident cases.

Voluntary liability insurance, in general, is far from being a popular insurance product in Russia. For example, in the first half of 2003, before the implementation of compulsory insurance, there was no significant demand for voluntary liability insurance (only 5% of drivers were covered by this insurance).¹⁵ There were some expectations that the implementation of compulsory motor third-party liability insurance in Russia would trigger an increase in the use of voluntary forms of liability insurance. However, these expectations did not materialise.¹⁶ The most probable explanation lies in the lack of financial resources of potential consumers.¹⁷ The other reason is a limited offer since the insurance market is still underdeveloped. For example, there are 500,000

¹⁴ Dmitriy Anshukov, 'Recovery of Pain and Suffering Damages from a Slip-and-Fall in a Shopping Mall' [Vzyskanie moral'nogo vreda ot padeniya v trgovom centre] (11 April, 2018) < <https://pravorub.ru/cases/81869.html> > accessed 17 January 2022.

¹⁵ Igor Kotlovsky, 'The Prospects for Motor Insurance in Russia' (2006) 11 *Journal of Risk Management and Insurance* 32.

¹⁶ Yulia Makhdieva, 'Liability Insurance in Russia: Current State and Development Areas [Strahovanie otvetstvennosti v Rossii: sovremennoe sostojanie i napravleniya razvitija]' (2014) 46 *Finance and Credit [Finansy i kredit]* 35

¹⁷ Jennifer McGrath, 'An Introduction to Russian Insurance Law and Current Reforms' (1994) 7 *The Transnational Lawyer* 471.

citizens per insurer in Russia, whereas this figure is 150,000 in the EU and 100,000 in the US.¹⁸ The liability insurance business overall is not particularly profitable.¹⁹ Insurance companies usually exclude insurance coverage for pain and suffering damages from their standard voluntary liability insurance policies for motor vehicle owners. The interview with an insurance lawyer with experience of work in different insurance companies shows that these damages are excluded from the standard terms and conditions. It normally covers only liability for pecuniary damages:

[Voluntary liability insurance] does not cover [pain and suffering damages] since you will always find a standard list of risks that are covered under standard terms of the insurance company. It is a civil liability except for pain and suffering damages.²⁰

The experience of other jurisdictions where insurance limits are not high demonstrates a tendency by drivers to purchase voluntary insurance as an extra service. For example, the limits for compulsory motor liability insurance in some states of the US are relatively moderate²¹ (in contrast to the UK where it is unlimited).²² So, it is common for American drivers to purchase voluntary insurance which covers liability above the limits, including pain and suffering damages. The same might be possible in Russia with the development of voluntary liability insurance

¹⁸ Julia Gryzenkova, Nadezda Kirillova and Alexander Tsyganov, 'The Key Problems of Regional Development at the Insurance Market in Russian Federation' (IX International Scientific Conference 'Analysis of International Relations' 2018) <https://air.ue.katowice.pl/pdf/2018a/7_Gryzenkova.pdf> accessed 17 January 2022.

¹⁹ Gulnara Kaigorodova et al, 'Insurance as a Mechanism for Protecting the Property Interests of Persons Involved in Road Accidents' (2017) 1 QUID: Investigación, Ciencia y Tecnología 1375.

²⁰ Interview with an insurance company lawyer from St Petersburg.

²¹ Tom Baker, for example, describes this difference between Europe and United States in the following way: 'In contrast to what I understand to be the case for some insurance policies in some European jurisdictions, all liability insurance policies in the United States are sold with limits on the amount of money that the liability insurer is obligated to pay for a particular claim or event, even if the damages owed by the insured are much larger. For example, as my European colleagues were shocked to learn, the limit on the mandatory automobile liability insurance policy in my state of Connecticut is \$20,000 per person, \$40,000 per accident, meaning that the maximum amount that the liability insurer must pay any one person is \$20,000 and the maximum amount that the insurer must pay all victims from any one accident is \$40,000. Of course, many people voluntarily purchase automobile liability insurance policies with limits that are much higher, but many people do not'. See in Tom Baker, 'Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action' (2005) 12 Connecticut Insurance Law Journal 1, 6.

²² Section 145(3)(a) of the Road Traffic Act 1988.

market. The analysis of railroad accidents where voluntary liability insurance is currently used extensively can help to explore this possibility. While this area is responsible only for 0,2% of the entire voluntary liability insurance market in Russia,²³ what makes this exceptional is that it covers pain and suffering damages. It would make sense, therefore, to take a closer look at this area as it will shed light on whether voluntary liability insurance is effective in addressing the problems with pain and suffering damages in Russia.

5.2.2 The Social Context of Railroad Accidents in Russia

This section aims to describe briefly the social context of railroad accidents in Russia. The following issues are discussed in particular: the statistics of railroad accidents, the situation of victims and the nature of victims' injuries, the status of the defendant, and safety measures and rules of conduct on railway lines. The discussion demonstrates the specifics of railroad accidents compared to other categories of personal injury cases. This will contribute to a better understanding of concrete problems with insurance and of pain and suffering damages in personal injury litigation.

i) The statistics of railroad accidents and railroad cases

Railroad accidents are a serious social problem in Russia. In 2018, for example, the total number of individuals involved in railroad accidents was 2,388 of which 1,608 were killed as a result.²⁴ Although the number of accidents has reduced by 32% since 2013,²⁵ this is still a considerable figure compared to other European countries. For example, there were only 1,645 victims of railroad accidents (among them 885 killed) in the entire European Union in 2018.²⁶ However, in terms of accident rates, the current situation with railroad accidents in Russia is not as

²³ Makhdieva (n 16).

²⁴ Department of Labour Protection, Industrial Safety and Ecological Control of Russian Railways, 'On Transport Accidents Caused Personal Injuries and Death Not Related to Industry, within the Territory of the Infrastructure of Russian Railways in 2018' (13 May 2019).

²⁵ *ibid.*

²⁶ Eurostat, 'Number of Railway Accidents Going Down' (22 January 2020) < <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200122-1> > accessed 17 January 2022.

problematic as with road traffic or workplace accidents. The number of railroad accidents is much smaller than the last two categories. For comparison, 168,099 road traffic accidents occurred in 2018 where 214,853 persons were injured and 18,214 killed.²⁷ However, the consequences of railroad accidents and categories of potential victims rather than the absolute numbers make them a matter of great concern. This argument will become clearer if we move from the statistics to personal stories of the victims and the nature of their injuries.

ii) The situation of accident victims

What makes the situation with railroad accidents problematic is probably not the number of accidents but the extremely severe character of injuries and related problems of victims in their life after the accident. The most typical consequences for those few who were able to survive are amputations of varying gravity and followed by permanent disability. This makes psychological consequences of the injuries serious and their possible alleviation by compensation becomes an important issue. The explanation of the claimant's psychological and social status after an amputation provided in one of the judgments can give a rough idea of some of the problems faced by this category of victims:

A very young woman remained disabled for life. The claimant lives in a small city, where it is already difficult to earn a living, and for a person without a leg it is almost impossible. As a result, the claimant was unable to find a job or start a family: because of the injury, it is difficult for her to communicate with people, and employers do not need a legless disabled person. The victim reacts painfully to everything, often is in a state of depression, apathy and gloom. What used to be a perfectly healthy person became permanently disabled without the possibility of recovery. The claimant's health will never be the same. After the injury, she was forced to undergo a long painful treatment. She feels like an inferior person, forced to constantly consult doctors. It is hard for her to walk, in bad weather, the stump starts to hurt and swells. The consequences of the injury poison even the best days of the claimant's life. Helplessness and constant pain only aggravate the suffering of the plaintiff. The mental state in which a person who has suffered a traumatic amputation of limbs is located can be classified as acute grief. Amputation is experienced as a grave personal tragedy, containing a huge destructive meaning. Amputation means for a person the collapse of all her life prospects

²⁷ The statistics of the Russian Road Traffic Police < <http://stat.gibdd.ru/> > accessed 17 January 2022.

and plans, a reassessment of her own self, a significant decrease in the level of personal aspiration, the need to search for her own special social niche. The source of the post-traumatic crisis is a serious physical condition that arose as a result of an injury, which is accompanied by severe pain, loss of motor functions and, as a result, the need for a long time to be treated. The social consequences of trauma are of no less importance – a change in a person’s social status, disability, weakening of social contacts and connections, and difficulties in spending leisure time.²⁸

Another problem is a significant number of retired, unemployed and homeless persons among railroad accident victims. For example, the proportion of railroad accident victims above the retirement age was about 19% in 2018.²⁹ These three groups are the most economically vulnerable groups for whom compensation could be substantial financial support. Pecuniary damages awarded to them cannot be particularly high since the calculation of lost earnings for the unemployed or retired victims is based on the average subsistence minimum (12,130 roubles or £121 per month). Pain and suffering damages could potentially correct this imbalance and improve to some extent the financial situation of these groups of victims.³⁰ However, the level of compensation in their cases is sometimes even lower than in typical cases. In the following case, for instance, the court mentioned homelessness among the factors for applying contributory negligence and reducing the level of damages:

In addition, the Court takes into account the information outlined in the report of the police officer S [the officer’s name] where K [the claimant’s name] characterised as a person leading

²⁸ Civil case n 2-31/18 (Decision of February 14, 2018), Leninskij District Court of Nizhnij Novgorod. There were awarded 50,000 roubles (£500) for pain and suffering damages in this case.

²⁹ Department of Labour Protection, Industrial Safety and Ecological Control of Russian Railways (n 24). This proportion for the whole population was 14,6% according to the Russian Federal State Statistics Service < https://gks.ru/bgd/regl/B18_111/IssWWW.exe/Stg/pred.doc > accessed 17 January 2022.

³⁰ For example, similar arguments were raised against the proposed caps on pain and suffering damages in clinical negligence cases in the US. It was argued that this reform would have a strong negative impact on women and the elderly. These claimants statistically obtain higher awards of pain and suffering damages than other groups as a way to ‘compensate’ lower awards of pecuniary damages or a total lack of ones. See Lucinda M Finley, ‘The Hidden Victims of Tort Reform: Women, Children, and the Elderly’ (2004) 53 Emory Law Journal 1263.

an antisocial lifestyle, not living at the place of registration, sleeping in the area of the X [the station's name] railway station.³¹

The claimant suffered foot amputation up to ankle joint followed by permanent disability. As a result, he received 30,000 roubles (£300) towards pain and suffering damages in this case. This sum is unlikely to meet the victim's needs in fair monetary compensation for his pain and suffering. Indeed, this sum is even lower than the median monthly salary in Russia which is 32,422 roubles (£324).³²

It is hard to estimate the proportion of homeless persons among victims based only on court cases. There is no legal requirement to mention this issue in the judgment unless it is relevant to the legal facts of the case, as it was in the case cited above. However, their proportion can be approximated by the number of unidentified individuals among railroad accident fatal victims. It is probably safe to assume that a substantial proportion of these victims are homeless persons, otherwise they would be identified sooner or later by family members. The proportion of these victims was 16% in 2018.³³

Furthermore, a significant proportion of accident victims consists of minors who were injured while playing or hanging out near the railway lines. The statistics show that there were 141 minor victims (93 killed) in 2018 which means 6% of all railroad accidents. If we look at the sample of railroad accident cases, the proportion of minor victims is even higher. There were 16% of cases involved minor claimants in 2018-2019. Understandably, such severe injuries suffered at an early age must have a great negative impact on the following years of the victims' life. The story of K is typical for this category of claimants and can vividly illustrate the situation of minor victims:

As a result of the injury, K. physical and moral suffering was inflicted, the plaintiff experienced a deep moral upheaval, and serious damage was caused to his health. Getting a serious injury at the age of 9 significantly affected his further adulthood. Currently, K. is deprived of the opportunity to live a normal life, cannot normally engage in everyday affairs and perform labour activities by profession in full. Changing weather conditions, physical activity on an

³¹ Civil case n 2-856/2019 (Decision of September 1, 2019), Vysokogorskij District Court of the Republic of Tatarstan.

³² See Russian Federal Agency of State Statistics <https://rosstat.gov.ru/labour_costs> accessed 17 January 2022.

³³ Department of Labour Protection, Industrial Safety and Ecological Control of Russian Railways (n 24).

injured limb cause inconvenience, fatigue and physical pain. The consequences of a railway injury are irreversible; the previous functions of the limb that were lost cannot be restored for a long time.³⁴

The court did not accept the defendant's arguments about contributory negligence due to the claimant's inability to foresee danger at this age. And yet, compensation for pain and suffering was awarded in the moderate amount of 40,000 roubles (£400) in this case.

To summarise this section, the nature of injuries and the impact of accidents on some of the most vulnerable social groups make this category of cases particularly problematic despite the smaller number of cases compared to road traffic or workplace accidents.

iii) The defendant as a 'repeat player'

Railroad accidents result in personal injury cases. For example, in 2018, 2,740 personal injury and fatal accident claims were submitted against the state railway company.³⁵ The defendant is always the same in this category of cases since the railroad services are provided by the State monopoly. It is an open joint-stock company called the 'Russian Railways', with 100 per cent of the shares held by the federal government. This effectively means that the defendant in all these cases is a 'repeat player'.³⁶ It has to deal with a large number of similar cases on a regular basis. Therefore, its litigation strategy is oriented to minimising the total amount of damages rather than focusing on concrete cases. The status of a 'repeat player' is likely to be the reason for the defendant's choice in favour of taking cases to trial rather than negotiating settlements. On the one hand, the benefits of keeping court awards at the current low level or moving it even lower stimulate taking these cases to courts. The existing liability insurance does not change this approach much since the railroad company still has to pay damages above the insurance limit (discussed below). On the other hand, the victims are probably not prepared to accept compensation lower than court

³⁴ Civil case n 2-292/2019 (Decision of March 12, 2019), Volzhskij District Court of Saratov.

³⁵ Department of Labour Protection, Industrial Safety and Ecological Control of Russian Railways (n 24).

³⁶ Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95.

awards (which are already low) and settle cases. In the absence of award standards, parties do not reach settlement agreement.

The status of a 'repeat player' is also reflected in the fact that defendant's lawyers raise very similar arguments in courts across different regions. Moreover, the pleadings submitted by the defendant (normally reproduced in the text of judgment) frequently replicate each other word-for-word regardless of the particularities of the case. Furthermore, the internal statistics of railway accident cases are frequently mentioned by the defendant during the trial.³⁷ All this indicates that the defendant looks at the case at hand as a part of a general trend rather than considering it individually.

iv) Safety measures and rules of conduct on and near railway lines or tracks

The rules of conduct on railway tracks are contained in an order implemented by the Ministry of Transport.³⁸ This act prescribes crossing the tracks only in the places specially provided for these purposes meaning on the railroad crossings or bridges. However, there are no such places nearby in many Russian small towns. Therefore, local citizens have to cross rail lines in inappropriate places putting themselves at risk of being hit by a train. The complaints of accident victims frequently point to this infrastructural problem and its consequences for inhabitants:

In support of the claims, the claimants indicate that this accident occurred primarily due to improper fulfilment by the owner of the railway transport infrastructure of the requirements establishing the obligation to ensure the safety of movement and operation of the railway transport. Even though the village H is divided into two parts by rail, there is no pedestrian crossing through the railways.³⁹

³⁷ eg in Civil case n 2-18/2019 (Decision of February 08, 2019), Privokzal'nyy District court of Tula or Civil case n 2-36/2019 (Decision of March 15, 2019), Tarumovsky District Court of the Republic of Dagestan.

³⁸ The Order of the Ministry of Transport of the Russian Federation N 18 'On Approval of the Rules for Locating Citizens and Placing Objects in Hazardous Areas, Performing Work in these Areas, Driving through and Crossing Railway Lines' of 8 February 2007.

³⁹ Civil case n 2-190/2018 (Decision of February 14, 2018), Central'nyj District Court of Chita.

She believes that the Russian Railways is to blame for the incident, which, while carrying out economic activities in order to profit, saves on the safety of citizens, does not equip the necessary and sufficient infrastructure, since they did not construct the railway crossing in the village in this place in the centre the village, and two distant crossings are not sufficient within the village; and there is no railway bridge over the way either. The village S is divided by rail. And there are two places of transition to another part of the village, but they are located very far from each other, the infrastructure is not favourable and sufficient for residents.⁴⁰

These extracts from different judgments demonstrate that victims tend to impose moral responsibility on the railroad company for the injuries suffered despite the lack of legal fault on the defendant's part in most cases. The safety issues are frequently raised by claimants in objecting to the defendant's arguments about contributory negligence. The main problem is that rail lines are not sufficiently isolated and protected from potential trespassing for much of their length in Russia. This can partly explain the high rate of accidents and a large proportion of fatalities compared to Europe. For example, if we look at the experience of the British railways, there are special protective cover and panels along the railways precluding trespassing.⁴¹

In addition to the social context, the situation of victims is largely shaped by the contractual framework of voluntary liability insurance for railroad accidents.

5.2.3 The Railroad Company and Liability Insurance: Contractual Framework

This section aims to analyse the contractual relationship between the defendant and the insurance companies. It further discusses the terms of insurance contracts covering the defendant's liability for railroad accidents. The primary purpose is to identify the most crucial provisions related to pain and suffering damages in all contracts. The terms of the contracts directly influence the situation of accident victims since they determine the claiming procedure,

⁴⁰ Civil case n 2-62/2018 (Decision of January 24, 2018), Saraktashsky District Court of the Orenburg Region.

⁴¹ Natalya Borisova, 'The Use of Foreign Experience in order to Reduce the Level of Injury to Citizens in the Infrastructure of the Railway [Primenenie zrubezhnogo opyta v tselyakh snizheniya urovnya travmirovaniya grazhdan na ob'ektakh infrastruktury zheleznoy dorogi]' (2019) 1 The Safety Issues of Russian Society [Problemy bezopasnosti rossiiskogo obschestva] 79, 81.

pre-conditions and limits of payments. Therefore, these terms are widely discussed in tort cases on railroad accidents.

There were overall three different insurance companies with which the railroad company concluded contracts since 2006. However, the terms and conditions are mostly the same in all three contracts.⁴² The applicable contract is the one that was in force at the moment of the accident. Since there are no time limitations for personal injury claims according to the Russian civil law, all three contracts are currently applied by courts depending on the date of the accident. The cases when victims claim pain and suffering damages five or more years after the accident were found from time to time in the course of this study. The defendant frequently argues that such victims should be paid lower damages as their pain and suffering were experienced a long time ago.

There are no copies of the contracts in public access. Nevertheless, the reconstruction of the contract particulars is possible based on the analysis of court judgments where these terms are discussed at a very detailed level. The concrete terms can vary slightly but the general approach to pain and suffering damages is practically the same in all three contracts. The object of insurance is the liability of the railroad company for any wrongful death or personal injury, including pain and suffering damages, caused by the moving rail transport or related infrastructure.⁴³ The latter is most relevant to the power lines along the railways since they make some contribution to the total number of accidents.

All the contracts contain the limits of insurance payments towards pain and suffering damages but concrete amounts vary depending on the insurer. There is a general tendency of increasing insurance limits at the time of contracting, albeit slightly, over the recent years. If initially the limit

⁴² The Voluntary Liability Insurance Contract N 01/06-19.1иm/1119 of 16 October 2006 (with insurance company 'ZHASO', absorbed on 30 August 2016 by SOGAZ); The Voluntary Liability Insurance Contract N 02910 ГОЖД/1012 of 08 December 2014 (with insurance company 'Soglasie'); The Voluntary Liability Insurance Contract N 2072681 of 14 September 2016 (with insurance company 'Ingosstrakh').

⁴³ Section 2.2 of the Contract. Mentioned, for example, in Civil case n 33-10658/2019 (Appeal Decision of July 2, 2019), Sverdlovsk Regional Court.

was set in the amount of 40,000 roubles (£400),⁴⁴ it later reached the level of 200,000 roubles (£2,000),⁴⁵ whereas the most recent contracts establish the limits of 300,000 roubles (£3,000).⁴⁶ It is noteworthy also that one of the contracts stipulates insurance franchise (commonly known as 'excess' in the UK insurance practice) in the amount of 10,000 roubles (£100).⁴⁷ This means that the defendant's liability for pain and suffering is not covered if it is below this limit. As it is a clearly low figure, the defendant seems to be prepared to pay damages below this figure from its own pockets if they are awarded by court. And in fact, there were some railroad accident cases where pain and suffering damages were awarded in such a minuscule amount.

The contracts stipulate further that insurance payments are made on the basis of a court judgment or acceptance of the claim by the defendant. The latter is subject to approval by the insurer, unless the claim is below 10,000 roubles (£100). Moreover, the contracts provide an opportunity for the beneficiaries (the accident victims) to claim damages directly from the insurance company. However, the section below makes an important exclusion concerning pain and suffering damages. It provides that these damages are paid solely on the condition of court judgment, without mentioning the option to settle the case out of court (implications of this in court practice are discussed further in section 5.3.3). The definition of 'pain and suffering damage'⁴⁸ provided in the introductory clauses of all three contracts also refers to the court judgment as a condition for making insurance payment.

⁴⁴ Section 3.3. of the Contract. Mentioned, for example, in Civil case n 2-2010 (Decision of November 21, 2018), Komsomolsky District Court of Togliatti.

⁴⁵ The Amendment N 2 of 15 October 2008 to the main contract. Mentioned, for example, in Civil case n 44g-23/2018 (Appeal Decision of February 27, 2018), Krasnoyarsk Regional Court.

⁴⁶ Section 8.1.1.3 of the Contract. Mentioned, for example, in Civil case n 33-2162/2018 (Decision of February 14, 2018), Krasnoyarsk Regional Court.

⁴⁷ Section 3.5 of the Contract. Mentioned, for example, in Civil case n 2-396/2018 (Decision of March 06, 2018), Yuzhno-Sakhalinskiy City Court of the Sakhalin Region.

⁴⁸ It understood as 'causing pain and suffering to the beneficiary by the actions of the insured which violate personal non-property rights or encroaching on other intangible goods belonging to the citizen, in the event that the insurer is charged with the obligation of monetary compensation for this damage by a court judgment' (section 1.5 of the contracts). Mentioned, for example, in Civil case n 2-89/18 (Decision of November 2, 2018), Kamyshevsky District Court of the Sverdlovsk Region.

It must be finally noted that all contracts establish a total limit of all annual payments towards pecuniary and non-pecuniary damages which is 1 b roubles (£10 m).⁴⁹ The railroad company has to pay damages after reaching this limit out of its own pockets. There is, therefore, a direct economic interest in keeping the average awards at the lowest possible level. This fact can partially explain the reason for taking most cases to court instead of settling them.

5.3 How Does Railroad Liability Insurance Address the Problems with Pain and Suffering Damages?

The purpose of this section is to discuss whether liability insurance for railroad accidents facilitates resolving the problems with pain and suffering damages. As identified in the second chapter, there are four main problems in this area: low level of damages, the inconsistency of awards, complicated claims procedure, and poor enforcement. The analysis below will examine whether availability of voluntary liability insurance remedies these problems in railroad accident cases.

5.3.1 Low Awards and Limits of Insurance Coverage

The mean and median level of pain and suffering damages is even lower in railroad accident cases than for personal injuries in general. The results of the analysis of cases demonstrate that the mean award of pain and suffering damages was 93,270 roubles (£932) and the median was 62,500 (£625) in railroad accident cases in 2017-2019. The internal statistics of the railroad company reports that the mean award without splitting material damages and pain and suffering damages was 99,000 roubles (£990) in 2018.⁵⁰ It can be assumed that pain and suffering damages taken separately are much lower than this figure. All these results indicate that awards are substantially lower in railroad accident cases compared to other categories of cases. For example, as has been shown in Chapter 3, the average award for all types of personal injuries was about 193,000 roubles (£1,930), according to official judicial statistics. The median awards for the category of

⁴⁹ Section 3.2 of the Contract. Mentioned, for example, in Civil case n 2-337/2018 (Decision of December 14, 2018), Kamyshlovsky District Court of the Sverdlovsk Region.

⁵⁰ Department of Labour Protection, Industrial Safety and Ecological Control of Russian Railways (n 24).

severe injuries within which fall almost all railroad accidents was 140,000 roubles (£1,400), according to the survey of practising lawyers.

The comparisons with the claimed sums show that there is a significant difference between the expectations of claimants and court practice.

Table 1. The outcomes of the railroad accident cases in 2017-2019

Outcome	Frequency	Per cent (%)
Satisfied fully	5	1,8
Satisfied partially	256	91,8
Dismissal	12	4,3
Approval of settlement	6	2,2
Total	279	100

The claims were fully satisfied only in around 2% of cases whereas in most cases claims were satisfied only partially (92%), i.e. damages were awarded in a lesser amount than they were claimed. The remaining 6% of outcomes are dismissals or settlements. The difference between the claimed damages and awards is dramatic.

Table 2. Claimed and awarded pain and suffering damages in the railroad accident cases in 2017-2019

Value	Claimed pain and suffering damages (RUR/GBP)	Awarded pain and suffering damages (RUR/GBP)
Mean	895,919 / 8,959	93,270 / 932
Median	1,000,000 / 10,000	62,500 / 625
Minimum	10,000 / 100	3,000 / 30
Maximum	5,000,000 / 50,000	800,000 / 8,000

The median claimed compensation was 1 m roubles (£10,000) in the analysed cases which is 20 times more than the actual awards. Furthermore, if we compare actual damages in railroad cases with the assessments by laypeople, the difference is even more dramatic. In fact, one of the

scenarios given to the respondents in the sociological survey included a railroad accident.⁵¹ The scenario was as follows:

A 54-year-old woman walked along the railway tracks to her garden plot. Some of the oversized metal cargo was sticking out of a passing train. This metal touched her hand at speed, actually cutting it into pieces. The woman underwent three operations, her hand was saved, but it is disfigured and does not move well. Disability is established for the woman.

The average fair compensation for this railroad accident according to the opinions of lay people was 4.6 m roubles (£46,000). The average estimations provided by judges during the anonymous survey for the same scenario was 531,000 roubles (£5,310). This figure is much lower (almost ten times) than the assessments by the general public but significantly higher than the actual damages awarded in these cases. This demonstrates that Russian judges seem to be ready to award higher damages but they preserve the *status quo* in their professional activities.

All these figures and comparisons raise an important question. Why are pain and suffering damages so low in railroad accident cases despite the severity of injuries and availability of insurance for pain and suffering damages?

i) Contributory negligence

The low level of damages could be explained by the fact that potential contributory negligence can be found in most railroad accident cases. Indeed, this is one of the favoured arguments of the defendant which is frequently accepted by courts. However, if we look at the data on personal injuries in total, contributory negligence is not the factor that strongly influences the level of damages. The issue of contributory negligence does make some difference but it is not substantial. For example, the median award is 70,000 roubles (£700) in the cases without any negligence on the part of the victim and 60,000 roubles (£600) in the cases involving contributory negligence

⁵¹Association of Russian Lawyers and Financial University of the Government of the Russian Federation, *Analytical Report by the Results of the Study of Russian Judges' Estimations of Fair Compensation for Pain and Suffering in Personal Injury and Fatal Accident Cases* (2020) < <https://zakon.ru/Tools/DownloadFileRecord/24384> > accessed on 17 January 2022.

(discussed in the second chapter). As one interviewee remarked, when it comes to the quantum of pain and suffering damages, 'it doesn't really matter that the claimant was drunk'.⁵²

This data concerns personal injury cases in general. The railroad cases might have their peculiarities. A comparative analysis of awards in cases that involved and those that did not involve contributory negligence demonstrates that there is a difference, although not substantial.

Table 3. Pain and suffering damages awarded in the railroad accident cases 2017-2019 (with and without contributory negligence)

Value	Pain and suffering damages in cases with contributory negligence (RUR/GBP)	Pain and suffering damages in cases without contributory negligence (RUR/GBP)
Mean	86,536 / 865	112,000 / 1,120
Median	60,000 / 600	75,000 / 750
Minimum	5,000 / 50	3,000 / 30
Maximum	500,000 / 5,000	80,000 / 8,000

The median award was 75,000 roubles (£750) in the cases without any negligence on the part of the victim and 60,000 roubles (£600) in the cases involving contributory negligence. The difference is insignificant, the same as in other personal injury cases.⁵³ The reference to contributory negligence is the most typical defence of the railroad company and frequently mentioned in court decisions as a justification for reducing claimed damages. However, empirical data demonstrates that this legal factor cannot explain the general (low) level of compensation in this category of cases.

⁵² Interview with a personal injury lawyer from Ekaterinburg.

⁵³ The median award is 70,000 roubles (£700) with contributory negligence and 60,000 roubles (£600) without contributory negligence in personal injury cases in general. See Irina Fast, Alexey Nesterov and Maria Sokolova, *Compensation of Moral Damages in Personal Injury Cases: Practical Results after 25 Years of the Institution's Existence in RF [Kompesatsiya moral'nogo vreda pri prichinenii vreda zhizni i zdorov'yu: prakticheskie itogi posle 25 let sushhestvovaniya instituta v RF]* (Analytical Report, 2018) 16 <<https://platforma-online.ru/upload/medialibrary/d5d/d5d59ddff1111fa619f8c2d5e753cc6e.pdf>> accessed 25 January 2023.

ii) Appeal courts

The other potential factor relates to the role of the higher appeal courts. The expert opinion of a personal injury lawyer, for example, suggests that reductions at the appeal stage are more common than increases. There were, for example, only three cases during the eight-year career of the interviewee when pain and suffering damages were increased by the appeal court:

You asked how often they [appeal courts] interfere. Not often in terms of increase, very rarely. In terms of decline – yes, very often. Especially if the defendant is Ministry of Defence or Russian Railways.⁵⁴

The empirical analysis of railroad accident cases, nevertheless, does not support this view. It should be noted that appeal courts, in general, are not inclined to reconsider the quantum of damages (see *Table 4*).

*Table 4. The outcomes of appeals in railroad accident cases in 2017-2019*⁵⁵

Outcome	Appeals by claimants		Appeals by defendant	
	Frequency	Per cent (%)	Frequency	Per cent (%)
Allowed	7	23,3	13	11,8
Dismissed	20	66,7	92	83,6
Returned to appellant	2	6,7	3	2,7
Withdrawn by appellant	1	3,3	2	1,8
Total	30	100	110	100

⁵⁴ Interview with a personal injury lawyer from Nizhniy Novgorod.

⁵⁵ The purpose of this table is to compare the outcomes depending on whether a claimant or defendant submitted an appeal. That is why the columns ‘appeals by claimants’ and ‘appeals by defendants’ do not include cases where appeals were submitted by both parties (9 cases), by both parties and a procurator (1 case), by one party and a procurator (5 cases), and by an insurer (2 cases). An additional reason for not including these 17 cases was the difficulties with coding their outcome in the database.

The data above demonstrates outcomes only in relation to the quantum of pain and suffering damages. Appeals based on other legal grounds (liability issues, procedural violations, competence, and so on) were excluded from the sample. In other words, an allowance of appeal means an increase or decrease of pain and suffering damages depending on whether a defendant or claimant submitted an appeal. Consequently, a dismissal means that damages awarded by the trial court remained unchanged. Appeals sometimes are returned to appellants without consideration due to procedural deficiencies. And it also occasionally happens that appellants for some reasons withdraw their appeals before their consideration.

As we can see, if appeal courts do allow appeals and reconsider quantum, they increase pain and suffering damages more frequently (23% of claimants' appeals) than reduce (12% of defendants' appeals). This can be explained by the policy of the railroad company to appeal most decisions even if the awards are less than typical.⁵⁶ As one of the interviewees mentioned, the Russian Railways appeal all judgments in personal injury or wrongful death cases based on railroad accidents.⁵⁷ Indeed, there were 110 cases appealed by defendants and only 30 cases where appeals were submitted by claimants in the sample of cases. It seems that appeal courts are not in position to reduce already low damages which do not exceed the average amounts. However, the percentage of allowed appeals is less illustrative than the extent of reductions and increases. The increase is normally not substantial.⁵⁸ And even if the increase is relatively substantial, the recalculated sums are not higher than average awards.⁵⁹

⁵⁶ For example, the appeal was submitted in the case where pain and suffering damages were 10,000 roubles (£100). See Civil case n 2-78/2018 (Decision of March 20, 2018), Pochinkovsky District Court of the Nizhny Novgorod Region.

⁵⁷ Interview with a personal injury lawyer from Ekaterinburg.

⁵⁸ There were, for example, increases from 60,000 (£600) to 100,000 roubles (£1,000) in Civil case n 2-2010/2018 (Decision of November 21, 2018), Komsomolsky District Court of Togliatti; from 80,000 (£800) to 250,000 roubles (£2,500) in Civil case n 2-1479-2018 (Decision of 19 July, 2018), Leninsky District Court of N. Novgorod; from 50,000 (£500) to 70,000 roubles (£700) in Civil case n 2-4351/2019 (Decision of October 2, 2019), Central'nyj District Court of Chita.

⁵⁹ As for example, in Civil case n 2-658/2018 (Decision of March 21, 2018), Zheleznodorozhny District Court of Yekaterinburg where it was increased from 25,000 (£250) to 100,000 roubles (£1,000).

In contrast, the extent of reductions is much more dramatic.⁶⁰ This approach precludes lower courts from awarding damages significantly higher than the average. This refers us back to the argument made in the previous chapter that the Soviet cultural attitudes are the most evident among senior judges. There is no need for many reversals since even rare reductions can serve as a signal.⁶¹ The interview with the former district judge where he discusses one of the railroad accident cases vividly illustrates this point:

I awarded 800,000 roubles [£8,000] as pain and suffering damages. And after the appeal of Russian Railways in such circumstances, with a smashed head, they [the appeal court] reduced it to 80,000 [£800]. <...> In the case of Russian Railways, I believe that this is the practice of caring for the budget. In the case of other situations, these are traditional moral positions of our judges, moreover, from the past, who are still working, who seem to think they are pouring this money from their own pockets.⁶²

So, there is a tendency of appeal courts to keep the status quo in relation to the general level of compensation. Increases do happen from time to time but even the increased awards do not depart from the general approach. The practice of appeal courts followed by first instance courts is likely to prevent changes in the approach of trial courts to pain and suffering damages in personal injury cases (discussed in greater detail in Chapter 3) and railroad accident cases in particular.

⁶⁰ For example, the award was reduced compared to first instance courts by a factor of 17 from 500,000 roubles (£5,000) to 30,000 roubles (£300) in Civil case n 33-1954/2019 (Appeal Decision of March 6, 2019), Stavropol Regional Court; by a factor of 14 from 70,000 (£700) to 5,000 roubles (£50) in Civil case n 33-43974/17 (Appeal Decision of October 24, 2017), Moscow City Court; and by a factor of 10 from 50,000 (£500) roubles to 5,000 (£50) roubles in Civil case n 33-32038/2017 (Appeal Decision of September 7, 2017), Moscow City Court.

⁶¹ Similar patterns can be found in the activity of appeal courts in Taiwan. Yun-chien Chang, Kong-pin Chen and Chang-Ching Lin, 'Attorney and Judge Experience in Torts Litigation: An Empirical Study' (2015) Working Paper < http://www.law.nyu.edu/sites/default/files/upload_documents/Yun-Chien_Chang_Attorney_and_Judge_Experience_in_Torts_Litigation_160125-1.pdf > accessed 17 January 2022.

⁶² Interview with Sergey Savostyanov, a former district judge (Mediazona, 09 Septemeber2019) < <https://zona.media/article/2019/09/09/savostianov> > accessed 17 January 2022.

iii) Protecting the state budget

The other possible explanation for low awards in this category of cases is the so-called ‘budget-protecting’ reasoning of the judiciary, as was mentioned in the former judge’s interview above. It should be noted that the same issue was also raised by personal injury lawyers in expert interviews: ‘Any claims which are related to the activities of institutions financially dependent on the state are considered precisely from this perspective, from the perspective of budgetary logic’.⁶³

From this perspective, the chance to obtain sufficient compensation is lower in the cases where public bodies or commercial companies entirely or partly owned by the state are involved. The railroad company certainly falls within this category since 100 per cent of the shares are owned by the state. Moreover, the fact that the railroad company is owned by the state and its economic interests are involved sometimes is explicitly mentioned by the defendant’s lawyers during the trial:

The recovery of large amounts of pain and suffering damages actually devalues the efforts to prevent injuries and causes significant damage to the interests of Russian Railways, 100% of which are owned by the state.⁶⁴

Legally speaking, the court cannot use this justification directly in the judgment since a reduction due to the defendant’s financial situation is stipulated by the Civil Code only in relation to individuals.⁶⁵ However, there were some cases in the sample where it was explicitly mentioned among the factors in awarding pain and suffering damages, even in relation to the company. As stated in one of the judgments: ‘The court also takes into account the financial situation of the defendant which is a legal entity and the requirements of reasonableness and justice.’⁶⁶ What is important here is that it is not just a legal entity, but a state-owned legal entity. So, the court took

⁶³ Interview with a personal injury lawyer from Nizhniy Novgorod.

⁶⁴ Civil case n 2-18/2019 (Decision of February 08, 2019), Privokzal’nyy District court of Tula. The same argument see also in Civil case n 2-36/2019 (Decision of March 15, 2019), Tarumovsky District Court of the Republic of Dagestan or Civil case n 2-484/2019 (Decision of April 10, 2019), Mezhdurechensk City Court of the Kemerovo Region.

⁶⁵ Art 1083 of the Civil Code of the Russian Federation of 30 November 1994.

⁶⁶ Civil case n 2-774/2018 (Decision of July 12, 2018), Kanashsky District Court of the Chuvash Republic.

into account this factor on its own initiative in this case. It is possible that the logic of protecting public money is at the forefront for courts in the decision-making on the quantum of damages. This needs further systematic empirical studies, beyond anecdotal evidence and expert opinions, which might support the claim that these policy arguments indeed influence decision-making.⁶⁷

iv) State procurators

A noticeable feature of the Russian civil procedure on personal injury cases is the participation of state procurators in these cases.⁶⁸ Railroad accident cases are no exception. First, procurators provide their written conclusion on liability and quantum of pecuniary and pain and suffering damages as a third party. Second, they appear and state their position directly in court hearings. Their presence technically is not a necessary requirement, but it is extremely rare in practice that the case is heard without their involvement. These two modes of activity are the most common forms of procurators' participation in personal injury cases.

However, procurators sometimes also participate in personal injury cases in another capacity. They act on behalf of the claimants who cannot afford legal representation. It is important to distinguish this form of participation from the one described above. Procurators can be legal representatives of poor claimants in any civil cases. Nevertheless, they rarely do this as requirements are strict for receiving this legal assistance. There were, for example, only 16 railroad accident cases in my database where procurators represented claimants. Claimants need to prove that they do not have any resources to hire a lawyer and cannot represent themselves. This thesis does not argue for abolishing this option as it is beneficial for victims, even to such a limited extent.

However, this thesis does argue for abolishing participation of procurators as third parties which provide their opinion in personal injury cases. The findings of my case analysis and interviews with

⁶⁷ A good example can be found in the Spanish quantitative study where non-pecuniary damages awarded in clinical negligence cases against private parties and the state have been compared. See in Sofia Amaral-Garcia and Nuno Garoupa, 'Do Administrative Courts Favour the Government? Evidence from Medical Malpractice in Spain' (2015) 6 *Journal of European Tort Law* 241.

⁶⁸ Art 45 of the Civil Procedural Code of the Russian Federation of November 14 2002.

practicing lawyers demonstrate that procurators tend to act against the interests of victims in that capacity. According to the interviews, a pro-defendant role of the state procurator in these cases prevents victims from obtaining just compensation:

As a rule, they are on the side of Russian Railways, on the side of the tortfeasor. This is their position. They have such a passive role, that is, they do not take an active position in defence of the interests of citizens' rights.⁶⁹

The empirical analysis strongly supports this opinion since in most cases procurators choose a position in favour of reducing pain and suffering damages claimed by accident victims (legally speaking, 'partially satisfying' the claim). They expressed this position in 64% of the railroad accident cases in the sample.

Table 5. State procurators' position on quantum of pain and suffering damages in railroad accident cases 2017-2019

Procurators' position	Frequency	Per cent (%)
To satisfy fully	12	7,5
To satisfy partially	102	63,8
Subject to judicial discretion	44	27,5
To dismiss	2	1,3
Total	160	100

Procurators rarely specify a sum to which the damages should be reduced, but if they do, the quantum is somewhere around the average awards or even lower:

After hearing the claimant, the representative of the defendant, the conclusion of the procurator, who considered it possible to satisfy the claim partially and recover from the defendant in favour of the claimant pain and suffering damages in the amount of 30, 000

⁶⁹ Interview with a personal injury lawyer from Nizhniy Novgorod.

roubles [£300], having studied and evaluated the case materials, the court comes to the following.⁷⁰

Assistant Procurator of the Tomsk District S indicated that she considered it necessary to satisfy the claim of S to Russian Railways and Ingosstrakh for pain and suffering damages partially and recover from Ingosstrakh 50,000 roubles [£500] of pain and suffering damages.⁷¹

Procurator R at the hearing argued in favour of pain and suffering damages in the amount up to 10,000 roubles [£100].⁷²

The broad participation of procurators in personal injury cases and their position on the quantum of damages can be seen as one of the remnants of the socialist legal system.⁷³ The majority of tort cases included the interests of the State in this period which required the involvement of procurator for the advocacy of public interests (discussed in section 4.4 of the previous chapter).

v) Summary of Main Findings

In light of the above, the upper limits for insurance payments under all three contracts become more understandable. These limits are relatively low but they only reflect the reality of court awards in railroad accident cases. In its turn, the approach of the judiciary to the quantum of damages can be influenced by the existing limits of insurance payments. It appears to be an interrelated process where it is hard to identify what comes first. As a result, the probability of exceeding the limits and therefore the necessity to pay out of pocket is not high for the defendant. The analysis of cases shows that the level of damages can be higher than average, sometimes substantially, but these cases are exceptional and are always at risk to be reconsidered in the appeal court. Therefore, there are no incentives for the railroad company and the insurer to set

⁷⁰ Civil case n 2-210/2018 (Decision of January 11, 2018), Kirovsky District Court of Ufa.

⁷¹ Civil case n 2-802/2019 (Decision of July 30, 2019), Tomsk District Court of the Tomsk Region.

⁷² Civil case n 2-423/2018 (Decision of March 05, 2018), Sovetskiy District Court of Chelyabinsk.

⁷³ A similar status of state procurators can be also found in some post-socialist Eastern European countries. For example, procurators continue to have an extremely wide competency in Bulgaria and Hungary. See Inga Markovits, 'The Death of Socialist Law?' (2007) 3 Annual Review of Law and Social Science 233, 240-241.

higher maximum limits of payments which would better satisfy the needs of accident victims, unless courts start awarding higher pain and suffering damages.

5.3.2 Inconsistency of Awards and Lack of Standards

The analysis of cases shows that awards can vary significantly across different regions. The highest damages were awarded in the Leningrad region (800,000 roubles or £8,000) and Stavropol region (500,000 roubles or £5,000) whereas damages in the amount of 10,000 roubles (£100) or even lower were found in Nizhny Novgorod, Kaliningrad, Saratov, Tymen and Ekaterinburg regions. Even though most of the latter cases entail minor injuries (frequently a contusions or brain concussion), there were cases including relatively severe injuries (a leg amputation⁷⁴ or a hearing impairment⁷⁵). The regional fluctuations can be partly explained by the differences in the interpretation of gross and mere negligence on the part of the claimant. According to the Russian civil law, only the former can be the ground for reducing damages.⁷⁶ So, the same behaviour can be treated as mere negligence (without reductions of damages) in some regions and as gross negligence (with reductions of damages) in other regions. The distinction between gross and mere contributory negligence is subject to judicial discretion based on the particularities of cases. For example, in certain regions, courts are more benevolent to claimants and can treat alcohol intoxication as mere negligence without any reduction of damages. This approach can be found in Saratov courts:

At the time of injury, P was intoxicated, which indicates the presence of mere negligence in his actions. Contrary to the arguments of Russian Railways, these actions of P are regarded by the court as simple negligence since the victim committed violations of the requirements of care and discretion near the railway tracks.⁷⁷

⁷⁴ Civil case 2-78/2018 Pochinkov district court of Nizhny Novgorod region Decision of 20 March 2018. The award was 10,000 roubles.

⁷⁵ Civil case 2-3178/2017 Leningrad district court of Kaliningrad region Decision of 18 October 2017. The award was 10,000 roubles.

⁷⁶ Art 1083 of the Civil Procedural Code of the Russian Federation of 14 November 2002.

⁷⁷ Civil case n 2-13/2018 (Decision of January 25, 2018), Volzhsky District Court of Saratov.

A different approach to this issue can be found in the practice of other regions such as, for example, in Moscow courts:

Information about alcohol intoxication, during the consideration of the case, is not refuted. Thus, the presence of Z in a state of intoxication at the time of injury indicates gross negligence in his actions when he was at high-risk facilities.⁷⁸

Therefore, the interpretation of contributory negligence is where a regional variation can manifest itself. Coupled with judicial discretion this would contribute to the inconsistency of awards in this category of cases.

Another reason for inconsistency and regional differences relates to the effect of the 'repeat player' mentioned above. The damages awarded in Moscow, particularly in one court (Meshchansky District Court), overall are the lowest compared to other regions despite the highest income level and cost of living in the capital city. The awards in this court rarely exceed 30,000 roubles (£300). The reference to this practice (positive for the defendant) can be found among the arguments of the railroad company:

In a similar category of cases, the courts have established a positive judicial practice on the recovery of compensation for pain and suffering in an amount not exceeding 30,000 roubles [£300].⁷⁹

Moreover, the appeal court of Moscow sometimes significantly reduces even these moderate pain and suffering damages.⁸⁰ This practice becomes less surprising if we consider the fact that Meshchansky court is a 'home' court of the defendant. This is the court where the defendant participates in a large number of cases and can achieve better outcomes due to familiarity with this particular court. The bulk of claims are considered in this court. Therefore, the defendant's

⁷⁸ Civil case n 33-23497/2018 (Appeal Decision of May 30, 2018), Moscow City Court.

⁷⁹ Civil case n 2-120/2019 (Decision of 7 May, 2019), Industrial'nyy District Court the Khabarovsk Region.

⁸⁰ eg The reduction from 30,000 roubles (£300) to 5,000 roubles (£50) in Civil case n 33-16/2018 (Appeal Decision of February 16, 2018), Moscow City Court; from 15,000 roubles (£150) to 3,000 roubles (£30) in Civil case n 33-35017/2018 (Appeal Decision of September 18, 2018), Moscow City Court; from 60,000 (£600) to 5,000 (£50) in Civil case n 33-7437/2018 (Appeal Decision of March 22, 2018), Moscow City Court.

lawyers normally know which arguments before which judge are better to put forward. Claimants' lawyers do not have this advantage as they participate in these cases mostly on an occasional basis. The opportunity to establish informal relations with institutional actors, first of all, courts, is one of the main advantages of 'repeat players'.⁸¹

The imbalance of power is less pronounced if claimants submit their claims at their own locations. This right is granted to claimants in personal injury cases according to the Civil Procedure Code. In this case, the defendant usually refers to the cases in their 'home' courts where awards are the lowest:

For example, the Meshchansky District Court, which considers the largest number of cases in this category, has developed the judicial practice of recovering compensation for non-pecuniary damage in the amount of on average no more than 30,000 roubles [£300] in favour of one claimant.⁸²

Provincial courts normally do not accept these arguments mentioning that precedents are not recognised by the national legal system: 'The reference of Russian Railways to judicial practice on similar disputes cannot be taken into account since legal precedent is not an official source of law in the Russian Federation'.⁸³

This resistance of Russian judges towards precedents cuts both ways. If some courts start to award higher damages, victims try to refer to these rare cases. However, their arguments are not accepted due to the same non-recognition of precedents. Therefore, lawyers have to take into account this judicial approach, as one of the interviewed lawyers mentioned in my interview:

And that's why, since I am familiar with this somewhat arrogant approach, I always say 'Your Honour, I know that we do not have a precedent law system, but just for reference purposes, if you wish, add this [comparable judgments] to the case file'.⁸⁴

⁸¹ Galanter (n 36).

⁸² Civil case n 2-36/2019 (Decision of March 15, 2019), Tarumovsky District Court of the Republic of Dagestan.

⁸³ Civil case n 33-15501/2019 (Appeal Decision of September 9, 2019), Rostov Regional Court.

⁸⁴ Interview with an advocate from Vladimir.

The lack of any standards, whether they are judicial or set by insurers, makes it difficult to predict the quantum of insurance payments and settle cases without a court procedure. This is one of the main reasons for setting the contractual requirement of a court judgment for making payments towards pain and suffering damages. The following interpretation of contract terms made by the court based on the arguments of the insurance company supports this conclusion:

Since under the terms of the contract, insurance payment towards pain and suffering damages is made only if there is a court decision that determined the amount of such compensation, and no court decision determining the amount of this compensation was made earlier, in the absence of settlement [reached at the trial stage and approved by court] between the insured, the insurer and the beneficiary, claiming directly from the insurer is not possible under the insurance rules.⁸⁵

However, there is nothing preventing insurance companies from developing standards and settling cases by amending insurance policies if there is a willingness to settle cases. In fact, not all European countries where pain and suffering damages are covered by insurance have adopted the requirement of standards for judicial awards. This does not stop insurance companies from making relevant payments under their internal standards. But there must be an incentive for an insurer to settle cases which is absent in railroad accident cases as will be demonstrated further.

5.3.3 The Necessity of Court Procedure and Lack of Settlements

The requirement to go through the court proceedings to obtain compensation for pain and suffering is included in all three contracts. Therefore, even if victims sometimes try to submit their claims directly to insurance companies, their claims are not accepted with reference to this clause. It is worth mentioning that the scheme whereby insurance companies cover pain and suffering damages only on the condition of a court judgment can be found in some other cases besides railroad accidents. For example, a similar scheme was adopted in a slip-and-fall case in a shopping mall mentioned above. The lawyer's post on a professional forum describes this scheme as follows:

⁸⁵ Civil case n 2-2639/18 (Decision of July 2, 2018), Nalchik City Court of the Kabardino-Balkaria Republic.

In fact, of course, it turned out that it was not non-pecuniary damage from slip-and-fall which was insured, and the insurer did not need to be dragged to court (although the judge still brought them in as a third party). It turned out that if money was collected from these defendants in such cases, the insurer would simply compensate them for these losses. Therefore, the judge in the process hinted to the defendant that there is no need to be stubborn, they [the insurer] will compensate you.⁸⁶

However, the question of whether the insurance company or the railroad company is a proper defendant in railroad accident cases remains. My analysis of railroad accident cases shows a variety of approaches to this issue across the courts. The insurance company could be called to the court as the only defendant and be ordered to pay within the insurance limits (less than 1% of cases). Alternatively, it could be not called at all, and the railroad company would be the only defendant (20%). This is possible when the court accepts the insurer's arguments that it becomes liable only after a separate judgment against the defendant. These two options, however, are the least likely scenarios. It is more common that the insurer is called to the court as a co-defendant (35% of cases). In this case, it could be found liable within insurance limits in the same trial (42%). Alternatively, it could be found not liable due to the contractual exclusion of direct claims against the insurer discussed above (58%). It could be also called to the court as a third party (35% of cases) which means it will not be liable by virtue of its procedural status of the third party. In the latter two cases, the railroad company would be liable and make payments. These expenses will be covered later by the insurance company under the terms of the voluntary liability insurance policy.⁸⁷

This information is essential for better understanding of problems with settlements. In all these scenarios, the insurers attend a trial or at least submit pleadings that entail legal costs on their part. Moreover, it means covering the claimant's legal costs within reasonable limits determined

⁸⁶ Dmitriy Anshukov, 'Recovery of Pain and Suffering Damages from a Slip-and-Fall in a Shopping Mall' [Vzyskanie moral'nogo vreda ot padenija v trgovom centre] (11 April, 2018) <<https://pravorub.ru/cases/81869.html>> accessed 17 January 2022.

⁸⁷ It can be expected that this inconsistency of the approaches will be resolved after the recent directives of the Supreme Court on moral damages. These directives stipulate that if moral damages are covered by voluntary liability insurance, the court should redress these damages directly from the insurer within insurance limits. See para 33 of Resolution of Plenum of the Supreme Court of the Russian Federation N 33 'On Court Practice of Application Rules on Moral Damages' of 15 November 2022.

by the court. This fact raises a simple question: why not amend the contract and exclude the clause referring to the need to go to court? It would open the way to settling cases with the insurer *out of court*. At the same time, settling a case with the defendant *at the trial stage* is possible. However, this rarely happens. In fact, there were only 2% of settled cases at the trial stage among the cases under consideration.

The situation in the Western countries is exactly the opposite. A similar percentage of personal injury cases normally reach trial, not settled. What is an explanation for this, at first sight irrational, approach of the defendant and insurance companies in Russia? The lack of standards for negotiating sums of payments and the status of a 'repeat player' discussed above are likely to be among the main reasons for this situation. The empirical evidence available supports such an explanation:

- You mentioned that defendants in Moscow are interested in settling cases because compensation can be high.
- These are not typical cases. This is not Russian Railways, meaning these are not mass cases, not mass defendants. This is, for example, a company that pays in a specific case, in the event of a workplace accident or an accident involving a car owned by the company. Everyone understands that this is one case, you considered it and left. And if you turn to vehicle fleets or Russian Railways, everyone understands that this is a certain influx of cases.⁸⁸

It is safe to assume that a shift to a general practice of settlement would mean for the defendant and insurers systematic payments at a higher level than current judicial awards, otherwise victims would not settle their cases.⁸⁹ However, the defendant and insurers, if they are willing to settle, are ready to offer lower compensation than the current judicial awards. The most frequently mentioned sum which the defendant mentions as 'fair and reasonable' is only 30,000 roubles (£300). To remind, the median claim sum for pain and suffering damages is 1 m roubles (£10,000) in railroad accident cases. Bearing in mind the inconsistency of awards and lack of standards, both parties try to set compensation closer to their expectations. Yet, the gap between these expected

⁸⁸ Interview with a personal injury lawyer from Nizhniy Novgorod.

⁸⁹ For example, the defendant made an offer between 30,000 (£300) and 50,000 roubles (£500) in one of the cases (Civil case n 2-386/2018 Zheleznodorozhniy District Court of the Samara Region). But the victim claimed 1 m roubles (£10,000) and expectedly did not accept that offer. As a result, the court awarded only 40,000 roubles.

figures is too large. In this case, it is not possible to reach an agreement on the amount of payment. The strategy of taking cases to trial entails fewer financial implications for the railroad company than settlements as long as courts continue with the current low level of compensation.

So, increased judicial awards would help to change this practice. There should be also strong economic and practical incentives for insurance companies to settle cases. There are, for example, such incentives in regards to compulsory motor vehicle insurance. Compulsory insurance provides more general protection for accident victims. For example, the insurer is obliged to pay 1 per cent of the insurance payment as a penalty for each day of delay in the case of unjustified refusal to accept or settle the claim.⁹⁰ Moreover, after the Resolution of the Supreme Court of 2012, the relationship between road accident victims and insurance companies started to be treated as a consumer relationship.⁹¹ This means that victims are protected by the Consumer Rights Act which prescribes 50 per cent of the non-paid sum for the benefits of claimants as a fine for consumer rights violation.⁹² On top of that, it is possible to claim non-pecuniary damages for consumer rights violation, albeit these are symbolic sums (around 5,000-10,000 roubles or £50-100) in most cases.⁹³

All this creates strong economic incentives for insurance companies to settle road traffic accident claims which are absent in the case of voluntary insurance for railroad accidents. Compulsory insurance overall provides more protection for accident victims. In addition to the information given above, claimants have a right to make a direct claim to an insurance company if liability insurance is compulsory.⁹⁴ This option is available to victims under voluntary liability insurance only if it is stated expressly in the contractual terms.⁹⁵ As discussed above, all liability insurance contracts for railroad accidents exclude this option in regards to pain and suffering damages.

⁹⁰ Art 12 para 21 of the Federal Law N 40-FZ 'On Compulsory Liability Insurance of Motor Vehicle Owners' of 25 April 2002.

⁹¹ The Resolution of the Plenum of the Supreme Court of the Russian Federation N 17 'On the Consideration of Civil Cases in Disputes on the Protection of Consumer Rights' of 28 June 2012.

⁹² Art 13 para 5 of the Law of the Russian Federation N 2300-1 'On Protection of Consumer Rights' of 07 February 1992.

⁹³ *ibid*, art 15.

⁹⁴ Art 931 para 4 of the Civil Code of the Russian Federation of 30 November 1994.

⁹⁵ *ibid*.

This makes victims go through a court procedure and contest objections of the defendant and insurance companies which requires professional legal assistance and legal costs. The most common reason for hiring a lawyer lies not only in the lack of legal knowledge but also in the emotional problems caused by personal presence and testifying in front of the court. The survey of accident victims undertaken by Andrea Cotti et al. shows that the necessity to participate personally in court proceedings has a negative impact on their physical and psychological condition.⁹⁶

The other problem is that participation in court proceedings, as a rule, is not limited by trial in the first instance. The defendant, as was mentioned above, frequently submits an appeal, even if there is no serious ground for that. The extremely low level of compensation also forces claimants to submit an appeal, albeit less frequently than the defendant. Overall, the cases on pain and suffering damages for railroad accidents deviate from the general trend in civil cases where appeals are exceptional. For example, only 3-4% of all first-instance judgments in civil cases were appealed in 2018.⁹⁷ If we look at railroad accident cases, the rate of appeals is dramatically higher. 58% of trial judgments from my dataset were appealed on the ground of disagreement with the quantum of pain and suffering damages. The total percentage of appeals will be even higher if we add to this figure appeals on other legal grounds. This makes this category of cases highly contested and the claiming process even more time-consuming for victims.

5.3.4 Enforcement of Judgments against Insurance Companies

The only problem with pain and suffering damages that voluntary liability insurance is capable of solving is the enforcement of awards. In contrast to individual defendants, insurance companies in

⁹⁶ Andrea Cotti et al, 'Road Traffic Accidents and Secondary Victimization: the Role of Law Professionals' (2004) 23 *Medicine and Law* 259.

⁹⁷ Zinaida Pavlova and Marina Nagornaya, 'Almost 50% of the Dismissals of Court Decisions in Civil Cases are Related to Violations of Substantive Law' [Pochti 50% otmen reshenij sudov po grazhdanskim delam svjazany s narushenijami norm material'nogo prava] *Advocate Gazette* (July 3, 2019) <<https://www.advgazeta.ru/obzory-i-analitika/pochti-50-otmen-resheniy-sudov-po-grazhdanskim-delam-svyazany-s-narusheniyami-norm-materialnogo-prava/>> accessed 17 January 2022.

most cases would have sufficient resources to make payments towards pain and suffering damages. There are three ways in which payments would reach the victims. The easiest one is when the insurance company after being found liable pays voluntarily within the prescribed period of seven days. If that does not happen, the judgment can be enforced by the state bailiff's service. However, as for the insurance company, there is no need to resort to the bailiff's service which is extremely inefficient.⁹⁸ Instead, in the case of any delay with payment, the claimant is entitled to submit an enforcement order directly to the bank of the insurance company.⁹⁹

The most problematic issue can be the situation when an insurance company goes bankrupt. However, the Insolvency Act¹⁰⁰ stipulates that claims under voluntary liability insurance for personal injuries would be satisfied on a priority basis right after the beneficiaries under compulsory liability insurance (first-order creditors) and life insurance (second-order creditors). There is no option of making these payments by a professional association of insurers in the case of the insurer's bankruptcy which is possible under compulsory motor vehicle insurance. This further demonstrates that the compulsory liability insurance scheme is more beneficial for victims, *inter alia*, in relation to the enforcement issues.

5.4 Conclusion

Compulsory insurance does not cover pain and suffering damages in Russia today. The historical analysis in Chapter 4 demonstrated that there are cultural reasons for this situation inherited from the Soviet past. Despite voluntary insurance for pain and suffering damages being available, it is far from being a popular insurance product. In this context, railroad accident cases provide a good ground for discussion of whether voluntary liability insurance can address the problems with pain and suffering damages in Russia. This is the area where voluntary liability insurance is widely used.

⁹⁸ Timur Bocharov, Alexey Knorre and Katerina Guba, *Execution of Court Decisions and Organisation of Bailiff's Work* [Ispolnenie sudebnyh reshenij i organizacija raboty sudebnyh pristavov] (Analytical Report, Centre for Strategic Research 2017) <<https://www.csr.ru/upload/iblock/4a6/4a643249f8744ba95cde958eee9ac0ee.pdf>> accessed 25 January 2023.

⁹⁹ Art 70 of the Federal Law 'On Enforcement Proceedings' of 2 October 2007.

¹⁰⁰ Art 184.10 para 3 of the Federal Law 'On Insolvency (Bankruptcy)' of 26 October 2002.

And yet, the analysis above has revealed some major drawbacks with the operation of this insurance scheme in this category of cases.

First, the judicial awards, despite the severity of injuries, remain low, rarely exceeding the maximum limits of liability insurance coverage. Nor are court awards consistent, varying across different regions. Neither do such claims avoid general complexities of claiming for pain and suffering damages. Insurance companies fail to set standards or tariffs for payments. They require in the terms of their policies a court decision as a necessary precondition for payment. As a result, accident victims must go through all stages of court proceedings, frequently including appeals, to obtain relatively moderate compensation, instead of settling claims directly with an insurer.

It can be concluded that while the availability of voluntary liability insurance almost completely eliminates the problem of enforcement, it fails to address the issues relating to quantum, inconsistency, and complexity of the claims procedure. This means that voluntary liability insurance is unlikely to improve the current situation with pain and suffering damages in Russia. This thesis argues further that compulsory insurance could be more effective in resolving all four problems with pain and suffering damages and therefore more advantageous for accident victims. The best practices of European jurisdictions in implementing compulsory liability insurance can serve as a helpful model for changes in a similar direction in Russia. These practices are discussed in detail in the next chapter.

CHAPTER SIX. SEARCHING FOR BEST PRACTICES: COMPULSORY LIABILITY INSURANCE IN BRITISH AND CONTINENTAL JURISDICTIONS

6.1 Introduction

It has been argued in Chapter 5 that the system based on voluntary liability insurance cannot resolve most problems with pain and suffering damages in Russia. In this regard, the European experience of compensating non-pecuniary losses through compulsory liability insurance is helpful. This chapter will look at how compulsory liability insurance for pain and suffering damages operates in some British and continental jurisdictions. Drawing on this experience, this chapter argues that compulsory liability insurance is more effective for addressing the four problems with pain and suffering damages. Therefore, it is more likely to ensure justice for accident victims.

The structure of the chapter is as follows. The next section will provide a comparative context and history of compulsory liability insurance in Europe with a focus on how it covers pain and suffering damages. Particular attention will be paid to the current approach of the European Union to compulsory motor vehicle third-party liability insurance and its influence on the Members' national legal systems.

The third section will discuss the role of compulsory insurance in the so-called 'deep pocket' reasoning. It means that lawyers are more prepared to claim higher damages and judges provide more generous awards if there is a 'deep pocket' behind the defendant (an insurance company in most cases). This is particularly true for pain and suffering damages where judicial discretion is the most evident. This section is based on the analysis of secondary sources – available empirical studies of this effect as well as legislation and case law adopted in Europe.

The fourth section will focus on the simplification of claims procedure which is one of the evident effects of compulsory liability insurance. The majority of personal injury claims for pecuniary as well as non-pecuniary losses are considered outside the court under the insurance-based system. The section will discuss the positive and negative consequences of this trend for accident victims in European countries.

The fifth section will analyse the relationship between liability insurance and standardisation of awards for pain and suffering caused by personal injuries. This section considers different approaches to setting standards for these awards across Europe. It argues that regardless of the chosen approach, any standardisation facilitates settlements and brings predictability. The sixth section will focus on the role of compulsory liability insurance in resolving the 'judgment proof problem', i.e. the lack of the defendant's assets to cover damages. The seventh section will identify and summarise the most effective features of European approaches to compulsory liability insurance as well as their limitations. Finally, the conclusion will suggest that the European experience of compulsory liability insurance is helpful for resolving most problems with pain and suffering damages. It suggests further that lessons learned from this experience could be successfully applied to the Russian situation, taking into account legal and cultural particularities.

6.2 A Brief Review of the Evolution of Compulsory Liability Insurance in Europe with the Focus on Pain and Suffering Damages

In contrast to the position in Russia, the European position on liability insurance is very different. Voluntary liability insurance started to be provided for the public as soon as motor vehicles flooded the streets of cities at the end of the 19th century. For example, the Law Accident Insurance Society began to provide voluntary liability insurance policies for UK drivers not later than in 1896.¹ At the beginning of the 20th century, there was a substantial growth of motor vehicles and the number of victims which became a serious social problem in Europe. There was always the risk that a defendant would not be able to meet a claim and a victim would not obtain compensation.² As a result, the state interfered very soon into the play of market forces and transformed voluntary insurance into compulsory insurance which was considered more beneficial for victims. The ground for this legislative choice in most cases is 'a decision to ensure (to one degree or another) that a person suffering harm receives indemnity or compensation'.³

Scandinavian countries were the pioneers in implementing compulsory liability insurance for road traffic accidents in Europe. The relevant legislation was adopted in Denmark in 1918, in Norway in

¹ Martin Davies, 'The End of the Affair: Duty of Care and Liability Insurance' (1989) 9 *Legal Studies* 67, 76.

² Özlem Gürses, *The Law of Compulsory Motor Vehicle Insurance* (Taylor & Francis 2019) § 1.5.

³ Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (Oxford University Press 2013) 264.

1926, and in Sweden in 1929.⁴ The UK adopted the Road Traffic Act in 1930 which introduced, *inter alia*, compulsory liability insurance for motor vehicle owners. The main rationale behind this legal development was the concern that with the increasing number of accidents more and more victims would remain under-compensated or not compensated at all because of the defendant's inability to pay.⁵ The implementation of the Act was positively evaluated by legal scholars at that time as it was clearly beneficial for victims and at the same time not particularly devastating for the insurance business.⁶ In addition, the Act widened the practice of shifting the personal liability of drivers to insurance companies which was also advantageous to the former. However, the utmost priority of the Act was the improvement of accident victims' situation. As Rob Merkin and Jenny Steele put it, the legal novelty 'was primarily considered to be for the benefit of the injured party to whom the assured was liable, and secondarily for the benefit of the assured.'⁷ The priority of the injured victims' interests is evident from the fact that only insurance against personal injuries, not property, became compulsory according to the Act.⁸

In Western European jurisdictions, it is a well-established position that pain and suffering damages are covered by liability insurance. This approach is in accordance with the basic principle of tort law *restitutio in integrum*. For example, the Spanish legislative Act on compulsory motor liability insurance stipulates as a 'fundamental principle' that full compensation includes not only pecuniary but also non-pecuniary damages.⁹ In post-socialist Eastern European countries, compulsory liability insurance also covers pain and suffering damages. This approach is understandable in the view of my historical analysis above. As discussed in Chapter Three, pain and suffering damages and liability insurance were always available in these countries despite the strong Soviet influence in other areas of tort and insurance law. For example, pain and suffering

⁴ Frank Astill, 'Compulsory Automobile Insurance in Europe' (1959) 85 Proceedings of the Casualty Actuarial Society 1.

⁵ Francis Deák, 'Compulsory Liability Insurance under the British Road Traffic Acts of 1930 and 1934' (1936) 3 Law and Contemporary Problems 565.

⁶ Astill (n 4) 8.

⁷ Merkin and Steele (n 3) 264.

⁸ Gürses (n 2) § 2.31.

⁹ Art 33 of La Ley Sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos a Motor, Decreto Legislativo 8/2004, de 29 de octubre.

damages are currently included in the coverage under compulsory liability insurance schemes in Albania,¹⁰ the Czech Republic,¹¹ and Romania.¹²

In stark contrast, most of the former members of the USSR do not include pain and suffering damages into compulsory motor third-party liability coverage, analogous to Russia. For example, these damages are explicitly listed among the losses which are not covered by compulsory insurance in the statutes on motor vehicle liability insurance in Belarus,¹³ the Kyrgyz Republic,¹⁴ Kazakhstan,¹⁵ and Uzbekistan.¹⁶ The alternative approach (i.e. inclusion of pain and suffering damages into compulsory insurance) can be found only in the Baltic countries (Estonia, Latvia, and Lithuania – currently EU Members), and Ukraine.¹⁷

As we can see, there is considerable variation in the approaches of the European jurisdictions to motor vehicle compulsory liability insurance. Yet, there were evident attempts to unify these approaches at the European Union level over recent times. There are overall five major legislative acts which were supposed to harmonise the rules on compulsory liability insurance in the European Union.¹⁸ The First Directive makes motor vehicle liability insurance against personal

¹⁰ Aranit Muja, 'Impact Analysis of the Change in Personal Injury Regulation in Albania' (2018) 9 *Mediterranean Journal of Social Sciences* 131.

¹¹ Petr Dobias, 'Compulsory Liability Insurance in the Czech Republic' in A Fenyves et al (eds), *Compulsory liability Insurance from a European Perspective* (Walter de Gruyter GmbH & Co KG 2016) 91.

¹² Marius Gavriletea and Aura Moga, 'Romanian Compulsory Motor Third Party Liability Insurance in 2010 and the Predictable Future' (2015) 13 *Annales Universitatis Apulensis Series Oeconomica* 2011.

¹³ Art 180 of the Decree of the President of the Republic of Belarus 'On Insurance Activity' N 530 of 25 August 2006.

¹⁴ Art 4 of the Law of the Kyrgyz Republic 'On Compulsory Insurance of the Motor Vehicle Owners' Civil Liability' N 192 of 24 July 2015.

¹⁵ Art 10 of the Law of the Republic of Kazakhstan 'On Compulsory Insurance of the Motor Vehicle Owners' Civil Liability' N 446-II of 1 July 2003.

¹⁶ Art 8 of the Law of the Republic of Uzbekistan 'On Compulsory Insurance of the Motor Vehicle Owners' Civil Liability' N ZRU-155 of 21 April 2008.

¹⁷ Vladimir Kochev, 'Comparative and Legal Analysis of the Legislation on Compulsory Insurance of the Civil Liability of Owners of Vehicles in the Countries of the CIS' [Sravnitel'no-pravovoj analiz zakonodatel'stva ob objazatel'nom strahovanii grazhdanskoj otvetstvennosti vladel'cev transportnyh sredstv v stranah SNG] (2010) 8 *Perm University Herald: Juridical Sciences* 118.

¹⁸ Gürses (n 2) § 1.14 – 1.22.

injuries compulsory for all EU members.¹⁹ The Second Directive added property damage to the insurance cover.²⁰ The Third Directive extended insurance coverage to the passengers in the stolen cars.²¹ The Fourth Directive established a claiming mechanism for victims suffered damages out of the country of their citizenship or of their permanent residence.²² And finally, the Fifth Directive sets higher minimum limits of insurance coverage and significantly simplified obtaining of temporary liability insurance for drivers staying in other EU member country.²³ These directives were combined into a single directive in 2009.²⁴ This regulation stipulates certain limitations of the free movement of goods and services as well as consumer rights.²⁵ However, it is seen by the Member States as a necessary means to protect victims and ensure adequate compensation for their losses.

In sum, compulsory liability insurance was implemented very early in Europe (mostly, in the first half of the 20th century), in contrast to Russia (only in 2003). This was done mainly in the interests of victims rather than defendants (voluntary insurance was already in place). Furthermore, insurance coverage from the start included pain and suffering damages, even in the Eastern European post-Socialist countries. Then, the approaches of European jurisdictions to compulsory liability insurance became even more harmonised with the EU integration. In this regard, the requirement of minimal insurance coverage and the possibility of a direct claim against insurers are the most beneficial EU regulations for victims. And finally, Russia, along with most post-Soviet countries, is exceptional in this regards. There is no coverage for pain and suffering damages under compulsory motor third-party liability there, as explained in Chapter 5. This exclusion is stipulated by the relevant statute in Russia.²⁶

¹⁹ Council Directive 72/166/EEC of 24 April 1972.

²⁰ Council Directive 84/5/EEC of 30 December 1983.

²¹ Council Directive 90/232/EEC of 14 May 1990.

²² Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000.

²³ Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005.

²⁴ Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009.

²⁵ Stefan Perner, 'Compulsory Liability Insurance and European Union Law' in A Fenyves et al (eds), *Compulsory Liability Insurance from a European Perspective* (Walter de Gruyter GmbH & Co KG 2016) 291-293.

²⁶ Art 6 para 2(b) of the Federal Law N 40-FZ 'On Compulsory Liability Insurance of Motor Vehicle Owners' of 25 April 2002.

The situation with employer's liability insurance is very different. There were practically no efforts to unify national approaches in this sphere at the EU level, and insurance schemes in European countries demonstrate a much greater variety. In the majority of European countries, a victim cannot make a separate claim in tort against the employer if social insurance is available.²⁷ The most substantial difference between liability insurance and social insurance lies in the area of pain and suffering damages. Compulsory liability insurance, as a rule, covers these damages in Europe whereas social insurance schemes do not provide compensation for pain and suffering. If social insurance schemes still provide compensation for non-pecuniary harm, its amount is very limited.²⁸ Therefore, the main attention will be paid further to the systems where compulsory employment liability insurance operates along with social insurance and the former does cover pain and suffering damages. The experience of these jurisdictions could be more helpful in resolving the problems with pain and suffering damages in Russia.

In this regards, the British approach allowing tort claims besides social insurance payments is exceptional compared to other European countries. As Richard Lewis mentions:

[T]he absence in this country [the UK] of an 'employer privilege' restricting tort claims is a considerable anomaly and typically overlooked by those academics who seem to view the ability to sue at common law as almost a universal right of universal application.²⁹

Another distinctive feature is the availability of compulsory liability insurance for workplace accidents and diseases which was adopted at the statutory level in the UK.³⁰ Voluntary employers' liability insurance became available at the end of the 19th century 'as a mechanism for protecting employers against damages claims by their employees'.³¹ Later, however, a special act was

²⁷ Gerhard Wagner, 'Tort liability and Insurance: Comparative Report and Final Conclusions' in G Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 332.

²⁸ Ken Oliphant, 'Landmarks of No-Fault in the Common Law' in WH van Boom and MG Faure (eds), *Shifts in Compensation Between Private and Public Systems* (Springer 2007) 81.

²⁹ Richard Lewis, 'Industrial Injuries Compensation: Tort and Social Security Compared' (2017) 46 *Industrial Law Journal* 445, 452.

³⁰ The same requirement can be also found in Cyprus but its tort system is almost identical to the UK. It can be safely assumed that the discussion of British experience below is also applicable to Cyprus.

³¹ Ken Oliphant, 'Tort Law, Risk, and Technological Innovation in England' (2014) 59 *McGill Law Journal/Revue de droit de McGill* 819, 839.

adopted in 1969 in the UK which explicitly obliged employers to purchase liability insurance.³² The pretext of this step was the fire in a Glasgow warehouse in 1968 after which the workers suffered difficulties with claiming damages from their employer.³³ The rationale behind this measure was ‘that in the case of small employers, claims had sometimes to be abandoned or injured workmen had to accept a smaller sum than was due to them’.³⁴ Thus, compulsory employers’ liability insurance, as in the case of compulsory motor third-party liability insurance, primarily aims to protect the interests of victims:

Indeed, insurance against liability to third parties in respect of personal injury is compulsory under the Road Traffic Act 1988 and under the Employers’ Liability (Compulsory Insurance) Act 1969; and this is not for the protection of drivers and employers but for the protection of injured road users and employees.³⁵

In a similar fashion, the implementation of compulsory liability insurance for pain and suffering damages in Russia is likely to ensure justice for victims of road traffic and workplace accidents.

The additional reason was that this would increase safety if the safety requirements were incorporated into the policies and insurance companies monitor their compliance.³⁶ This motivation is contrary to the widespread concerns about the elimination of the deterrence function of tort law with the expansion of liability insurance (discussed in more detail in Chapter 7).

This legal innovation substantially improved the standing of accident victims who could enjoy much more generous compensation compared to social security benefits. However, the level of protection is more limited compared to motor insurance schemes. The most disadvantageous

³² Employers’ Liability (Compulsory Insurance) Act 1969.

³³ Merkin and Steele (n 3) 294.

³⁴ RA Hasson, ‘The Employers’ Liability (Compulsory Insurance) Act 1969-A Broken Reed’ (1974) 3 *Industrial Law Journal* 79.

³⁵ Peter Cane and James Goudkamp, *Atiyah’s Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 221.

³⁶ Niels Philipsen, ‘Industrial Accidents and Occupational Diseases: Some Empirical Findings for the Netherlands, Belgium, Germany and Great Britain’ in S Klosse and T Hartlief (eds), *Shifts in Compensating Work-Related Injuries and Diseases* (Springer 2007).

feature of the scheme was the lack of an institution similar to the Motor Insurance Bureau which would meet the claims of victims suffered from an uninsured employer. The insurance lobby forced the government to compromise and not impose this 'burden' (from their point of view) on the insurance business.³⁷ However, this limitation was to a large extent removed by the establishment of the Financial Services Compensation Scheme in 2000.³⁸

The other difference is that, in contrast to motor insurance, there are limits on payments for insurance companies (currently £5 m for any one occurrence, including pain and suffering damages).³⁹ This puts workplace accident victims into a disadvantaged position compared to road traffic accident victims covered by compulsory liability insurance with no limits for personal injuries.⁴⁰ Uninsured employers are subject to criminal sanctions. And yet, despite the risk of criminal liability, about 8% of small companies do not purchase liability insurance in the UK, mostly because of the high costs of the insurance policy.⁴¹ In sum, workplace liability insurance providing pain and suffering damages is more beneficial for victims than social insurance but not as much as compulsory motor third party liability.

It must be noted that a statutory requirement to purchase employment insurance is not the only possible option. The same requirement can be also stipulated at the level of industry associations. For example, a mix of commercial employer liability insurance and social insurance scheme can be found in Sweden. Most employers there purchase the insurance policy called *Trygghetsförsäkringen* (TFA) which is based on collective agreements of employers.⁴² This scheme provides additional coverage for pain and suffering, besides social insurance payments which exclude any non-pecuniary damages. All the employers which are members of the Confederation of Swedish Enterprise are obliged to be covered by TFA insurance as well as non-members if

³⁷ Merkin and Steele (n 3) 295.

³⁸ Part XV sections 216 and 217 of The Financial Services and Markets Act 2000.

³⁹ Section 3(1) of The Employers' Liability (Compulsory Insurance) Regulations 1998.

⁴⁰ Chris Parsons, 'Employers' Liability Insurance – How Secure is the System?' (1999) 28 *Industrial Law Journal* 109.

⁴¹ Brenda Barrett and David Lewis, 'Is the Employers' Liability (Compulsory Insurance) Act 1969 Fit for Purpose?' (2016) 45 *Industrial Law Journal* 503, 515.

⁴² Bill W Dufwa, 'Liability in Tort and Liability Insurance: Sweden' in G Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 168.

collective agreements in these enterprises require this insurance.⁴³ It is estimated that about 90 per cent of employees in Sweden are covered by this insurance.⁴⁴ The similar 'mixed' systems with the elements of semi-compulsory liability insurance for pain and suffering damages exist in other Scandinavian countries: Finland,⁴⁵ Norway,⁴⁶ and Denmark (only for diseases).⁴⁷

Road traffic accidents and workplace accidents and diseases are not the only categories of personal injury cases where compulsory liability insurance is applied in Europe, albeit the largest ones. For example, compulsory liability insurance for railroad accidents is very common in Europe. The requirement to purchase liability insurance for damages caused to passengers and third parties exists in Serbia,⁴⁸ Spain,⁴⁹ Bulgaria,⁵⁰ Germany,⁵¹ and Switzerland.⁵² Similar rules on

⁴³ The Booklet by Finfa (part of the Confederation of Swedish Enterprise) 'Introduction to Insurance Schemes on the Labour Market' <https://www.svensktnaringsliv.se/bilder_och_dokument/g2n45i_introduction-to-insurance-schemes-on-the-labour-market-2019pdf_1132955.html/BINARY/Introduction%20to%20insurance%20schemes%20on%20the%20labour%20market%202019.pdf> accessed 17 January 2022.

⁴⁴ The Booklet by AFA Insurance 'Work-related Insurance' <https://www.afaforsakring.se/globalassets/sprak/f6285_forsakringar-i-arbetslivet-engelska.pdf> accessed 17 January 2022.

⁴⁵ Sonia Macleod, Matti Urho and Christopher Hodges, 'Nordic Injury Compensation Schemes: Finland' in S Macleod and C Hodges (eds), *Redress Schemes for Personal Injuries* (Bloomsbury Publishing 2017).

⁴⁶ Bjarte Askeland, 'Basic Questions of Tort Law from Norwegian perspective' in W.H. Koziol (ed) *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) 102.

⁴⁷ Gerhard Wagner, 'New Perspectives on Employers' Liability' in K Oliphant and G Wagner (eds), *Employers' Liability and Workers' Compensation* (Walter de Gruyter 2012) 564.

⁴⁸ National Bank of Serbia. Insurance Supervision Department, 'Compulsory Insurance in the Republic of Serbia' 20 March 2020 <https://nbs.rs/export/sites/NBS_site/documents-eng/osiguranje/compulsory_insurance.pdf> accessed 17 January 2022.

⁴⁹ David Diez Ramos, 'A Market Opportunity for Insurers. Summary of the Compulsory Insurances Approved in Spain during 2018 — Part I' February 2019 <<https://www.lexology.com/library/detail.aspx?g=f019f1d8-efb2-4cd2-b6a8-c8716e9627f6>> accessed 17 January 2022.

⁵⁰ Financial Supervision Commission of Bulgaria, 'List of the Compulsory Insurance Stipulated by Bulgarian Legislation' <<https://www.fsc.bg/d.php?id=1088>> accessed 17 January 2022.

⁵¹ Bundesanstalt für Finanzdienstleistungsaufsicht, 'Compulsory Insurances in Germany' 25.10.2007 <https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/dl_mb_zulassung_eu_pflichtvers_en.pdf?__blob=publicationFile&v=2> accessed 17 January 2022.

⁵² Vincent Brulhart et al, 'Switzerland' in G Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 176.

compulsory liability insurance were adopted in Europe in relation to aircraft, vessels, cableways and other hazardous vehicles and technical equipment.⁵³ Let us now look at how compulsory liability insurance addresses the four problems with pain and suffering damages identified in Chapter 3.

6.3 Compulsory Liability Insurance and 'Deep Pocket' Reasoning

The first problem entails the low level of damages. It is hypothesised that the availability of insurance leads to higher general damages (the so called 'deep pocket' argument). The 'deep pocket' bias is a more debatable and more explored problem in the US where civil juries give decisions on the quantum of damages. Juries consisting of laypeople are presumed to be more ready to award higher damages if the defendant is a corporation or is covered by an insurance company. Some empirical studies demonstrate the relevance of these arguments⁵⁴ while other studies were not able to observe this effect.⁵⁵ The impact of liability insurance, nevertheless, was demonstrated in mediation proceedings over compensation for pain and suffering.⁵⁶ The findings show that mediation is frequently constructed around the issue of whether defendants are fully covered by the insurance or whether they have to pay some part of damages out of pocket. In the latter case, the subject of disputes shifts from the issues of fault and causality to the sufficiency of the insurance cover.⁵⁷ This demonstrates how important the issue of the insurance cover maximum is for personal injury cases (discussed in relation to Russia in Chapter 7).

However, the situation with decision-making on pain and suffering damages is different in Europe. This issue is the exclusive prerogative of professional judges in all European countries. Yet, the 'deep pocket' reasoning finds its place even in the judicial systems. If we look at the legal doctrine in England and Wales, the financial situation of the defendant and the existence of liability

⁵³ Wagner, 'Tort liability and Insurance: Comparative Report and Final Conclusions' (n 27) 311-312.

⁵⁴ Audrey Chin and Mark A Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* (Rand Corporation 1985).

⁵⁵ Robert J MacCoun, 'Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis' (1996) 30 *Law and Society Review* 121.

⁵⁶ Stacy Lee Burns, 'Pursuing "Deep Pockets" Insurance-Related Issues in Judicial Settlement Work' (2004) 33 *Journal of Contemporary Ethnography* 111.

⁵⁷ *ibid.*

insurance is irrelevant to the courts while establishing liability and assessing the quantum of damages. As Judge Viscount Simonds noted in *Lister vs Romford Ice*: 'As a general proposition, it has not been questioned for nearly 200 years that in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded'.⁵⁸

Yet, this formal approach started to change gradually as the impact of liability insurance became increasingly evident in tort cases. The arguments about liability insurance are used from time to time as a part of policy reasoning by higher courts in England and Wales.⁵⁹ If initially most arguments referring to liability insurance were put forward by Lord Denning in his judgments,⁶⁰ there are now some other appeal court decisions based on similar logic.⁶¹ The same doctrinal principle on the irrelevance of the defendant's ability to pay out damages or availability of insurance is in force in other common law countries.⁶² However, even there, some policy-based decisions with the reference to compulsory liability insurance can be found.⁶³

The most well-known case where the role of liability insurance was recognised in English law is *Nettleship v Weston*.⁶⁴ That was a road traffic accident case involving personal injuries. The main legal issue was whether a learner driver is liable in Negligence for personal injuries she caused in

⁵⁸ [1957] AC 555, 576–77.

⁵⁹ Gotthard Gauci, 'Compulsory Insurance under EC Directive 2009/20/EC-an Adequate Solution for Victims, or Is It Also Time for the Abolition of Maritime Limitation of Liability and the Establishment of an International Fund as an Insurer or Last Resort' (2014) 45 Journal of Maritime Law and Commerce 77.

⁶⁰ For example, the relevant cases are *Lamb v Camden Council* [1981] 11 QB 625, 637- 638; *Spartan Steel v Martin & Co* [1973] 1 QB 27, 38- 39.

⁶¹ The relevant cases are *Vowles v Evans* [2003] EWCACiv 318; [2003] 1 WLR 1607 and *Gwilliam v West Hertfordshire NHS Trust* [2002] EWCACiv 1041; [2003] QB 443.

⁶² Interestingly, a deviation from this trend can be found in Louisiana in the US (mixed legal system). See, for example, this position in the case *Urk v. Southern Farm Bureau Cas. Ins. Co.*, 181 So.2d 69, 70 (La. App. 2d Cir. 1965): 'The legal principle generally followed by the courts of other states is that one who sustains damages by reason of the tortious acts] of another ... is entitled to a verdict for the amount of damages which he is able to prove, regardless of the ability of the defendant to pay ... The courts of Louisiana, however, have uniformly held that the ability of the defendant to respond in damages will be taken into consideration in determining the amount of the judgment.' Cited in Larry J Gunn, 'Insurance – Insurer's Liability above Policy Limits' (1968) Louisiana Law Review 11.

⁶³ For example, in Canada and Australia. See in greater detail in Tracey L Carver, 'Insurance and the Law of Negligence: an Influential or Irrelevant persuader?' (2011) 22 Insurance Law Journal 51.

⁶⁴ [1971] 2 QB 691.

the course of her training. Lord Denning answered positively to this question since: ‘Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her’.⁶⁵ Thus, the court was prepared to impose a higher standard of care knowing that the driver is covered by the insurance policy. Otherwise, it would have to be admitted that the accident was no one’s fault leaving the claimant without any compensation. As Lord Denning concludes, ‘that is not an acceptable solution, at any rate in these days of compulsory insurance’.⁶⁶

Lord Denning applied a very similar logic to the issue of vicarious liability for a road traffic accident in *Launchbury v Morgans*.⁶⁷ Here, the issue was whether the owner of a motor vehicle is liable for the damage caused by his agent who actually operated the vehicle. Lord Denning found the owner liable, again basing his reasoning on the argument of compulsory liability insurance:

It is true that the master or principal is not personally at fault. But it is only right that he should be made vicariously liable. Otherwise it would mean that the injured person would get no redress; for, more often than not, the servant or agent has not the means to pay: whereas his master or principal has the means: or, at any rate, ought to insure against the liability so as to get the means to pay.⁶⁸

In both cases, the compulsory nature of motor vehicle liability insurance has been emphasised. It seems that courts more readily take liability insurance into account in those areas where it is compulsory. Prue Vines clarifies this tendency among the judiciary as follows:

Where insurance is compulsory, it is reasonable to assume it and to assume that it is possible for the judiciary to know what the parameters of the insurance are. It is reasonable to assume this precisely because its compulsory nature means that the same situation applies to everybody. It is not reasonable to assume such things where insurance is not compulsory.⁶⁹

⁶⁵ *ibid* 700.

⁶⁶ *ibid* 703.

⁶⁷ [1971] 2 QB 245.

⁶⁸ *ibid* 253.

⁶⁹ Prue Vines, ‘Apologies as “Canaries” – Tortious Liability in Negligence and Insurance in the Twenty-First Century’ in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 287.

So, following this reasoning, liability insurance can influence the scope of liability in road traffic and workplace accident cases since such insurance is compulsory in these areas. However, there are different views on the actual extension of the influence of liability insurance on tort cases. Jane Stapleton, for example, is not ready to acknowledge a particularly substantial effect of liability insurance on the development of English tort law. As she notes:

In cases where liability is imposed, the references to insurance are typically equivocal: they are at least as consistent with the judge merely observing that the relevant liabilities can be insured against as they are with the judge using the insurability of the defendant as part of the reasons which convinced him to impose liability on this particular occasion. This confirms the suspicion that on the very few occasions when courts refer to liability insurance they do so as a 'makeweight' factor after it has been decided, having balanced other concerns, to impose liability.⁷⁰

If Stapleton seems to underestimate the effect of liability insurance, Jonathan Morgan acknowledges the critical influence of liability insurance on English tort law.⁷¹ In particular, he points out *Vowles v Evans*⁷² and *Gwilliam v West Herts NHSTrust*.⁷³ These are both personal injury cases. In the first case, the Court of Appeal explicitly based its reasoning on the availability of insurance while imposing liability on a rugby club for personal injuries caused to a young player. In the second case, the Court of Appeal went even further in its insurance-based policy reasoning. It has been found that the hospital is liable in addition to a primary defendant (a non-insured contractor) as it was the hospital's duty to make sure that insurance is in place. Richard Lewis also challenges Stapleton's conclusion that liability insurance plays only a minor role in tort law.⁷⁴ But rather than focusing on particular cases, he argues in general that 'insurance has had a profound effect upon tort and in particular upon the system of personal injury litigation'.⁷⁵ This is because liability insurance has become an institutional framework of practically all personal injury cases.

⁷⁰ Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 *The Modern Law Review* 820, 827.

⁷¹ Jonathan Morgan, 'Tort, Insurance and Ideology' (1995) 58 *Modern Law Review* 820.

⁷² [2003] EWCA Civ 318.

⁷³ [2002] EWCA Civ 1041.

⁷⁴ Richard Lewis, 'Insurance and the Tort System' (2005) 25 *Legal Studies* 85, 116.

⁷⁵ *ibid.*

The principle of insurance irrelevance (*Trennungsprinzip*) is adopted by German legal doctrine.⁷⁶ This principle means that 'liability comes first and must be established without regard to the availability of an insurance cover'.⁷⁷ However, this principle is not extended to the assessment of pain and suffering damages. Basil Markesinis and others explain this exception from the general rule as follows:

Such damages have to be assessed as the court deems equitable and just in the case before it, and all factors of a case will be taken into account, including the financial situation of both parties. The liability insurance puts the tortfeasor on the same footing as 'rich' tortfeasors, and the damages will be assessed accordingly.⁷⁸

So, German courts normally take into account liability insurance when awarding pain and suffering damages (discussed in more detail below in this section).

In France, the situation appears to be reversed. The defendant's financial resources are considered irrelevant for the assessment of pain and suffering damages.⁷⁹ It can be assumed that liability insurance is a resource that is not taken into account. However, the implicit effect of insurance on liability issues is acknowledged by the commentators, although it was not mentioned explicitly in the judgment. A case in point is the judgment of *Cour de Cassation* on the liability of parents. The long-term position of the French legal doctrine was that parents are liable for tortious acts of their children only on the basis of fault. And yet, *Cour de Cassation* changed this approach to the no-fault liability in its judgment *Chambre civile (Cass civ) 2, 10 May 2001*.⁸⁰ As Jean-Sébastien Borghetti concludes,

⁷⁶ Gerhard Wagner, 'Tort Liability and Insurance: German Report' in Gerhard Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 87.

⁷⁷ *ibid.*

⁷⁸ Basil Markesinis et al, *Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline* (Cambridge University Press 2005) 190.

⁷⁹ Suzanne Galand-Carval, 'Non-Pecuniary Loss under French Law' in WV Horton Rogers (ed), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Springer 2001) 99.

⁸⁰ *Cour de cassation, Chambre civile (Cass civ) 2, 10 May 2001.*

[T]he rule would never have been adopted had the Court not relied on the common knowledge that most parents in France are insured against any liability they may incur through their children thanks to their household insurance.⁸¹

The French specificity is that most people are covered by a household insurance (*assurance habitation*) which, as a rule, includes liability insurance.⁸² That is probably the reason for an extensive tort liability there, including liability for children. These examples from various jurisdictions suggest that courts sometimes do take into account liability insurance when deciding on liability issues.

The question of whether liability insurance has an impact on the level of damages is more complicated. The problem is that the effect of insurance on judicial decision-making on the quantum of damages, first of all, non-pecuniary ones, is not easy to observe. As Gerhard Wagner rightfully emphasises, 'the influence insurance might have on tort law in general or on the assessment of damages, in particular, is impossible to isolate because, in one of the main arenas of liability [road traffic accidents], everybody is protected by insurance.'⁸³ However, many scholars are of the opinion that there is a connection between the level of damages and the availability of insurance. For example, Randall Bovbjerg mentions that 'large recoveries are simply infeasible for those, presumably few, cases against uninsured or poorly insured defendants that do go forward.'⁸⁴ The availability of insurance can also influence the application of contributory negligence in some European jurisdictions. This defence is less likely to be accepted by courts and damages reduced when the defendant is covered by liability insurance. As Michael Faure describes the Dutch approach, 'as far as traffic accidents are concerned, the contributory negligence of the victim will almost completely be neglected from the moment that the injurer is insured'.⁸⁵

The role of liability insurance, according to Nataša Petrović-Tomić, is mostly evident in the assessment of damages:

⁸¹ Jean-Sébastien Borghetti, 'The Culture of Tort Law in France' (2012) 3 *Journal of European Tort Law* 158, 167.

⁸² *ibid* 165.

⁸³ Wagner, 'Tort liability and Insurance: Comparative Report and Final Conclusions' (n 27) 331.

⁸⁴ Randall R Bovbjerg, 'Liability and Liability Insurance: Chicken and Egg, Destructive Spiral, or Risk and Reaction' (1994) 72 *Texas Law Review* 1655, 1662.

⁸⁵ Michael Faure, 'Interdependencies between Tort Law and Insurance' (1997) 2 *Risk Decision and Policy* 193, 201.

It is our opinion that insurance does not contribute to the taking of legal action any more than other factors do. However, when it comes to the amount of compensation awarded, the role of insurance is certainly more prominent. Even though one might point out, as an argument against this view that damages claims have been tried in the past regardless of insurance, today the question whether the tortfeasor has insurance may be viewed as a circumstance that defines their financial situation.⁸⁶

The lesser impact on the propensity to claim can be explained by the willingness of some claimants to sue wrongdoers based on emotions rather than purely financial considerations.⁸⁷

Christian Lahnstein is even more convincing in his assessment of the effect of liability insurance on the quantum of pain and suffering damages:

Liability insurance has a pronounced effect on the award of damages if an exact figure cannot be put on the loss, i.e. especially in the case of pain and suffering and other non-pecuniary losses. The tortfeasor's increased ability to pay based on liability insurance can then be more or less openly considered in setting the damages, provided judges are not bound by damages tables but have broad scope for discretion.⁸⁸

The same observation was made by Steve Hedley while discussing the principle of personal liability in the era of omnipresent liability insurance:

This liability is therefore in practice a mere technicality. A deeper answer is that nothing like the scale, complexity and level of recovery in the modern tort system would be possible if it

⁸⁶ Nataša Petrović-Tomić, 'Liability Insurance as a (Social) Response to the Changing Regulatory Framework: From Prohibited to Compulsory' (2020) 68 *Anali Pravnog Fakulteta u Beogradu* 80, 92.

⁸⁷ See more on this rationale in Tom Baker, 'Blood Money, New Money, and the Moral Economy of Tort Law in Action' (2001) 35 *Law and Society Review* 275.

⁸⁸ Christian Lahnstein, 'Tort Law and the Ethical Responsibilities of Liability Insurers: Comments from a Reinsurer's Perspective' (2011) 103 *Journal of Business Ethics* 87, 89.

were assumed that individuals bore the financial risk of liability themselves, in anything but exceptional cases.⁸⁹

And finally, Kenneth Abraham puts forward a similar argument but specifically in relation to pain and suffering damages. This observation entails that liability insurance is a necessary condition for high compensation for pain and suffering:

Only because liability insurance is so readily available to individuals and small businesses can law suits claiming hundreds of thousands or even millions of dollars for pain and suffering from such defendants even be imagined.⁹⁰

These are the scholars' opinions on the *implicit* effect of liability insurance. However, the situation becomes much more straightforward when legislation or case law *explicitly* recognises the relevance of the defendant's financial situation (as it is in Russia) in the calculation of pain and suffering damages. This is the case, for example, in Germany. There, insurance has had to be taken into account, as an exception to *Trennungsprinzip* (the irrelevance of insurance) mentioned above, in the cases on pain and suffering damages since the 1950s.⁹¹ The German Civil Code prescribes to account for the financial situation of the defendant in awarding just and reasonable compensation for pain and suffering. The Federal Supreme Court (*Bundesgerichtshof*) found in its judgment BGH (6.7.1955) that liability insurance directly influences the defendant's financial capacity to meet claim so it must be taken into account by courts in calculating damages.⁹² Nataša Petrović-Tomić notes in this regards:

Even though the courts most often do not mention insurance even in the rationale of the decision, its influence is quite noticeable. Furthermore, the knowledge that there is liability insurance is used by the courts to appraise the financial situation of the tortfeasor (the liable party), and the court might not reduce the sum owed by the liable party, even though their

⁸⁹ Steve Hedley, 'Tort: The Long Good-Bye' (April 8, 2020) <<https://ssrn.com/abstract=3571950> or <http://dx.doi.org/10.2139/ssrn.3571950>> accessed 17 January 2022.

⁹⁰ Kenneth S Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era To 9/11* (Harvard University Press 2008) 3-4.

⁹¹ BGH (6.7.1955) in BGHZ 18, 149, 165.

⁹² Peter Thalmer, 'The View of an Insurer: The Impact of Liability Insurance on Tort Law' in G Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 276.

financial situation meets the requirements for the implementation of this instrument, solely because they are insured.⁹³

The financial situation of the defendant, albeit not being decisive, must be also taken into account by courts in assessing pain and suffering damages in Lithuania. The Supreme Court there prescribes:

[T]he real possibility of recovery of the adjudged amount of compensation awarded from the defendant must be assessed, and such a monetary compensation for non-pecuniary damage must be fixed which would reach the victim within a reasonable time, be relevant to him, and provide a real opportunity to benefit from it.⁹⁴

It can be assumed that liability insurance would be also taken into account following this ruling. This principle is also applicable in Sweden and The Netherlands:

Furthermore, in some jurisdictions the right of a court to take insurance into account in particular cases is explicitly recognized. For example, in Sweden and The Netherlands courts have the power to consider the economic circumstances of the parties when fixing damages, but no mitigation is permitted if the defendant is covered by liability insurance.⁹⁵

According to this principle, the defendant's financial situation including whether she is insured would be taken into account in deciding whether to increase or decrease damages.

The same rule exists in Poland where according to article 440 of the Civil Code in the case when one individual causes harm to another individual pain and suffering damages can be reduced due to the financial circumstances of the defendant. In this regards, the availability of insurance

⁹³ Petrović-Tomić (n 86) 93.

⁹⁴ Romas Raudys, 'Methods of Ascertainment of Personal Damage in Lithuania' in SD Ferrara, R Boscolo-Berto and G Viel (eds), *Personal Injury and Damage Ascertainment Under Civil Law: State-of-the-Art International Guidelines* (Springer 2016) 244.

⁹⁵ Christopher Parsons, 'Moral Hazard in Liability Insurance' (2003) 28 *The Geneva Papers on Risk and Insurance-Issues and Practice* 448, 465.

renders art. 440 not applicable and damages would not be reduced since 'the existence of insurance cover influences his [defendant's] financial situation'.⁹⁶

Further to that, liability for minors or incapable persons is the area of law where the defendant's financial position plays an important role in judicial decision-making on damages in continental Europe. This area covers cases where parents are held liable for the damage caused by their minor children or caretakers for the damage caused by legally incapable persons under their responsibility. For example, according to paragraph 829 of the German Civil Code, the financial position of the defendant is one of the issues which must be taken into account in this category of cases. Liability insurance is considered as a factor indicating the defendant's financial capacity. However, the Code distinguishes the impact of compulsory and voluntary liability insurance in these cases. The availability of the former can serve as a ground for imposing this kind of liability *per se* whereas the latter is only the factor influencing the quantum of damages.⁹⁷

In sum, the list of examples discussed above demonstrates that Western courts tend to take liability insurance into account in those jurisdictions where the poor financial situation of the defendant is a legitimate reason for reducing the quantum of damages.

At the same time, one has to keep in mind that the impact of liability insurance on the quantum of damages depends on the maximum level of insurance cover for personal injury damages (including compensation for pain and suffering). In other words, insurance limits determine how deep the 'pocket' is. Unlimited insurance coverage for personal injuries is adopted in Finland, France, Ireland, Luxembourg, Norway, and UK.⁹⁸ In other continental jurisdictions, the responsibility of insurance companies is limited but the minimum level is relatively high in those countries which are EU members. The reason is that the EU Directive of 2009 currently establishes the minimal coverage of €1,050,000 per victim and €5,210,000 per claim for personal injuries (pecuniary and non-pecuniary damages together). The figures are regularly updated in accordance with

⁹⁶ Katarzyna Ludwiczowska-Redo, 'Basic Questions of Tort Law from a Polish Perspective' in WH Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) 233.

⁹⁷ Cees Van Dam, *European Tort Law* (Oxford University Press 2015) 271.

⁹⁸ Wanda Ronka-Chmielowiec, Anna Jędrzychowska and Ewa Poprawska, 'The Sufficiency of the Minimum Amounts in Compulsory Liability Insurance to Cover Personal Injury Claims Based on Motor Third Party Liability Insurance and Medical Liability Insurance' (2015) 4 *Wiadomości Ubezpieczeniowe* 79.

inflation.⁹⁹ However, the limits can be even higher than the compulsory levels in some European countries such as Switzerland (€50 m) or Spain (€70 m).

The impact of liability insurance on awards of damages is likely to be more significant in those jurisdictions where there is unlimited insurance cover or limits are set at a high level, at least in accordance with the EU Directives. This is, for example, the case in Poland where insurance limits are identical to the compulsory minimum prescribed by EU regulations:

[I]ncrease public awareness of insurance and, consequently, the propensity and effectiveness of the claims which are clearly in recent years on the Polish market translates into an increase in claims asserted in court and increase the amounts awarded.¹⁰⁰

The level of compensation under compulsory insurance increased almost twofold in Poland after joining the EU and implementing its regulations.¹⁰¹ The limit of insurance coverage is lower in some non-EU countries but not substantially. For example, in Albania, it is set in the amount of 20 m leks (£146,000) for property damage, loss of earnings, and personal injuries, including compensation for pain and suffering. Yet, some Albanian scholars criticise this level as a violation of the principle *restitutio in integrum* and argue for lifting it up closer to the EU standards.¹⁰²

The problem with the EU directive is that it broadly imposes minimal limits without breaking it down into pecuniary and non-pecuniary losses. Therefore, some EU countries can set limits for personal injuries in accordance with the EU rules or even higher but set much lower limits for pain and suffering damages. This is the case, for example, in Lithuania where the general limit for pecuniary and non-pecuniary losses consequent on personal injuries is € 5,000,000 but the limit

⁹⁹ Christopher J Robinette and Dani Wachtel, 'Raising Compulsory Automobile Insurance Minimum Amounts' (2019) 4 Insurance Review 59.

¹⁰⁰ Ilona Kwiecień and Ewa Poprawska, 'Motor Third Party Liability Insurance – Polish Market in Connections to European Trends' (2011) 3 International Journal of Economics and Finance Studies 117, 122.

¹⁰¹ *ibid.*

¹⁰² Juliana Bylykbashi and Eneida Sema Dervishi, 'Reflections on Liability and Full Reimbursement of "Restituito in Integrum" Damage in Insurance' (2019) 8 Academic Journal of Interdisciplinary Studies 175.

for pain and suffering damages is only € 5,000.¹⁰³ This can probably explain why chronic whiplash injuries are reported less frequently in Lithuania compared to other European countries.¹⁰⁴ In contrast, two other Baltic countries (Latvia and Estonia) chose not to separate non-pecuniary damage and establish a common (high) limit for both types of damages.¹⁰⁵ The other example of setting insurance limits specifically on pain and suffering damages can be observed among post-Soviet countries outside the European Community.

As mentioned above, pain and suffering damages are normally excluded from compulsory insurance coverage in post-Soviet non-EU countries. The only exception is Ukraine where compulsory insurance cover for pain and suffering was implemented in 2012. However, the level of pain and suffering damages remains practically unchanged there and award sums are still extremely low.¹⁰⁶ This could be interpreted as a problem for the main argument of the thesis, but there are particular reasons why compulsory liability insurance for pain and suffering damages did not work in Ukraine. This can be partly the legacy of the Soviet cultural background discussed above which Ukraine shares with Russia but insurance limits are also likely to be at blame. The current upper limit of coverage for pain and suffering which can be claimed under motor liability insurance is only 5,000 hryvnias (around £139) in Ukraine.¹⁰⁷ This sum is surprisingly low even if we compare it with the median awards of pain and suffering damages for traffic accidents in Russia (40,000 roubles or £400, as it was presented in Chapter 3), let alone the figures in other European countries. The implementation of compulsory liability insurance for pain and suffering, therefore, did not improve the standing of accident victims in Ukraine. Thus, the European experience shows that compulsory liability insurance can secure adequate compensation for victims' pain and suffering subject to sufficient limits of insurance cover.

¹⁰³ Art 11 of the Law of the Republic of Lithuania 'On Compulsory Insurance against Civil Liability in Respect of the Use of Motor Vehicles' No IX-378 of 14 June 2001.

¹⁰⁴ Along with Greece and Germany. See in Nikhil Shah and Stuart Matthews, 'Whiplash injury' (2014) 2 *Journal of Personal Injury Law* 55.

¹⁰⁵ The Law of the Republic of Latvia 'Compulsory Civil Liability Insurance of Owners of Motor Vehicles' of 7 April 2004; Motor Insurance Act the Republic of Estonia of 26 March 2014.

¹⁰⁶ EV Pushkina and YA Kriklevetz, 'The Comparative Characteristic of Moral Damages in Ukraine and Foreign Countries' [Sravnitel'naya kharakteristika vozmescheniya moral'nogo vreda v Ukraine i zarubezhnykh stanakh] (2015) 2 *Dnepropetrovsk University Herald: Juridical Sciences* 94.

¹⁰⁷ Art 26.1 of the Law of Ukraine 'On Compulsory Insurance of the Motor Vehicle Owners' Civil Liability' № 1961-IV of 1 July 2004 (amended in 2012).

The other problem which compulsory liability insurance can address is the complex claims procedure. It facilitates settling of personal injury claims and direct claiming to insurance companies out of court.

6.4 Compulsory Liability Insurance and Claims Procedure

In Europe, most personal injury cases are settled due to the existence of the insurance-based system. This tendency makes some scholars speak about the transformation of traditional tort litigation into 'litigotiation' (a clumsy neologism combining 'litigation' and 'negotiation').¹⁰⁸ In European jurisdictions, it is widely considered that quick and amicable resolution of personal injury cases through settlement can be advantageous for both parties, not only insurers.

A variety of arguments exist in favour of settlements. The first argument emphasises that 'it is intrinsically better and more desirable that people should settle disputes by mutual agreement and accommodation than by having recourse to a third party to impose a solution'.¹⁰⁹ The second argument focuses rather on the fact that the system based on settlements 'ensures that parties do not expend time and money on claims that can be resolved informally'.¹¹⁰ The third argument pays more attention to the fact that the real defendant is not called to the court and 'compensation and the whole compensation process is normally a 'private' matter between the victim and the insurer'.¹¹¹ So, this system is beneficial for defendants who do not want to be formally subject to a court judgment and therefore 'stigmatised' as a wrongdoer found at fault. Indeed, most settlements with insurance companies do not include an admission of fault on the defendant's part.¹¹²

¹⁰⁸ Cane and Goudkamp (n 35) 246.

¹⁰⁹ Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 232.

¹¹⁰ Lord Dyson MR, 'Compensation Culture: Fact or fantasy?' Holdsworth Club Lecture, 15 March 2013 <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-compensation-culture.pdf>> accessed 17 January 2022.

¹¹¹ Borghetti, 'The Culture of Tort Law in France' (n 81) 168.

¹¹² Tom Baker, 'Liability Insurance, Moral Luck, and Auto Accidents' (2008) 9 *Theoretical Inquiries in Law* 165, 174.

Trials are exceptional in the UK since insurance companies acting for defendants are interested in settling cases and reducing legal costs. The likelihood of a trial depends on the category of cases. For example, one of the British lawyers I interviewed explains this as follows:

I have one case in five years. Very few cases go to trial, normally. I mean more perhaps in other areas of personal injury where liability is not so clear-cut. In road traffic accidents, for example, liability is normally quite straightforward. In other areas such as clinical negligence <...> it is a lot more complex, perhaps more chances to go to trial but defendants do not want the case to go to trial.¹¹³

Formal mechanisms to promote settlements between claimants and insurance companies were implemented in Europe. For example, after the Woolf procedural reforms in the UK, claimants are now obliged to use the pre-action protocol before submitting a claim to the court.¹¹⁴ Furthermore, courts have more powers now to encourage parties to reach a settlement, for example, by imposing financial sanctions on the party which unreasonably avoids negotiating a settlement.¹¹⁵ The same movement towards the system based on settlements rather than litigation can be observed also in civil law jurisdictions, such as Germany. The procedural reform of 2002, similarly to the Woolf reforms, aimed to convince parties to reach a settlement by introducing compulsory conciliation hearing (*Giteverhandlung*) which substantially increased the proportion of settlements.¹¹⁶ Compulsory insurance law in Europe usually requires an insurer to make an offer within a reasonable period if liability is not contested. This is the case, for example, in Belgium where an insurer has to pay double interest in the case of not making an offer without a reasonable excuse. If liability is contested but an insurer does not explain the grounds for this to victims within three months, the latter is entitled to claim €250 for every day of delay.¹¹⁷

The strongest efforts of the state, understandably, are focused on promoting settlements in road traffic accident cases as the largest category of personal injury cases. They make the greatest

¹¹³ Interview with a personal injury solicitor from London (specialisation – claimants).

¹¹⁴ Michael Zander, *Cases and Materials on the English Legal System* (Cambridge University Press 2007) 61.

¹¹⁵ Emily Allbon, *Elliott and Quinn's English Legal System* (21st edn, Pearson 2020) 670.

¹¹⁶ Jörg Fedtke, 'The Culture of German Tort Law' (2012) 3 *Journal of European Tort Law* 183, 191.

¹¹⁷ Herman Cousy and Caroline Van Schoubroeck, 'Compulsory Liability Insurance in Belgium' in A Fenyves et al (eds), *Compulsory Liability Insurance from a European Perspective* (Walter de Gruyter GmbH and Co KG 2016) 45, 71.

impact on the workload of civil court in European countries. For example, a special procedure intended to eliminate litigation in road traffic accident cases was adopted in Sweden. The Road Traffic Injuries Commission (*Trafikskadenämnd*) has operated there since 1936 and is intended to help victims and insurance companies to reach a settlement.¹¹⁸

If we look specifically at the claims covered by compulsory liability insurance, the most significant achievement in simplification of claiming procedure has been reached by the European Communities (Rights against Insurers) Regulations 2002. They introduced the right of victims to submit a direct claim against the defendant's insurers.¹¹⁹ This legislation significantly changed the claiming procedure in the UK. If previously the Third Parties (Rights Against Insurers) Act 1930 (replaced by the later version of 2010) allowed to sue insurance companies directly only in the case of defendants' insolvency, with the implementation of the Directive the scope became broader. There is no need now to make a claim against the actual defendant as claimants can make a direct claim against the insurer. Compared to the previous, indirect, claiming procedure, 'the 2002 Regulations are speedier and cheaper, and are now in widespread use'.¹²⁰ However, the Third Parties Act keeps its significance for those claimants who are covered by other forms of insurance besides motor third-party liability insurance (MTPLI).¹²¹

However, some Member States, for example, France (by the legislation known as *loi Badinter*), went even further and made direct claiming mandatory for accident victims.¹²² This effectively means that they are not allowed to make a claim against an individual defendant even if they, for some reasons, wish to do this. Since insurance companies anyway were involved in the procedure in most cases, the rule only solidified the existing practice. On their side, insurance companies are obliged (if there is no dispute between parties over the quantum of damages or liability) to provide compensation within three months at the threat of legal sanctions.¹²³ Noteworthy, the period during which insurance companies are obliged to pay compensation for material losses is

¹¹⁸ Macleod, Urho and Hodges (n 45).

¹¹⁹ European Communities (Rights against Insurers) Regulations 2002, SI 2002/3061.

¹²⁰ Merkin and Steele (n 3) 272.

¹²¹ Gürses (n 2) § 1.10.

¹²² Jean-Sebastien Borghetti, 'Extra-Strict Liability for Traffic Accidents in France' (2018) 53 Wake Forest Law Review 265.

¹²³ *ibid.*

even shorter in Russia (20 days), otherwise insurers have to pay penalty.¹²⁴ In the case of extension of compulsory liability insurance to pain and suffering damages, this would be a strong incentive to pay these damages promptly.

Generally speaking, direct claim and settlement are beneficial for victims as it allows obtaining compensation quickly without spending time, costs, and energy on court proceedings. However, there are some arguments against settlements and in favour of court procedure. A just outcome of the negotiations over the amount of compensation can depend on the bargaining powers of the parties. If negotiations, on one side, are undertaken by a professional lawyer hired by an insurance company and on another side they are held by an individual, the chances of an unjust outcome of the settlement are high for victims. It is widely considered that insurers and lawyers are more interested in cutting costs rather than in bringing justice to victims.¹²⁵ As one of the interviewees mentioned, insurance companies sometimes try to force victims without legal representation to engage in settlements which can be grossly disadvantageous for them:

That is what they do, insurance companies, they make offers trying to incline people to settle so they don't instruct solicitors, no other costs as well, and a couple of thousand pounds for anyone is enough, handy, I'll take that. And then six months down the line they still have back pain and they can't do anything about that because the settlement is full and final.¹²⁶

As Peter Cane and James Goudkamp note, in such circumstances, 'it was suggested that such settlements should be reviewable by a court within, say, twelve months'.¹²⁷ Hazel Genn in her empirical study shows that bargaining powers of claimants and insurance companies are not equal in negotiations over settlements in personal injury cases.¹²⁸ Claimants are a weaker party in this communication. For these reasons, some jurisdictions already provide higher protection for the

¹²⁴ Art 12 para 20 of the Law of the Russian Federation 'On Compulsory Social Insurance against Work Accidents and Professional Disease' of 24 July 1998.

¹²⁵ Nathaniel Donahue and John Fabian Witt, 'Tort as Private Administration' (2019) 105 Cornell Law Review 1093.

¹²⁶ Interview with a personal injury solicitor from London (specialisation – claimants).

¹²⁷ Cane and Goudkamp (n 35) 247.

¹²⁸ Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon 1987).

most vulnerable victims by requiring court approval of settlements, as it is in the UK in cases involving children.¹²⁹

The third problem which compulsory liability insurance is capable of resolving is inconsistency of awards. The lack of standards precludes justice for victims. There are two main approaches to this issue in European jurisdictions – guidelines based on previous judicial awards and statutory tables adopted by the governmental bodies. Let us discuss these two approaches in detail.

6.5 Compulsory Liability Insurance and Standardisation of Awards

There is a strong link between the average level of judicial awards and the average amount of insurance coverage for pain and suffering. The matter is that settlement negotiations are usually conducted taking into account the possibility of trial, even though only a few per cents of cases really reach this stage. As Solomon notes, ‘insurance companies base the amount of money that changes hands and who pays whom on a rough prediction of what would happen if the case went to trial, even if a lawsuit is never filed’.¹³⁰

Therefore, insurance companies have to rely on judicial awards while offering compensation to victims. These awards must be predictable so that insurance companies can evaluate risks, determine premiums and sums of payments towards victims’ non-pecuniary losses. The existence of broad judicial discretion is not in the interests of insurance companies since ‘they have to pay for the changed risk from unchanged, previously collected premiums’.¹³¹

The situation is more straightforward if there are formal judicial guidelines to which both parties can refer while bargaining. The most evident example of this approach can be found in England and Wales where special Judicial Guidelines for awards of pain and suffering damages have been used for over thirty years.¹³² The purpose of implementing these guidelines, among other things,

¹²⁹ Para 6.1 of the Practice Direction supplements CPR Part 21.

¹³⁰ Jason M Solomon, ‘What is Civil Justice’ (2010) 44 *Loyla of Los Angeles Law Review* 317, 330.

¹³¹ Bovbjerg (n 84) 1668.

¹³² Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, 16th Edition, 2022.

was to facilitate settlements in personal injury cases. Lord Woolf made this rationale clear in his judgment in *Heil v Rankin* :

Consistency is important, because it assists in achieving justice between one claimant and another and one defendant and another. It also assists to achieve justice by facilitating settlements. The courts have become increasingly aware that this is in the interest of litigants and society as a whole.¹³³

The figures in the JC Guidelines were uplifted by 10 per cent by this judgment following Law Commission recommendations aiming to improve the situation of the victims who primarily suffered severe injuries.¹³⁴ A further increase was introduced by *Simmons v Castle*.¹³⁵

Similar tables for assessing pain and suffering damages based on judicial practice have been in use in Germany for a long time. They are prepared by private publishers such as Beck or Hacks/Wellner/Häcker.¹³⁶ These guidelines are not binding on judges who can still rely on their discretion adjusting compensation to the circumstances of the cases and the current level of inflation.¹³⁷ Moreover, the German model is more helpful for legal practitioners since, as comparative scholars note, it 'offers more structured and complex information than the English one.'¹³⁸ In the Netherlands, a similar approach can be found but tables are published in an authoritative law journal ('Verkeersrecht').¹³⁹

¹³³ [2001] Q.B. 272.

¹³⁴ Roger Halson, 'The Recovery of Damages for Non-Pecuniary Loss in the United Kingdom: A Critique and Proposal for a New Structure Integrating Recovery in Contract and Tort' (2015) 3 *The Chinese Journal of Comparative Law* 245.

¹³⁵ [2012] EWCA Civ 1039.

¹³⁶ Vera Sterzik et al, 'Methods of Ascertainment of Personal Damage in Germany' in SD Ferrara, R Boscolo-Berto and G Viel (eds), *Personal Injury and Damage Ascertainment Under Civil Law: State-of-the-Art International Guidelines* (Springer 2016) 206.

¹³⁷ Ulrich Magnus, 'Damages for Non-Pecuniary Loss in German Contract and Tort Law' (2015) 3 *The Chinese Journal of Comparative Law* 289, 305.

¹³⁸ Giovanni Comandé, 'Compensation for Personal Injury in a Comparative Perspective: The Need to Bridge Legal and Medicolegal Knowledge' in SD Ferrara, R Boscolo-Berto and G Viel (eds), *Personal Injury and Damage Ascertainment Under Civil Law: State-of-the-Art International Guidelines* (Springer 2016) 59.

¹³⁹ Vaia Karapanou and Louis Visscher, 'Towards a Better Assessment of Pain and Suffering Damages' (2010) 1 *Journal of European Tort Law* 48, 56.

The effect of standardisation on the level of damages is different depending on the willingness of courts to change their practice. The standards are set taking into account judicial awards. If these awards are low, the standard payments are also low. As has been discussed above, Germany and the Netherlands adopted similar approaches to the calculation of damages but court cultures are different in these jurisdictions.¹⁴⁰ Consequently, ‘whereas under German law the same model has appeared to be suitable to a substantial rise of the awards for non-pecuniary loss, the awards in the Netherlands do not even seem to keep up with inflation’.¹⁴¹

Since 2005 (after *Dintilhac* reform), the trend towards standardisation of awards of pain and suffering damages can be observed in France. This led to the interdependence between the approaches of courts and insurance companies to quantification. As Eric Baccino and Jean Sebastien Raul describe this process, ‘there has been a clear tendency towards unification of valuation criteria (i.e. scales) in appraisals ordered by insurance companies as well as by the courts [from expert organisations]’.¹⁴² These steps made the situation of accident victims better than earlier as the difference between the assessments of insurers (in most cases lower) and courts has been eliminated.

However, even in countries where there are no statutory standards or judicial tariffs, insurance companies try to use court practice to determine the final sum of compensation. For example, in the Netherlands, providers of motor third-party liability insurance establish the sum of pain and suffering damages using previous judicial awards for similar injuries as guidance.¹⁴³ And vice versa, Swedish courts widely use insurance tables for assessing pain and suffering damages. As Gerhard Wagner puts it, ‘although it might be thought that the fact of these tables stemming from a big

¹⁴⁰ Erhard Blankenburg, ‘Patterns of Legal Culture: The Netherlands Compared to Neighbouring Germany’ (1998) 46 *The American Journal of Comparative Law* 1.

¹⁴¹ Siewert D Lindenbergh and Tammo Wallinga, ‘Compensation of Non-Pecuniary Loss in The Netherlands: Past, Present, Predictions’ (2015) 3 *The Chinese Journal of Comparative Law* 308, 322.

¹⁴² Eric Baccino and Jean Sebastien Raul, ‘Methods of Ascertainment of Personal Damage in France’ in SD Ferrara, R Boscolo-Berto and G Viel (eds), *Personal Injury and Damage Ascertainment Under Civil Law: State-of-the-Art International Guidelines* (Springer 2016) 102.

¹⁴³ Jan Buitenhuis and Wout EL De Boer, ‘Methods of Ascertainment of Personal Damage in the Netherlands’ in SD Ferrara, R Boscolo-Berto and G Viel (eds), *Personal Injury and Damage Ascertainment Under Civil Law: State-of-the-Art International Guidelines* (Springer 2016).

player in the compensation game somewhat contaminates their quality, the Swedish courts have been prepared to accept them and the numbers presented therein'.¹⁴⁴ As a result, Swedish courts, in theory, enjoy broad discretion but in reality, rarely deviate from the tables adopted by insurance companies.¹⁴⁵

Compensation tables were also provided by an organisation connected to the insurance business in France. A private body (*l'Association pour la Gestion des Informations sur le risque automobile: AGIRA*) periodically published tables determining the average of the point's value. Their status was established as a result of the Act of 1985 on road accidents.¹⁴⁶ However, this practice has been replaced by the tables (*barèmes*) of the regional appeal court which 'track the statistical tables published by insurance companies, indicating damages awarded for different categories of injury, and include information on the victims' disability rates, age, and gender'.¹⁴⁷ These tables are not fully in accordance with formal legal principles, but French appeal courts try to be consistent and follow these tables.¹⁴⁸

To sum up, two main approaches to the standardisation of pain and suffering damages in European jurisdictions can be identified in European jurisdictions depending on what the criterion of assessment is. The first model is based on previous judicial decisions on the quantum of damages whilst the second model means statutory point-based tables prepared by medical experts. The first model is functional in England and Wales, Germany, and the Netherlands. The second model is mainly adopted in countries from the Roman legal family: France, Italy, and Spain. It is worth mentioning that the 'precedent model' does not relate only to the precedent legal system and has been in operation for a long time in such civil law jurisdictions as Germany. These approaches differ substantially from the current Russian approach to assessment of pain and suffering damages. In the latter case, there are no standards for judicial awards of these damages.

¹⁴⁴ Wagner, 'Tort liability and insurance: Comparative Report and Final Conclusions' (n 27) 331.

¹⁴⁵ Dufwa (n 42) 167.

¹⁴⁶ Michel Cannarsa, 'Compensation for Personal Injury in France' (2002) 8 *The Cardozo Electronic Law Bulletin* <<http://www.jus.unitn.it/cardozo/review/2002/cannarsa.pdf>> accessed 15 January 2023.

¹⁴⁷ David Corbé-Chalon and Martin A Rogoff, 'Tort Reform à la Française: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France' (2006) 13 *Columbia Journal of European Law* 231, 277.

¹⁴⁸ Stefano Troiano, "'EC Tort Law" and the Romanic Legal Family' in H Koziol, R Schulze, and L Antonioli (eds), *Tort Law of the European Community* (Springer 2008).

Standardisation is in the interests of the insurance business as it suggests figures around which the negotiation over settlements can be structured. Otherwise, it is hard to reach an agreement between the parties. This is the problem, for example, in Romania where liability insurance covers pain and suffering damages and the limits are high enough (in accordance with the EU requirements). However, this does not bring justice to the victims, mostly because of the lack of standards. As a result, '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'.¹⁴⁹ There are similar problems in Bulgaria where liability insurance also covers pain and suffering damages but there are no standards even as a recommendation. Pain and suffering damages are assessed by insurers' experts which frequently leads to a disagreement with victims about final calculation and channelling cases to courts.¹⁵⁰

As Giovanni Comandé emphasises, the method based on guidelines 'simplifies the calculation process, attains consistency in the outcome of cases, and also aids predictability, useful both in promoting settlements and in maintaining insurability'.¹⁵¹ The implementation of standards is also beneficial to victims since it ensures horizontal and vertical justice in assessing damages. As Ronen Avraham explains this aspect, 'horizontal equity means similar compensation for injuries of similar severity, and vertical equity means more severe injuries receive more compensation than less severe ones do'.¹⁵² The lack of standards constitutes an impediment to both types of justice.

¹⁴⁹ Anca-Iulia Hânc, 'Moral Damages in Accident Insurance (RCA Insurance) Are there Sufficient Criteria?' [2016] *Challenges of the Knowledge Society* 176, 176. The amiable procedure means out-of-court settlement here.

¹⁵⁰ Hristo Draganov and Georgi Draganov, 'Moral Damages and the Activity of Insurance Companies' (2019) 1 *Business Management* 56.

¹⁵¹ Comandé (n 138) 58.

¹⁵² Ronen Avraham, 'Estimating Pain-and-Suffering Damages' in F Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law* (Oxford University Press 2017) 99.

6.6 Compulsory Liability Insurance and Judgment Enforcement

The problem of judgment enforcement is almost entirely eliminated with the shift to an insurance-based system. And yet, despite the compulsory character of MTPLI, there is still a certain percentage of uninsured drivers. For example, around 4-6 per cent of drivers in the UK do not have insurance for a variety of reasons: they cannot afford insurance, underestimate the risk of being traced and severity of the penalty.¹⁵³ This would render the victim's chances to obtain compensation extremely low. However, the problem with untraced or uninsured defendants has been eliminated to a certain extent by the European Union Directive which prescribes to organise a special fund or institution in all Member States which would provide compensation in these cases.¹⁵⁴ It should be noted that such institutions were in place in some European countries long before this regulation. For example, the Motor Insurance Bureau was established in the UK in 1946 to provide compensation to victims who suffered harm from non-identified or uninsured drivers. This measure clearly demonstrates 'the hybrid function of insurance under the compulsory scheme'.¹⁵⁵ It distributes losses and shifts the liability of individual drivers to insurance companies, but more importantly, it performs the social function of guaranteeing compensation to victims, even if it is not very profitable for insurers.

Similar institutions were founded in other European countries as, for example, in France ('Fonds de garantie des assurances obligatoires de dommages')¹⁵⁶, in Belgium ('Gemeenschappelijk Motorwaarborgfonds') and in the Netherlands ('Waarborgfonds Motorverkeer').¹⁵⁷ These funds are based on the contributions provided by insurance companies. As mentioned in Introduction, there is a similar institution in Russia that guarantees compensation in the cases involving untraced or uninsured motorists but only for material losses. This thesis argues that it must be extended to pain and suffering damages.

¹⁵³ Jef De Mot and Michael G Faure, 'Special Insurance Systems for Motor Vehicle Liability' (2014) 39 *The Geneva Papers on Risk and Insurance-Issues and Practice* 569, 578.

¹⁵⁴ Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009.

¹⁵⁵ Merkin and Steele (n 3) 266.

¹⁵⁶ Borghetti, 'Extra-Strict Liability for Traffic Accidents in France' (n 122) 285.

¹⁵⁷ Mot and Faure (n 153) 571.

Another potential problem is insolvency of insurers. In that case, most jurisdictions allow a claim against a professional association of insurers or special compensation schemes (like FSCS in the UK mentioned above). This is the case in Austria in regards to road traffic accident claims whereas in other cases claimants can only enjoy a priority before other creditors during the bankruptcy procedure.¹⁵⁸ There is a similar situation in Belgium where Common Guarantee Fund exists only in relation to road traffic accidents.¹⁵⁹ In the Czech Republic, claims for insurance payments have a priority over other claims except those which are made by a liquidator but there is no special institute that would meet these claims.¹⁶⁰

It is also important that insurance companies are not allowed to raise any defences against the enforcement of judgments based on the invalidity of contracts, in contrast to voluntary insurance. This was the case, for example, in Belgium where there was a claim on the non-constitutional and discriminatory character of this difference which was unsuccessful. The court found that these two forms of liability insurance have different objectives.¹⁶¹ There also can be a requirement, as it is in the Czech Republic, to make advance payments to victims, again if the claim is justified and liability is not contested.¹⁶²

Thus, the European experience shows that compulsory liability insurance almost entirely eliminates the problems with awards enforcement, subject to addressing the issues of the uninsured motorists and of the insolvency of insurance companies.

¹⁵⁸ Daniel Rubin, 'Compulsory Liability Insurance in Austria' in A Fenyves et al (eds), *Compulsory Liability Insurance from a European Perspective* (Walter de Gruyter GmbH and Co KG 2016) 17, 39.

¹⁵⁹ Cousy and Van Schoubroeck (n 117) 76.

¹⁶⁰ Dobias (n 11) 104.

¹⁶¹ Cousy and Van Schoubroeck (n 117) 79-80.

¹⁶² Dobias (n 11) 101.

6.7 Best Practices and Limitations of Compulsory Liability Insurance in Europe (in Relation to Pain and Suffering Damages)

As a result of the comparative overview above, it is possible to identify the best practices of European countries in the area of compulsory liability insurance. These practices include high judicial awards and insurance payments for victims' pain and suffering, consistency of these awards and payments, the option to claim directly against insurance companies, willingness of parties to settle cases, and special institutions and schemes which pay pain and suffering damages in the cases of untraced and uninsured motorists as well as insurer's insolvency. Compulsory liability insurance covers pain and suffering damages in Western European jurisdictions. This is a generally accepted rule because their approach to the calculation of damages is based on the tort law principle *restitutio in integrum*.¹⁶³ As a result, full compensation for personal injury, whether it is done through insurance payments or court judgments, necessarily includes pecuniary and non-pecuniary damages. A similar position can be found in Eastern European post-Socialist countries where compulsory motor third party liability also covers pain and suffering damages. Their system is not much different from the Western European counterparts despite the strong influence of the Soviet doctrine on other areas of tort law (discussed in Chapter 4).

However, most post-Soviet countries are different in this regard. Compulsory liability insurance does not cover pain and suffering damages in these jurisdictions. The problem is not due to the doctrine since a similar principle *restitutio in integrum* for personal injuries is established in civil codes of these countries.¹⁶⁴ And yet, this principle is not applied to insurance payments. These payments cover only material losses. The only exception is Ukraine and the Baltic countries which are members of the European Union. These countries chose the common European insurance-based approach to compensation of pain and suffering damages, although with some important deviations discussed below.

¹⁶³ Cane and Goudkamp (n 35) 447.

¹⁶⁴ eg 'The injury inflicted on the personality or property of an individual, and also the damage done to the property of a legal entity shall be subject to full compensation by the person who inflicted the damage.' Art 1064 of the Civil Code of the Russian Federation of 30 November 1994.

There is much less consistency if we look at another large category of personal injury cases – workplace accidents and diseases. Social insurance is a prevailing way to compensate the victims for the losses caused by these events. However, as a rule, it does not cover pain and suffering damages.¹⁶⁵ Those rare European systems where tort liability exists in parallel with social insurance are more advantageous for victims. In these systems, the extra liability of employers is normally covered by liability insurance which can be made compulsory by statute (the UK and Cyprus) or ‘semi-compulsory’ by industry branch agreements (Scandinavian countries). In order to improve the situation of injured employees and provide compensation for their pain and suffering, the experience of these countries might be helpful.

Generally, the presence of liability insurance is likely to influence the scope of liability and quantum of damages. This can be part of the implicit policy reasoning in those jurisdictions where the defendant’s financial capability and availability of insurance are in principle irrelevant.¹⁶⁶ At the same time, the relevance of these issues can be explicitly recognised legislatively in other jurisdictions.¹⁶⁷ However, the extent of this impact depends on the limits of insurance payments towards pain and suffering damages. In the EU countries, for example, these limits are normally set in accordance with the minimum figures prescribed by the EU directives which are sufficiently high. This requirement plays a significant role in improving the situation of victims. The situation is particularly problematic in those post-Soviet countries where these limits are relatively low (Lithuania) or extremely low (Ukraine). The problem with the limits is that they can serve as *de facto* caps of damages for those victims who are not prepared, for whatever reasons, to claim compensation from the defendant through the court procedure. This category of victims, as a result, has to be content with the limited insurance payments and remains systematically under-compensated. To prevent this, insurance payment limits must be set sufficiently high by the legislature, at least up to the EU level.

This issue is particularly problematic since most cases are settled now, with the extension of liability insurance in Europe. As a result, personal injury damages are compensated in most cases

¹⁶⁵ Gerhard Wagner, ‘Tort, Social Security, and No-Fault Schemes: Lessons from Real-World Experiments’ (2012) 23 Duke Journal of Comparative and International Law 1, 9.

¹⁶⁶ Bovbjerg (n 84); Faure (n 85); Lahnstein (n 88).

¹⁶⁷ Thalmer (n 92).

by insurance payments outside the court. The resolution of claims through settlement is considered advantageous both for the insurers and the victims since it saves time and money. There are various measures aiming to promote settlements adopted in European countries. The most successful approach, arguably, has been adopted in the UK. The courts are granted broad discretion to encourage parties to reach a settlement. There are also specific measures for stimulating parties to settle cases. For example, financial sanctions can be imposed for not making an offer without reasonable grounds or rejecting a reasonable offer. However, settlements, being a bargain, can be disadvantageous for victims if the bargaining powers are not equal.¹⁶⁸ Therefore, some jurisdictions provide higher protection for most vulnerable victims requiring court approval of settlements, as it is in the UK in cases involving children. The active role of courts in such cases, from my point of view, is absolutely justifiable.

The interest in settling cases requires predictability and consistency of awards which is also beneficial to both parties. Standards are necessary for reaching settlements in relation to pain and suffering damages, otherwise, the claiming process would still require court proceedings, as it is currently in Romania or Bulgaria. There is insurance cover for pain and suffering damages in these jurisdictions and insurance limits are sufficiently high (in accordance with the EU requirements) but a lack of standards makes claiming these damages problematic for victims.¹⁶⁹ There are two main approaches to standardisation of pain and suffering damages across European jurisdictions. The first approach is based on previous judicial decisions whereas the second approach is based on statutory tables which depend on the severity of injuries. Compulsory liability insurance is relevant under both models. The judiciary can rely on the tariffs used by insurers or insurance companies can use judicial tariffs in settling cases or lobby statutory tariffs at different legislative stages. However, I will argue in the next chapter that the first approach better reflects the views of the whole society (represented by the parliament) on just compensation. It is, therefore, preferable for adoption in Russia.

Finally, compulsory liability insurance almost entirely eliminates the problem of award enforcement in the European countries. In fact, the main reason for implementing compulsory liability insurance is to facilitate the standing of victims in the case when defendants are

¹⁶⁸ Genn (n 128).

¹⁶⁹ Gavriletea and Moga (n 12); Draganov and Draganov (n 150).

judgment-proof or insolvent. However, there still exists the problem of uninsured or untraced motorists as well as insolvency of the insurance company. The analysis of European practices demonstrates some effective ways of eliminating these problems. In the case of untraced/uninsured motorists, the most usual measure is the right of victims to claim compensation, including pain and suffering damages, from a professional association of motor insurers or a state fund. The problem of insolvency can be also resolved by delegating the right to claim compensation from a special institution or by giving priority to the victims seeking personal injury damages over other creditors.

6.8 Conclusion

The analysis in the chapter has demonstrated that the European compensation systems based on compulsory liability insurance are effective in resolving most problems with pain and suffering damages. Compulsory liability insurance schemes, if properly organised, could facilitate a higher level of pain and suffering damages, contribute to more consistency in awarding these damages, and introduce a more simplified claims procedure and out-of-court settlements. Moreover, these schemes almost entirely eliminate the problem with judgment enforcement. The chapter suggests that the European experience could serve as a helpful model for the reforms in a similar direction in Russia. It would be a mistake, however, to transfer European practices automatically, without considering the cultural specifics of the Russian tort system. Otherwise, as the experience of some post-socialist countries demonstrates, most problems with pain and suffering damages would persist even with compulsory liability insurance in place. Consequently, the next chapter discusses which European practices would fit better with implementing compulsory liability insurance for pain and suffering damages and what other measures are needed to change current cultural attitudes towards these damages in Russia.

CHAPTER SEVEN. COMPULSORY LIABILITY INSURANCE FOR PAIN AND SUFFERING DAMAGES IN RUSSIA: BENEFITS FOR VICTIMS AND POTENTIAL SOCIAL COSTS

7.1 Introduction

This chapter will argue for the implementation of compulsory liability insurance covering pain and suffering in road traffic, workplace, and railroad accident cases in Russia as a solution to the problems with pain and suffering damages. The analysis in the chapter is intended to inform policy debates in Russia about potential reforms in the area of pain and suffering damages. It should be noted, however, that it does not aim to provide detailed recommendations and suggestions on how to implement the new legal mechanism into Russian legislation. Rather, it seeks to give careful consideration to the social benefits and costs of such reforms. It is hoped that chief Russian political actors will be able to use this evidence-based research in their decision-making.

The chapter is divided into three sections. The first section will consider how the implementation of compulsory liability insurance would address the four problems with pain and suffering damages in Russia: the low level of damages, inconsistent awards, complicated claims procedure, and poor enforcement of judgments. Drawing on the insights of the concept of legal transplants, the second section will focus on the obstacles to reforms derived from tort law culture. This section suggests that without overcoming these obstacles compulsory liability insurance is unlikely to succeed in improving the situation of accident victims in Russia. Finally, the third section will discuss concerns about potential social costs of the reforms and ways to address them. In the conclusion, the chapter will summarise the most important recommendations and suggestions of the chapter and assess the prospects of implementing compulsory liability insurance for pain and suffering damages in Russia.

7.2. Potential Impact of the Reform

7.2.1. The Necessity of Compulsory Liability Insurance

The analysis in Chapter 6 demonstrated that most European countries replaced voluntary forms of motor third party liability insurance with compulsory forms of insurance in the first half of the 20th century. The reasoning behind this step was to guarantee compensation for all victims, regardless of drivers' preferences to purchase liability insurance or remain uninsured. What is clear is that substantial number of Russian drivers are not ready to spend money on the insurance policy unless they are legally obliged to do this. A national survey of Russian drivers in 2013, for example, showed that 54% of respondents supported the abolition of mandatory motor vehicle liability insurance.¹ It seems that Russian drivers are more concerned about the more immediate requirement to pay annual insurance premiums rather than the possibility of needing to cover losses in future. This data makes it clear that drivers are very unlikely to purchase liability insurance for pain and suffering damages voluntarily in Russia. Therefore, this thesis argues for the implementation of a compulsory form of such insurance.

The same problem arises in the area of employers' liability. Russian companies rarely purchase voluntary liability insurance. Insurance premiums for voluntary liability insurance amounted to just 3.4% of all insurance premiums in 2018.² The general trend is a gradual decline of interest in purchasing voluntary liability insurance. For example, the number of issued voluntary liability insurance policies decreased by 8% in 2014 and by 10% in 2015 compared to 2013.³ It can be assumed that this declining trend remained the same after 2015 as the economic situation and income of the population has worsened. The real disposable incomes of Russians, for example,

¹ The Russian Public Opinion Research Centre (VCIOM). 'Consumer behaviour of Russians in the market of compulsory auto insurance' <https://wciom.ru/fileadmin/file/reports_conferences/2013/2013-10-05-osago.pdf> accessed 17 January 2022.

² News for Insurance Companies N23 (3954), 8 February 2019 <<https://fmimg.finmarket.ru/IF/STRAH9M2018.pdf>> accessed 17 January 2022.

³ VA Grebennikova and AA Liubartcev, 'Assessment of the Status of the Auto Insurance Market [Ocenka sostojanija rynka avtostrahovanija]' (2017) 6 Journal of Economy and Business [Jekonomika i biznes] 32.

decreased between 2013 to 2018 by over 8.3% in total.⁴ It can be expected that the COVID-19 pandemic has only aggravated this trend.

Thus, the need for compulsory liability insurance for pain and suffering damages is vital. Voluntary forms are not in general demand by population and businesses. It is very unlikely that the demand for voluntary liability insurance will increase in the foreseeable future. Moreover, even if voluntary liability insurance were to become widely available, it is unlikely to substantially improve victims' situation. As discussed in Chapter 5, the conditions of this insurance are likely to be structured in a way that mostly satisfies the interests of insurers and defendants rather than accident victims. In contrast, compulsory liability insurance provides enhanced protection for victims. According to the Russian insurance law, the minimum insurance payments, for example, are fixed at the national level and cannot be reduced by insurance companies. The victims are entitled to submit claims directly to insurance companies out of court and any delays or unjustified refusals in making payment can lead to a fine in the amount of 50% of the payment.⁵ The victims covered by compulsory liability insurance are also in a better position than other claimants in the case of the insurer's bankruptcy or loss of licence. After demonstrating the benefits of compulsory liability insurance for victims compared to voluntary form, we should discuss whether compulsory liability insurance can address the problems with pain and suffering damages in Russia.

7.2.2 The Impact on the Level of Damages Awarded

The availability of insurance is likely to be a driving factor for a higher level of pain and suffering damages awards in Europe. This is especially true in those jurisdictions where the financial situation of defendants is taken into account in judicial decision-making such as Germany, Sweden, Latvia, and Poland (discussed in Chapter 6). In these countries, damages can be reduced due to the poor financial situation of the defendant. Yet, this seemingly pro-defendant approach does not lead to an imbalance between claimants' and defendants' interests: if liability insurance

⁴ Alexander Pyatin, 'Analysts Predicted the Strongest Drop in Russians' Incomes since 2014' [Analitiki sprognozirovali samoe sil'noe s 2014 goda padenie dohodov rossijan] Forbes 06.04.2020 12:21 <<https://www.forbes.ru/newsroom/finansy-i-investicii/397083-analitiki-sprognozirovali-samoe-silnoe-s-2014-goda-padenie>> accessed 15 January 2021.

⁵ Art 16.1 of the Law of the Russian Federation 'On Compulsory Motor Third Party Liability Insurance' of 1 July 2003.

is available, the reduction is simply not applied. In Russia, the possibility of reducing pain and suffering damages in light of the financial situation of the defendant is stipulated in the Civil Code.⁶ The first instance courts often use this option, as the lawyers I interviewed confirm:

Exactly this argument was put forward in the case. The defendant is poor, has a family, and children, there are no jobs since it is a provincial town. The region is not rich, the town is consequently the same, the salaries are not very appealing. Loans. These are the reasons. It is understandable. This is taken into account.⁷

They are often retired persons among defendants in road accident cases. They say, here I have my pension, here I have a wife with cancer, how I would live without a car. I would sell the car but it is too tough without it. Something like this. The courts always take into account the financial situation of the defendant and reduce pain and suffering damages.⁸

The majority of defendants in these current situations are without insurance coverage and, as such, are simply not able to pay high damages. This issue was emphasised, for example, by one of the leading Russian legal scholars, the head of the research institute of private law *M-Logos*, in an interview given to a socio-political magazine:

In addition, one must understand that the defendants are often poor people. The bulk of pain and suffering damages in Russia is associated with road accidents. If the person who hit the pedestrian is obliged to pay 30-40 million roubles [£300,000-400,000] to the victim, he will never pay it. And since in our country even the procedure for personal bankruptcy does not exempt him from obligations to compensate for non-pecuniary harm, he will be in debt until the end of his days.⁹

⁶ Art 1083 of the Civil Code of the Russian Federation.

⁷ Interview with an advocate from Vladimir.

⁸ Interview with a state procurator.

⁹ Interview with Artyom Karapetov in Nikita Aronov, 'Life at the Price of an iPhone: How the Russian System of Compensation for Material and Moral Harm Works [Zhizn' po cene 'ajfona' Kak ustroena rossijskaja sistema kompensacij material'nogo i moral'nogo vreda]' (2020) 7 Spark [Ogonjok] <<https://www.kommersant.ru/doc/4242286>> accessed 17 January 2022.

It can be assumed that compulsory liability insurance would also be taken into account in cases where defendants are legal entities. This relates not to the reductions discussed above (applied only to individuals according to art. 1083 of the Russian Civil Code) but rather to the ‘deep-pocket’ reasoning in awarding damages. This is how it works abroad, as discussed in Chapter 6, and there is no reason to expect that it would work differently in Russia. There are certain signs of this already, even in the absence of compulsory liability insurance for pain and suffering damages. For example, materials from the national lawyers’ forum *Pravorub* show that Russian judges sometimes take voluntary liability insurance into account even when dealing with corporate defendants. In one case, for example, a woman slipped and fell in a shopping mall in Arkhangelsk breaking her arm as a result. The defendant initially offered her 5,000 roubles (£50) to compensate for pain and suffering and settle the case out of court. The claimant, however, was not happy with this insignificant sum and contacted a lawyer to submit a formal claim to the district court. The issue of liability insurance was raised during the trial:

It turned out that if money was collected from these defendants in such cases, the insurer would just compensate them for these losses. Therefore, the judge in the process hinted to the defendant that there is no need to be stubborn as the insurer would compensate you.¹⁰

As a result, the court awarded 50,000 roubles (£500) as pain and suffering damages, more than ten times the defendant’s initial offer. Interestingly, despite this tenfold increase, the lawyer still found the award unsatisfactory, but the claimant was not prepared to appeal. The award for material losses related to broken bone was significantly lower, amounting to 3,900 roubles (£39) towards medical costs.

Thus, compulsory liability insurance is likely to lead to uplifting of pain and suffering damages. However, despite this promising opportunity, there is no noticeable debate about its introduction among Russian legal scholars or politicians. Nevertheless, some practising lawyers believe that compulsory liability insurance against pain and suffering damages would result in a substantial

¹⁰ Dmitriy Anshukov, ‘Recovery of Pain and Suffering Damages from a Slip-and-Fall in a Shopping Mall [Vzyskanie moral’nogo vreda ot padenija v trgovom centre]’ (11 April 2018) <<https://pravorub.ru/cases/81869.html>> accessed 17 January 2022.

increase of these damages. This prediction was made, for example, by Taras Golub' (from the law firm 'Chairborne Fury') on the professional lawyers' social network *Zakon*:

Even to compensate for losses from road accidents, they introduced motor third party liability that is compulsory insurance. Because liability insurance without state coercion could not become widespread, despite the fact that the benefits of this are clear to the average person, and the risk of being at fault in an ordinary road accident is systemic. The solution to the issue of pain and suffering damages is only COMPULSORY [*the caps are used in the original text*] civil liability insurance by analogy with motor third party liability: both to exclude the casino element (inequality of victims), and to significantly increase the amount of payments.¹¹

However, the extent of the potential increase depends on the maximum levels of insurance coverage. The experience of post-Socialist countries, such as Ukraine or Lithuania, (discussed in Chapter 6) demonstrates that setting these limits at low levels would not lead to significant changes in damages awards. In Russia, the current limit of compulsory liability insurance coverage for pecuniary damages related to personal injuries is only 500,000 roubles (£5,000). Were there to be reform, this limited amount provided by the insurance coverage will also include pain and suffering damages. Therefore, the maximum limit for both must be substantially uplifted.

The implementation of insurance coverage and an increase in awards would probably lead to an increase in insurance premiums. This consequence is mentioned as the main risk by those post-Soviet scholars who compare their compulsory liability insurance systems with the one in Ukraine or Baltic countries where compensation for pain and suffering is available under compulsory liability insurance. The main concern of these authors is that introducing insurance coverage for pain and suffering damages would increase 'the financial burden imposed on the policyholders'.¹²

¹¹ Taras Golub' (the comment of 18 December 2019) in Artyom Karapetov, 'The Amount of Pain and Suffering Damages for Tetraplegia in the Russian Federation and Abroad: a Comparative Table' [Razmery vozmeshhenija moral'nogo vreda pri polnom paraliche vseh konechnostej v RF i za rubezhom: sravnitel'naja tablica] *Zakon* (a professional blog of Russian lawyers) 16 December 2019 <https://zakon.ru/blog/2019/12/16/razmery_vozmescheniya_moralnogo_vreda_pri_polnom_paraliche_vseh_konechnostej_v_rf_i_za_rubezhom_srav> accessed 17 January 2022.

¹² I Esmantovich, 'Some Aspects of Compulsory Insurance of Vehicle Owners' Civil Liability (on the Example of CIS Countries) [Nekotorye aspekty objazatel'nogo strahovaniya grazhdanskoj otvetstvennosti vladel'cev transportnyh

While it is important to recognise this impact, it cannot be an obstacle to potential reforms which are intended to serve primarily to the benefit of accident victims rather than wrongdoers (insured motorists). Indeed, similar concerns were discussed by the Law Commission in England and Wales in 1973 but were finally not taken into account:

Any increase in the scale of damages awarded means inevitably increased premiums. This fact leads some to the conclusion that the impact of any increase upon premiums is something which ought to be taken into account in deciding what principles ought to govern the assessment of damages in this class of litigation. Those who hold this view are, in fact, advocating that the amount of such damages should be artificially restricted to relieve the burden upon premium payers. We reject this view.¹³

The Law Commission in this report did not even consider it necessary to go deep into the relationship between the level of non-pecuniary damages and insurance premiums. However, about two decades later, the Law Commission paid more attention to this issue.¹⁴ In the report of 1998, it has considered the evidence from the Association of British Insurance (ABI) on how much insurance premiums would increase in the case of the uplift of damages for pain, suffering and loss of amenities. The submitted evidence suggested that the general increase of these damages of 50% was likely to result in an increase in motor vehicle insurance premiums of 1.9 to 2.3% and employers' liability insurance premiums of 6.9 to 9%.¹⁵ At the same time, the evidence from ABI implied that the increase in damages for minor injuries would be responsible for the most substantial increase in premiums.

And yet, despite being informed of the potential increase in premiums, the Law Commission recommended uplifting the level of pain and suffering and loss of amenities damages. Taking this decision, the Law Commission partly relied on public views on the matter assessed by way of sociological survey. The respondents were asked whether their assessments of the appropriate amount of compensation would be different after knowing that this makes insurance more

sredstv (na primere stran SNG)]' (2015) 1 Nizhny Novgorod State University Bulletin [Vestnik Nizhegorodskogo universiteta] 221.

¹³ Law Commission, *Report on Personal Injury Litigation: Assessment of Damages* (Law Com No 56, 1973).

¹⁴ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com No 257, 1998)

¹⁵ *ibid* 48.

expensive. Only 11% of respondents replied affirmatively to this question. As the Law Commission concludes, 'this has convinced us that we should not be dissuaded by costs considerations from recommending an increase to damages for non-pecuniary loss'.¹⁶ However, the Law Commission did take into account the data from ABI that the impact of an increase in damages on insurance premiums is likely to vary as between serious and minor injury cases. The reason is that the majority of claims are for minor injuries, so the impact of increase in these cases would be more substantial on insurance premiums. As a result, they proposed the uplift by 50% and more in serious injury cases and by less than 50% for minor injury cases.¹⁷

In Russia, there have been no studies which have assessed the potential impact of the increased pain and suffering damages on insurance premiums. It is reasonable to expect that there would be at least some increase in insurance premiums. And this increase would be more noticeable by those drivers who currently pay low insurance premiums. As stated above, this is a consequence worth accepting. At the same time, the reform will be more effective if it is informed by evidence similar to that the ABI prepared for the Law Commission. Therefore, it could be recommended to perform such research before the implementation of the proposed reforms. In particular, the issue of whether most claims are for minor injuries and the increase of premiums should be different in serious injury and minor injury cases should be explored. If it happens to vary, as it was found in England, this could be taken into account when setting the standard awards (discussed in more detail in the next section). That means the level of awards for serious injuries could be uplifted more substantially than for minor injuries. This would help to reduce the social costs of the reforms in the form of increased premiums.

It is appropriate to consider to what extent the Russian government is ready to increase the maximum level of insurance coverage. There is some evidence to suggest that there is a readiness to increase this level for material losses. In 2019, a draft bill prepared by the Russian Ministry of Finance proposed an uplift of the current level of insurance coverage from 500,000 roubles (£5,000) to 2 m roubles (£20,000).¹⁸ This initiative, however, was as expected not met by

¹⁶ *ibid.*

¹⁷ *ibid* 64.

¹⁸ The Bill n 754963-7 'On Amending the Federal Law "On Compulsory Civil Liability Insurance of Vehicle Owners" (in terms of changing approaches to pricing when concluding agreements on compulsory civil liability insurance of vehicle owners) of 16 July 2019' <<https://sozd.duma.gov.ru/bill/754963-7>> accessed 17 January 2022.

insurance companies with enthusiasm, as it would lead, in their view, to the increased activity of insurance fraudsters attracted by higher sums of compensation.¹⁹ Similar arguments are regularly raised by UK insurers in their lobbying activity for capping damages.²⁰ Despite this, in 2019, the bill was submitted to the Russian parliament but the amendments on the increase of limits were later removed.

This is disappointing, and it is hoped that the Russian Parliament will return to this issue. Importantly, the uplift of insurance cover must include both pecuniary and non-pecuniary damages. An uplift to at least 2 m roubles (£20,000) in respect of both would lead to a higher level of pain and suffering damages were they are included in the compulsory motor third party liability coverage. This level would be in accordance with the current maximum levels of insurance payments of pecuniary damages under compulsory liability insurance against personal injuries caused to the passengers of the public ground and air transport which is set exactly at 2 m roubles (£20,000).²¹ In fact, one of the reasons for introducing this bill was a substantial disparity between public and private transport passengers when it comes to the extent of insurance cover.

The reform would lead, as estimated by experts, to the increase of insurance premiums by 10-11%, i.e. approx. by 500-600 roubles (£5-6).²² This increase is not dramatic for insurance holders, but it would significantly improve the situation for accident victims. Therefore, the thesis strongly

¹⁹ Danis Yumbaev, 'The Ministry of Finance Begins the Reform of Motor Third Party Liability Insurance [Minfin nachinaet reformu OSAGO]' *Vedomosti* (Moscow, 24 July 2018) <<https://www.vedomosti.ru/finance/articles/2018/07/25/776421-minfin-reformu-osago>> accessed 25 November 2020.

²⁰ This lobbying activity was successful resulting in the Civil Liability Act 2018. This statute sets tariffs for whiplash injury claims. See more details on the official website of the Association of British Insurers <<https://www.abi.org.uk/products-and-issues/topics-and-issues/personal-injury-claims/whiplash-claims/>> accessed 17 January 2022.

²¹ The Federal Law N 67-FZ 'On compulsory insurance of civil liability of the carrier for causing harm to life, health, property of passengers and on the procedure for compensating for such harm caused during the transportation of passengers by metro' of 14 June 2012.

²² Vladimir Barshev, 'Russian Association of Motor Insurers: Motor Third Party Liability Insurance Will Rise in Price by 500 Roubles in Case of an Increase in the Payment Limit [RSA: OSAGO podorozhaet na 500 rublej v sluchae uvelichenija limita vyplat]' *Russian Gazette* (Moscow, 29 January 2019) <<https://rg.ru/2019/01/29/rsa-osago-podorozhaet-na-500-rublej-v-sluchae-uelicheniia-limita-vyplat.html>> accessed 17 January 2022.

supports the increase of the compulsory motor third party liability minimum insurance coverage from the current 500,000 roubles (£5,000) to at least 2 m roubles (£20,000) (the most realistic scenario taking into account the current economic situation and level of incomes in Russia), with the potential of being increased to the EU minimum insurance coverage of €1,050,000 in future.

7.2.3 The Impact on Standardisation of Awards

The expansion of liability insurance and the interest of parties in settling personal injury claims would lead to standardisation in awarding pain and suffering damages (discussed in Chapter 6 based on the European experience). This is currently not the case in Russia. So far, the approach of the Russian judiciary is based on full discretion legitimised by reference to the ‘non-precedent’ nature of the national legal system. These arguments can be found in the judgments on personal injury cases (see Chapter 5 on railroad accident cases). These arguments are even publicly articulated in the media as, for example, in the interview given by a trial judge for the Russian official government gazette:

The court’s decision on the amount of compensation is always subjective and depends on the nature of the harm caused, the circumstances of the case, and the presence of guilt. We have no legal precedent, which is why the court awards different amounts in situations with similar circumstances and legal relationships.²³

However, the lack of predictability and consistency violates the principle of equality of claimants before the law. The same injuries suffered by different claimants obtain varying amounts of compensation. Therefore, the inconsistency of awards for pain and suffering is considered by some Russian legal scholars as a violation of this basic principle of civil law.²⁴ It is not accidental

²³ Interview with the district judge of the Sysertsk District Court (Sverdlovsk region) Alexandr Tranzlov in Anna Shiller ‘Is it Worth the Litigation’ *Russian Gazette* (Sverdlovsk region, 17 January 2019) <<https://rg.ru/2019/01/17/reg-urfo/kak-moralnyj-vred-stanovitsia-sposobom-nazhivy-v-sude.html>> accessed 17 January 2022.

²⁴ eg ‘Unfortunately, in an environment where there is no clear criteria for assessing moral damages, conditions are formed for systematic violations of the principle of horizontal justice, which undermines the principle of formal legal equality’ in ‘The Guidelines for the Assessment of Compensation for Moral Damage Caused by Wrongful Acts Affecting Life, Health and Physical Integrity of Persons’ prepared by the Commission for Determining the Amount of Compensation for Moral Damage (Association of Lawyers of Russia)

that the main efforts of those Russian legal academics and practitioners who support reforming the approach to pain and suffering damages have concentrated on setting standards for awards.²⁵ Indeed, the recent discussion of reforms in the area of pain and suffering damages in the upper house of the Russian parliament (Federation Council) was focused precisely on this issue.²⁶

To date, the lack of consistency of awards is one of the key obstacles to the development of liability insurance against non-pecuniary damages in Russia. Insurance companies are very reluctant to start supplying liability insurance policies if there are no standards on assessment of potential payments. This is the general approach of the insurance business to all kinds of risks, not only to liability for causing personal injuries.²⁷ My interview with a lawyer from a Russian insurance company demonstrates the necessity of addressing this issue if compulsory motor third-party liability is to be extended to pain and suffering damages:

When a situation arises that requires compensation for pain and suffering, a special case of personal injury damages, you do not know, generally speaking, how much you will be awarded in court. It is very difficult to link this up with the technical side of the question. How would you put this into the insurance rate? By what percentage will you increase or decrease the insurance premium?²⁸

The same opinion which emphasises the importance of this issue for implementing insurance for pain and suffering damages can also be seen in academic literature:

<<https://alrf.ru/association/commissions/komissiya-po-voprosam-opredeleniya-razmerov-kompensatsiy-moralnogo-vreda/>> accessed 17 January 2022.

²⁵ This issue was discussed, for example, at the round table at the All-Russia Civil Forum in 2019. Among the participants were representatives of the Bar, academia, the Constitutional Court, ombudsman office, and human rights organisation. <https://civil-forum.ru/news/podgotovlena-rezolyutsiya-kruglogo-stola-kompensatsiya-moralnogo-ushcherba-za-prichinenie-vreda-zhiz.html?sphrase_id=7417> accessed 17 January 2022.

²⁶ The round table 'Regulation of the Procedure for Calculating the Amount of Compensation for Moral Damage in Relation to Wrongful Acts Affecting Life, Health and Physical Integrity of Persons' held on 29 October 2020 <<http://council.gov.ru/events/news/120979/>> accessed 17 January 2022.

²⁷ Richard Victor Ericson and Aaron Doyle, *Uncertain Business: Risk, Insurance and the Limits of Knowledge* (University of Toronto Press 2004).

²⁸ Interview with an insurance lawyer from St Petersburg.

Currently, there are no approved or recommended methods for determining the amount of pain and suffering damages in Russia, which has been repeatedly noted in legal literature. In these conditions, it is difficult to carry out actuarial calculations and offer the market an optimal (in terms of 'price-quality') insurance product.²⁹

Theoretically, it is possible for insurers to calculate average awards based on the existing statistics but they do not do this in practice, presumably because there is no high demand for insurance covering pain and suffering damages. The situation is likely to change were compulsory liability insurance to be introduced. Its introduction would inevitably require a certain level of standardisation. Indeed, the main issue would be how this standardisation should be organised in order to reflect better the interests of accident victims.

As discussed in Chapter 6, there are two main routes to standardisation. The first approach is based on previous judicial decisions, while the second approach is grounded on tariffs adopted by the parliament and/or the government. This question of who is responsible for indicating concrete figures is critically important. The approach which delegates standardisation to the judiciary is currently adopted in England and Wales. It is not, however, free from criticism. For example, David Kemp QC and Colin McEachran QC, in their comments in the Law Commission report on non-pecuniary damages in 1998, argued that the English judiciary cannot reflect adequately the views of the whole society.³⁰ Despite these arguments, the Law Commission in its report recommended keeping Judicial College Guidelines as the main approach instead of introducing legislative tariffs. While the Law Commission did not reject the idea of legislative tariffs in principle, it felt that there is no sufficient support for these measures among judiciary, legal scholars and politicians. Moreover, the higher courts in England and Wales have demonstrated that they can be flexible enough and meet the expectations of society in regards to the level of compensation for pain and suffering. As discussed in Chapter 6, they were prepared to adjust their approach in the interests of victims and uplift the general level of pain and suffering damages by 10%, without a necessity to implement any legislative mechanisms for this.³¹

²⁹ Alexander Mokhov et al, 'Professional Liability Insurance and Pain and Suffering Damages [Strahovanie profesional'noj otvetstvennosti i kompensacija moral'nogo vreda]' (2006) 6 Lawyer [Jurist] 25.

³⁰ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Law Com 257, 1998).

³¹ *Heil v Rankin* | [2000] EWCA Civ 187.

There is some support for the judicial-based approach to tariffs among Russian legal academics too. Alexander Erdelevskiy, the leading Russian scholar on pain and suffering damages, has suggested that:

No improvement in legislative regulation is required to assess the amount of compensation. It is already there, you just need to apply it correctly. In Russia, it seems to me, we do not correctly understand the meaning of Articles 151, 1101 of the Civil Code of the Russian Federation, which says ‘the quantum of pain and suffering damages is determined by the court’. Usually, we mean by this the trial court considering a particular case. Whereas the phrase rather refers to the entire judicial system of the Russian Federation, including the court that is responsible for the uniformity of case law, that is, the Supreme Court.³²

This broad interpretation of the law provides, in the opinion of Erdelevskiy, an opportunity for the Supreme Court to limit judicial discretion of trial courts and adopt guidelines, similar to those which were adopted by the Judicial College in England and Wales. However, this position totally ignores current practices and cultural attitudes of the Russian judiciary. The judicial approach to pain and suffering damages inherited from the Soviet past mean that Russia is in a different situation compared to England and Wales. Judicial views on fair and reasonable compensation differ significantly from the views of laypersons and practising lawyers. As we have seen, there is also a resistance to the idea of precedents and their influence on the first instance court decisions. Therefore, any guidelines based on previous decisions most probably would not be welcomed by the Russian judiciary.

In summary, it is unlikely that the Russian higher courts or a separate judicial institution akin to the Judicial College would start tackling the problem of standardisation in Russia. Even if it were to happen, given that the views of acting judges on the level of fair and just compensation differ significantly from the views of ordinary Russians (as discussed in Chapter 3), the level of compensation set by these standards most likely will not be considered adequate by the entire society.

³² Alexander Erdelevskiy in ‘Experts Propose to Establish Criteria for the Assessment of Pain and Suffering Damages’ (All-Russia Civil Forum, 24 April 2019) <<https://civil-forum.ru/news/eksperty-predlagayut-ustanovit-kriterii-dlya-opredeleniya-kompensatsii-moralnogo-vreda.html>> accessed 17 January 2022.

In this regard, the thesis argues that the second route, i.e. legislative tariffs, would be more preferable for Russia. Arguments in favour of this approach, that is the implementation of clear standards by the legislature taking into account the level of awards in European jurisdictions and the value of the subsistence minimum in Russia, can be found in Russian legal literature.³³ The tariffs can be implemented as fixed sums or brackets providing lower and upper limits for various injuries. The brackets are probably more appropriate since they would preserve some necessary judicial discretion. This would help judges to take into account all the particularities of the case and adjust compensation accordingly.

The second-best option is the implementation of governmental tables based on the opinions of experts as is currently the case in continental Europe (for example, in France which is discussed in Chapter 6). The advantages of this approach are the speed and easiness of adopting such a table compared to a relatively complicated legislative procedure. However, the figures suggested as a result would probably be seen as less legitimate than those which would be adopted by the parliament. Parliament is supposed to represent the interests of the whole electorate whereas figures suggested by experts are likely to be criticised as subjective and detached from reality as is currently the case with the judicial assessment.

To conclude, the introduction of compulsory liability insurance for pain and suffering damages in Russia would require standardisation of awards. The reason is that insurance companies would need consistency to calculate premiums and settle cases. The awards can be standardised by the way of judicial guidelines or legislative tariffs. The latter option is more preferable, as it would better represent social views on fair level of pain and suffering damages.

7.2.4 The Impact on the Claims Procedure

The implementation of compulsory insurance for pain and suffering damages is likely to result in more cases settled, as it saves legal costs for insurance companies. The standardisation of awards

³³ For example, see Irina Fast, 'Compensation for Moral Harm in the Event of Harm to Life and Health: Practical Results of 25 Years of the Institution's Existence in the Russian Federation [Kompensacija moral'nogo vreda pri prichinenii vreda zhizni i zdorov'ju: prakticheskie itogi 25 let sushhestvovanija instituta v Rossijskoj Federacii]' (2018) 5 Eurasian Advocacy [Evrazijskaja Advokatura] 58.

discussed above would contribute to this process. In Russia, there are currently no standards that could serve as a starting point for bargaining about payments even if there is a willingness to settle cases. If such standards are adopted, it is likely that more cases on pain and suffering damages would be settled by insurers and victims. There is an expectation among Russian legal practitioners that the implementation of standards would facilitate settling cases involving pain and suffering damages similarly to European countries. This prediction has been made, for example, by the head of the Russian Pedestrians' Association at the round table dedicated to the problems with pain and suffering damages:

If they [claimants and defendants] know the minimum size and criteria for determining it [quantum of pain and suffering damages], then before the trial they will understand what the approximate amount in question is. The parties will be motivated to conclude an agreement without judicial red tape.³⁴

Settlements and mediation would have some obvious advantages for accident victims in Russia. First, some victims are reluctant to take their claim to court because they expect their legal costs to exceed the award sum.³⁵ Focus groups discussions with Russians involved in road traffic accidents undertaken by Kathryn Hendley underline this. Hendley held 29 focus groups in various cities, from Moscow to small provincial towns. One of the participants, a 42-year-old store manager, recalled these attitudes after the collision of his car with an SUV. The driver agreed to settle the case eventually, not least due to the victim's wish to avoid a court procedure:

He was skittish about the judicial procedure, describing it as 'difficult and cumbersome'. The other members of the focus group shared his distaste for the courts. When Nikolai said that he would go to court 'only in an extreme situation – only if there is no other option', the group chimed in support. They agreed that settling on the spot was the right choice.³⁶

³⁴ Olga Vakina in 'Experts Propose to Establish Criteria for the Assessment of Pain and Suffering Damages' (All-Russia Civil Forum, 24 April 2019) <<https://civil-forum.ru/news/eksperty-predlagayut-ustanovit-kriterii-dlya-opredeleniya-kompensatsii-moralnogo-vreda.html>> accessed 17 January 2022.

³⁵ *ibid.*

³⁶ Kathryn Hendley, *Everyday Law in Russia* (Cornell University Press 2017) 105.

Secondly, many claimants would prefer to resolve their case peacefully through settlement not for financial reasons but rather for moral ones. One case described by Hendley vividly illustrates the preparedness of some accident victims in Russia to settle cases out of court if defendants could demonstrate some expression of concern about the victim's medical condition and needs. The case involved a female teacher who had been hit while crossing the street in Tomsk, a central city in one of the Russian regions:

During the three months of her recovery, the driver was vigilant. When she was unable to walk, he carried her in his arms to his car and took her to her treatments. He paid for her treatment. In her words, 'he did everything to ensure my recovery and to make amends'. After three months when she was literally back on her feet, he offered her a final payment of 10,000 roubles [£100] asked her to sign a release of liability. She went along. By that time, they had developed what she described as a 'human relationship' (*chelovecheskoe otnoshenie*).³⁷

This example demonstrates that some Russian people are very uneasy about going to court and try to avoid it at all costs. Another case, found in a professional blog of Russian lawyers, also demonstrates that victims in Russia are prepared to accept a lesser financial settlement, through an amicable procedure rather than in the court, when it is accompanied by an apology. The claimant was hit by a driver for whom a company was vicariously liable. The company initially did not express any interest in the victim's condition but the lawyer after taking this case was determined to show his care and reach a settlement agreement. The changed attitudes of the victim prove that this strategy can be more successful than litigation:

'If someone from your enterprise came to my hospital or home, and even just asked about my health by phone, I could take 5,000 roubles [£50], and if you talked to me the same way you talk now, I might not have taken anything at all'. Comments, as they say, are superfluous. Indeed, often an apology and human compassion from the culprit is more needed by the victims than monetary compensation. But for many, it is harder to apologize than to pay a

³⁷ *ibid* 107.

significant amount and think that everyone around is just thinking of getting something from them. Well - let them shell out then!³⁸

Thus, it is very likely that some victims would welcome out-of-court claims procedure in the case of the implementation of compulsory liability insurance for pain and suffering damages. Of course, settlements are also beneficial for defendants. Settlements would cut legal costs otherwise spent on legal representation. However, as was said above, this is dependent on a consistency of awards and accepted standards.

Mediation is another out-of-court dispute resolution mechanism which is beneficial for victims. However, legal regulation of mediation is inefficient in Russia. The current procedural law formally welcomes mediation. Judges can postpone court proceedings and encourage parties to try mediation. Yet, the use of mediation is very limited in practice. The problem is that there are no incentives for parties to start mediation or binding rules which would prescribe at least to consider and try this option:

Currently there is very limited judicial mediation in Russia. Also, only a minority of judges actually make serious effort to encourage settlement. Many judges limit such measures to merely asking parties whether they are willing to settle the dispute amicably.³⁹

The figure of 'financial ombudsman' (*finansovyj upolnomochennyj*) was created by Russian legislation in 2019.⁴⁰ The mediation and legal assistance provided by these officials is free for claimants. Financial ombudsmen help victims to reach agreement with insurance companies before making a formal claim to the court. Although it is too early to conclude whether this new institution does facilitate settlements, a certain trend is observable. Statistics provided by the report of the Russian Association of Motor Insurers demonstrates an evident decrease of trials

³⁸ Igor Shirshov, 'On the Need for Careful Attention of the Wrongdoer to the Accident Victim [O neobhodimosti vnimatel'nogo otnoshenija k postradavshemu v DTP so storony ego vinovnika]' *Pravorub* (a professional forum of Russian lawyers) 21 July 2017 <<https://pravorub.ru/cases/78207.html>> accessed 17 January 2022.

³⁹ Dmitry Davydenko, 'Mediation in Russia: Regulation and Practice' in Klaus J Hopt and Felix Steffek (eds), *Mediation* (Oxford University Press 2013) 1170.

⁴⁰ Art 19 para 1(8) of the Federal Law N 123-FZ 'On the Ombudsman for the Rights of Consumers of Financial Services' of 4 June 2018.

over insurance payments in 2019. The authors of the report explain this decrease by reference to the involvement of financial ombudsmen in resolving disputes with insurance companies:

At the end of 2019, the ratio [of court cases over insurance payments] had decreased to 16 % [from 21% in 2018]. The primary cause of this reduction was the introduction of a financial ombudsman: from 1 June 2019, insurance companies engaged in motor third party liability insurance must enable claimants to correspond with the financial ombudsman before making a claim not exceeding 500,000 roubles [£5,000]. A claimant disputing a motor third party liability insurance claim with an insurance company in any amount must also communicate with the financial ombudsman before presenting the claim.⁴¹

This decreasing trend shows that the institution of financial ombudsmen has great potential in settling claims for pain and suffering damages. However, the current legislation on financial ombudsmen directly states that any claims for pain and suffering damages are out of their competency. Financial ombudsmen are involved in negotiating only car damage and medical costs which are covered by insurance. However, if pain and suffering damages become part of compulsory motor third-party liability payments, as the thesis suggests, this restriction will need to be abolished.

To sum up, implementing compulsory liability insurance is likely to create an enabling environment for settling cases on pain and suffering damages. And yet, any legislative changes or financial incentives would be limited if parties are not prepared to resolve their disputes through mediation or settlement. There must exist a system promoting the culture of settlements in Russia among not only individuals but also corporate defendants:

Indeed, mediation is not yet sufficiently integrated into the Russian business and legal culture. People are accustomed to resolving disputes through informal mechanisms or by litigation. In comparison to litigation or even arbitration, mediation obviously requires more cooperation between the parties in dispute. Many businesses are reluctant to cooperate with the other party or with a third party once the dispute arises. Given this, mediation cannot unencumber the courts in the short term. However, the consistent cultivation of a culture of amicable

⁴¹ The Russian Association of Motor Insurers (RAMI) Annual Report 2019 <https://autoins.ru/upload/ARreport_RSA_2019.pdf> accessed 17 January 2022.

settlement by both the state and by business and lawyers' associations has the potential to gradually make a substantial difference.⁴²

The starting point for developing this culture could be a popularisation of settlements and mediation since most claimants do not even know about this possibility.⁴³ Popularisation means making more people aware of the option to settle their cases out of court as well as the option of applying for the assistance of a third party (a professional mediator) for reaching a settlement. That also means encouraging people to avoid litigation and settle their cases. Lawyers could contribute to achieving this goal. They are best placed to inform and encourage their clients to settle cases, even if it means fewer hourly-based fees than those they could charge for trials. That would imply putting the interests of clients over short-term financial profit which is a part of the lawyers' professional ethics. The strong preference for settling cases could be implemented into a professional code of conduct or specific guidelines of the Federal Bar Association. If personal injury lawyers work on a contingency fee basis, promoting settlements is in their own interests. As Herbert Kritzer demonstrates:

[P]ersonal injury lawyers have available many tools to manipulate and control their clients into accepting settlements, the potential result of which is to reduce lawyers' time investment in contingency-fee cases.⁴⁴

The benefits and features of alternative dispute resolution can be explained to future lawyers during their study at law schools. Currently, there is lack of modules on this subject. As Elena Nosyreva notes: 'Out-of-court forms of dispute resolution are taught, as a rule, for not more than

⁴² Davydenko (n 39) 1190.

⁴³ Kathryn Hendley, 'Judges as Gatekeepers to Mediation: The Russian case' (2014) 16 *Cardozo Journal of Conflict Resolution* 423, 451. Interestingly enough, this was one of the main points of the Civil Justice Council report on mediation also in the UK. It was stated there that the issue of making ADR compulsory is of less importance than the issue of wider promotion and popularisation of ADR among citizens, practicing lawyer and the judiciary. See in Civil Justice Council, *ADR and Civil Justice* (Final Report, 2018).

⁴⁴ Herbert M Kritzer, 'Contingent-Fee Lawyers and their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship' (1998) 23 *Law and Social Inquiry* 795, 798.

two hours during lectures on the law of civil procedure'.⁴⁵ It is clear that this time is not sufficient and a more systematic teaching on alternative dispute resolution is needed.

The role of the judiciary is also important. In this regard, the approach suggested by the Woolf reforms in England and Wales (has been discussed in section 6.4) could be helpful. One of the central ideas of these reforms was making courts more active in encouraging parties to use alternative dispute resolution.⁴⁶ Drawing on this experience, Russian courts could promote settlements not only by explaining to the parties the availability and advantages of this option at the pre-trial stages of the proceedings,⁴⁷ but also by penalising parties in costs for not considering this option.⁴⁸ That would offer a powerful incentive to achieve a settlement. Moreover, detailed information about the option of settling and mediation including the list of available mediators should be displayed in prominent places in the court buildings and on official websites.

And finally, it is important to increase awareness of settlements and mediation among the general public. As Kathryn Hendley notes in her study of ordinary Russians' views on mediation: 'The most striking finding that emerges from the focus groups is the profound lack of popular knowledge of mediation'.⁴⁹ This lack of knowledge inhibits the development of alternative dispute resolution in Russia. Based on the suggestions from the CJC ADR Working Group report in the UK,⁵⁰ potential measures could include peer mediation in schools and colleges, annual mediation awareness weeks, a unified portal about settlements and mediation with all necessary information as well as more materials covering settlements and mediation in social media and on TV. It should be made clear that these procedures help resolve disputes smoothly and informally, without substantial social or financial costs for the parties.

⁴⁵ Elena Nosyreva, 'Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation' (2001) 7 *Annual Survey of International and Comparative Law* 7, 17.

⁴⁶ AKC Koo, 'The Role of the English Courts in Alternative Dispute Resolution' (2018) 38 *Legal Studies* 667.

⁴⁷ Art 150 of the of the Civil Procedure Code of the Russian Federation of 14 November 2002. In England and Wales, a similar duty of courts to encourage settlements is prescribed by Pt 1 rule 1.4(2)(e) of the Civil Procedure Rules 1998.

⁴⁸ In England and Wales, for example, this measure is stipulated by para 8 of the Practice Direction on Pre-Action Conduct and Protocols of the Civil Procedure Rules 1998. In Russia, there is no such measure.

⁴⁹ Kathryn Hendley, 'Resistance, Indifference or Ignorance? Explaining Russians' Nonuse of Mediation' (2017) 32 *Ohio State Journal on Dispute Resolution* 487, 503.

⁵⁰ ADR and Civil Justice CJC ADR Working Group, *Final Report* (November 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf>> accessed 22 November 2022.

7.2.5 The Impact on Judgment Enforcement

Compulsory liability insurance has almost entirely eliminated the problem of judgment enforcement in Europe (discussed in Chapter 6). It can be assumed that the measure would have the same effect in Russia. However, without additional measures, compulsory liability insurance is unable to address problems with untraced/uninsured motorists and insurer's bankruptcy/licence annulation without additional measures. While the first problem – inability to identify the defendant – means that insurance payments are not available for accident victims, the second precludes the payment of compensation.

There are a number of possible solutions to these problems adopted in European countries which are likely to work well also in Russia. The remit of the fund of Russian Association of Motor Insurers (RAMI) (akin to the Motor Insurance Bureau in the UK), already established in Russia and which is supposed to compensate *material losses* in both cases, might be extended. But first, we need to assess the scope of the problems.

Uninsured/untraced motorists. There are different estimations of number of uninsured motorists in Russia. A sociological survey, for example, shows that 97% of motorists in large cities are covered by liability insurance.⁵¹ However, many more respondents were ready to confirm their knowledge of cases when other drivers did not have an insurance policy (72% of the respondents).⁵² Road traffic accident statistics are even more concerning. These suggest that between 2015-2018 more than 11% of road traffic accidents with serious consequences were so-called 'hit-and-run' cases. About 14% of road traffic accidents in 2018 involved non-compliance with compulsory motor third-party liability insurance requirements.⁵³ While 'non-compliance'

⁵¹ Alexey Zubets, *Analytical Report Based on the Results of the Monthly Sociological Survey 'The Attitude of Motorists to the State of the Motor Third Party Liability Insurance Market'* [Analiticheskij otchyot po itogam provedenija ezhemesjachnogo sociologicheskogo issledovanija 'Otnoshenie avtomobilistov k sostojaniju rynka OSAGO'] (The Financial University at the Government of the Russian Federation 2019) <http://www.fa.ru/science/index/SiteAssets/Pages/Zubets_Pubs/2019_12_MTPL.pdf> accessed 25 January 2023.

⁵² *ibid.*

⁵³ Andrey Dorozhniy and Sergey Ustinov, 'Emergency Signs. A Study on How the Statistics of Car Accidents Prove the Weakness of the Russian Government' [Issledovanie o tom, kak statistika avtomobil'nyh avarij dokazyvaet slabost' rossijskoj vlasti] (19 December 2018) <<https://www.proekt.media/research/statistika-dtp/>> accessed 17 January 2022.

includes not only uninsured motorists but also the cases when a driver did not have a compulsory motor third party liability insurance policy at the accident scene or someone who was not listed in the policy was behind the wheel, even taking this into account, the proportion of 'non-compliance' seems high, especially at the regional level. For example, the proportion of road traffic accidents where there were violations of compulsory motor third-party liability insurance requirements reached 58% in Ingushetia.⁵⁴ Currently, while RAMI makes payments to claimants in the cases involving untraced or uninsured motorists, this is limited to pecuniary damages related to personal injuries. Importantly, the payments by the RAMI are made within the general limits of insurance payments which are 500,000 roubles (£5,000). As we can see, the scheme is very restricted in scope. Therefore, it is critically important that RAMI payments are extended to cover pain and suffering damages if compulsory liability insurance for pain and suffering damages is implemented in Russia. Otherwise, accident victims hit by untraced or uninsured motorists would be disadvantaged in comparison to other victims.

Insurer's bankruptcy or license annulation. The case of a large insurance company called 'Russia' demonstrates well all the advantages of compulsory liability insurance. This company with an extensive client base had been operating in the market for a long time. However, its licence was annulled by the state regulator. The consequence for policyholders differed significantly depending on the type of insurance: the holders of voluntary insurance policies (about 24,000 clients) could only get preference over some other creditors during the bankruptcy proceedings. In contrast, claimants covered by compulsory motor third-party liability were entitled to receive the guaranteed payments (approximately 1.6-2.3 b roubles) from the RAMI fund.⁵⁵ The fund was created in 2004, has since then paid out compensation to more than 882,600 accidents victims in cases where motorists were untraced or uninsured as well as in cases where insurance companies were in bankruptcy or lost their licence (117 companies).⁵⁶ According to Russian bankruptcy law, victims covered by compulsory liability insurance are considered as first-ranking creditors, whereas victims covered by voluntary liability insurance are considered as third-ranking

⁵⁴ *ibid.*

⁵⁵ RN Borovskikh and AV Chumakov, 'National Insurance Market and Improvement of Counteraction Efficiency in the Sphere of Insurance Fraud [Otechestvennyj strahovoj rynek i povyshenie jeffektivnosti protivodejstvija moshennichestvu v sfere strahovanija]' (2014) 2 Buryat State University Bulletin [Vestnik Burjatskogo universiteta] 260.

⁵⁶ RAMI Annual Report 2019 n (41).

creditors.⁵⁷ Due to this priority, compulsory liability insurance is more beneficial for accidents victims compared to voluntary form in the case of insurer's bankruptcy.

7.3 Consideration of Tort Law Culture and Obstacles to the Reforms

As argued in the previous section, compulsory liability insurance is likely to facilitate addressing the four problems with pain and suffering damages in Russia. However, this section goes on to argue that this measure must be accompanied by some changes of the Russian tort law culture. Otherwise, there is a risk that the advantages of the new legal institution will be negated by the vestiges of the obsolete tort law culture. This thesis suggests therefore three main directions for reforms – changing judicial attitudes, excluding state procurators from personal injury cases, and providing access to justice and legal assistance for victims in this category of cases. These three areas were identified as priorities for reform based on the results of my analysis of cases and expert interviews. As we shall see, the difficulties associated with each of these areas threaten to invalidate the positive impacts of voluntary liability insurance for pain and suffering damages in railroad cases. There is a reason to fear that wide implementation of compulsory liability insurance for these damages would meet the same fate. To prevent this, Russian tort law culture will need to adapt. The idea of legal transplants is helpful concept in this context as it shows that cultural, social and political context must be taken into account when transplanting legal institutions.

7.3.1 Compulsory Liability Insurance as a Legal Transplant

The term 'legal transplant' was first coined by Scottish legal scholar Alan Watson.⁵⁸ However, the main problem with his notion of legal transplants lies in its black-letter approach which suggests that legal rules and institutions can be successfully transferred from one jurisdiction to another without changing the surrounding social and cultural context.⁵⁹ His work received some strongly critical reviews for its omission of the role of socio-legal factors and overemphasis on the role of

⁵⁷ Art 184.10 of the Federal Law N 127-FZ 'On Insolvency (Bankruptcy)' of 26 October 2002.

⁵⁸ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993).

⁵⁹ Alan Watson, *Legal Transplants and European Private Law* (2006) <http://awf.ius.bg.ac.rs/legal_transplants.pdf> accessed 18 January 2023.

legal rules and doctrine. Perhaps, the fiercest critic of his approach to legal transplantation is French comparative legal scholar Pierre Legrand who suggested a provocative argument that legal transplants are not possible in principle since any rule includes the net of semantic meanings typical for a certain legal culture which is impossible to transfer to a foreign language environment.⁶⁰ Therefore, any rule or institution taken from one context and transplanted to another would be a different rule or institution with different implications. This line of thought is shared by Gunther Teubner in his discussion of the possibility of the doctrine of good faith in English contract law.⁶¹ In particular, he suggests using the term 'legal irritant' instead of 'legal transplant' to reflect the difficulties which a foreign legal institution faces in the alien legal context. This new concept was intended to acknowledge the fact that transplanted legal institution cannot be set easily into a new cultural environment. It rather irritates foreign legal culture in the sense that it 'triggers a whole series of new and unexpected events'.⁶²

The critique suggested by Legrand and Teubner has substance and must be taken seriously. However, it is hard to ignore the fact that many legal institutions have been deliberately borrowed from one jurisdiction and successfully adapted to another jurisdiction. For instance, Japanese civil law has largely been based on the German civil code since the Meiji Restoration.⁶³ Similarly, Turkish civil law after Atatürk's Reforms was successfully modelled on Swiss legal institutions.⁶⁴ At the same time, there are many examples of unsuccessful attempts to transplant legal institutions. The attempt to implement the American institution of punitive damages in Mexico is a recent

⁶⁰ Pierre Legrand, 'What 'Legal Transplants'?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Bloomsbury Publishing 2001) 57-59. Legrand mentions as an example the case *O'Reilly v Mackman* ([1982] 3 All ER 1124 where the court found that in public law cases claimants cannot make ordinary claims but can only apply for judicial review. The reasoning was partially based on the similar French rule. Nevertheless, as Legrand argues, that rule has a different meaning and operates differently in the French context since there is a clear distinction between private and public law there.

⁶¹ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 *The Modern Law Review* 11.

⁶² *ibid* 12.

⁶³ Shigenari Kanamori, 'German Influences on Japanese Pre-war Constitution and Civil Code' (1999) 7 *European Journal of Law and Economics* 93.

⁶⁴ Esin Orucu, 'Law as Transposition' (2002) 51 *International & Comparative Law Quarterly* 205, 215-217.

example.⁶⁵ As is the aforementioned unsuccessful attempt to transfer the continental doctrine of good faith to England and Wales. But if we take the medical metaphor literally, particular cases of failed organ transplantation do not call into question the necessity of transplantation as clinical practice. The main requirement for successful legal transplant is a careful consideration of all relevant cultural factors which may facilitate or hinder efficient transplantation.

Compulsory liability insurance for pain and suffering damages, while a familiar institution in the European countries, is completely unknown to Russian tort law culture. The suggested reform proposed by this thesis – that is the adoption of compulsory liability insurance for pain and suffering damages – requires taking a legal institution from one context and implanting it into another. The prospects of success are higher if a transplanted institution is not completely unfamiliar to the receiving legal culture.⁶⁶ Compulsory liability insurance for material losses was introduced in Russia almost twenty years ago and, despite some initial problems, gradually has become a part of the Russian tort law system. Therefore, insofar as the proposal is understood as an 'update' to the current system it may be the case that expanding compulsory liability insurance to include pain and suffering damages would not be too problematic. However, we must not assume that this will be the case. The mechanical transfer of a legal institution or a legal mechanism from a different jurisdiction, even if aspects of the institution are familiar, does not guarantee the success of 'legal transplant'.

This is particularly true in relation to Russia where massive reforms modelling Western institutions took place in the 1990s. Some of them were successful (most institutions in the sphere of commercial and company law) whereas others were not accepted. It turned out that they are alien to Russian tort law culture. Indeed, there are a number of examples in the post-Soviet history of Russia when the ignorance or underestimation of legal culture led to a failure or serious difficulties in transplanting the Western legal institutions. The example of the ombudsman institution demonstrates these problems with legal transplants in Russia.⁶⁷ Further examples include jury

⁶⁵ Edgardo Muñoz and Rodolfo Vázquez-Cabello, 'New Punitive Damages in Mexican Law-Or the Chronicle of a Failed Legal Transplant Foretold' (2019) 42 *Hastings International & Comparative Law Review* 203.

⁶⁶ Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 *The American Journal of Comparative Law* 163.

⁶⁷ Anders Fogelklou, 'The Regional Ombudsman as a Western (Swedish) Legal Transplant: Experiences from the Legislative Process in St Petersburg' (2003) 13 *Transnational Law and Contemporary Problems* 537.

trials,⁶⁸ common law institutions of estoppel⁶⁹ and trusts,⁷⁰ self-regulation of media,⁷¹ and personal bankruptcy.⁷² However, the risk of this happening can be minimised in the case of the implementation of compulsory liability insurance if it is supported by other measures aimed at changing the prevailing tort law culture. The first measure is intended to change current judicial approach to pain and suffering damages.

7.3.2 Changing Judicial Attitudes towards Pain and Suffering Damages

While the implementation of tariffs for pain and suffering damages will go some way to limiting judicial discretion, courts would still be free to award damages within the brackets based on their views on fair and just compensation. Therefore, the approach adopted by the judiciary is still substantial. This thesis argues that only a combination of two measures will ensure the effective functioning of compulsory insurance for pain and suffering damages after its implementation: recruiting more judges from lawyers with practical experience of representing claimants and leadership by the Supreme Court signalling to appeal and lower courts that compensation award should be higher. This latter measure was mentioned by one of the lawyers I interviewed:

Some judges think 'He [the claimant] wants to get rich. It's just money out of thin air. He didn't explain to me enough how he suffered'. This is such an ephemeral concept of 'moral damages'. Realistically speaking, if the Supreme Court speaks out and someone starts applying this in practice, then something may work out, but otherwise, no way, really.⁷³

Let us discuss these two measures in greater detail. There are no formal obstacles preventing claimant-focused lawyers joining the judiciary. Nevertheless, the recruitment from practising

⁶⁸ Valerie P Hans, 'Trial by Jury: Story of a Legal Transplant' (2017) 51 *Law & Society Review* 471.

⁶⁹ Eugenia Kurzynsky-Singer, 'Estoppel in Russian law' (2018) 3 *German-Russian Law Review (DRRZ)* 128.

⁷⁰ Anton Rudokvas, 'Trust and Fiduciary Ownership in Russia' (2017) 7 *Korea Legislation Research Institute Journal of Law and Legislation* 43.

⁷¹ Marina Kurkchian, 'Russian Legal Culture: an Analysis of Adaptive Response to an Institutional Transplant' (2009) 34 *Law & Social Inquiry* 337.

⁷² Jason J Kilborn, 'Fatal Flaws in Financing Personal Bankruptcy: The Curious Case of Russia in Comparative Context' (2020) 94 *American Bankruptcy Law Journal* 419.

⁷³ Interview with a personal injury lawyer from Ekaterinburg.

lawyers in general is not typical in Russia.⁷⁴ Most newly appointed judges are recruited from the judicial assistants or court clerks. Their expectations of a fair and just level of compensation are formed mostly within the judicial system. As noted above, the judiciary's expectations of such awards differ significantly from the expectations of practising lawyers, not to say accident victims (see Chapter 3). A wider share of claimant lawyers among judges would make it easier to set and maintain a higher level of compensation after the implementation of compulsory liability insurance. It would not require substantial changes to the appointments system. There are no legal restrictions for practising lawyers to apply for judicial positions. Rather all that is needed is to adjust the current policy of the judicial professional bodies⁷⁵ with the aim to attract more lawyers with the experience of representing claimants. This measure is likely to be implemented if it is accompanied by public support.

The second measure requires the Supreme Court to recognise the problem with the low level of pain and suffering damages and take steps towards resolving it. There has been some recognition of the problem by some Supreme Court Justices. For example, the Vice-President of the Supreme Court pointed out that the current level of compensation is too low.⁷⁶ Moreover, the Supreme Court in the recent judgment raised the awards of pain and suffering substantially compared to the appeal court.⁷⁷ However, this case was far from typical since it involved a victim who was a minor and who had suffered extremely severe injuries. It is not clear whether this judgment will result in any substantial changes in judicial decision-making. Another attempt to tackle the issue of quantum can be found in the recent directives of the Supreme Courts on moral damages where it states that courts should avoid awarding 'extremely low, insignificant sums of money'.⁷⁸ These measures, however, are not sufficient. There is a need for a more systematic approach to this

⁷⁴ Vadim Volkov and Arina Dzmitryieva, 'Recruitment Patterns, Gender, and Professional Subcultures of the Judiciary in Russia' (2015) 22 *International Journal of the Legal Profession* 166.

⁷⁵ These bodies are regional qualification boards of judges and the national High Board of Judges. They are consisted of judges form different types of courts with a small proportion of the members of the public.

⁷⁶ Victor Momotov in 'The Supreme Court Judge Conceives that the Quantum of Moral Damages Should Be Higher [Sud'ja Verhovnogo Suda schitaet, chto razmery kompensacij moral'nogo vreda dolzhny byt' vyshe]' TASS 20/03/2018 <<http://tass.ru/obschestvo/5050216>> accessed 17 January 2022.

⁷⁷ The Judgment of the Supreme Court of the Russian Federation N 56-KGPR19-7 of 8 July 2019. Pain and suffering damages were awarded in the amount of 3 m roubles.

⁷⁸ See para 30 of Resolution of Plenum of the Supreme Court of the Russian Federation N 33 'On Court Practice of Application Rules on Moral Damages' of 15 November 2022.

issue similar, for example, to the Court of Appeal decision in 2012 to raise awards by 10% which was binding for trial courts.⁷⁹ In addition, more pro-claimant attitudes might be inculcated through short-term judicial training focused specifically on the problems with pain and suffering damages.

The second measure is easier to implement than the first one. It is likely that some hurdles might appear on the way to the co-optation of claimant lawyers to the judiciary. As the International Commission of Jurists (ICJ) mentions in its report, ‘the internal selection and appointment system lacks transparency, strict criteria and rules for selection and accountability, which inevitably leads to arbitrariness and abuses’.⁸⁰ It is not the skills and qualifications of candidates that play a major role, but rather the discretion of the president of a court where a vacancy is open.⁸¹ That makes the current judiciary system difficult for entry of privately practising lawyers in general, not to say claimant lawyers. The increasing trend is that the members of court staff (assistant judges and court clerks) are integrated into the judiciary. In 1997, for example, newly appointed judges with such a background constituted only 9%.⁸² In 2013, the share of such candidates increased up to 30%.⁸³ And the most recent research suggests that this share has reached 65%.⁸⁴ More importantly, the clerkship experience is seen as the most valuable by the judiciary. For example, about 80% of the surveyed judges said that they consider this experience as the most appropriate for a future judge while only 17% are of the same opinion in regards to the experience of practising lawyers.⁸⁵ Overall, as the ICJ mission concludes, ‘the existing structure of preferences

⁷⁹ *Simmons v Castle* [2012] EWCA Civ 1039.

⁸⁰ International Commission of Jurists, *The State of the Judiciary in Russia* (2010) 13 <https://hro.org/files/Mission%20Report%20FINAL_ENG.pdf> accessed 22 November 2022.

⁸¹ Aryna Dzmitryieva, ‘Becoming a Judge in Russia: An Analysis of Judicial Biographies’ (2021) 73 *Europe-Asia Studies* 131.

⁸² Peter Solomon and Todd S Foglesong, *Courts and Transition in Russia: The Challenge of Judicial Reform* (Routledge 2018) 257.

⁸³ Vadim Volkov and Aryna Dzmitryieva, ‘Recruitment Patterns, Gender, and Professional Subcultures of the Judiciary in Russia’ (2015) 22 *International Journal of the Legal Profession* 166.

⁸⁴ Dzmitryieva (n 81).

⁸⁵ Vadim Volkov et al, *Russian Judges as a Professional Group [Rossiyskie Sudii kak Professionalnaya Gruppy]* (Institute for the Rule of Law 2012) 19 <https://enforce.spb.ru/images/analit_zapiski/Jan_2012_NormsValues.pdf> accessed 25 January 2023.

gives better chances of joining the judiciary to court staff, their bureaucratic experience being appreciated the most'.⁸⁶

Thus, there is an imbalance in the appointment system in favour of the court clerkship background. It is clear that the primary measure should be correcting this imbalance in the selection process. It is worth mentioning again that there are no formal obstacles to their appointment. As the ICJ mission notes:

There is a need to attract and encourage applications from candidates from a wider range of professional legal backgrounds, including lawyers, and to ensure that such candidates are not disadvantaged vis-à-vis colleagues with law enforcement experience.⁸⁷

How to change this trend so that more claimant lawyers could be integrated into the judiciary? That is one of the main challenges. This thesis does not seek to delve deeply into the practical steps needed to change the current judicial appointment system. However, it has been suggested elsewhere that limiting the discretion of the president of the court in the appointment process could be helpful.⁸⁸ The other measure is to ensure wider public participation in the appointment process so that not only the judiciary and executive make final decisions on candidates.⁸⁹ That would help to correct the imbalance in favour of candidates with a court clerkship background. The approach to judicial appointments adopted in England and Wales can be helpful. The judicial appointment commission there consists of lay members along with judicial members and professional lawyers (6 of 15 commissioners).⁹⁰ It is important that the chairman of this commission is always a lay member. Setting a similar independent commission with a substantial

⁸⁶ International Commission of Jurists, *Appointing the Judges: Procedures for Selection of Judges in the Russian Federation* (Analytical Report, 2014) 43 < <https://www.icj.org/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf>> accessed 22 November 2022.

⁸⁷ *ibid* 62.

⁸⁸ Timur Bocharov et al, *Proposals for Improving the Judicial System in the Russian Federation and Amending Legislative Acts for their Implementation* (Centre for Strategic Research 2018) 27-40 <<https://www.csr.ru/upload/iblock/1a2/1a2f21d0e9d165a80ab4de7d6a8f5f3c.pdf>> accessed 25 January 2023.

⁸⁹ International Commission of Jurists (n 86) 61.

⁹⁰ See more details on the official web site of the Judicial Appointment Commission <<https://judicialappointments.gov.uk/>> accessed 13 January 2023.

share of lay members would probably limit the practice of giving priority to the former members of court staff and raise the proportion of private practitioners, including claimant lawyers.

7.3.3 Exclusion of the State (Represented by Procurators) from Personal Injury Cases

There is a general opinion of practising lawyers that it is harder to win the case or obtain adequate compensation if the defendant is a state institution or a state-owned company. It is considered that the public interests prevail over the individual interests of claimants in judicial decision-making on these cases. One lawyer I interviewed, for example, suggested that concerns about the budget are likely to be an explanation for low sums awarded in the cases against the state.⁹¹ An account of a retired district judge given to the media supports this claim:

I think it's not a secret for anyone – there is a certain bias towards authorities. For example, the city property department, Mosgosstroynadzor. If we take statistics, they practically do not lose cases, and where they lose, they complain to the last. In this sense, of course, the judges are forced to treat their cases very cautiously and consider them from the point of view of the interests of the city, it seems to me.⁹²

While it is likely that this is a result of judicial attitudes rather than direct instructions from state authorities it remains problematic. The examples above relate to property cases. However, in personal injury cases, the impact of the state is even more significant. While state procurators will only be present in property cases where property is state-owned,⁹³ they participate in almost all personal injury cases.⁹⁴ They provide their conclusion on liability and quantum of pain and suffering damages as a third party. They can also participate in personal injury cases on behalf of the claimants who cannot afford legal representation. This is a vestige of the Soviet tort system where the majority of tort cases included the interests of the State which required the

⁹¹ Interview with an advocate from Vladimir.

⁹² Interview with Sergey Savostyanov, a former district judge (Mediazona, 09 Septemeber 2019) <<https://zona.media/article/2019/09/09/savostianov>> accessed 17 January.

⁹³ Art 52 of the Commercial Procedure Code of the Russian Federation of 24 July 2002.

⁹⁴ Art 45 of the Civil Procedure Code of the Russian Federation of 14 November 2002.

involvement of a procurator. The institution of state procurators remains in the Eastern European post-Socialist countries as well.

It is important to understand the difference between the Soviet-type procurator acting in civil cases and the seemingly similar institution of State Attorney Solicitor in common law jurisdictions. The Attorney General and the Solicitor General in England and Wales, for example, are responsible amongst other things for national or international litigation involving the government as a party.⁹⁵ While state attorneys in the US are responsible for representing the federal government in civil litigation.⁹⁶ In contrast, the function of Russian procurators in personal injury cases does not represent explicitly the interests of the government or particular governmental offices (this is the prerogative of lawyers within the relevant offices who are supposed to defend zealously the state interests in these cases). Rather procurators are supposed to provide opinion on the legal basis of the case and quantum of damages acting as a third party.

However, since most previous studies have focused on procurators' activity in criminal cases as prosecutors and general supervision over legality,⁹⁷ there is a lack of studies discussing their role in civil cases, especially in personal injury cases. The empirical research presented in Chapter 5 is the first step in this direction. It demonstrated that state procurators tend to take a position contrary to the interests of victims and in favour of the state railroad company. In most railroad accident cases, procurators support reducing the pain and suffering damages that are claimed by accident victims. If courts give decisions not in accordance with the procurators' opinions, it is very likely that they will appeal:

Well, normally, when the procurator gives one opinion, but the court makes a decision not in accordance with this opinion, we look very carefully at the decision. When for example our position was to satisfy the claim but the court dismissed, or vice versa. In this case, we look at

⁹⁵ Emily Allbon, *Elliott and Quinn's English Legal System* (21st edn, Pearson 2020) 355.

⁹⁶ See the official web site of the Offices of the US Attorneys <<https://www.justice.gov/usao/about-offices-united-states-attorneys>> accessed 17 January 2022.

⁹⁷ For example, see Peter H Solomon Jr and Todd S Foglesong, 'The Procuracy and the Courts in Russia: A New Relationship' (2000) 9 *Eastern European Constitutional Review* 105; Krzysztof Krajewski, 'Prosecution and Prosecutors in Poland: in Quest of Independence' (2012) 41 *Crime and Justice* 75; Ekaterina Trendafilova-Batchvarova, 'The New Legal Status of the Bulgarian Prosecutor's Office' (1997) 4 *Annual Survey of International & Comparative Law* 132.

the decision, and if the decision does not convince us, we appeal. This is the right of the prosecutor.⁹⁸

Therefore, the exclusion of the procurator from personal injury cases would give courts more freedom in awarding higher compensation in cases involving public organisations and state-owned companies. Currently, as was expressed in the interview, procurators take the role of an additional lawyer in the courtroom:

The participation of the procurator helps to orient the court to make the right decision. We give an opinion, the court either agrees with it or disagrees, but in any case, takes it into account. It is a second legal officer [besides the judge]. And of a high class, I would say without false modesty, not a simpleton, not a schoolboy expressing an opinion on the case. So the task is to assist the judge in complicated situations, to figure it out, with the aim perhaps that fewer judgments will be overruled in courts of appeal later.⁹⁹

Such an active role of procurators in personal injury cases contravenes the principles of adversarial proceedings and judicial independence. As Peter Solomon and Todd Fogelson demonstrate, the widespread influence of procurators on courts during the Soviet times was only partially overcome after the collapse of the Soviet Union.¹⁰⁰ The authors discussed mainly the role of procurators in criminal cases but this influence is still evident also in some areas of civil law including personal injury cases. As Aharon Barak emphasises in his book on the judiciary and democracy, the independence of judges means that 'On matters of adjudication, the judge is alone. He is subject to no authority other than his understanding of the law'.¹⁰¹ In this regard, the involvement of Russian procurators in personal injury cases, the rendition of their legal opinion, and assessment of damages can be seen as a violation of judicial independence. The thesis, therefore, proposes to exclude state procurators from personal injury cases.¹⁰²

⁹⁸ Interview with a state procurator.

⁹⁹ *ibid*

¹⁰⁰ Solomon and Foglesong (n 97) 105.

¹⁰¹ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2009) 80.

¹⁰² This said, it must be noted that the ability of procurators to act on behalf of deprived groups in personal injury cases is not intended to be abandoned (the distinction between these two roles has been discussed in section 1.3.4). This peculiar form of legal assistance despite being limited in Russia serves the interests of accident victims and therefore should be kept.

The major involvement of procurators in civil litigation was a unique feature of the Soviet legal system.¹⁰³ As Christopher Osakwe notes, ‘the intensity of the procurator’s participation in civil proceedings is one of the quintessentially socialist features of modern Soviet civil procedure’.¹⁰⁴ The removal of the procurators from personal injury cases would mean a substantial change in their role since the Soviet times. It would entail a limitation of the procurators’ competency which is likely to be opposed by this law-enforcement office. In the 1990s, for example, there was an attempt to remove procurators from civil cases, but ‘the procuracy had fended off a challenge to its distinctive role and powers’.¹⁰⁵ This is one of the obstacles to achieving the proposed reform. The other issue is the lack of a solid consensus on the removal of procurators from personal injury cases among legal scholars. There are different views on the prospects of their removal in Russian scholarly literature. Some scholars disagree arguing for the retention of procurators. For example, Lyubov Isaeva and Mikhail Krutikov do not put into question the utility of such an institution: ‘There is no doubt that the involvement of the procurator, in general, positively influences the case proceeding’.¹⁰⁶ The authors seem to take this assertion for granted as no supporting arguments are provided. In contrast, Svetlana Yaroshenko being of the same opinion does explain the involvement of procurators by the following reasons: ‘the procurators ensure the lawfulness of parties’ actions and correctness of court judgments, eliminate law violations, and assist courts in performing justice’.¹⁰⁷ Tatyana Byval’tseva also argues that the legitimate purpose of the procurator’s involvement is to assist courts in resolving cases.¹⁰⁸

¹⁰³ Alex J Morton, ‘Civil Procedure in the U.S.S.R.’ (1975) 7 *Case Western Reserve Journal of International Law* 211, 217.

¹⁰⁴ Christopher C Osakwe, ‘The Public Interest and the Role of the Procurator in Soviet Civil Litigation: A Critical Analysis’ (1983) 18 *Texas International Law Journal* 37, 88.

¹⁰⁵ Gordon B Smith, ‘The Struggle over the Procuracy’ in Peter H Solomon Jr (ed), *Reforming Justice in Russia, 1864-1996: Power, Culture and the Limits of Legal Order* (ME Sharpe 1997) 369.

¹⁰⁶ Lyubov Isaeva and Mikhail Krutikov, ‘The Participation of the Procurator in Civil Proceedings [Uchastie prokurora v grazhdanskom protsesse]’ (2006) 1 *Legality [Zakonnost’]* 17, 18.

¹⁰⁷ Tatyana Yaroshenko, ‘The Issues of the Participation of the Procurator in Civil Proceedings [Aktualnye voprosy uchastiya prokurora v grazhdanskom protsesse]’ (2008) 9 *The Bulletin of the Immanuel Kant Russian State University. Economics and Law [Vestnik RGU im I Kanta. Ekonomicheskie i Yuridicheskiye Nauki]* 47, 47.

¹⁰⁸ Svetlana Byval’tseva, ‘The Legal Opinion of the Procurator in Civil Proceedings [Zaklyuchenie prokurora v grazhdanskom protsesse]’ (2010) 5 *Legality [Zakonnost’]* 56, 56.

However, this is exactly the reason why other scholars argue for the removal of the procurators from civil cases. They criticise the intervention of procurators in justice matters which should be left entirely to the courts. As Andrei Ferens-Sorotskin clarifies: ‘the court is supposed to know the law (*jure navit curia*), and if so, any other legal opinion is excessive’.¹⁰⁹ Victor Pokhmelkin similarly argues that ‘judges do not need legal opinions of procurators while considering civil cases’,¹¹⁰ treating this institution as clear ‘legal atavism’ inherited from the Soviet times. Evgenii Bobrov also suggests the abolishment of this role of procurators as this would allow them to concentrate more effectively on their second role in civil cases, namely acting on behalf of socially disadvantaged groups.¹¹¹ This thesis takes a similar view on the issue arguing for the elimination of the first role of procurators while retaining their second role. This reform will be in accordance not only with the principle of judicial independence but also with the principle of equality of arms. The latter has been considered by the European Court of Human Rights in *Mikryukov and Others v. Russia*.¹¹² The ground for the appeal to Strasbourg was that procurators provided opinions against the interests of claimants in civil cases where they were suing state organisations. The Court found that this was a violation of Article 6 § 1 of the European Convention of Human Rights (right to a fair hearing). Specifically, the Court notes that ‘this all created, in the detriment of claimants, disequilibrium incompatible with the equality of arms’.¹¹³ As discussed in Chapter 5, such ‘disequilibrium’ is common in railroad accident cases, and likely to be found in other personal injury cases involving state companies and agencies. The removal of the procurators from personal injury cases, therefore, will help to restore the balance and ensure justice for victims.

¹⁰⁹ Andrei Ferens-Sorotskin, ‘The Procurator in Civil Proceedings [Prokuror v grazhdanskom protsesse]’ (1992) 4 Jurisprudence [Pravovedenie] 91, 95.

¹¹⁰ Viktor Pokhmelkin, ‘The Participation of Procurators in Considering Civil Cases is a Legal Atavism [Uchastie prokuratury v rassmotrenii grazhdanskikh del – yuridicheskii atavizm]’ (2001) 5 Russian Justice [Rossiyskaya Yustitsiya] 6, 7.

¹¹¹ Evgenii Bobrov, ‘On the Effectiveness of Legal Opinions as a Form of the Procurator’s Participation in Civil Proceedings [O probleme effektivnosti dachi zaklyucheniya kak formy uchastiya prokurora v grazhdanskom protsesse]’ (2019) 4 Russian Justice [Rossiyskaya Yustitsiya] 29.

¹¹² *Mikryukov and Others v. Russia* no. 34841/06 (ECtHR, 31 July 2012).

¹¹³ *ibid* para 52.

7.3.4 Access to Justice and Legal Assistance in Personal Injury Cases

Legal assistance is crucial for protecting the interests of accident victims seeking pain and suffering damages.¹¹⁴ Kathryn Hendley's study based on focus groups shows that Russian accident victims in most cases require professional legal assistance but few of them can afford legal fees. The story of the claimant who suffered severe injuries and lost her brother in the accident vividly demonstrates these difficulties. Despite having a law degree, she soon realised that it was a mistake to represent herself instead of hiring a professional lawyer with practical experience:

In reflecting on the court case, she speculated that she might have done better had she had help from legal professionals, but noted the difficulty of finding reputable lawyers. The experience of her friends left her convinced that good lawyers were very expensive. She explained that any spare financial resources had gone to pay for her brother's funeral and her own medical expenses.¹¹⁵

My interviews also confirm that in most personal injury cases victims participate in the cases with the assistance of professional lawyers: 'Normally, people rarely come on their own to the court. Mostly, they still come with lawyers who work off their money and collect evidence'.¹¹⁶

Therefore, funding schemes based on the outcome of the case can be beneficial for those victims who cannot afford legal cost. In particular, conditional and contingent fee agreements can guarantee victims access to justice in these circumstances.¹¹⁷ These schemes are not formally illegal in Russia but their use is substantially restricted. The removal of these restrictions would

¹¹⁴ This is true not only for Russia. For example, the YouGov report suggests that injured people find it difficult to claim compensation without legal assistance. The sociological survey showed that '[o]f those who have experience of making personal injury claims ('claimants') 66 per cent thought it would be difficult to negotiate a fair settlement without legal help. Half of claimants thought they would find it difficult to prepare the required court forms, and more than half (53 per cent) of claimants thought it would be difficult to find, appoint and instruct a medical expert.' See in Association of Personal Injury Lawyers, *Small Claims Limit for Personal Injury* (Written Evidence for the House of Commons Justice Select Committee Inquiry 2017).

¹¹⁵ Kathryn Hendley, *Everyday Law in Russia* (Cornell University Press 2017) 113.

¹¹⁶ Interview with a state procurator.

¹¹⁷ There are some significant differences between these two schemes but it is important that they both depend on the result of the case. Therefore, these two schemes are considered together here.

make legal assistance more available for victims. This was the reasons for implementing these funding schemes in England and Wales.¹¹⁸ The conditional fee agreements were legally introduced in 1999.¹¹⁹ It is considered that access to justice, as a result, has been improved significantly for deprived groups of claimants.¹²⁰ Indeed, the main rationale behind the 1999 Act was to make legal assistance available for the categories of claimants who were not eligible for public legal aid. However, there is a major difference between the two systems. As Peter Cane and James Goudkamp note, a legal aid system in contrast to the conditional fee system is based not only on the prospects of success but also on the social importance of the case.¹²¹ That could make the conditional fee system less suitable for high-risk and complicated cases. That is probably the main limitation of the funding scheme which is based on conditional fees. But at the same time, this scheme excludes extremely costly cases with unclear prospects. As Herbert Kritzer explains, 'some of the pressure to move away from legal aid toward conditional fees was probably a result of some spectacular losses on legally aided cases'.¹²²

Moreover, one of the consequences of the replacement of legal aid by conditional fee schemes was the growing activity of claims management companies.¹²³ These companies (commonly known as 'claim farms') made their profit by targeting accident victims and managing settlements

¹¹⁸ 'The Government has indicated that its objective in introducing the 1999 Act was: '[T]o make justice affordable to all, to discourage weak claims and encourage early settlement. Allied to this was the desire to ease the administrative burden on those providing and purchasing legal services'. House of Commons Constitutional Affairs Committee, *Compensation Culture: Volume I* (HC 754–I, 2006).

¹¹⁹ Access to Justice Act of 1999.

¹²⁰ 'Despite criticism and complaints by insurers and other compensators and the amount of satellite litigation about them, CFAs have been largely successful in their main objective of improving access to justice. There are very many genuine claimants who, had it not been for a CFA, would not have succeeded in obtaining compensation for genuine claims' (Evidence submitted by The Law Society). See in House of Commons Constitutional Affairs Committee, *Compensation Culture: Volume II* (HC 754–II, 2006).

¹²¹ Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 251.

¹²² Herbert M Kritzer, 'The Fracturing Legal Profession: The Case of Plaintiffs' Personal Injury Lawyers' (2001) 8 *International Journal of the Legal Profession* 225, 234.

¹²³ James Hand, 'The Compensation Culture: Cliché or Cause for Concern?' (2010) 37 *Journal of Law and Society* 569, 571.

with insurers for them or alternatively by referring them to solicitors for referral fees.¹²⁴ The problem with these companies was that their working practices were not always in accordance with professional legal ethics. The most scandalous cases implied their involvement in insurance fraud schemes.¹²⁵ To address these issues, in 2006 the UK Parliament implemented a stricter regulation of claim management companies' activity.¹²⁶ These measures included among other things a ban on referral fees and prohibition of approaching accident victims in person.¹²⁷ The political background of these measures was growing concerns about the development of a so-called compensation culture in the UK (discussed in more details in the next section).¹²⁸

The next major change in the regulation of legal assistance and costs in personal injury cases was influenced by the Jackson reforms of 2012.¹²⁹ The most substantial modification was that success fees under conditional fee agreements ceased to be recoverable as previously from the defendant. The main rationale behind this measure was to minimise legal costs associated with personal injury litigation. That was the context for the 10% uplift of general damages declared by the Court of Appeal in *Simmons v Castle*.¹³⁰ The reason for this uplift was to compensate in some way claimants and their solicitors for the lost opportunity to recover success fees from the defendant.

What lesson can be learnt from the British experience? It is likely that the full recognition of conditional and contingent fee agreement could result in the growing activity of the companies akin to the 'claim farms' in the UK. As suggested above, this issue can be addressed by restricting the most extreme practices of such companies and developing a professional association of licensed personal injury lawyers. As for the issue of who pays success fees, it is more reasonable to make them recoverable from the defendant rather than deductible from the claimant's pain and

¹²⁴ Richard Lewis, 'Compensation Culture Reviewed: Incentives to Claim and Damages Levels' (2014) 4 *Journal of Personal Injury Law* 209, 215-216.

¹²⁵ *ibid* 216.

¹²⁶ The Compensation Act 2006 and the Compensation (Claims Management Services) Regulations 2006.

¹²⁷ Richard Lewis, 'Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System' in Eoin Quill and Raymond J Friel (eds), *Damages and Compensation Culture: Comparative Perspectives* (Hart Publishing 2016) 46-47.

¹²⁸ See, for example, House of Commons (Constitutional Affairs Committee), *Compensation Culture. Third Report of Session 2005-06. Volume I and II* (HC 754-I and II, 2006).

¹²⁹ The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act of 2012.

¹³⁰ [2012] EWCA Civ 1288.

suffering damages. The proposals suggested by Lord Jackson were rightfully criticised by the working group of the most prominent UK tort scholars.¹³¹ As the group concluded, these proposals implied a serious threat to claimants' access to justice as 'they favour the financial interests of defendants over the interests of claimants in getting effective legal advice and assistance and proper compensation for their injuries'.¹³² It can be only added to this that pain and suffering damages are simply not intended to cover legal costs. Their core function is to compensate claimants for their pain and suffering. Therefore, it is better to adopt the pre-Jackson approach to success fees by making them payable by the losing party.

So, this thesis suggests that conditional and contingent fee schemes can be successfully applied in Russia. However, there is a long-term position that this way of funding is not recognised and protected by Russian law, even though it is *de facto* used in practice. The main limitation is that these fees cannot be claimed from the defendant as legal costs. Moreover, conditional and contingent fees cannot be claimed by lawyers from their clients if the latter refuse to pay for whatever reasons. This ambiguous legal situation is one of the obstacles which prevent lawyers from taking personal injury cases:

Very few people work for a success fee. Everyone works mostly for fixed fees. And to pay a lawyer even in this category of cases, frankly, not everyone can afford it, not everyone is prepared. They might wish to get legal assistance, but sometimes they are simply not ready to pay here and now. And a lawyer is not ready to work, for example, a year or a year and a half on a case so that he would be paid something on a contingency basis.¹³³

The increase in award sums is likely to make conditional and contingent fees more attractive for lawyers. However, the legal regulation of these schemes would require a change. The current position of these agreements within the 'grey zone' must be replaced by a clear and transparent regulation.

¹³¹ Ken Oliphant et al, 'On a Slippery Slope. A Response to the Jackson Report' (February 2011) <<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=0cfa565b29c67f35d4b981459c6e0478b6c2d94>> accessed 15 January 2023.

¹³² *ibid* 89.

¹³³ Interview with an advocate from Vladimir.

It is true that most European jurisdictions are less benevolent to conditional and contingent fees when compared to the British and American approaches. However, this is balanced by the widely available legal aid funded by the state in Europe. As Gerhard Wagner notes:

Contingency fees are banned in most European countries. Instead, poor plaintiffs who cannot afford to hire counsel, but also poor defendants in the same position, are entitled to legal aid such that the public takes on their legal fees if they lose their case.¹³⁴

The German system, for example, allows conditional or contingent fee schemes in only exceptional cases since most poor claimants are already covered by the system of public legal aid (*Prozesskostenhilfe*).¹³⁵ However, the scope of state legal aid in civil cases is very limited in Russia. It is regulated by a separate law,¹³⁶ which applies only to the most socially disadvantaged groups — pensioners, disabled people, orphans, adoptive parents, and those who have suffered as a result of an extreme situation. Currently, free legal aid in civil cases is underdeveloped due to high administrative costs and insufficient funding, the burden of which lies on the limited regional budgets. Furthermore, before-the-event insurance covering potential legal costs is not widespread in Russia. The number of claimants is expected to increase with the implementation of compulsory liability insurance for pain and suffering damages in Russia. This makes conditional and contingent fees the only possible way for them to obtain legal funding and gain access to justice.

The advantages of the system based on conditional and contingent fees agreements outweigh its disadvantages. The most evident of them can be summarised as follows:

[L]awyers acting in any case will be confident (they will have had to weigh carefully the chances of success before taking the case as their fee depends on winning) and determined; there will be freedom from the anxiety of having to pay huge fees; there will be no need to pay fees in advance; and there will be no delays or worries with legal aid applications.¹³⁷

¹³⁴ Gerhard Wagner, 'Tort liability and insurance: Comparative Report and Final Conclusions' in G Wagner (ed), *Tort Law and Liability Insurance* (Springer 2005) 336.

¹³⁵ Jörg Fedtke, 'The Culture of German Tort Law' (2012) 3 *Journal of European Tort Law* 183.

¹³⁶ The Federal Law N 324-FZ 'On Free Legal Aid in the Russian Federation' of 21 November 2011.

¹³⁷ Gary Slapper and David Kelly, *The English Legal System* (5th edn, Cavendish Publishing 2001) 551.

It is beneficial, therefore, for personal injury lawyers as well as their clients, although insurers frequently criticise this funding system as fuelling compensation culture (these concerns are discussed in the next section).

Furthermore, the specialisation in personal injury cases is well established in Western jurisdictions. This area of practice creates a specific market niche with the development of professional cooperation. For example, in France, there is an association specialising in insurance and the law of obligations that deals, among other things, with personal injury cases: the *Association des Avocats des Compagnies d'Assurance et du Droit de la Responsabilite* (ASACA).¹³⁸ In 2015, for example, their annual meeting was dedicated to alternative dispute resolution where not only lawyers (*avocats*) participated but also representatives of insurance companies, academia and mediators.¹³⁹ More specifically, there are associations focused entirely on personal injury cases: the *Association du droit de la réparation du dommage corporel* (ADRDC) and *Association Nationale des Avocats de Victimes de Dommages Corporels* (ANADAVI). Both organisations have the status of associations within the Paris Bar (*Barreau de Paris*).¹⁴⁰ As can be inferred from the website of the Paris Bar, associations are informal networks of lawyers specialising in a certain area of law without mandatory membership.¹⁴¹ As it is stated only briefly on the ADRDC's web page, the purpose of the association defines is 'to ensure the promotion of the right to compensation for bodily injury'.¹⁴² In contrast, ANADAVI is a much more developed organisation. As it is stated in their status declaration, their mission is to provide personal injury victims with the relevant information, share knowledge between personal injury lawyers for more coherent practice, interact with public authorities and provide legal training tuned for personal injury

¹³⁸ Peter Marks and Bruno Paris, 'France' in Martha Warren Neocleous (ed), *Personal Injury: Practice & Procedure* (Psychology Press 1997).

¹³⁹ The programme of the General Annual Meeting of the ASACA of 2015 < http://www.efb.fr/tools/upload-fichier/read?file=201411251416291dba1b-AssemblY_oe_GY_onY_orale_A_S_C_A_.pdf> accessed 15 January 2023.

¹⁴⁰ The full list of the associations within the Paris Bar as of 2021 <http://dl.avocatparis.org/news_letters_co/AnnuaireAssociations_SITE.pdf> accessed 15 January 2023.

¹⁴¹ The page on organising associations on the web site of the Bar of Paris < <https://www.avocatparis.org/services-de-l-ordre/bureau-des-associations>> accessed 15 January 2023.

¹⁴² The page of the ADRC on the official site of the Bar of Paris < <https://www.avocatparis.org/vie-associative/association-du-droit-de-la-reparation-du-dommage-corporel>> accessed 15 January 2023.

lawyers.¹⁴³ They also managed to adopt ethical principles to which their members should adhere when entering the association. For example, the first principle is to act exclusively in the interests of victims and not of insurance companies, if their interests are opposing.¹⁴⁴ The most recent activity of the association includes, for example, preparing a special issue on personal injury law in the *Gazette du Palais*, one of the most authoritative French law journals.¹⁴⁵ It is worth noting, that French lawyers are permitted to advertise and promote their legal services as specialists in personal injury law.¹⁴⁶

The same approach is adopted in The Netherlands where the Union of Personal Injury Lawyers (*Letselschade Advocaten, LSA*) organises and supports lawyers specialising in personal injury cases.¹⁴⁷ Although the membership is voluntary, there are rather strict requirements for entering this association. The candidate must have 5 years of legal practice experience, including not less than 500 hours dedicated to personal injury cases per year, and finish a special training in personal injury law provided by the association prior to applying.¹⁴⁸ Importantly, the association has its own disciplinary mechanisms for addressing the cases of its members' professional misconduct.¹⁴⁹

Similarly, in the UK, the well-established Association of Personal Injury Lawyers (APIL) assists personal injury lawyers in their practice and lobbies for their interests.¹⁵⁰ That typically means opposing the interests of insurance companies and their legislative initiatives. The association was established in 1990 and gathers barristers and solicitors specialising in personal injury law. The

¹⁴³ The declaration of the status of the ANADAVI

<https://www.anadavi.com/dotclear/public/document2006/statuts_anadavi.pdf> accessed 15 January 2023.

¹⁴⁴ The declaration of good practices of the ANADAVI

<<https://www.anadavi.com/dotclear/index.php/static/Declaration-de-bonnes-pratiques> accessed> 15 January 2023.

¹⁴⁵ The web page of the *Gazette du Palais* <<https://www.anadavi.com/dotclear/index.php/category/Gazette-du-Palais>> accessed 15 January 2023.

¹⁴⁶ Michel Cannarsa, 'Compensation for Personal Injury in France' (2002) 8 *The Cardozo Electronic Law Bulletin* <<http://www.jus.unitn.it/cardozo/review/2002/cannarsa.pdf>> accessed 15 January 2023.

¹⁴⁷ Bas Baljet and Edward Dijkhoorn, 'The Netherlands' in Martha Warren Neocleous (ed), *Personal Injury: Practice & Procedure* (Psychology Press 1997) 109.

¹⁴⁸ The LSA membership requirements <<https://www.lsa.nl/lsa-lid-worden>> accessed 15 January 2022.

¹⁴⁹ Disciplinary and complaints regulations of the LSA <<https://www.lsa.nl/lsa/tucht-en-klachtregelingen>> accessed 15 January 2022.

¹⁵⁰ Cane and Goudkamp (n 121)252.

objectives of the association according to their website are as follows: the promotion of full and just compensation, wider redress for personal injuries and safety standards, providing a communication network for its members, development of expertise in personal injury law and campaign for improvements in this area of law.¹⁵¹ The association has its code of conduct for breaching which the executive committee can impose sanctions: for example, expulsion from the association, suspension, public rebuke of the member's conduct, or referral to the member's legal professional regulatory body.¹⁵² Among other things, it issues a journal with academic and practical publications on various problems of personal injury law.¹⁵³

In contrast, there was no such specialisation in Russia for a long time. For example, an overview of the Russian tort system prepared in 1997 stresses this remarkable feature as compared to other jurisdictions:

Lawyers do not call themselves specialists in the field of personal injury, nor is there an equivalent to an association of personal injury lawyers. They may not advertise their services. Information about personal injury lawyers is best obtained from personal contacts or advertisements.¹⁵⁴

One reason for this is that this sphere of work is not promising in terms of potential profits. There is, at the same time, a wider specialisation in road traffic accidents which attracts lawyers who are frequently called 'auto-lawyers' (*avtojuristy*).¹⁵⁵ The number of these 'auto-lawyers' has grown substantially. They typically bought the right to claim directly from the participants of road traffic accidents which means that the person who has sold his/her claim does not have to participate in the court proceedings:

¹⁵¹ The APIL objectives < <https://www.apil.org.uk/about-apil#objectives> > accessed 15 January 2022.

¹⁵² The APIL Code of Conduct < <https://www.apil.org.uk/code-of-conduct> > accessed 15 January 2022.

¹⁵³ The Journal of Personal Injury Law web page < <https://www.apil.org.uk/jpil> > accessed 15 January 2022.

¹⁵⁴ Dmitry Chuprov, John Phipson and Lisa Booth, 'Russia' in Martha Warren Neocleous (ed), *Personal Injury: Practice & Procedure* (Psychology Press 1997) 128.

¹⁵⁵ Viktor N Domanov and Margarita L Lebedeva, 'The Lawyer's Actions in the Solution of Disputes on Indemnity Caused by Road Traffic Accident [Dejatel'nost' advokata pri razreshenii specificheskikh sporov o vozmeshhenii vreda, prichinennogo v rezul'tate DTP] (2014) 2 Mari State University Bulletin [Vestnik Marijskogo universiteta] 100.

A participant in an accident, transferring his rights, receives a reward and the opportunity not to participate in the trial personally, the auto lawyer obtains redress through the court which is compensation for material damage, a forfeit and a consumer fine.¹⁵⁶

However, this scheme is legal only in relation to car damage.¹⁵⁷ It is not permitted to buy a personal injury claim as it is considered inseparable from the person. This limitation reduces the lawyers' interest in taking personal injury cases. Another reason is the low level of pain and suffering damages. These lawyers specialised, therefore, mostly in claims for compensation of damages to a car which was their main source of income.

However, there have been some significant changes in the market over the past few years. In 2017, legislation that makes a repair provided by the insurance company a primary recovery for a damaged car was adopted.¹⁵⁸ Insurance payments are now available only in exceptional cases which caused substantial changes in the market of auto-lawyers' services. Some of them did not survive these changes, whereas the others were forced to refocus on personal injuries. One of my interviewees describes this transformation in the following way:

Well, some colleagues, if you call things by their proper names, cheat their clients or took from them up to 50% of the insurance payment. That is, people did not receive anything at all. And because of this greed, the same throughout the country, changes in legislation and policy of insurers, the market turns out to be narrowed. If there were six largest players in Yekaterinburg in 2017, now, in fact, there are only three companies that are engaged in this. And at some moment, due to such a situation on the market, the idea arises that we can not only get paid for metal [car damage] but also get paid for people [personal injuries].¹⁵⁹

¹⁵⁶ Tatjana Mechetina and Denis Mechetin, 'Consumer Status in Russian Civil Law and Some Issues of Pain and Suffering Damages [Status potrebitelja v rossijskom grazhdanskom prave i nekotorye voprosy kompensacii moral'nogo vreda]' (2017) 2 Legal Science [Juridicheskaja nauka] 55.

¹⁵⁷ Para 19 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No 2 'On the application by courts of legislation on compulsory civil liability insurance of vehicle owners' of 29 January 2015 .

¹⁵⁸ The Amendments to the Law on Compulsory Motor Third Party Liability Insurance implemented by the Federal Law N 49-FZ of 28 March 2017.

¹⁵⁹ Interview with a personal injury lawyer from Ekaterinburg.

The only way for them to survive is to take as many personal injury cases as possible taking into account the low levels of compensation for medical expenses and pain and suffering damages. The possibility to gain from legal costs and penalty imposed on insurance companies for not making a prompt payment (50% of payment) makes them more ready to bring cases to courts and reluctant to settle them at early stages. The practices of these lawyers are beginning to resemble those which are typical for claim management companies in the UK. They similarly rely on 'cold calls' and databases of accident victims in searching for potential clients. It is likely that the implementation of compulsory liability insurance for pain and suffering damages and conditional/contingent fee agreements would make the market more attractive for these practitioners. That is why the establishment of a *professional* association of personal injury lawyers (similar to the abovementioned associations in the UK, France, and Denmark) is needed.

The association of personal injury lawyers could be organised as a voluntary community within the existing Russian Federal Bar Association. There is no need for mandatory membership. The Bar membership is already mandatory, and Bar members are free to choose any area of law as their practice, including personal injury law. The main purpose of such an organisation could be analysing the practice and preparing recommendations for lawyers specialising in personal injury practice. It can also participate in the legislative process by expressing and promoting the interests of victims. It is also important to have a code of conduct for personal injury lawyers and an effective disciplinary mechanism for its enforcement. These are the main areas of activities of similar associations abroad. Such association, once established in Russia, would help prevent malpractices and guarantee high-quality legal assistance for victims.

7.4 Addressing Concerns about Social Costs of the Reform

The section above considered the features of Russian tort law culture which are likely to limit the impact of the proposed reform. However, there are further concerns with the introduction of large compensation for pain and suffering and the involvement of liability insurance in this area. These concerns include the development of compensation culture, insurance fraud and moral hazard. They are frequently raised in the tort law literature. From the point of view of those scholars who share these concerns, Russia might be seen as a place which fortuitously avoids all these problems due to its current system, albeit at the expense of low pain and suffering damages

and lack of liability insurance. Yet, as will be seen, some of these concerns are unwarranted regardless of whether we are talking about Russia or European countries, while others are relevant to some extent for Europe, but are less applicable to the Russian situation due to the specifics of the tort law culture. Nevertheless, a few of them should be taken seriously and addressed, as far as possible.

7.4.1 Compensation Culture

Compensation culture is usually understood as a propensity to submit too many claims (a substantial part of which are frivolous) and seek too much compensation. There is concern that the widely available liability insurance for pain and suffering damages would open the floodgates and increase the caseloads of Russian courts. This concern, as was discussed in Chapter 5, is already frequently expressed in courts by Russian Railways lawyers. It can be assumed further that personal injury lawyers would be more interested in taking these cases, especially under conditional/contingent fee agreements.¹⁶⁰ Indeed, the recent reorientation of ‘auto-lawyers’ towards personal injury cases shows that this segment of legal services is likely to expand in Russia. However, there is nothing wrong with this tendency unless the bulk of these claims are unjustified or fraudulent. There are no signs of that in the current claiming behaviour (discussed in more detail in section 7.4.3). Moreover, the opposite scenario is equally likely to happen. It can be assumed that lawyers thinking strategically would be cautious in taking cases under conditional/contingent fee schemes filtering out frivolous and unmerited claims.¹⁶¹ Their potential profit would be determined by the prospects of cases.

The scholarly literature demonstrates that compensation culture is rather a myth. It does not emerge even in the systems where insurance coverage is widely available. There are reliable

¹⁶⁰These reservations closely resemble the concerns in the UK prior to the implementation of conditional fee agreements. However, these concerns are not justified in most cases as the report prepared by the House of Commons on compensation culture demonstrates: ‘Conditional fee agreements have not directly caused the perception of a compensation culture. The statistics demonstrate that the number of claims has not risen since CFAs were introduced as the primary method of funding personal injury claims.’ See in House of Commons Constitutional Affairs Committee, *Compensation Culture: Volume I* (HC 754–I, 2006).

¹⁶¹Joan T Schmit, ‘Factors Likely to Influence Tort Litigation in the European Union’ (2006) 31 *The Geneva Papers on Risk and Insurance-Issues and Practice* 313.

qualitative and quantitative studies showing that there are no sufficient reasons to talk about the actual existence of compensation culture in the US¹⁶² or the UK.¹⁶³ Yet, this does not stop politicians and media from supporting the same discourse about compensation culture. Personal injury litigation is to a large extent a political issue in the US and UK that attracts the attention of the two major stakeholders: insurance companies and personal injury law firms. The insurance companies attempt to limit personal injury damages (especially for minor injuries) considering a significant part of such claims to be fraudulent or exaggerated, while personal injury lawyers are understandably interested in a constant increase of compensatory awards and cases. Thus, it can be argued that compensation culture is rather a myth, political rhetoric or a media construct than a genuine problem.¹⁶⁴

There are even fewer grounds for concerns about the potential for the creation of a compensation culture in Russia. A study of litigation behaviour in Russia shows that there are no good reasons to expect that courts would be flooded by personal injury claims,¹⁶⁵ even if the level of damages is increased and legal funding through conditional/contingent fee schemes becomes widely available. Qualitative studies demonstrate that Russians are relatively reluctant to make claims arising out of road traffic accident even for pecuniary damages currently covered by compulsory liability insurance:

In Russia, victims' trepidation stems from their more general skittishness about officialdom, both private and public. Bilateral negotiations between those involved in accidents allow them to bypass the bureaucratic demands of insurance companies as well as the traffic police and the courts. This distaste for formal channels among Russians is well known. This finding would likely come as a surprise to ordinary Russians themselves. Judging by the focus groups, few of them see the courts as inviting. Indeed, they mostly see the entire system as stacked against them, from the unresponsive and insolent attitudes of the traffic police in the immediate aftermath of accidents to the bureaucratic maze required to recover through insurance

¹⁶² David M Engel, *The Myth of the Litigious Society* (University of Chicago Press 2016).

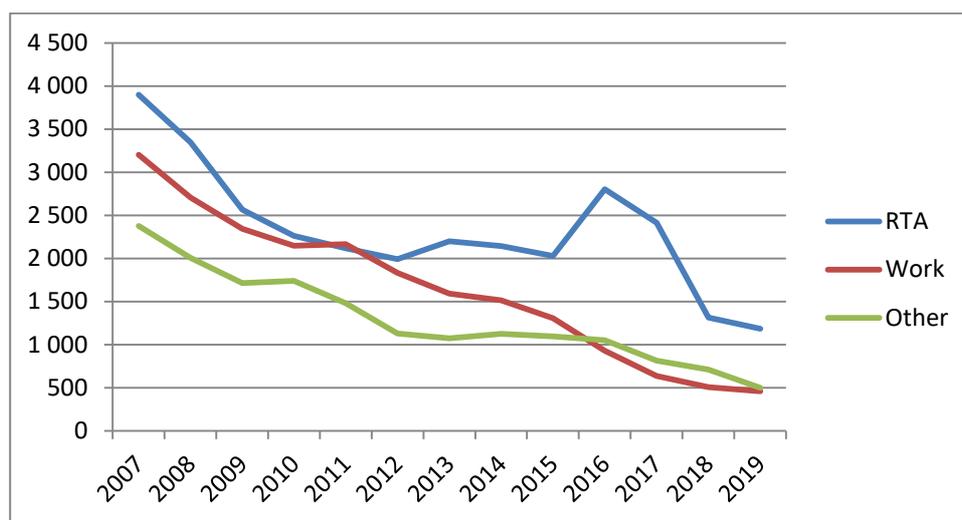
¹⁶³ Richard Lewis, Annette Morris and Ken Oliphant, 'Tort Personal Injury Claims Statistics: Is there a Compensation Culture in the United Kingdom?' (2006) 21 *Journal of Insurance Research and Practice* 5.

¹⁶⁴ Annette Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70 *The Modern Law Review* 349.

¹⁶⁵ Timur Bocharov, 'Is There a "Compensation Culture" in Contemporary Russia? The Role of Liability Insurance, Non-Pecuniary Damages, and Legal Profession in Personal Injury Litigation' (2021) 11 *Oñati Socio-Legal Series* 556.

companies to the courts. They complain bitterly about the time required to assemble the evidence required to substantiate their claim and about the emotional energy needed.¹⁶⁶

This is especially true in relation to minor accidents where the compensation awarded often is not worth the effort. Moreover, the official statistics of court cases demonstrate that there are relatively few personal injury cases considered by Russian courts.



Graph 1. The number of court decisions on personal injuries and fatal accidents in Russia by categories in 2007-2019

As can be seen, in 2019, there were only 1,184 decisions on personal injuries and deaths caused by road traffic accidents, 460 decisions on workplace accidents, and 498 decisions on other unspecified cases.¹⁶⁷ Unfortunately, in Russia, in contrast to the UK, there is no statistics on the total number of claims filed to insurance companies that did not appear in court. Nor is there an institution equivalent to the UK Compensation Recovery Unit where insurance companies are obliged to report any submitted claim. Therefore, we can only speculate that the total number of claims filed to Russian insurance companies would substantially exceed the number of court cases.

¹⁶⁶ Kathryn Hendley, *Everyday Law in Russia* (Cornell University Press 2017) 107.

¹⁶⁷ The statistics are taken from the Judicial Department official website <<http://www.cdep.ru/index.php?id=79>> accessed 17 January 2022.

However, it must be recalled that the internal claims procedure in an insurance company is much less problematic than the court procedure (discussed in Chapter 3). Internal claiming does not prompt the usual problems of compensation culture – too many claims and high legal costs. If we consider cases involving pain and suffering damages (where there is no internal claiming mechanism and any entity should go through a court procedure), we will see that the number of cases is still relatively low. As Russian judicial statistics demonstrates, only 16,066 decisions on pain and suffering damages were considered in 2019. The intensity of claiming is surprisingly low in this area. Claimants have a formal right to file for pain and suffering damages in every accident where there is someone's fault, but they do not do this in most cases.

To sum up, the analysis of personal injury litigation in Russia shows that there are no sufficient reasons to talk about litigiousness in the sphere of compensation for personal injuries. The number of personal injury cases per population is not high, and there is an evident trend of its decrease. In fact, the lack of insurance can partly explain the current relatively low level of personal injury cases involving claims for pain and suffering damages. So, it can be expected that the claims rate will increase to some extent with the implementation of compulsory liability insurance. This measure is likely to uplift the current level of awards for pain and suffering. That could attract, as a result, more personal injury claims.

However, as mentioned above, there is a general tendency among Russian people to 'lump it' rather than initiate litigation. As the survey demonstrates, about 38% of respondents were not prepared to submit a claim when they faced a situation where such a claim was possible.¹⁶⁸ The most popular explanation for that is a negative attitude toward courts (44%).¹⁶⁹ This attitude can be explained by the continuity of the Soviet litigation pattern. The avoidance of court disputes was a well-known trend in the socialist Eastern European countries where the citizens were not prepared to make claims against the State institutions which were the typical defendants in most tort cases.¹⁷⁰ The scepticism toward official legal institutions is still evident in Russia where general trust in the judicial system is extremely low, according to national surveys.¹⁷¹

¹⁶⁸ AK Gorbuz et al, *Transformation of the Russian Judiciary. An Attempt of Comprehensive Analysis [Transformatsiya rossiiskoi sudebnoi vlasti. Opyt kompleksnogo analiza]* (Norma 2010) 371.

¹⁶⁹ *ibid* 373.

¹⁷⁰ Inga Markovitz, 'Law and Glasnost': Some Thoughts about the Future of Judicial Review under Socialism' (1989) 23 *Law and Society Review* 399.

This is a general claiming pattern which is unlikely to vary drastically after the implementation of compulsory liability insurance for pain and suffering damages. The culturally determined preference to avoid litigation is not something that can change in an instant. Even in the UK where liability insurance is well developed, a substantial share of people prefers not to claim.¹⁷² It is also worth mentioning that compensation for pain and suffering is only one element of a personal injury claim which normally supplements pecuniary damages. Making this element more available does not necessarily mean that it would trigger a substantial change of the whole personal injury claims rate. It seems safe to conclude that there would probably be some increase in the number of personal injury claims, but it is unlikely to be dramatic.

And in the end, there is nothing wrong with a reasonable increase in claims rates as a result of pain and suffering damage becoming higher and easier to obtain. Rather, a clearly low rate of claims implies that a considerable proportion of accident victims remain uncompensated. As David Engel mentions:

The victim's claim is tort law's sine qua non. If it turns out that claiming by victims rarely occurs, if most potential plaintiffs absorb their losses without confronting the injurer, then neither compensation nor deterrence nor corrective justice nor loss distribution can result. If most potential claimants remain inactive, tort law's promise is thwarted. Its capacity to attain its own stated goals is undermined.¹⁷³

A certain increase of personal injury claims rate can be seen as a growth of the right-awareness of accident victims. Therefore, the rise of claims rate as such should not be seen as a matter of concern but rather only the rise of fraudulent and clearly exaggerated claims. These issues are discussed in the next section.

¹⁷¹ According to the survey conducted by the Fund of Public Opinion (FOM) in 2018, only 24% of respondents assessed the work of Russian judicial system positively, and only 31% of them were prepared to bring their claim to the court while 57% treated it as a last resort. FOM Report (05 August 2018) <<https://fom.ru/Bezopasnost-i-pravo/14080>> accessed 18 January 2023.

¹⁷² According to the survey, 5% of respondents prefer to do nothing when facing a justiciable problem and 35% of respondents prefer to handle such problem themselves. See Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing 1999) 68.

¹⁷³ Engel (n 162) 15.

7.4.2 Insurance Fraud

Another potential social cost of extending insurance cover for pain and suffering damages is increased insurance fraud in personal injury cases. These concerns are mostly raised by insurance companies. For example, large insurance companies suggest that fraudulent payments account for no less than 10% of all payments in Russia.¹⁷⁴ Western academic literature also stresses that the problem of fraud mostly stems from pain and suffering damages. As Christopher Parsons notes:

Liability insurers are very attractive targets for fraudulent schemes of this sort because the payoff from a successful claim typically includes not only compensation for reported economic losses but for pain and suffering also.¹⁷⁵

Similarly, Peter Cane and James Goudkamp suggest: 'The willingness of the tort system to compensate for mental distress and pain and suffering also lays it open to claims which may, at least, be difficult to verify'.¹⁷⁶

There is a similar risk that the wider availability of liability insurance and generous cover for pain and suffering damages in relation to accident victims would increase the rate of insurance fraud in Russia. At first sight, there are grounds for these concerns. The Russian Union of Auto Insurers (RSA), for example, estimates that 20% of all declared losses are obtained fraudulently.¹⁷⁷ According to experts, fraudulent claims can account for 20-30% of payments.¹⁷⁸ The sociological survey of motor vehicle owners shows that attempts of insurance fraud are known to 18% of respondents.¹⁷⁹

¹⁷⁴ VG Avakyan, 'Insurance Fraud in Russia and Other Countries [Strahovoe moshennichestvo v Rossii i za rubezhom]' (2011) 2 *Baikal State University Bulletin [Izvestija Bajkal'skogo Gosudarstvennogo Universiteta Jekonomiki i Prava]*.

¹⁷⁵ Christopher Parsons, 'Moral Hazard in Liability Insurance' (2003) 28 *The Geneva Papers on Risk and Insurance-Issues and Practice* 448, 462.

¹⁷⁶ Cane and Goudkamp (n 121) 344.

¹⁷⁷ Yuliya M Makhdieva, 'Liability Insurance in Russia: Current State and Development Areas [Strahovanie otvetstvennosti v Rossii: sovremennoe sostojanie i napravlenija razvitija] (2014) 46 *Finance and Credit [Finansy i kredit]* 35.

¹⁷⁸ Maria Zhilkina, *Insurance Fraud: Legal Assessment, Detection Practice and Methods of Suppression [Strahovoe moshennichestvo: Pravovaja ocenka, praktika vyjavlenija i metody presechenija]* (Wolters Kluwer Russia 2005).

¹⁷⁹ Alexey Zubets (n 51).

It must be noted, however, that insurance companies and their associations tend to provide high estimations, but usually without supporting these figures by any reliable empirical data:

One of the negative factors is the lack of official statistics on cases of fraudulent activities that are committed in the motor vehicle insurance industry in Russia. The Insurance Supervision Department [of the Bank of Russia, the country's central bank, the watchdog tasked with regulating the insurance market] does not have such data, and insurance companies have scattered information on cases of fraud.¹⁸⁰

This brings us back to the discussion of compensation culture. Insurance companies play a significant role in fuelling the perceptions that a significant number of claims are unjustified and fraudulent. But if we look at crime statistics, the situation is somewhat different. Since 2012, insurance fraud has been covered by a specific article of the Russian Criminal Code.¹⁸¹ However, this category of cases is not widely used in practice. Only 350 persons were convicted under this article of the Criminal Code in 2019.¹⁸² This is not a sizeable number compared to other crimes, although there is a slight increase in the recent years: 267 convicted persons in 2015, 304 convicted persons in 2016, and 307 convicted persons in 2017.¹⁸³ It should be borne in mind that the most prevalent types of insurance fraud relate to compensation for car damage rather than personal injuries.¹⁸⁴

Nevertheless, the possibility of *latent* insurance fraud in Russia should not be underestimated. For example, a survey of prosecutors, employees of the Bank of Russia, and employees of insurance

¹⁸⁰ AK Gasanov, 'Activity in Motor Insurance as an Object of Criminal Legal Protection in the Russian Federation [Dejatel'nost' po strahovaniju avtotransportnyh sredstv kak objekt ugovolno-pravovoj ohrany v Rossijskoj Federacii] (2016) 5 Legal Scholar [Jurist-Pravoved] 103.

¹⁸¹ Art 159.5 of the Criminal Code of the Russian Federation of 13 June 1996.

¹⁸² Judicial Department (n 167).

¹⁸³ Olga Evalnova, Ekaterina Krasnikova and Nadezhda Pavlovskaya, 'Criminality in the Insurance in the Russian Federation (Condition, Structure, Dynamics)' (2019) 2 Moscow Academy of the Investigative Committee of the Russian Federation Bulletin 60.

¹⁸⁴ Tatjana Epifanova, Andrei Grankin and Andrei Vatutin, 'The Problem of Fraud in the Field of Compulsory Motor Third Party Liability Insurance [Problema moshennichestva v oblasti objazatel'nogo strahovanija avtograzhdanskoj otvetstvennosti] (2017) 6 Problems of Economics and Legal Practice [Problemy jekonomiki i juridiceskoj praktiki] 236.

organizations shows that the respondents believe that only an insignificant part of insurance fraud cases is revealed and prosecuted.¹⁸⁵ This is likely to be true if we take into account the attitudes towards insurance companies among the Russians. A public opinion performed in 2013 showed that 27% of Russians believed that it was permissible to deceive an insurance company by exaggeration of damage or by filing a claim for damage that did not actually exist.¹⁸⁶

However, this risk is unlikely to be extreme if we are talking about pain and suffering damages. The area where this risk is the highest is normally in relation to soft tissue injury cases (such as whiplash injuries). The main problem with this category of claims is that there is no objective test that could diagnose this medical condition precisely.¹⁸⁷ Therefore, it is hard to distinguish between genuine fraud and mere exaggeration in the case of whiplash injuries or other soft tissue injuries.¹⁸⁸ It was found, for example, that the number of victims who suffered from whiplash injuries is determined to a certain extent by the social context of such injuries:

It is interesting to note that the problem of chronic whiplash injury does not exist in every country which has cars and accidents. It is clear that automobiles and accidents happen universally but the recovery rate from the so-called acute whiplash injury varies considerably from culture to culture. It is seen that in some countries, such as Greece, Germany, and Lithuania, even though patients involved in these mechanisms report acute pain, they seem to get better within weeks.¹⁸⁹

It is believed that the problem of insurance fraud in the UK mostly relates to whiplash injuries.¹⁹⁰ This is not necessarily the case in other countries, including Russia. A keyword search in case law

¹⁸⁵ Evlanova, Krasnikova and Pavlovskaya (n 183) 62.

¹⁸⁶ Gasanov (n 180).

¹⁸⁷ Ingrid Torjesen, 'Doctors Should Have to Be Accredited to Support Whiplash Claims, Say MPs' (2013) 347 *British Medical Journal* 1.

¹⁸⁸ Ashley Cartwright and Jason Roach, 'Fraudulently Claiming Following a Road Traffic Accident: A Pilot Study of UK Residents' Attitudes' (2016) 23 *Psychiatry, Psychology and Law* 446; Julie-Anne Tarr, 'Grappling with Fraudulent Insurance Claims and Collateral Lies: Comparative Insurance Law Developments in the United Kingdom and Australia' (2019) 1 *Journal of Business Law* 43.

¹⁸⁹ Nikhil Shah and Stuart Matthews, 'Whiplash Injury' (2014) 2 *Journal of Personal Injury Law* 55, 57-58.

¹⁹⁰ This was the rationale for the implementation of the whiplash reforms in the Civil Liability Act 2018 in England and Wales.

database showed that there were a very insignificant number of whiplash injury (*klystovaya travma*) cases considered by Russian courts.¹⁹¹ Interviews with Russian lawyers also confirm that these cases do not occur in their practice as this condition is treated as insignificant and not recognised as actionable harm.¹⁹² Thus, there is no likelihood of a great increase in the number of fraudulent or exaggerated claims if compulsory liability insurance for pain and suffering damages is implemented. However, it is reasonable to expect at least *some* increase compared to the current situation. It is worth, therefore, briefly discussing how these social costs could be minimised taking into account the comparative legal and social contexts.

The first way is to develop forensic assessment techniques which could help to distinguish between fake and actual symptoms of pain and suffering. As American forensic studies suggest, such psychological techniques as the M-FAST and the TSI-ATR tests can be helpful in identifying malingering in personal injury cases.¹⁹³ These or similar instruments can be used by Russian medical experts in their assessment of pain and suffering if they have a hunch that the claim is fraudulent.

The second way to address potentially fraudulent claims includes legal measures applied by the court. The long experience of English courts dealing with insurance fraud in personal injury cases could serve as guidance. The Criminal Justice and Courts Act 2015 stipulates that in the case of 'fundamental dishonesty' a fraudulent personal injury claim can be entirely dismissed by the court, even if some part of the claim is genuine.¹⁹⁴ However, prior to that, the Supreme Court had clearly stated that striking out the claim in its entirety is a very exceptional measure.¹⁹⁵ More commonly, courts take into account the fact of exaggeration and reduce damages proportionally. That it is what indeed happened in *Fairclough* where damages were reduced almost tenfold.¹⁹⁶

¹⁹¹ There were found only 140 court cases in 2018-2020. Most of them were criminal or administrative offence cases, and only a small proportion of PI cases. The search was made in the State Automated System of the Russian Federation 'Justice' <<https://bsr.sudrf.ru>> accessed 17 January 2022.

¹⁹² Interview with a personal injury lawyer from Ekaterinburg.

¹⁹³ Ashley K Christiansen and John P Vincent, 'Assessment of Litigation Context, Suggestion, and Malingering Measures among Simulated Personal Injury Litigants' (2012) 12 *Journal of Forensic Psychology Practice* 238.

¹⁹⁴ Section 57 of the Criminal Justice and Courts Act 2015.

¹⁹⁵ *Fairclough Homes Ltd v Summers* [2012] UKSC 26.

¹⁹⁶ *ibid.*

In a more recent case, the payment was also reduced tenfold by the trial judge due to the claimant's fraud.¹⁹⁷ That was a personal injury case which had been settled not even reaching a trial stage. The insurer, however, submitted a claim later on seeking to unwind the settlement in the view of the discovered fraud. Importantly, the Supreme Court found in this case that the amount of personal injury damages can be reviewed on this basis, even if the case was initially settled by the parties. As Philip Rawlings and John Lowry summarise the rationale behind this judgment, 'the aim of deterring fraud was given priority over the public interest in finalising settlements'.¹⁹⁸ The development of a similar approach by Russian courts could help to minimise potential insurance fraud. It would mean their readiness to dismiss claims for pain and suffering damages entirely in the case of serious fraud or reduce these damages proportionally in less serious cases of exaggerating symptoms or consequences of injuries.

7.4.3 Moral Hazard and Deterrence

Moral hazard can be broadly defined as 'a phenomenon whereby the obtaining of insurance tends to alter an individual's incentives to prevent loss or to take specific actions; for example, to take care'.¹⁹⁹ It is usually understood in the opposition to tort liability which is considered to have the deterrence effect. However, this effect is not confirmed by the data. It was suggested in literature that tort law and damages are not particularly successful in deterring potential wrongdoers.²⁰⁰ As Steve Hedley notes while discussing this issue:

Increasing realism about the 'deterrence' function of tort is becoming more apparent. It is now well-recognised that the threat of litigation for harm does not have a positive effect on public

¹⁹⁷ *Hayward v Zurich Insurance Co plc* [2016] UKSC 48.

¹⁹⁸ Philip J Rawlings and John P Lowry, 'Insurance Fraud and the Role of the Civil Law' (2017) 80 *The Modern Law Review* 510, 539.

¹⁹⁹ Parsons (n 175) 451.

²⁰⁰ Helmut Koziol, 'Comparative Conclusions' in WH Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015).

safety; rather, it corrodes public trust, promoting the idea that someone who is your 'neighbour' today may sue you tomorrow.²⁰¹

The readiness of legal doctrine to recognise the deterrence effect varies from jurisdiction to jurisdiction. It is not recognised in most Western European jurisdictions whereas in some Eastern European countries the preventive function is recognised alongside the compensatory.²⁰² In Germany, it can also be recognised but this does not mean that it is explicitly taken into account in judicial decision-making.²⁰³ The remarkable exclusion there is pain and suffering damages:

Although this does not mean that the amount of damages is generally assessed with regard to aspects of prevention, there are some exceptions one might regard as a revival of punitive elements of private law. For instance, the assessment of the amount of damages for pain and suffering may take aspects of prevention and legal redress into account, in particular where an intentional and serious infringement of the right of personality is at issue and the tortfeasor acted to make a profit.²⁰⁴

Russian legal doctrine tends to recognise the deterrent function of personal injury damages, following the Soviet approach discussed in Chapter 3. There is, therefore, a view among Russian legal scholars that the obligation to pay pain and suffering damages personally deters potential defendants from wrongdoing.²⁰⁵ Moreover, lawyers and politicians in Russia tend to emphasise this function of pain and suffering damages when paid directly by the defendant:

Insignificant amounts of compensation do not work to prevent moral harm. Everyone knows the foreign practice of satisfying multimillion-dollar claims related to compensation for damage by large furniture manufacturers and catering companies. This institution should

²⁰¹ Steve Hedley, 'Tort: The Long Good-Bye' (April 8, 2020) <<https://ssrn.com/abstract=3571950> or <http://dx.doi.org/10.2139/ssrn.3571950>> accessed 17 January 2022.

²⁰² Markus Kellner, 'Comparative Report' in Helmut Koziol, Reiner Schulze and Luisa Antoniolli (eds), *Tort law of the European Community* (Springer 2008) 580.

²⁰³ Ulrich Magnus and Klaus Bitterich, 'Tort and Regulatory Law in Germany' in Willem H Van Boom, Meinhard Lukas and Christa Kissling (eds), *Tort and Regulatory Law* (Springer 2007).

²⁰⁴ *ibid* 141.

²⁰⁵ Igor Nikolaev and Olga Tochilkina, *The Economy of Moral Damages* [Ekonomika Moral'nogo Vreda] (Analytical Report, Institute of Strategic Analysis FBK 2013).

motivate business not only to strive to improve the consumer qualities of its goods, work, services, but also to take care of their safety.²⁰⁶

According to this view, the possibility of shifting liability completely from wrongdoers to insurance companies could eliminate the deterrence function of pain and suffering damages. It has to be admitted that there are certain grounds behind these concerns. As Peter Cane and James Goudkamp note:

It is widely accepted that the prevalence of liability insurance, although essential for achieving tort law's compensatory goal, greatly reduces tort law's deterrent potential. A motorist who is not deterred from doing something foolish by fear for his or her own safety or that of passengers in the car, nor by fear of the criminal law, nor by fear of being disqualified from driving, is unlikely to be deterred by the fear of being sued in a tort action in which the damages will be paid by an insurance company.²⁰⁷

However, motorists can be deterred by the risk of higher insurance premiums. Thus, the impact of compulsory liability insurance on the deterrence potential of tort law depends on the structure of insurance premiums. As Frank Sloan, Bridget Reilly and Christoph Schenzler state:

Mandatory insurance with a flat premium structure should reduce drivers' incentive to be careful since there is little or no offset to the reduction in exposure to damages. But, with compulsory coverage and hefty premium surcharges, drivers who have little wealth and might otherwise not purchase automobile liability insurance are made to pay for being careless through higher premiums.²⁰⁸

Steven Shavell is of the same opinion when addressing the question of what is the incentive for potential tortfeasors to be careful if their liability is covered by insurance:

²⁰⁶ Interview with Irina Rukavishnikova (Senate member) in Nikita Aronov, 'Life at the Price of an iPhone: How the Russian System of Compensation for Material and Moral Harm Works [Zhizn' po cene 'ajfona' Kak ustroena rossijskaja sistema kompensacij material'nogo i moral'nogo vreda]' (2020) 7 Spark [Ogonjok] <<https://www.kommersant.ru/doc/4242286>> accessed 17 January 202.

²⁰⁷ Cane and Goudkamp (n 121) 412.

²⁰⁸ Frank A Sloan, Bridget A Reilly and Christoph M Schenzler, 'Tort Liability versus Other Approaches for Deterring Careless Driving' (1994) 14 International Review of Law and Economics 53, 55-56.

The answer depends on whether the insurers can easily determine risk-reducing behaviour – so that they can link the premium charged or the other terms or conditions of coverage to the party’s precautions. Where this linkage can be established, the party’s incentive to take care should be tolerably good.²⁰⁹

In this regard, it is worth noting that the premiums of compulsory motor vehicle liability insurance in Russia are set taking account the claiming record and driving experience of the insured.²¹⁰ This mechanism should be retained after the reforms. It is likely to reduce a potentially undermining effect of insurance on the deterrent function of pain and suffering damages.

The choice between the interests of victims and deterrence is always a policy decision, especially in the context of road traffic accidents. As Christopher Parsons notes:

[I]t is commonly observed that the need for liability insurance as a means of guaranteeing compensation to victims of tortious injuries should, as a matter of policy, take precedence over the need to deter wrongdoing through tort liability. This argument looks particularly strong where mass injuries are concerned, such as those that occur on the road; indeed, it has led to the almost universal adoption by governments of compulsory third-party motor insurance schemes.²¹¹

Further, the risk of moral hazard, even if we assume it exists, is normally greatly reduced by the controlling activity of insurance companies financially interested in addressing the problem of moral hazard. A further way to mitigate this problem is a standard bonus-malus system which adopts a flexible approach to the level of insurance premiums depending on the accidents record of the holder of the insurance policy. As Peter Cane notes:

²⁰⁹ Steven Shavel, ‘Liability for Harm versus Regulation of Safety’ (1984) 13 *The Journal of Legal Studies* 357, 361.

²¹⁰ Art 9 sec 2(b) and 2.1 of the Law of the Russian Federation ‘On Compulsory Motor Third Party Liability Insurance’ of 1 July 2003.

²¹¹ Parsons (n 175) 456.

In other words, it is widely accepted that if insurance premiums are properly risk-related, liability insurance will not dilute any deterrent effect of tort liability, or at least it will dilute that effect only to the extent inevitably attributable to the spreading achieved by insurance.²¹²

This is the typical practice of insurance companies across the world, and Russian insurance companies are no exception.

A final argument is that there are other, even harsher sanctions, for wrongdoing besides paying damages which are supposed to deter potential wrongdoers from causing harm.²¹³ In Russia, the criminal sanctions for causing personal injuries by negligence, especially if safety rules at the workplace or traffic laws were violated, are sufficiently harsh to prevent drivers or corporate management from moral hazard. For example, the penalty, according to the Russian Criminal Code, is up to seven years of imprisonment for causing personal injuries in a road traffic accident²¹⁴ and up to one year of imprisonment for safety violations at the workplace resulting in personal injuries.²¹⁵ In 2019, there were 5,396 and 48 persons convicted for these crimes respectively.²¹⁶ To sum up, the deterrent function of tort liability is likely to be preserved even in the event of the implementation of compulsory liability insurance for pain and suffering damages.

7.5 Conclusion

As the analysis in this chapter has demonstrated, the implementation of compulsory liability insurance is a viable option to improve the situation of accident victims in Russia by providing just compensation for their pain and suffering. First, the awards are likely to be higher. Judges will, or at least should over time, no longer be inclined to reduce pain and suffering damages in light of the defendant's financial situation. Rather the availability of liability insurance would, as is the case in the UK, Germany or Poland, improve the capability of the defendant to cover damages. Second, with the imposition of some additional measures promoting settlements and mediation, the claims procedure would gradually become less litigious. Third, the standardisation of damages

²¹² Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 220.

²¹³ Parsons (n 175).

²¹⁴ Art 264 of the Criminal Code of the Russian Federation of 13 June 1996.

²¹⁵ Art 143 of the Criminal Code of the Russian Federation of 13 June 1996.

²¹⁶ Judicial Department (n 109)

would make awards more predictable and fairer to victims. This could be implemented through legislation (as is the case in most continental jurisdictions) or judicial guidelines (as in England and Wales). This thesis argues for the continental model since it would better represent the views of the whole society on just compensation. This measure would require submitting of a relevant bill to the parliament. Otherwise, there is a risk that guidelines would perpetuate the current *ad hoc* judicial approach. In doing so, statutory tariffs must be higher than the average damages awarded by Russian courts. Fourth, and finally, the reform would eliminate or at least substantially reduce the problem with enforcement as insurance companies in Russia are normally solvent.

However, if the implementation of compulsory liability insurance is to successfully address these problems, then it must be accompanied by changes to Russian tort law culture. Changing judicial attitudes is the most complicated issue since the Russian judiciary is largely closed and resistant to change. The chapter proposed three ways to address this. First, by recruiting practising lawyers into the judicial profession who, as we have seen, have a much more generous view, and vitally one that more in line with societal expectations, on the level of damages. This would better reflect the expectations of society, as argued in the third chapter. The second way to effect cultural change would be to abandon the institution of state procurators in personal injury cases. This would facilitate a move away from the 'pro-state' approach of courts and substantially improve the situation of victims suing the state for pain and suffering damages. Thirdly, permitting contingency and conditional fees would encourage more legal practitioners to take on personal injury cases. This would ensure access to justice for victims while at the same time reduce the bargaining power of insurance companies who have consistently utilised their stronger position during settlement negotiations and left victims under-compensated.

Finally, the chapter considered three potential social costs of the reform: the creation of a 'compensation culture', insurance fraud, and moral hazard. There are some grounds for these concerns. It argues, nevertheless, that these should not be overvalued. Not least because there is no reason, for their escalation in contemporary Russia. The claim rate in personal injury cases is currently much lower there than in European countries. One can expect some increase in the number of personal injury claims after the reforms, but this increase is unlikely to be dramatic. A large proportion of people prefer to 'lump it', rather than initiate litigation. Moreover, a certain increase is acceptable as it indicates a growth of the victims' right-awareness. Insurance fraud is a more serious risk. It can be mitigated by the development of forensic assessment techniques and

court penalties for fraudulent and exaggerated claims. And finally, the risk of moral hazard is likely to be minimised by the existing criminal sanctions and flexible insurance premiums. For these reasons, the proposed reform is likely to significantly improve the situation of accident victims in Russia without major social costs.

CHAPTER EIGHT. CONCLUSION

8.1 Key Findings of the Research

This thesis has examined the current system of tort compensation for pain and suffering caused to accident victims. The thesis research has identified four key problems with the award of pain and suffering damages: the low level and inconsistency of awards, complex claiming procedure, and poor enforcement of judgments. It was demonstrated that compensation for pain and suffering awarded by Russian courts is typically much lower than pain and suffering damages awarded in Europe. Moreover, the views of accident victims, practising lawyers, and the general public on the fair and reasonable quantum of damages deviate substantially from the actual awards. Further, inconsistency in the levels of awards is heightened by a lack of general standards that the judiciary could use in the decision-making on the quantum of pain and suffering damages.

This thesis argued that the legacy of Soviet understandings of pain and suffering damages and liability insurance is a key explanation for these problems. There existed very specific cultural views on these two legal institutions in the Soviet Union. The idea that pain and suffering can be remedied by monetary compensation was considered bourgeois and alien to the Soviet tort law culture. Furthermore, the possibility to shift civil liability for a tortious act from the individual defendant to the insurance company was not recognised in the Soviet tort law culture. However, this approach has been rejected across Eastern European jurisdictions despite the Socialist nature of their legal system.

The research has demonstrated that the remnants of the Soviet approach are still evident in personal injury cases in contemporary Russia. This is manifested in three ways: 1. The judiciary tends to award extremely low amounts of pain and suffering damages. 2. Pain and suffering damages are often reduced further in response to the poor financial situation of the defendant. 3. Pain and suffering damages are excluded from compulsory insurance schemes most notably by the relevant statutes from the coverage under compulsory insurance schemes against road traffic accidents and work accidents in Russia.

The research has found that the only area where liability insurance for pain and suffering damages is widely and systematically used is in railroad accident cases. The state railroad company has purchased voluntary insurance against such liability for more than a decade. And yet, the empirical study of this category of cases has indicated serious problems with the functioning of voluntary liability insurance in this area as well. The level of pain and suffering damages remains low despite the availability of insurance. The awards for similar injuries vary significantly across different regions. The defendant and insurance companies are reluctant to settle cases out of court.

This thesis, as a result, has argued that voluntary liability insurance will not improve the situation for accident victims in Russia even if it were to become widely available. Instead, compulsory liability insurance is necessary and would be more effective in resolving the four problems with pain and suffering damages. The experience of European countries in this area was explored as a potential model for the reforms in Russia. The analysis of how compulsory liability insurance operates in Europe demonstrated that it can be helpful in addressing the problems with pain and suffering damages. This legal transplant likewise can improve the situation with these damages in Russia. Drawing on these findings, this thesis offers policy recommendations of how to tackle the problems with compensation for pain and suffering damages in Russia. These measures will bring justice to accident victims, meaning fair, consistent, enforceable pain and suffering damages through an effective and convenient system. They will also bring justice to defendants, at least in the sense that they would not have to meet these damages out of their own pocket.

8.2 Key Policy Recommendations

This thesis has suggested the implementation of compulsory liability insurance for pain and suffering damages in Russia. It has been argued that compensation for pain and suffering damages is likely to be higher after introducing this measure and that the claims procedure would become less complex and litigious for victims. The reform should include standardisation of pain and suffering damages since insurance companies need standards for settling cases. This would bring more consistency into this area of civil litigation and ensure greater justice for accident victims. This thesis argues that this measure will almost completely remedy the problem with enforcement of judgments because insurance companies in most cases are capable to pay the awarded damages.

This thesis has further argued drawing on the literature on legal transplants that the implementation of compulsory liability insurance alone is not sufficient. It is crucial for successful adaptation of the new insurance mechanism to consider the entire cultural context. Additional measures are needed in order to overcome the potential cultural obstacles to the reform. These measures are aimed at changing judicial attitudes, excluding state procurators from participating in personal injury cases as third parties, and recognising conditional and contingent fees. It has been concluded that all these policy steps are likely to substantially improve the current situation of accident victims in Russia.

Finally, this thesis has discussed potential concerns about the social costs of the reform. The most common concerns of this kind entail the development of compensation culture, insurance fraud, and moral hazard. However, it was concluded after careful consideration that there are no sufficient grounds for the first problem to expand greatly in contemporary Russia. As for the remaining two issues, this thesis suggested possible ways of addressing them. Overall, it can be safely assumed that the suggested reform would result in more benefits than costs for the accident victims.

8.3 Theoretical Contributions of the Research

This thesis contributes to the current academic debates concerning the relationship between liability insurance and pain and suffering damages in the post-socialist Russian tort culture. This thesis made its primary contributions to three areas of literature.

First, the research has added to the Russian literature on liability insurance and pain and suffering damages. The previous studies being mostly doctrinal were preoccupied with searching for better techniques for the calculation of pain and suffering damages. The potential of liability insurance in resolving the issues with pain and suffering damages was out of the scope of these studies. Thus, this research was the first attempt to systematically examine the potential of compulsory liability insurance in improving the current compensation system for pain and suffering in Russia. It was found that the implementation of this measure would significantly enhance the situation of accidents victims by providing adequate compensation for their pain and suffering. This

theoretical statement draws on the thorough analysis of the European practices in this area as well as an empirical study of Russian court cases.

Second, the research contributes to the Western literature on liability insurance and pain and suffering damages. It is true that the growing impact of liability insurance on tort systems is a well-explored research area in the Western scholarship. The same can be said about the topic of pain and suffering damages. However, scholars tend to consider these issues separately. In contrast, this thesis combines both bodies of literature to go further and concentrate specifically on the relationship between liability insurance and pain and suffering damages. This thesis argues for a shift towards a more positive view of liability insurance (especially its compulsory form) in the scholarly literature on tort law. There is a position in the Western academia that shares a critical view on the increasing significance of liability insurance. It is suggested that liability insurance makes a fault-based tort system meaningless as actual defendants almost never pay. This leads to a situation when only those who were injured by an insured defendant are compensated ('damages lottery', as Patrick Atiyah puts it).¹ This research demonstrated that compulsory liability insurance is needed to provide justice for accident victims. The analysis of the deeply problematic situation in Russian strongly supports this conclusion.

Finally, the research contributes to the socio-legal literature on Russian tort law specifically and post-socialist tort law in general. Two key debates in the literature on Socialist and post-Socialist tort law culture emerge. The first relates to the question of whether there was a single socialist tort law culture. This thesis demonstrated that it is hard to talk about a common tort law culture in the Eastern bloc if we look at pain and suffering damages and liability insurance. The Soviet approach to these issues differed significantly from other socialist countries. The initial attempts to introduce this approach also in satellite countries quickly failed due to the pre-existing tort law culture in these countries. Thus, it would be more correct to speak about multiple versions of socialist tort law cultures. The role of ideology could be strong in some of these cultures, whereas in others it could be relatively weak. The second debate refers to the issue of whether the attributes of the Socialist tort law cultures still exist despite the shift to the market economy in the former socialist countries. This thesis has argued that it is too early to bury socialist tort law cultures, at least in Russia. The most basic features of the Soviet approach to tort law still prevail.

¹ Patrick Atiyah, *The Damages Lottery* (Bloomsbury Publishing 1997).

There are very few socio-legal studies that focus on the institutional elements of the Russian tort system after the collapse of the Soviet Union. The existing scholarship tends to adopt an 'external' approach concentrating on the attitudes and behaviour of ordinary people related to tort law. This thesis has partially filled this gap by looking empirically at how legal professionals and others 'internal' to the legal system act in personal injury cases.

8.4 Limitations of the Research

The findings and conclusions of the thesis research are supported by empirical data. At the same time, the research has three limitations: a relatively small sample of interviewees, the limited scope of the analysis of compulsory liability insurance in Europe and a limited set of sources on the Soviet tort law culture.

The first limitation relates to the empirical part of the research. The number of interviews collected during the study cannot be considered representative of the entire Russian legal profession. Therefore, it was used in the research rather as a supplementary empirical material than the key source of data. The main goal was to approach different segments of the Russian legal profession involved in the situation with pain and suffering damages as they are likely to have divergent views on this situation. It can be cautiously assumed that this goal has been achieved and different views were analysed despite the limited number of interviews. There were interviewed experts from among personal injury lawyers, insurance lawyers, and state procurators. These are the key actors involved in personal injury litigation.

The second limitation relates to the scope of the analysis of the European jurisdictions. The analysis was limited by the experience of European countries, including the former socialist countries. This focus was made because of the features of Russian civil law which are largely based on the European legal institutions. This choice can be also explained by the availability of literature devoted to tort issues in Europe. At the same time, little or practically no attention was paid to the experience of Latin America where there are similar problems with pain and suffering damages. More importantly, the experience of China where large scale project of tort law reform has just started was not covered in this thesis. In particular, the institution analogous to pain and suffering damages was introduced there. As China adapts its tort system to market changes and the

recently introduced system of pain and suffering damages beds down, it will be a valuable source for comparisons with Russia.

The third limitation concerns the study of the Soviet tort law culture. The sources used in this research for analysing Soviet cultural attitudes included mostly academic literature and doctoral dissertations prepared by legal scholars. The research did not analyse Soviet court cases which could demonstrate how these attitudes manifested themselves in practice. The reason is that very few court cases have been preserved from the Soviet times (especially civil cases). Furthermore, the archives where the remaining cases are stored are not easy to access. However, this limitation does not strongly affect the results of the analysis. It is unlikely that court cases would contain valuable data related to pain and suffering damages and liability insurance. As was discussed in this thesis, these damages and this type of insurance were not available during the Soviet times. It is, therefore, hard to imagine a context where this issue would be regularly mentioned in the courtroom or judicial documents in the Soviet Union.

8.5 Directions of Further Studies

Some subjects related to the research questions, which were encountered during the course of this research, were not deeply explored. They are intended to constitute a research agenda for further socio-legal studies. At least three potentially fruitful and promising topics are identified for exploration in greater detail in future research including whiplash injury claims, specialisation of lawyers in personal injuries, and the role of state procurators in personal injury cases.

The first topic is the study of the social construction of whiplash injuries in Russia in comparison with European countries. Preliminary findings show that there are very few cases where the Russian drivers who suffered this injury claim damages. This observation is in stark contrast with the situation in the UK where the large number of whiplash claims is recognised as a social problem.² The theoretical approach to claiming behaviour suggested by William Felstiner, Richard

² Kenneth Oliphant, "'The Whiplash Capital of the World': Genealogy of a Compensation Myth' in Eoin Quill and Raymond J Friel (eds), *Damages and Compensation Culture: Comparative Perspectives* (Hart Publishing 2016).

Abel and Austin Sarat ('naming – blaming – claiming')³ could be particularly helpful in this context. This approach grounded in the understanding that the likelihood of a dispute becoming a legal claim depends on the social context in which it occurs. Assuming that the chances to suffer whiplash injury in Russia and abroad are more or less equal, it is clear that the minuscule number of claims is not due to lack of relevant injuries. Rather there are other factors working against effective claims. More research is needed to identify these and which may, in turn, reveal the socio-legal factors that make claiming for whiplash injuries popular, for example, in the UK or Ireland and unpopular in Russia.

The second topic relates to the studies of personal injury lawyers. As discussed in this thesis, personal injury litigation was never a market niche or established specialisation in Russia. This situation differs substantially from the Western European countries where this area of practice is a clearly defined and popular area of practice. In contrast, there was a specialisation among Russian lawyers relating to compensation claims for motor vehicle damage. However, as the legal and institutional environment was changed and insurance recoveries became more straightforward, the specialism started to die out. Today in most cases, insurance companies organise car repairs rather than pay monetary compensation for car damage. This makes cases involving car damage less profitable and therefore less attractive for lawyers. As a result, these lawyers have started to move into personal injury cases. This is an on-going process study of which would contribute to literature on the legal profession and the ability of lawyers to adapt to institutional changes and develop new professional identities.

The final potential topic for further exploration is the institution of state procurators in European countries. This is one of the salient vestiges of the Socialist period in the national life of these countries. To date, studies focused on their activity in criminal cases as prosecutors and general supervision over legality.⁴ There is a distinct lack of studies exploring the role of state procurators in civil cases, especially in personal injury cases. Research, particularly from a comparative

³ William LF Felstiner, Richard L Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980) 15 *Law and Society Review* 631.

⁴ For example, see Peter H Solomon Jr and Todd S Foglesong, 'The Procuracy and the Courts in Russia: A New Relationship' (2000) 9 *Eastern European Constitutional Review* 105; Krzysztof Krajewski, 'Prosecution and Prosecutors in Poland: in Quest of Independence' (2012) 41 *Crime and Justice* 75; Ekaterina Trendafilova-Batchvarova, 'The New Legal Status of the Bulgarian Prosecutor's Office' (1997) 4 *Annual Survey of International and Comparative Law* 132.

perspective, is needed to fill this gap. In this regards, it could be fruitful to compare the involvement of procurators in civil cases in post-socialist countries with the activity of solicitors general in such cases in common law jurisdictions.

These three areas have a great potential for further socio-legal studies. In the meantime, this thesis has identified key problems with pain and suffering damages and suggested ways forward to better ensure and to enhance the quality of justice for accident victims in Russia.

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APPENDIX 1

List of Interviewed Experts

1. Barrister (currently non-practicing), 40-50 years old, specialisation – personal injuries (mostly for defendants), location of practice – Liverpool.
2. Barrister (QC), male, 40-50 years old, specialisation – personal injuries (for claimants and defendants), location of practice – London.
3. Solicitor, female, 20-30 years old, specialisation – personal injuries (for defendants, mostly clinical negligence), location of practice – London.
4. Solicitor, male, 20-30 years old, specialisation – personal injuries (for claimants), location of practice – London.
5. Lawyer, male, 30-40 years old, specialisation – insurance law (mostly road traffic accident claims), location of practice – St Petersburg.
6. Advocate, female, 40-50 years old, specialisation – personal injury law (for claimants), location of practice – Nizhniy Novgorod and Moscow.
7. Advocate, female, 30-40 years old, specialisation – personal injury law (for claimants), location of practice – Nizhniy Novgorod and Moscow.
8. Lawyer, male, 30-40 years old, specialisation – tort law (for claimants, mostly road traffic accidents), location of practice – Ekaterinburg.
9. Lawyer, female, 20-30 years old, specialisation – tort law (for claimants, mostly road traffic accidents), location of practice – Ekaterinburg.
10. Advocate, male, 30-40 years old, specialisation – mixed (criminal and civil cases), location of practice – Vladimir.

11. Procurator, 50-60 years old, specialisation – civil cases, location of practice – a small city in Leningrad region.

APPENDIX 2

Indicative Interview Guide (UK)

Greetings, explanation of the research purposes, guarantees of anonymity, informed consent

Introduction

- Tell a little bit about yourself. How did you become a PI barrister/solicitor? What were the reasons for choosing this specialism?
- What was your career path? Where did you work before joining this chamber/firm?
- Please describe briefly your typical working day.

Clients

- What type of clients do you predominately represent?
- What are the main differences between pro-claimant and pro-defendant practice?
- How do you determine your fees? Do you take cases on the conditional fees basis? How often?
- Are there any cases which you prefer not to take? Why?
- Is the issue of the defendant's payment capacity crucial? What would you recommend your client if the defendant is non-insured?
- Do you remember cases where the claimant's main impetus was not to get money but something else like justice, revenge, or punishment? Please describe.
- How do you deal with the client's emotions? Do you keep neutrality or prefer a more empathic approach?

Settlements

- At what stages and how does the settlement process usually occur?
- How is the quantum of PLSA damages determined? What are your tactics during the bargaining? What are the insurance adjusters' tactics?
- In what cases insurance companies prefer to take a dispute to the court?

Litigation

- How does your work differ depending on the type of procedure and the level of court (small claim, fast-track, multi-track)?
- Do you think the judge's personality matter for the case outcome? What factors (gender, professional background, experience, etc.) are crucial?
- How do you prepare your clients for cross-interrogation? Do their narrative about pain and suffering matter for the final quantum of PLSA damages?
- Are fraudulent PI claims widespread in English courts? How does the fraud could be revealed? Did you come across fraudulent claims in your practice?
- How do you think judges determine the concrete quantum of PLSA damages (within JCG limits)?
- Do judges awarding PLSA damages take into account the financial state of the defendant? Are the defendant's fault and claimant's contributory negligence relevant to quantum of PLSA damages?

Compensation Culture

- Do you think 'compensation culture' exists in this country? Please explain.
- According to your experience, what are the main problems with the PI law system in this country?
- How can these problems be fixed, in your opinion?

- Do you support the reform of PI law proposing by the government? Please explain your reasons.

APPENDIX 3

Indicative Interview Guide (Russia)

Greetings, explanation of the research purposes, guarantees of anonymity, informed consent

Introduction

- Tell a little bit about yourself. How did you start working in this area? What were the reasons for choosing this specialism?
- What was your career path? Where did you work before?
- Please describe briefly your typical working day.

Cases on Pain and Suffering Damages

Did you have cases involving claims for pain and suffering damages?

What are typical outcomes of these cases? Who are claimants and defendants? Average awards in your region?

Can you describe in detail the most noticeable case of that kind?

Settlements

- Do parties reach settlements in cases on pain and suffering damages?
- If yes, how does the settlement process occur?
- What is the parties' motivation to settle cases?

Deep Pocket Reasoning and Liability Insurance

- Does financial situation of defendants matter in these cases?
- Do defendants argue for a reduction of pain and suffering damages based on this argument?
- Do courts take this issue into account?
- Did you have any cases where defendants would have voluntary liability insurance against pain and suffering damages?

Procurators

- What is the role of procurators in personal injury cases?
- What is their usual position towards pain and suffering damages?

Lawyers, Specialisation, and Fees

- Do parties are represented by professional lawyers in cases on pain and suffering damages?
- Is there a specialisation in personal injuries in your region?
- Do lawyers work for fixed fees or conditional/contingent fees in these cases?

Expert Opinion (Problems and Reforms)

- What are the main problems with pain and suffering damages currently in Russia?
- How do you think these problems could be resolved?