

Legal Consequences of the Delayed Occurrence of Posttraumatic Stress Disorder

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Abstract

The posttraumatic stress disorder (PTSD) leads to the disruption of family, social and professional functioning of the person. In legal theory and practice the issue of PTSD is defined as mental pain, i.e. a phenomenon that occurs in the inner psychic live of an individual. We have clarified the possibility of instituting proceedings, i.e. filing claims for compensation of non-material damages to all persons who have sustained mental pain, fear or physical pain, in the legal system of the State Union of Serbia and Montenegro, if the PTSD has occurred within the statutes of limitation for filing such claims. The experience in therapeutic and forensic work shows that PTSD can occur subsequently, many years after the exposure of the injured party to the traumatic event. Given the existing jurisprudence, IAN Belgrade has addressed an initiative to the Serbian Supreme Court to take legal position by which the statute of limitation would be extended to allow the calculation of time from the moment of diagnosing the disorder, irrespective of whether it has occurred within the statute of limitation prescribed by law. It is necessary to change the obsolete views with regard to calculating statute of limitations for PTSD patients, as well as to train judges in the field of PTSD and related mental disorders.

INTRODUCTION

The posttraumatic stress disorder (PTSD) is a psychiatric disorder that occurs as the result of a powerful and dramatic stressful event leaving psychic consequences on the affected person.

The most frequent and prominent symptoms of PTSD are the intensive fear, sudden decrease of positive mood and vital dynamism, loss of confidence in other people, occurrence of intrusive memories of the traumatic experience (flash-backs), insomnia or persistent nightmares, anhedonia (inability to experience pleasure). This symptomatology usually develops soon after exposure to the stressful event, which can be various catastrophic experiences (loss of a close person, loss of property, exposure to war conditions, detention, torture, traffic accident or the like), without prior existence of these symptoms.

The intensity and duration of the disorder depend on the intensity of the stressor, duration of exposure to stressor as well as from previous rehabilitative capacities of the person.

The nature of PTSD is such that it leads to a significant reduction of the quality of life, to the inability of the affected person to adequately rest, relax, enjoy meeting other people; this is frequently accompanied by the loss of sexual desire, which results in social isolation and deepening of the damage to personality, followed by development of new and even more profound symptomatology. This way permanent and irreversible changes in personality occur as a consequence of the exposure to stressor. This in turn has a damaging effect on how the affected person functions in the family, society and professionally.

Besides the impact of the stressor and its intensity, the length of time during which the victims was exposed to the stressor is also highly important for the development of the clinical picture of PTSD. The longer the stressor lasts, without the possibility of the victim to resist it (e.g. torture in captivity), the more severe and deeper the consequences would be, thereby reducing the possibility of overcoming the stressful event.

In legal theory and practice this concept is regarded as a psychic or emotional pain and defined as an event occurring in the inner psychic life of the individual, the primary source of knowledge about this event being the behaviour of the affected person and his/her verbalisation of it.

Each person experiences emotional and mental pain in a different way. The injured party is a victim who has been brought against his/her will into a state of experiencing pain, which disturbs his/her psychophysical balance.

RIGHT TO INDEMNITY

CODE OF OBLIGATIONS

Art. 200 para.1

For sustained physical pain, for sustained emotional pain due to diminished life capacity, disfiguration, injury to reputation, honour, freedom or rights of person, death of a close member of family, as well as for fear experienced, the court shall, if found that the circumstances of the case, especially the intensity of pain and fear and their duration provide full justification, award just financial compensation, independently of the compensation for material damages sustained as well as in the absence of material damages sustained.

Art. 376

Para. 1. Claiming compensation for damages sustained has a statute of limitation of three years from the time when the injured party learned about the damages and the person who had inflicted the said damage.

Para. 2. In every case this claim for compensation has a statute of limitation of five years from the time when the damage was inflicted.

The Code of Obligations envisages the possibility of initiating proceedings, in other words, filing claims for compensation for non-material damages, by all individuals who have sustained emotional pain, fear or physical pain. Claims are filed against natural or legal persons or bodies that have by their action caused one or more the aspects of the sustained non-material damages. The aim of the legislator was to allow those persons who have sustained a form of these damages (injured parties) to somewhat reduce or ease the suffering they have been or are still exposed to by way of financial compensation awarded.

The Code also envisages statutes of limitation within which the injured parties have the right to exercise this right. Claims for compensation of non-material damages have to be filed within 3 years from the time that the injured party learned about the damages sustained and the person who has inflicted them (subjective statute of limitation), and in any case this right expires within 5 years from the time when the damage was sustained (objective statute of limitation).

Statute of limitation for filing claims for non-material damages begins on the third day from the time when some aspects of the non-material damage have acquired the form of a final permanent condition. The final permanent condition is determined by way of the end of a treatment, or the completion of such medical interventions and operations that can be identified as the factual end of a meaningful medical treatment.

In case of persons with PTSD, the knowledge of the injured party that he/she suffers damages in terms of emotional or mental pain becomes legally relevant at the time of diagnosing the PTSD by a neuropsychiatrist.

If PTSD should occur and is clearly manifested and if its presence is then confirmed by a medical diagnosis and findings within legal deadlines, there are no obstacles for the injured party to exercise his/her right to compensation for non-material damages.

The procedure for exercising the right to indemnity will be illustrated by cases of claims that IAN lawyers have filed and are currently conducting before the First Municipal Court in Belgrade.

THE CASE OF "THE FORCIBLY MOBILISED REFUGEES"¹⁸

These cases concern refugees and expelled persons from the parts of Former Yugoslavia, who fled in fear for their lives during the war waged in the region between 1991 and 1995, seeking refuge for themselves and their families in Serbia.

Once outside their country of citizenship, these people were given refugee status in the Republic of Serbia, in accordance with the UN Refugee Convention from 1951,¹⁹ the Protocol to this Convention from 1967, as well as on the basis of the valid Republic of Serbia Law on Refugees.

The Article 33 of the Convention clearly stipulates that "no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Between June and September 1995, this constituted no obstacle for the official bodies of the Republic of Serbia, more specifically the Ministry of the Interior of Serbia (MUP RS), to deprive of liberty over 10.000 refugees and expelled persons²⁰ and transport them across the state border to the territories of Republic of Croatia and Bosnia-Herzegovina, thus sending them back to the territory from which they had fled.

After coming to FRY refugees and expelled persons were accommodated mostly in collective centres throughout Serbia. Members of the Serbian Ministry of Interior (policemen) have unlawfully deprived them of liberty, without court order or a founded suspicion that they have committed a criminal offence. When coming to the refugee collective centres, the policemen requested all able bodied men of military age to come with them under the pretext that they need to conduct an information interview or check

¹⁸ The information presented was obtained from the injured parties, as well as from their witnesses

¹⁹ This Convention was ratified by the Federal National Republic of Yugoslavia on 1 July 1960 and thereby became a state party, bound by the Convention.

²⁰ Unofficial data

personal data, at the same time threatening the refugees with the use of force should they refuse to comply. Subsequently they took the refugees to local police stations and after several hours of detention escorted them across the state border under armed threat and abusive treatment. Some of the refugees were sent to the town of Erdut in Eastern Slavonia, where the Serb Voluntary Guard camp (hereinafter "the Camp") was located, under the command of Željko Ražnatovic Arkan, whereas other refugees were sent via Bijeljina and Janja to the location of Manjaca in Republika Srpska, Bosnia, to another camp held by the Serb Voluntary Guard.

In the Camp they were exposed to ill treatment and humiliation. Methods of "punishment" they were subjected to for the alleged "offences" they did not commit, were aimed at deeply hurting their human dignity. They were forced to run in circles, carrying a 20 kg rock called "Mr. Discipline", which they had to bow to before they take it up and repeat the same after putting it down. They were locked up and tied to doghouses, as well as forced to bark like dogs. Stripped to the waste they were tied to flag poles and held there for several consecutive days. This violence was used as a method of coercion against refugees and expelled persons with the aim of instilling fear in them and breaking their personalities.

Detention in the Camp lasted for several days, after which the refugees were sent to the military units in Republic of Serb Krajina or the Republic of Srpska Army. They were deployed at the frontlines where they were constantly exposed to all risks of war, whereas a large number of them were killed. Most of them have remained in these units until the signing of the Dayton Agreement in December 1995. Some of them have been captured during war actions and held captive in prisons in Sarajevo, Mostar, Bihac and other towns until the final exchange of all prisoners of war, which in some cases happened as late as June 1996.

From the moment they had been deprived of liberty by the Serbian police (MUP), until their return to Serbia, these people suffered extreme pain, primarily emotional and mental one, due to the violation of their personal freedom and rights of person (unlawful arrest), while many of them also suffered physical pain and fear caused by the torture they were subjected to. All these events have had a strong negative impact on their health.

By such action of the Serbian Ministry of Interior units, basic human rights and freedoms of these refugees and expelled persons were violated, they sustained grave emotional pain, which is a direct consequence of the unlawful deprivation of liberty, use of force and brutal ill treatment as well as the forceful participation in war activities.

Republic of Serbia not only failed to ensure the necessary protection of refugees and expelled persons within its territory in keeping with the UN Convention and the Law on refugees, but did in fact through its own official bodies expose them to the exact same dangers they had fled, ultimately obtaining the status of refugees. Such action by the state is also in violation of the Article 23 of the FRY Constitution, Article 25 of the Serbian Constitution and Article 1 of the Law on Internal Affairs of the Republic of Serbia.

In the proceedings for compensation for damages the court has established beyond doubt the responsibility of Republic of Serbia for the damages inflicted, which are manifested through the fear for life and personal integrity experienced by the injured parties, as well as their emotional suffering resulting from the injury to reputation, freedom and right of person, and is therefore obliged to provide indemnity to the plaintiffs (refugees and expelled persons who have filed the claims) in the form of financial compensation²¹ for sustained emotional pain and for violation of freedom and rights of person, as well as fear and physical pain inflicted.

Baring in mind the time aspect of the occurrence of PTSD, as well as legal rules and regulations of the proceedings and manner of identifying the existence of this form of non-material damages, as has been shown in the above mentioned case, this matter is fairly straightforward and the injured party can use civil proceedings without restriction and with no significant material or procedural legal difficulties succeed in the process and exercise the right to indemnity for this type of damages.

RIGHT TO INDEMNITY IN THE CASE OF BELATED OCCURRENCE OF PTSD

The experience in therapeutic and forensic work with victims of PTSD reveals that in many of those afflicted the disorder appears at first unrecognised by the victim himself, who does not realise the fact that numerous long-term psychic consequences could develop. This means that the victim is unable to understand his/her difficulties and ailments as a psychic problem, but rather resigns with them as an inevitable consequence of war, displacement and loss. This is usually the result of a low level of education and low capabilities of recognising one's own psychic states. This leads to the development of multiple deep psychic problems and a comprehensive damage to psychosocial, family and professional functioning.

In case of PTSD victims it frequently happens that new stressful events resembling the original stressor (for instance, the experience of NATO air strikes in 1999 or information about war activities in other places affecting refugees who have been through war suffering or captivity) lead to reactivating the symptomatology with renewed intensity as well as to deepening damage to personality and further diminishing the possibility of rehabilitation. Baring in mind the inclination to develop a chronic disorder with permanent personality changes and a recurrent flow of illness, the stand on statute of limitation becomes obsolete and inadequate for the needs of injured parties.

Given the possibility of the belated occurrence of PTSD, many years after the confrontation of the injured party with the traumatic event, we are facing a very delicate question. What are the legal possibilities and options for exercising the right to compensation for non-material damages for psychic and physical pain and fear if this

²¹ Depending on concrete cases, the amounts awarded range from 150000 to 250000 dinars (2300 to 3800 EUR) – jurisprudence

disorder should occur, or its existence is determined by medical examination after the expiration of the statute of limitation? In current jurisprudence the belated occurrence of PTSD, as grounds for claiming compensation for non-material damages, is taken into account only in case if its clinical picture should occur within the deadlines stipulated by the Code of Obligations and if the psychiatric treatment of the disorder is under way or has been recently completed.

As we have already pointed out, the claim for compensation of non-material damages has a statute of limitation of 3 and 5 years. By interpreting the relevant authentic legal provision, none of the persons who have been diagnosed with PTSD after the expiration of these statutes of limitation would have the right to indemnity. In the current jurisprudence, when in these cases the appelee invokes the statute of limitation despite the insistence of the plaintiff to perform psychiatric evaluation in order to determine whether the disorder occurred belatedly, so that the treatment could not have been initiated in the legally stipulated period, the courts usually dismiss the claims as statute-barred. Such conduct of the court probably arises from the fact that the court itself does not have any knowledge in the field of psychiatry, that the jurisprudence is old and in some instances obsolete and that proving the existence of PTSD before the court is a relatively new practice. Namely, most of these cases have occurred in our country after the war 1991-1995 and the NATO air strikes in 1999.

Such practice of the courts discontinues the right of persons affected with PTSD, in our case the forcibly mobilised refugees, who have not filed their claims within the 5 year legal period, to request compensation for damages through a judicial procedure. This was the key reason why IAN has forwarded the initiative to the Supreme Court of Serbia to take an official legal position that would prolong the statute of limitation, or such position that would allow the possibility to count the beginning of this period from the moment when the disorder was diagnosed, regardless of whether it had occurred within the legally stipulated deadline.

By changing the legal position in this respect, all refugees who so far have not filed their claims would be allowed to acquire at least partial satisfaction and remuneration for all they have been through. Material compensation also has a therapeutic significance for this population, as a social recognition and understanding of the suffering they experienced and sacrifice they have made, reduces the feeling of social isolation frequent in victims of torture, and represents a further step in rehabilitation of the victim.

RECOMMENDATION

The Supreme Court of Serbia should as soon as possible take a legal position and change the obsolete legal views with regard to the beginning of the statute of limitation in case of PTSD victims. Given that the court does not have expert knowledge about this disorder, seminars should be organised to educate and train judges in the field of PTSD and other mental disorders and thereby facilitate the taking of new legal positions with regard to

persons who request compensation for damages and are in fact afflicted with a mental disorder.