CYNTHIA M. SEMMLER*

The Foreign Party to an Auto Accident in the USSR: Calculation of Damages†

I. Introduction

Nowhere in Soviet private international law does the issue of damages arise with such regularity as in actions brought by nationals of capitalist states for personal and property damage caused by automobile accidents occurring in the USSR. While domestic statistics vary concerning the number of motor vehicles presently on the road in the USSR,[1] the number of auto accidents in large population centers is significant enough to cause official concern and massive campaigns for traffic safety. One of the many anomalies of Soviet society is the coexistence of a strong official and popular antipedestrian stance,[2] which permits drivers to bring actions against pedestrians for personal injury and property damage, and a strict liability standard for car owners based on a Cardozoesque view of the automobile as a "thing of danger" (*istočnik povyšennoj opasnosti*).[3] Foreigners who are accustomed to a right of

*Member, New York Bar, J.D. 1976, Columbia University School of Law. All translations herein are by the author.

†The research for this article was conducted in Moscow and Leningrad in 1976-77 under a grant by the International Research and Exchanges Board and the Soviet Ministry of High and Specialized Education.

[1]Two million one hundred thousand to two million two hundred thousand private and state-owned vehicles expected by 1980, PRAVA; OTVETSTVENNOST' PEŠEKHODOV (PEDESTRIANS' RIGHTS AND DUTIES), Juridičeskaja Literatura (Legal Literature Press) (Moscow 1976) (hereinafter PRAVA) at 4.

[2]It has been stated that in 50 to 90 percent of all motor accidents involving pedestrians, the pedestrian is at fault, and that 90 percent of all such accidents in Moscow are caused by the fault of pedestrians. *Id. see* RULES OF TRAFFIC FOR ROADS AND HIGHWAYS OF USSR (federal law), *infra*.

[3]Literally, "source of increased danger." Para 1, art. 90, Osnovy graždanskogo zakonodatel'stva Sojuze SSR i sojuznykh respublic (OGZ); para. 1, art. 454, Grazdanskii kodeks RSFSR (RSFSR CIVIL CODE):

> Organizations and persons whose activity involves increased danger to the surroundings (*i.e.*, transportation organizations, industrial enterprises, construction sites, automobile owners, etc.) shall be required to compensate the damage caused by the source of increased danger, unless it is proven that such damage occurred as a consequence of *force majeure* or the aggrieved party's intent.

way that is not merely *de jure*, cling to the curb rather than sprint across an intersection after their first experience of outrunning a barrelling Soviet vehicle.[4] Soviet motorists' almost universal disregard for other drivers or for pedestrian safety might be traced to the sense of power of possession achieved after three or four years of suffering in the waiting line for the limited number of cars produced each year.[5]

With the die already cast against them by application of strict penalties[6] for jaywalking and a firm doctrine of comparative negligence in Soviet tort law,[7] foreign drivers and pedestrians additionally are often bewildered by the cryptic hand signals of Soviet traffic police, which are far more obtuse[8] than a simple system of stoplights and stop signs (the latter always being octagonal and often bearing the word STOP in English in white on a red background).

Reckless driving in the largest cities of the Soviet Union and on the highways has been responsible for an increasing number of accident suits by foreign passengers and pedestrians over the past twenty years. Such actions in turn have raised the issue of remedies and calculation of damages that have already

---

The OGZ, or Fundamentals of Civil Legislation of the USSR and Union Republics, is federal (*i.e.*, all-Union) legislation of the USSR as a whole, reproduced with minor changes in the Civil Codes of the fifteen Union Republics. The Civil Code of the RSFSR will be referred to herein where reference may be made generally to analogous articles in the Civil Codes of the various republics.

[4]A generalization may be safely made that the rare offer by a Soviet driver to let a pedestrian cross against the light invariably will turn out to be a joke. The enthusiasm with which Soviet ambulances almost uniformly drag-race with pedestrians is particularly alarming, although at least in this case the emergency medical equipment is on hand immediately.

[5]The extraordinarily high alcoholism rate in the Soviet Union has been blamed for about one-third of all auto accidents (PRAVA 8), but most drivers appear to have enough respect (or fear) for the criminal penalties for driving after imbibing, which are enforced by frequent random spot-checks on the road, to sit martyrlike at restaurant tables sipping soda pop as their companions down stronger stuff.

[6]While a first jaywalking offense generally elicits only a printed warning handed out by a police officer or civilian auxiliary police officer (*druženník*), in Kiev the situation is more serious: jaywalking residents are obliged to spend two hours after work for a week or so standing at the curbside in red construction vests to catch other offenders. Not only is the embarrassment and inconvenience enough to discourage further offenses, but the revenge engendered by the amusement displayed by passersby is responsible for a true vigilante approach to pedestrian negligence by these involuntary *druženniki*.

[7]Art. 90 OGZ; art. 456, RSFSR CIVIL CODE:

> If gross negligence by the aggrieved party has contributed to the creation or increase in injury, then the size of recovery shall be decreased or denied in accordance with the degree of the aggrieved party's fault (and, where the person causing the injury is at fault, also in accordance with the degree of his fault), unless otherwise provided by laws of the USSR.

[8]If a traffic policeman is standing with hands at his sides or held out at either side, only pedestrians to whom his face or back is visible may not cross, while all motorists viewing him from the same angle may pass. If both hands are raised, no pedestrians on either side may cross, and those motorists viewing him in profile may pass. Those pedestrians to whom he stands in profile with his hands down may cross while all motorists facing him may pass. If his hands are outstretched, pedestrians to whom he is in profile may cross only behind him, while no motorists may pass. (The masculine pronoun is used in light of the conspicuous absence of female traffic police in the Soviet Union.) PRAVA at 22-23. (*See* illustrations in PRAVA 22-23.)

had some influence on basic concepts of Soviet tort law and public policy. The following is an analysis of these issues in the light of current trends in Soviet legal thought and several cases arising in 1976 and 1977.

II. Collision of Laws in Collision Cases

According to federal and republic legislation, foreign parties possess the same legal capacity as Soviet citizens, subject to legislative reciprocity.[9] In cases where exceptions are established by federal law, however, capacity is determined alternatively under the conflicts principle of "nationality regime" (*natsional' nij režim*), i.e., the recognition of all rights and only such rights available to Soviet citizens in the jurisdiction of the alien's nationality.[10] An advantage of the application of article 122 of the OGZ to foreign victims of auto accidents, is the free health care provided for citizens and aliens alike under article 32 of the OGZ, regardless of the availability of an analogous right to citizens or to aliens by the state of the plaintiff's nationality. A disadvantage is the impossibility of enforcing any foreign right of action in the Soviet Union under choice of law rules where such a right of action is not recognized in Soviet substantive law.[11]

Tort actions involving a "foreign element" (*inostrannij élement*) are subject to Soviet rules of conflict of laws. A case involving a foreign element is one which involves at least one of the following factors:

1. A foreign person or legal entity
2. Property located outside the Soviet Union
3. A fact or facts of legal significance involving the creation, alteration or termination of a legal relationship existing outside the Soviet Union.[12]

Different norms are involved depending upon whether a conflict is between laws of two republics or between laws of the Soviet Union and those of

---

[9]Para. 1, art. 37, 1977 DRAFT CONSTITUTION OF THE USSR:

Citizens of foreign states and persons without citizenship in the USSR are guaranteed the rights and freedoms provided by law, including the right to apply to court and other state organs in defense of personal property, family and other rights belonging to them by law.

Art. 122 OGZ, *See also* art. 146 RSFSR CIVIL CODE:

Aliens possess the same legal capacity in the RSFSR as Soviet citizens. Specific exceptions may be established by laws of the USSR.

The Council of Ministers of the USSR (article 122 Fundamentals of Civil Legislation of the USSR and Union Republic) may establish reciprocal restrictions on the citizens of states which place special restrictions on the civil capacity of Soviet citizens.

[10]ŠIMONOVA, DELIKTNYE OBJASATEL'STVA S ŬCASTIEM INOSTRANTSEV V SSRR (TORTS AND ALIENS IN THE USSR), monograph, USSR ACADEMY OF SCIENCES (Moscow 1970) at 6, (hereinafter ŠIMONOVA, DELIKTNYE). Exceptions to the general rule include special currency privileges for aliens from capitalist states. Of course, laxity in enforcement of criminal and administrative law against aliens is a separate issue.

[11]LUNTS, MEŽDUNARODNOE ČASTNOE PRAVO, OBSČAJA CAST' (Private International Law, General Section), at 258. (Moscow 1973) (hereinafter LUNTS). *See* discussion *infra.*

[12]*Id.* at 19.

another state. While in inter-republic conflicts the governing law is normally that of the forum, unless replaced by the law of the tort situs upon a motion by the plaintiff,[13] those cases involving a foreign element may be governed by the *lex loci delicti*, which is defined in Soviet law as the place of the cause of injury, rather than the place of the resulting damage.[14] However, no legislative provision exists to compel use of the *lex loci delicti* rather than the *lex fori* as an absolute rule.[15] Foreign law may be applied as *lex loci delicti* by a Soviet court only if the defendant's action was tortious both under the law of the situs and under Soviet law.[16] Some Soviet jurists find a contradiction between this rule and article 128 of the OGZ, which bars the application of only those foreign laws which "contravene the foundations of the Soviet system."[17] This public policy provision is rarely invoked in cases involving foreign litigants, and in the area of foreign trade contracts, flexibility is exercised in determining trade practices and measuring fair market value in inflation-ridden societies. Recovery of lost profits by capitalist and socialist legal persons alike has been recognized since 1964 in article 36 of the OGZ.[18] Tort law has been traditionally more restrictive, although there are indications of a second campaign in favor of more extensive recovery of damages.

The measure of compensation in civil actions is based upon the "actual damages" (*real'nij uščerb*) caused by the defendant's unlawful action.[19] Damages beyond the monetary amount actually expended or lost by the aggrieved party are unrecoverable. In the area of torts, this restrictive rule eliminates causes of action for punitive damages, pain and suffering, and mental distress, which fall under the heading of "moral injury" (*moral'nij uščerb*). While defamation, invasion of privacy and false judgment by governmental agencies are grouped together under the heading of "honor and dignity"[20] as permissible causes of action, damages in such cases generally are restricted to public apology, injunction and a fine, with monetary awards only in the amount actually lost by the plaintiff.[21]

---

[13]LUNTS at 258. *See* text accompanying note 33 *infra*. *See also* ŠIMINOVA DELIKTNYE 8 and IMUŠCESTVENNAJA OTVETSTVENNOST' ZA MORAL 'NIJ UŠČERB (PROPERTY LIABILITY FOR MORAL INJURY) 121 (hereinafter ŠIMINOVA, IMUŠČ.).

[14]LUNTS at 254; PETERESKII I KRYLOV, MEŽDUNARODNOE ČASTNOE PRAVO (Moscow 1940) 132.

[15]ŠIMINOVA, DELIKTNYE 8;

[16]ŠIMINOVA, DELIKTNYE 8; LUNTS 248.

[17]*See* ŠIMINOVA, IMUŠČ. 120, 122, *citing* ZVEKOV, MEŽDUNARODNOE ČASTNOE PRAVO (PRIVATE INTERNATIONAL LAW (Moscow 1949).

[18]*See also* art. 219 RSFSR CIVIL CODE:

> The term "damages" means expenses incurred by the creditor, loss or damage to his property, and also income not received by the creditor which he would have received if the obligation had been fulfilled by the debtor.

[19]*See* arts. 219, 457 RSFSR CIVIL CODE; art. 36 OGZ.

[20]Art. 7 OGZ; art. 7. RSFSR CIVIL CODE.

[21]*See* art. 7 OGZ; art. 7. RSFSR CIVIL CODE.

As a result of substantive differences between Soviet tort law and the tort law of other jurisdictions, Soviet plaintiffs are placed under a handicap by article 122 of the OGZ. Where a Soviet citizen suffers personal injury abroad and a cause of action for pain and suffering would be permissible under the law of the situs state, a Soviet court is prevented from applying the substantive law which would normally be applicable under Soviet conflicts principles, because such a cause of action does not exist in Soviet substantive tort law.[22]

III. Moral Injury and Punitive Damages in Soviet Substantive Law

The concept of punitive damages in Soviet tort law began its career already checkered. During the 1920s, controversy had raged among jurists as to whether moral injury was in fact a capitalist doctrine. Punitive damages found support from Professor Utevskii, however, on the basis of the duty to redress injury under article 44 of the 1926 Criminal Code of the RSFSR, and the duty to compensate damage under article 403 of the 1922 Civil Code. Damages under these sections were interpreted by Utevskii to include "the spiritual sphere" (*dukhovnaja sfera*).[23]

The most common justifications for rejecting moral injury as a legal concept, have been based on the premises that monetary compensation for non-property loss is an institution of bourgeois law, and that no monetary equivalent can be measured for moral suffering. In a recent series of articles attacking these long-held views, M. A. Shiminova of the USSR Academy of Sciences, has rejected both premises. Shiminova assets, albeit somewhat illogically, that punitive damages no longer can be considered bourgeois because a number of other socialist states have incorporated them into their civil codes[24] (therefore apparently transforming them into socialist concepts). Secondly, she argues that money damages should not be denied merely because measurement of the cost of emotional trauma, long suffering and irreparable

---

[22]*See* text accompanying note 19 *infra.*

[23]B. Utevskii, *Vozmeščenie neimuščestvennogo vreda kak mera sotsial'noj zaščity (Recovery for Non-Property Injury as a Measure of Social Protection),* 1927 EZENEDEL'NIK SOVETSKOJ JUSTITSII (SOVIET JUSTICE WEEKLY) No. 35; ŠIMINOVA, IMUŠČ. 119. *See also* B. Lapitskii, *Voznagrazdenie za neimuscestvennij vred (Compensation for Non-property Damage),* Sbornik, JAROSLAV SKOGO GOS. UNIVERSITETA, Issue I (1920) (YAROSLAVL STATE U. R.EV.); Agarkov, *Objazatel'stva iz pričinenija vreda: Dejstvujuščee pravo i zadači GK SSSR, (Obligations in Tort: Current Law and Tasks of the Civil Codes of the USSR)* in PROBLEMY SOTSIALISTIČESKOGO PRAVA (PROBLEMS OF SOCIALIST L.) No. 1 (1939).

[24]ŠIMINOVA, IMUŠČ. 119. *See* CIVIL CODE OF POLAND. ch. 2, art. 44 (installment payments are recoverable by plaintiff who has lost partial or entire working ability "or if his needs have increased or his possibilities of achieving success in the future have decreased." Polish courts may also award damages for insult. ŠIMINOVA, IMUŠČ. 120. *See also* CZECHOSLOVAK CIVIL CODE, art. 444; Bulgarian Law of Torts and Contracts.

mutilation cannot be precise, since an equally unsatisfactory statutory sliding scale system is used regularly for measuring loss of working capacity and could be adopted in the nonphysical sphere as well.[25] While Shiminova agrees with Agarkov that no monetary damages should be recoverable in "honor and dignity" cases, she cites a 1963 USSR Supreme Court advisory opinion which indicates a shift in favor of material compensation for injury that is not strictly physical. The Supreme Court stated, in a discussion of damages guidelines, that in exceptional cases, where the plaintiff resists an artificial limb, the court may order the defendant to pay the cost of a motorized wheelchair.[26] If the plaintiff is unable to operate a motor wheelchair, it would be inequitable, the Court stated, to leave the plaintiff uncompensated. In such a hypothetical case, the Court recommended the award of a television set to relieve the plaintiff's moral suffering.

Shiminova's opinion is mirrored in an analysis by a different author of compensation in the analogous area of false prosecution by governmental agencies. M. F. Polyakova notes that damages awarded for false prosecution constitute not a fine or penalty for violation of honor or dignity,[27] but compensation for the victim's long suffering and any injury to his or her health.[28] While conceding the difficulty of assigning a monetary value to the aggrieved party's suffering, advocates of compensation for false accusation insist upon the victim's right to restitution of his or her former status,[29] particularly in light of the practice of assigning a property value to intangibles in the area of property law despite the lack of correlation between the size of the penalty and the amount of actual damage.[30] While the award of damages to cover actual expenses by the victim of false accusation or other emotionally distressing torts leaves uncompensated the consequential damage of emotional trauma, it has been suggested that the aggrieved party be awarded monetary damages in an amount sufficient to change his or her living conditions: for example, to permit a move to another neighborhood.[31] Polyakova asserts that such an award

[25]ŠIMINOVA, IMUŠČ. 120.

[26]*Id.* at 119. (no citation given).

[27]Art. 7 OGZ; art. 7 RSFSR CIVIL CODE. *See also* Postanovlenie plenuma Verkhovnogo suda SSR (Resolution of USSR Supreme Court Plenary Session), December 17, 1971, No. 11, "O primenenii v sudebnoj praktiki statji i 7 Osnov graždanskogo zakonodatel'stva sojuza SSR i sojuznyx respublik o zaščite česti i dostojnstva graždan i organizatsii" (On the Application in Judicial Practice of Article 7 OGZ on Protection of Honor and Dignity of Persons and Organizations), in *Bjulleten' Verkhovnogo suda SSSR* 1972 No. 1.

[28]M. F. Poljakova, "Reabilitatsija nevinovnykh: garantii česti i gostojnstva ličnosti" (Rehabilitation of the Innocent: Guaranties of Honor and Dignity"), 1976 Sovetskoe gosudarstvo i pravo (Soviet Government and Law) No. 10 at 121. (hereinafter "Poljakova")

[29]H. C. MALIN, VOZMEŠČENIE VREDA, PRICINENNOGO LIČNOSTI (COMPENSATION FOR EMOTIONAL INJURY), Moscow 1965. *cited in* POLJAKOVA at 121.

[30]*See e.g.*, art. 50 OGZ on fixed penalties for delay in delivery.

[31]POLJAKOVA 124.

would be compensation for actual damages rather than for moral injury, and that any coverage of necessary psychiatric care could be justified as a medical expenditure.[32]

IV. Handicaps Under Article 122 OGZ

Objections by some Soviet jurists to the treatment of moral injury in Soviet substantive law have been extended to refusals by courts on public policy grounds to apply or enforce foreign causes of action for moral injury.

The requirement that a foreign cause of action also exist against the defendant under Soviet law where the act complained of occurred outside the USSR, has been criticized by Professor Zvekov as not corresponding to the intent of article 122.[33] Since no Soviet conflicts norm requires a strict application of *lex loci delicti* even under treaties on judicial expedition between the Soviet Union and Socialist states, Zvekov recommends that the OGZ be amended to allow the plaintiff in tort actions with a foreign element to choose the law which suits its interests. Otherwise, he points out, a Soviet plaintiff loses both in a Soviet court, under the present interpretation of article 128, and in a foreign forum, since courts of other jurisdictions generally refuse causes of action by Soviet parties for pain and suffering on grounds of reciprocity.

A 1966 Moscow City Court case[34] serves as an example of the harsh results visited upon Soviet plaintiffs by application of article 122 of the OGZ in the area of moral injury. A wrongful death action was brought by a Soviet plaintiff against the Czechoslovak national airline for her son's death in an accident in Czechoslovakia. The plaintiff sought 7,462 rubles, the maximum amount of damages recoverable under the Warsaw Convention, to which both the Soviet Union and Czechoslovakia are parties. Because the Convention was found to contain no language defining parties with standing to sue for money damages, the court applied Soviet law to the question of capacity according to Soviet conflicts rules. Since under article 460 of the RSFSR Civil Code, only disabled dependents of a deceased are eligible for recovery in wrongful death actions, and since the plaintiff had not yet reached retirement age and was self-supporting, the court awarded her 562[35] rubles, "the value of the deceased's lost baggage, possessions and burial expenses." If the Soviet Union had had an absolute *lex loci* rule for torts with a foreign element, Shiminova points out, it

---

[32] *Id.*

[33] ZVEKOV, MEŽDUNARODNOE ČASTNOE PRAVO (PRIVATE INTERNATIONAL LAW) (Moscow 1949), *cited in* POLJAKOVA at 124.

[34] B. v. Czechoslovak Airlines, Moscow City Court (Moskovskii gorodskoj sud), May 21, 1966; *cited in* ŠIMINOVA, IMUŠČ. 122.

[35] The value of the ruble is currently about $1.50.

would have applied Czechoslovak law and allowed recovery of the maximum amount permissible under the Warsaw Convention.

The impact of recent criticism of the state of Soviet tort law is as yet unclear. Soviet attorneys and professors with whom I raised the question felt that the practice of nonrecognition of moral injury showed no real sign of decreasing, although, of the three Soviets interviewed, two expressed some dissatisfaction with the rule. I was given an example of a relatively recent case in which a young Englishwoman suffered mutilation of her knee in an auto accident in Moscow. Despite the presentation of real evidence and plaintiff's statement that she would have to wear loose garments for the rest of her life in order to conceal the grotesque condition of her leg, her claim for damages for pain and suffering was denied.

V. Calculation of Damages for Personal Injury and Property Damage Suffered by Foreigners.

The jurisdictional impossibility in most cases of bringing a Soviet-based tort action against a Soviet vehicle owner in a foreign forum obligates an alien plaintiff to forego any hope of receiving damages in a Soviet court for pain and suffering and other moral injury. Other areas of damages raise equally serious problems.

A. *Medical Expenses*

A foreign victim of an auto accident or other personal injury who is treated for injuries outside the Soviet Union or within the country by embassy medical personnel generally will not be awarded compensation for expenses under article 459 of the Civil Code. Proponents and opponents alike of compensation for moral injury approve of this rule on the ground that it would be inequitable to force a Soviet defendant to pay for inflated medical fees because the aggrieved party chose to reject the free medical care offered to foreigners by state hospitals.[36] A rather harsh result was reached in a Moscow case brought by an American citizen against Taxi Park No. 10 for the shattering of her upper and lower teeth in a collision with one of the Park's cabs.[37] The plaintiff was represented by Injurkollegia, the association of Moscow attorneys specializing in litigation and arbitration of private international law cases. The plaintiff sought $3,695, the cost of dental work performed by a Dr. Herschman in the United States. The court called as a witness a Dr. Franklin, who estimated that the operation which the plaintiff had undergone could

[36]ŠIMINOVA, UČASTIE INOSTRANTSEV V DELIKTNYKH OBJAZATEL' STVAKH, SOVETSKAJA JUSTITSIA (SOVIET JUSTICE) No. 22 at 17. (1966) [hereinafter ŠIMINOVA, UČASTIE].

[37]Moscow City Court, April 25, 1968 (no title given), cited in ŠIMINOVA, UČASTIE at 18.

have been performed in the United States for $1,000. While indicating its confusion over the wide variance in dental fees in capitalist countries, the court rejected all evidence of both the actual cost and the reasonable cost of plaintiff's medical care, and awarded her the dollar equivalent of 245 rubles (about $325 at the time), which represented the fixed charge for her operation in the Soviet Union. The result of this case was described rather wryly as "unsatisfactory" in discussions which I had with several Soviet jurists, since, as they were quick to note, the standard Soviet procedure for prosthetic work is extraction and insertion of a row of flashing gold teeth. The lawyers and professors with whom I spoke expressed sympathy for any foreign plaintiff who, having the opportunity to choose between gold teeth and natural-looking Western dentures, would select the second without finding the $3,000 difference in cost sufficient to justify a requirement that the less expensive option be exercised.

The questionable competence of the average Soviet doctor and the unsanitary conditions in most Soviet hospitals (as judged by American standards) in themselves would be enough to make an injured foreigner who is still conscious hesitate to employ their services, although a special clinic for foreigners run by Intourist, the travel agency for foreign tourists, provides a higher caliber of medical care, if only one could be guaranteed admittance in an emergency. However, rejection by Soviet courts of the inflated measure of medical costs used in those capitalist states which do not offer free medical care is based upon article 93 of the OGZ, which permits adjustment of awards in light of the defendant's financial situation.[38] This is somewhat understandable in such cases when one considers that the average salary in the USSR is 120 rubles, or 180 dollars, per month. At forty-five dollars per week, even with compulsory Gosstrakk auto insurance, the average Soviet defendant would be unable to work off the cost of an average hospital stay for an American plaintiff, even over a long period.

B. *Property Damage*

1. *SAMPO V. U.O.O.P. LENOBLISPOLKOM*

The same problems inherent in measuring the cost of medical care arise in the evaluation of the cost of repairing property outside the USSR. In an action brought in the USSR against the Leningrad Regional Executive Committee, a state agency, by SAMPO, a Helsinki mutual insurance company, for the value of repairs performed in Finland on the insured's automobile, which had been

[38] Art. 408 RSFSR CIVIL CODE:
The court may decrease the size of an award of damages caused by a person in accordance with his property status. (Decree of the Presidium of the Supreme Soviet of the RSFSR of December 12, 1973, 1973 "Vedomosti Verkhovnogo Soveta RSFSR", No. 51 at 1114).

struck by a vehicle owned by the agency, the court rejected affidavits of actual repair costs offered through the Finnish Embassy by remarking that "the value of repair work does not always reflect the amount of material damage."[39] After presentation of expert testimony on the cost of similar repairs in the Soviet Union, the court determined that the Finnish car involved in the accident was close in model to the Soviet Volga, and awarded the equivalent of 559 rubles in Finnmarks as the standard cost of analogous repair work performed on Volgas. There was no guesswork involved in evaluating Soviet repair work because of state-regulated prices, but the court did not appear to take into account the fact that unlike medical services, auto repairs generally cannot be performed in the Soviet Union for foreign plaintiffs, because of the unavailability of spare parts. While the court expressed a rare concern for the car's depreciation in value after the collision, it appears from the rather sketchy account of the case that damages for decrease in value were not included in the 559 rubles awarded.

2. *RENNE BRUNENEN V. SELESNOVA*

In February, 1977, I attended a similar action for property damages brought in Leningrad City Court by a Finnish bus company against a Soviet car owner and a Soviet driver.[40] Although the case was still in progress when I left the USSR in August of 1977 (cases involving foreigners generally are drawn out longer than the swift one-day domestic actions because of problems in the production of documentary evidence and translation), the following analysis of the trial will offer an indication of Soviet civil procedure and courtroom atmosphere, as well as an account of the handling of calculation of damages.

The plaintiff was a tour bus company involved in a collision with a car driven by a Soviet citizen. The question of civil liability had been determined as an ancillary holding in an earlier criminal action against the driver of the car, who had been found guilty of violation of the Traffic Rules and of causing the death of a passenger in the car which he had been driving. The plaintiff, which did not appear, was represented by a Soviet attorney from Injurkollegia, as is the usual procedure in civil actions by alien plaintiffs. The owner and the driver were represented by attorneys from a Leningrad law office. The panel of judges was composed of one professional judge, who conducted the trial, and two acting lay judges, appointed in a capacity similar to that of jurors in the common law system.

The trial opened with the presiding judge's request for documentary evidence on the issue of damages. The expert called by the court was requested to

[39]ŠIMINOVA, UČASTIE 17. (no cite)

[40]Renne Brunenen v. Selesnova,. Leningrad City Court, February 28, 1977.

sign the account of his expert testimony. Plaintiff's attorney presented his case first, establishing the facts of the accident on the Leningrad Highway on July 30, 1974, and claiming 11,466 rubles in damage to the bus.

The owner of the Soviet case had not been in the vehicle at the time of the accident, but was being sued under the doctrine of strict liability set out in article 454 of the Civil Code for injury caused by "a source of increased danger" (*istočnik povyšennoj opasnosti*). Documentary evidence was produced from the Finnish garage which had repaired the vehicle at a cost of 1,960 rubles, or 58,000 Finnmarks. The balance of the amount sought included damage to the upholstery and radio inside the bus, as well as lost profits.

At this point the judge suggested splitting the damages between the parties. Plaintiff's attorney objected strenuously on the basis of article 219 of the Civil Code, on the ground that the plaintiff was entitled to full compensation for damages suffered. The judge was dissatisfied with the unitemized bill offered from the Finnish garage, and remarked that Soviet commercial organizations do not aggregate their charges. Plaintiff's attorney countered that this happened to be a practice of Finnish garages. The judge commented that the cost of repair as listed on the bill seemed too high and that she would like authentication of the Finnish document produced by the plaintiff. Plaintiff's counsel irritatedly replied that judges never demand proof of Soviet documents on price, and that to do so would be inequitable to a foreign party. (To this the judge retorted, "We verify them all!")

Problems with the document originated from the fact that it had not been issued through diplomatic sources, and plaintiff's attorney himself appeared to be conceding at times that the claim could be a little high. A representative from Sovavtotransport, the Soviet automobile organization which had transported the disabled vehicle to Finland, gave alternate figures on the estimated cost of repair work. The judge raised the question of insurance on the parties' cars. It was brought out at trial that the Finnish company was covered both by a Finnish insurer and by compulsory Ingosstrakh state auto insurance for foreign nationals in the USSR. The defendants were asked directly if they had any questions to address to plaintiff's attorney. No questions were offered.

After the conclusion of plaintiff's argument, defendant Selesnova took the stand and answered preliminary questions directed by the judge concerning her name, address, place of employment, salary (120 rubles a month), marital status, number and age of her children, and her husband's place of employment and salary (140 rubles). Selesnova then began her testimony. Her attorney had not yet participated at this point. Selesnova stated that she was the registered owner of the car driven by the other defendant, but that she was not the owner in fact: she had signed up to buy a car and had waited two years before acquiring one, but had done so only as a favor to the other defendant, a friend, and had paid for the car with money which he had given her for that

purpose, because he had one car already and thus was ineligible for a second. (If any criminal issues were involved in such a procedure, or if they had been involved in the earlier criminal case, the court did not raise them.) Selesnova then had given the other defendant a power of attorney to use the car over a three-year period. Her attorney objected to her joinder as a party, and the judge determined, upon agreement by plaintiff's attorney, that Selesnova would be replaced as defendant by the owner-in-fact, who was also the driver. Selesnova returned to her seat and the driver took the stand. In response to the judge's questions, the defendant stated that his salary was 110 rubles a month, that he was married a second time and was paying child support from his first marriage. His second wife also had a child from her first marriage and was earning about 100 rubles a month. Defendant's account of his acquisition of the car was identical to Selesnova's, and he replied to further questions that he had been convicted in connection with the accident and had already paid 219 rubles (presumably as a fine). Defendant stated that a police detective at the scene had estimated the amount of damage to the bus at 525 rubles and had looked to Selesnova for that amount. Defendant had contributed 30 rubles so far toward compensation of the damage.

The judge explained to the defendant that the present action was for lost profits and cost of repairs. Defendant objected without aid from his attorney, arguing that an inspection had been performed at the time of the accident and that the amount calculated by the police was the ultimate amount for which he was responsible. Upon further questioning, defendant admitted that he was obligated to pay for the damage caused to the other vehicle, but that he did not know whether the size of the damages claimed were correct. (Defendant appeared to have borrowed this idea from the judge's earlier exchange with the plaintiff's attorney.) The defendant then announced indignantly, again without participation by his attorney, that he should not be held responsible for the company's lost profits. Defendant's interesting basis for such an assertion was that he could not possibly have detained plaintiff's bus or otherwise prevented it from operating after the accident because, at the time that such bus would have lost profits, he had been lying in the hospital!

Plaintiff's attorney began a cross-examination of the defendant by asking what the estimation of damage had been in the criminal trial. Defendant replied that he did not remember. Defendant's attorney then asked defendant if he could remember ever acknowledging the claim presented by Injurkollegia. Defendant claimed no memory of such acknowledgment.

The judge next called a mechanical expert to take the stand, who stated that the value of the bus had been calculated at 6,000 rubles upon inspection. At this point Selesnova was released and left the courthouse. The expert, who seemed rather senile, became confused over the calculation of repair costs, and

a 45-minute recess was called while the judge reckoned loudly with the expert and the two attorneys in her chambers. Upon returning, the judge asked both parties whether the trial could be continued at a later time while verification was made of the cost of repair. The attorneys for both parties agreed to postpone further hearings until documents were obtained from the Novgorod Regional Finnish Bureau (*Novgorodskij raifinnotdel*) and other sources. The expert was assigned specific questions to answer in writing concerning the cost of materials damaged in the bus.

The Selesnova case has not yet been decided because of the difficulties involved in obtaining documentary evidence from Finnish insurance companies and diplomatic sources in a form acceptable to the court. While the apparent novelty of the situation appeared to be contributing to the confusion in the courtroom, auto accident cases involving Finns are certainly not unheard of in Leningrad, mainly because of the number of Finnish tourists and employees in that city. A strikingly positive aspect of the Selesnova case as compared with the SAMPO case cited earlier was the court's disregard for figures based on equivalent repair work done on Soviet buses in the Soviet Union. The court seemed to recognize that no parallel could be drawn between the value of a Finnish-made bus and a similar Soviet model. The main difficulty in the case so far has been verification of the authenticity of the figures given for Finnish repair work, and not the reasonableness of the figures themselves. The attorney for SAMPO explained to me several months afterward that since the record of the criminal case against the driver contained damaging expert testimony by a psychiatrist that the Finnish driver may have lost consciousness immediately before the collision, Injurkollegia was advising SAMPO to accept an offer by the defendant to pay 2,680 Finnmarks in settlement, plus an additional 3,463 Finnmarks to cover repairs and the cost of transporting the bus to Finland, rather than to risk losing on the merits.

3. *SAMPO V. MILITARY BASE NO. 850, VYBORG GARRISON*

The presiding judge of the Leningrad Regional Court (*oblastnoj sud*) was most gracious in permitting me to examine the record, evidence, and his decision in another auto accident case involving a Finnish plaintiff, which was particularly noteworthy because of the nature of the defendant. In Case No. 3-10/1976, filed in August, 1976, the before-mentioned Finnish insurance company SAMPO brought a different action against Military Base No. 850, Vyborg Garrison, in the amount of 41,990.53 rubles for personal injury and property damage caused to a busload of Finnish tourists and to the bus in which they were riding. The accident had occurred when a truck owned by the Soviet Army and driven by a soldier collided with the bus on the East Vyborg Highway on October 18, 1973. The Finnish bus, a Skandia model, was owned by

the Pohjolan Liikenne company. The bus driver, a Finnish national, sustained serious injuries, while passengers in the bus suffered loss of personal property and minor injuries. The plaintiff had paid 41,990.53 rubles to the insured bus company under its insurance policy, and sought reimbursement from the Soviet Army base. The complaint itemized the amount of damage suffered by each individual passenger. The Finnish driver had lost 30 percent of his working capacity, as estimated by Finnish medical sources, and had been paid 11,121.63 rubles in coverage by the plaintiff. The suit was brought on the bases of articles 456, 445, 454 and 459 of the RSFSR Civil Code, as *lex loci delicti.* Plaintiff had filed with the court a security bond of 2,519.43 rubles.

The report filed by a Soviet auto inspector concerning the inspection and technical condition of the vehicle confirmed that damage to the vehicle had occurred.[41] According to a separate official report,[42] at the time of the accident the weather had been clear and sunny with unlimited visibility. The defendant's driver had made a left turn from the right lane of the highway and struck the bus as it approached in the opposite direction. Eleven passengers in the bus had suffered rib, shoulder, and forehead injuries. A letter from the Military Procurator of the Vyborg Garrison to the Chief of the Insurance Department for Aliens and Their Property of Ingosstrox and filed by the plaintiff as documentary evidence stated that in the criminal case against the driver of the Army truck, the soldier had been found guilty of violating articles 3, 73 and 83 of the Traffic Rules. In reaching its decisions, the military tribunal found that the Finnish driver had violated article 74 of the Traffic Rules by speeding in a populated area, and that "while this violation did not constitute the proximate cause of the auto accident at hand, it nevertheless caused an increase in the loss resulting from the event." The Military Procurator remarked in the letter to Ingosstrox that the amount of damages asserted by the plaintiff during the criminal trial appeared to be too high, and that it should be verified in any civil action. The letter concluded with a statement that eight of the Finnish passengers had been treated for light injuries in the Soviet Union and had returned to Finland on the same day.

A photograph of the bus taken after the accident accompanied the documents, indicating that the entire front of the vehicle had been destroyed. Other documents in the record included the claim sent by the bus company to the insurer, an itemized bill for repair costs from the Finnish garage, and medical reports submitted by three Finnish physicians concerning the health of the Finnish driver, who had been comatose at first and then had suffered attacks of violence in which he smashed various hospital instruments. Also included was

[41] Protokol osmotra i provera tekničeskogo sostojanija transporta.
[42] Spravka po dorožno-transportnomy proiž̌šestviju.

a memorandum by the insurance company on the facts of the accident and calculations of expenses, a pamphlet setting forth the method for calculating auto insurance, and documentary evidence of the other passengers' expenses, including fifteen massage treatments, hotel costs for the night of the accident, and lost wages. One passenger's claim to SAMPO for pain and suffering had been rejected by the insurance company as not being within the scope of coverage.

The opinion in *SAMPO v. Military Base No. 10*[43] commenced with an acknowledgment of criminal case No. 191/74, against Anatolij Alexandrovich Debjakovich under article 211 of the RSFSR Criminal Code, in which defendant's driver had been sentenced to eighteen months in prison and suspension of his driver's license for three years. The Military Procurator appeared at the trial to contradict the defendant's argument regarding damages. After reciting the facts of the case, the court noted that the defendant Army base had refused plaintiff's claim for a fine (*prostoj*) on the ground that such damages would constitute lost profits, which, the defendant claimed, were unrecoverable under the Civil Code.[44] Defendant had argued that the cost of repair had been insufficiently shown, that the seventeen passengers injured in the crash had not received serious enough injuries to warrant a criminal charge, and that the insured's driver could not recover lost wages because the plaintiff's insurance company had not yet paid him such amounts.

In determining the amount of damages payable to the plaintiff as 33,770 rubles 20 kopeks, the civil court based its finding of defendant's liability on the verdict issued by the military tribunal. Since defendant had not proven that injury had occurred as a result of *force majeure* or the plaintiff's deliberate action,[45] the court found it strictly liable as the owner of a "source of increased danger" for the full amount of damages actually suffered.[46] The amount claimed by the plaintiff for lack of use of the bus was held not to constitute lost profits in any event, on the reasoning that the amount lost was concrete income that the bus company had received through exploitation of the bus. (Interestingly, the court seemed hesitant to acknowledge lost profits as a legitimate cause of action despite provision for it in federal and RSFSR legislation.) The court agreed with the defendant that the official inspection had not proven the amount of damages to the emergency brake on the bus, and damages sought for the radio and refrigerator in the vehicle had not been supported by documentary evidence. A claim by one passenger for a scar was

[43]June 14, 1976.
[44]*Cf.*, Art. 36 OGZ; art. 219 RSFSR CIVIL CODE.
[45]Art. 454 RSFSR CIVIL CODE.
[46]Arts. 457, 219 RSFSR CIVIL CODE.

rejected as a cause of action for moral injury which did not fall within the scope of the Civil Code.[47] Another passenger's claim for her husband's travel expenses in returning home from work to take care of her was rejected on the ground that the husband would have had to travel the same distance home, in any event, at the end of the working day.

The court rejected defendant's claim that the passenger's injuries were not serious enough to warrant compensation. Since the damages were proven by medical records, the court insisted upon awarding them. Interestingly, the court had no difficulty in justifying an award of compensation for medical treatment in Finland:

> The fact that certain Finnish nationals were not examined by medical workers on Soviet territory, and that the diagnosis of those immediately after the accident revealed only minor bodily injuries, does not in itself contradict medical documents concerning their working incapacity and the necessity of treatment which were issued by medical institutions in Finland. The aggrieved parties may have suffered post-traumatic illness for which they entered medical institutions in their own country and for which they were assigned suitable treatment.

The judge agreed with plaintiff's calculation of the insured driver's lost wages and working ability. However, a claim for a lump sum payment of his life pension was rejected on the ground that advance payment of pensions is unrecoverable under article 457 of the RSFSR Civil Code. The Finnish driver was awarded damages only for actual expenditures made during the first half of 1976. The total amount of the award was 33,770.29, with an additional 2026.20 rubles awarded under article 90 and 91 of the RSFSR Code of Civil Procedure for attorneys' fees, translations, long-distance phone calls, and court costs. Defendant's payment of damages was regulated by articles 14, 50, 197, 20 and 35 of the RSFSR Code of Civil Procedure.

VI. The Alien as Defendant

The final point concerns the possibility of execution of judgments and other matters involved where a foreigner is accused of causing personal injury or property damage to a Soviet citizen or legal entity.[48] Execution of a Soviet judgment against a foreign defendant is made mandatory only by treaty, and the Soviet Union has no agreements on execution of foreign judicial judgments with capitalist states.[49] As it is, even the conversion into Western currency of an award in rubles is conditional upon reciprocity.[50]

---

[47]In this case the issue of application of art. 122 of the OGZ to bar such a claim did not arise, since Soviet substantive law governed as situs law.

[48]Para 2, art. 37 1977 DRAFT CONSTITUTION OF THE USSR: "Citizens of the foreign states to persons without citizenship; on territory of the USSR are under a duty to respect the Constitution of the USSR and to observe Soviet laws."

[49]SIMINOVA, DELIKTNYE 16.

[50]Id.

Before the question of execution is even reached, however, the alien tortfeasor must be located before departure across the border. In the 1959 case of *Nemchikova v. X.*,[51] a Soviet woman in the city of Chekkov was struck and seriously injured by a car driven by an American tourist. The American was found to have violated articles 65 and 67 of the Rules of Traffic for the Streets and Highways of the USSR in force at that time. The American left the country before his home address could be determined. (It is unclear from the report of the case whether the defendant's name was known and whether a check had been made on the visa records of the relatively few American citizens in Moscow at that time.) By the time the whereabouts of the defendant had been discovered in New York, the three-year New York statute of limitations had run, so that a New York court would not accept the action. In addition, there had been no criminal charge brought against defendant to warrant expedition, and *in personam* jurisdiction in Moscow was beyond attainment in the defendant's absence from the country.

Shiminova suggests several alternatives for ensuring recovery of money damages from alien tortfeasors and avoiding their possible flight from the Soviet Union before their identity can be determined. The first suggestion is a request that all aliens entering the USSR carry compulsory Ingosstrax liability insurance.[52] A second alternative would be a type of *quasi-in-rem* attachment of personal property, most noteworthy, of the offending car belonging to an alleged alien tortfeasor, in order to provide monetary compensation through state sale of the proceeds. Shiminova proposes an additional, and disturbingly radical variant: detainment of aliens accused of causing tortious injury from leaving the country until payment of a deposit to cover a possible award of damages to the Soviet plaintiff.[53]

Conclusion

In light of the volume of traffic accidents in the Soviet Union, it would not be entirely facetious to suggest prophylactic measures on the street as the most satisfactory way for foreigners on Soviet territory to deal with the problems inherent in a litigation. Conflicts norms unfavorable to foreign causes of actions, as well as judicial rejection of remedies involving punitive damages or compensation for nonphysical injury, work to the detriment of aliens who would be eligible for greater damages in a different forum. However, it appears that at least among scholars, moral injury is being revived as a subject of genuine interest. The appearance of several articles on the subject within the

[51]Moscow Regional Court (Moskovskij oblastnoj sud); Šiminova, Učastie 121.
[52]Učastie 18.
[53]*Id.*

past twelve years is of some significance, since, like other civil law systems, the Soviet legal system gives greater recognition than the common law system does to treatises as a source of law. In addition, a more sympathetic attitude toward medical treatment outside the Soviet Union, as displayed in the Military Base case, might even be extended in the future beyond cases involving Finnish plaintiffs to actions brought by Americans and other nationals of states which do not provide free medical care. The deviations from the norm in the Military Base and Selesnova cases, in which the courts have not rejected the idea of compensation for actual costs of property repairs abroad without reference to comparable Soviet changes, indicate some degree of flexibility where foreign parties are concerned. The main obstacle at this point seems to be the handling of evidentiary questions concerning calculation of costs. Perhaps, as more accident cases with foreign elements are brought to trial, particularly in Moscow and Leningrad, which claim the highest concentration of foreign visitors and residents, courts in at least these two cities will develop a more consistent approach to such questions. In any case, the rising number of motor vehicles on Soviet roads and the increase in the tourist trade and contracts with Western countries promises that the issue of damages in cases brought by foreign victims of auto accidents will arise even more frequently in the future. The amount of concern given by the Selesnova and Military Base courts to fair treatment of foreign parties within the strictures of current legal norms, and their willingness to deviate from such norms where necessary, may well herald the advent of more flexible rules in favor of foreign and Soviet plaintiffs alike who claim the benefit of more favorable foreign laws and causes of action.