

Some considerations on compensation for non-material loss in protection of personality

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Some considerations on compensation for non-material loss in protection of personality. The article addresses the issue of compensation for non-material loss as a form of satisfaction in case of infringement of the personality rights according to the Slovak Civil Code. The author points out that the decision on awarding compensation is a matter of judge-made law. The molding of law by judicial decisions not only emphasises their predictability; it envisages the application of law in accordance with its meaning and purpose. A court must take into account mutual relations of individual arguments coming into consideration and to balance their role in a particular case with regard to its specific character and the person whose personality rights have been infringed. In addition, it must reflect the constitutional aspects of this issue, including case-law of the Constitutional Court of SR and case-law of the European Court of Human Rights.

Keywords: rise of liability for a loss according to the Civil Code; form of compensation for non-material loss; amount of compensation for non-material loss and test proportionality; function of the courts in determination of the amount of compensation for non-material loss

Introduction

Non-material (immaterial, moral) loss belongs to newer legal terms, although the roots of this institute can already be found in the Roman law.¹ This institute was re-established in Slovak law after 1989.² However, the theoretical basis of this term in our literature can be found much earlier, e.g. in works of Š. Luby.³

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¹ Compensation for damage as a sanction for non-material loss appears in the capitalist private law. In LUBY, Š. *Prevention and Liability in Civil Law. II.* Bratislava: Vydavateľstvo SAV, 1958, p. 436.

² The first law that introduced these changes was the Act No. 87/1990 Coll. amending the Civil Code. According to Article 13 paragraph 1 of this act citizens have in particular the right to require that others desist from unlawful conduct damaging to their personal rights, that the consequences of such conduct be eliminated and that adequate compensation be given. Pursuant to paragraph 2, where adequate compensation within the meaning of paragraph 1 does not seem to be adequate, particularly where the honour or social prestige of the citizen has been seriously affected, the latter is also entitled to financial compensation for non-material loss. According to paragraph 3 the amount of compensation under paragraph 2 shall be determined by the court with reference to the seriousness of the non-material loss and the circumstances in which the infringement of the right occurred.

At present this term can be found in tens of acts of private and public law. The institute of compensation for non-material damage is comprehensively covered by the following articles: KEREČMAN, P. Right to adequate satisfaction and compensation for non-material damage in Slovak law (Part 1). In *Justičná revue*, 2006, No. 8/9, pp. 1157 – 1182; KEREČMAN, P. Right to adequate satisfaction and compensation for non-material damage in Slovak law (Part 2). In *Justičná revue*, 2006, No. 10, pp. 1431 – 1445.

³ LUBY, Š. *Prevention and Liability in Civil Law. I.* Bratislava : Vydavateľstvo SAV, 1958, pp. 98, 219, 273.

The liability for damage and the liability for non-material loss can be designated as traditional topics of civil law. The liability for damage is addressed by several monographs, in both Czech and Slovak specialised literature. The liability for non-material loss is covered by a small number of specialized articles. It is because this institute was fully re-established in Czechoslovak law only after 1989.⁴

Reparation for non-material loss does not pursue the objective of providing compensation in the form of financial equivalent to the injured person or restoration of the status *quo ante* (because of its nature, loss suffered by the injured person in his/her personal sphere namely cannot be recovered, exactly expressed in money terms and quantified); its aim is to achieve equitable mitigation of the caused loss (to provide so-called “satisfaction”).⁵ Material loss is often identified with damage, which Š. Luby designated as wrong in his timeless work more than fifty years ago.⁶ These two terms are closely related, as proved by the publication Principles of the European Tort Law, where damage is defined as a loss that is compensated for within the meaning of its further provisions.⁷ In some countries these two terms are regarded as synonyms at one time and as two different words at another time, whereby the term “damage” is used for designation of intervention into the personal or material sphere, while the term “loss” is used for designation of material and non-material consequences of such intervention.⁸

Financial compensation for non-material loss is understood as an instrument for elimination of caused loss, which cannot be made good or reversed even by satisfaction in the form of apology.

Like for material damage, the proof of existence of causal nexus linked to the unlawful conduct of the infringer, that caused a non-material loss, is required for the rise of liability for non-material loss. The liability of the infringer is assessed on the basis of an objective principle (fault is neither examined, nor presumed). The threatening infringement of the respective protected rights is usually sufficient for the rise of liability. Therefore, it is so-called “private tort of threatening nature”. The objective liability for threatening infringement or infringement of the rights is typical for the area of protection of personality. Compensation for non-material loss is, in the first place, the means of satisfaction, and so elements of material nature are not taken into account, because this legal means does not serve primarily for material reparation. Of course, the provision of satisfaction also has a character of sanction, because payment of compensation also means financial damage for the lawbreaker, but this sanction aspect plays only secondary

⁴ Act No. 87/1990 Coll., amending the Civil Code – Article 13.

⁵ LAZAR, J. et al. *Basics of Civil Material Law* : 2nd volume, 2nd edition, Bratislava : Iura Edition, 2004, p. 557.

⁶ LUBY, Š. *Prevention and Liability in Civil Law*. I. Bratislava: Vydavateľstvo SAV, 1958, pp. 274-275. The author points out that not every material loss is damage. J. Švestka understands both terms in the ratio of class (higher level) and gender (lower level). See ŠVESTKA, J. *Liability for Defects According to Czechoslovak Socialist Law*. Prague: Charles University, 1976, p. 72.

⁷ ELISCHER, D. Conception of loss/harm in the recent documents on European tort „soft law“. In *Právnik*, 2011, No. 4, pp. 380, 382.

⁸ *Ibid*, p. 382.

role in the provision of satisfaction. The non-material aspect of satisfaction will be decisive. Subjective and sanction criteria are therefore not decisive for determination of the amount of compensation for non-material loss.

In private law the issue of non-material loss and adequate satisfaction for non-material loss is regulated by civil law (e.g. protection of personality, protection of good reputation of legal persons, threatening infringement of intellectual property rights), copyright law and commercial law (unfair competition). In Slovak legislation the criteria for compensation of non-material loss are differently formulated in the Civil Code and the Commercial Code. The Act on Copyright makes reference to a legal solution set out in the Civil Code.⁹ Many ideas from decisions made in the area of law against unfair competition or copyright law are applicable to considerations on compensation for non-material loss in protection of personality. We believe that this diversity of legal regulations on the conditions of provision of financial compensation for non-material loss is caused by the absence of legislative coordination rather than by a sophisticated procedure of the legislator. In our opinion, the criteria for awarding financial compensation for non-material loss could be identical for all three acts from the area of private law and case-law of courts making decisions could specify the general conditions of its awarding and take into account the specific characteristics of individual acts. When comparing the three private-law regulations – civil, commercial and copyright law – the regulation in the Civil Code for the area of protection of personality (Article 13 paragraph 2 and 3 of the Civil Code) seems to be most precise. It determines two criteria for determination of the amount of financial compensation for non-material loss:

- Seriousness of the non-material loss, and
- Circumstances, in which the infringement of the right occurred.

1. Rise of liability for damage according to the Civil Code

The liability for damage and the liability for non-material loss have many common features. Like for material damage, the proof of existence of causal nexus linked to the unlawful conduct of the infringer, which caused a non-material loss, is required for the rise of liability for non-material loss. The liability of the infringer is assessed on the basis of an objective principle (fault is neither examined, nor presumed). The threatening infringement of the respective protected rights is usually sufficient for the rise of liability for non-material loss. Therefore, it is so-called “private tort of threatening nature”. The

⁹ The Act on Copyright also addresses the term “non-material loss”, although very briefly, when in Article 56 of the Act on Copyright entitled “Protection of copyright” it awards to the author, whose right was or is likely to be infringed, among others the right to require compensation for damage according to special regulation, while making reference to the Civil Code, which addresses the issue of compensation for non-material loss in Article 442a paragraph 1. According to this provision of the Civil Code, in case of infringement or threatening infringement of the intellectual property right financial compensation for non-material loss shall be provided if the award of other form of satisfaction, in particular apology or publication of a judgment of the court at expense of the person who infringed or threatened to infringe the intellectual property right, seems to be inadequate.

objective liability for threatening infringement or infringement of the rights is typical for the area of legal protection of the right to intangible goods and protection of economic competition.¹⁰ In case of liability for damage exculpation is not possible; this option can be considered only in case of liability based on fault. The infringer is liable for non-material loss regardless of his fault or knowledge that he violates the law by his conduct. The courts require the exact proof of damage; in case of non-material loss it is sufficient to demonstrate and justify the loss. Damage can be exactly quantified and the court deciding on compensation for damage may use consideration of judges only exceptionally; on the other hand, exact quantification of non-material loss is impossible. Unlike the order for compensation for damage sought by the plaintiff, where compensation awarded by the court covers all the damage caused by infringement, compensation provided for non-material loss should be paid on a reasonable basis.

Compensation for damage and compensation for non-material loss should be understood differently – they must not be confused. Compensation for non-material loss is understood as an instrument for elimination of non-material loss, rather than as compensation for caused material damage. In case of material damage the law regulates two means of compensation: compensation for damage and recovery of unjust enrichment.

2. Form of compensation for non-material loss

There are several forms of provision of compensation for non-material loss, such as apology or payment of the specified amount. The non-financial form of compensation has a character of so-called “moral performance”. It means the making good of caused non-material loss by the same or similar means, by which the loss was caused, e.g. publication of corrective article, supplementary information or public apology, most frequently in the press, radio or television. Non-public apology, e.g. through a private letter, is not excluded, but it is used seldom. The affected person usually wishes the general public to be informed about the apology. Although publication of apology is proposed by the plaintiff, it does not mean that he may require publication of anything.

If the plaintiff requires adequate satisfaction in non-financial form, he must indicate in the action the exact wording of required apology, including the place and scope of its publication. The apology must not be revised by the court or represent a hidden attack against the defendant. An apology in the media usually has a meaning for the plaintiff when it is published as soon as possible after the unlawful conduct; apology published later may not serve to its purpose or even become counterproductive.

The legal formulation does not exclude a combination of the financial and non-financial forms of satisfaction, so that total compensation for non-material loss is adequate. The selection of the form of compensation lies on the plaintiff – together with the burden of proof as regards substantiation and justification of his choice.

¹⁰ TELEČ, I., TŮMA, P. *Act on Copyright: Comments*. 1st edition. Prague : C. H. Beck, 2007, p. 422.

3. Adequacy of compensation for non-material loss

Adequacy, which is a conceptual sign of satisfaction, applies not only to the amount of provided satisfaction, but also to its chosen form and scope. Unlike the order for compensation for damage sought by the plaintiff, where awarded compensation covers the all damage caused by infringement, compensation for non-material loss will be paid on a reasonable basis.

The court awards financial compensation, including its exact amount, at its sole discretion; in this way it has enough space for consideration of all circumstances of the case. The order sought by the plaintiff is binding for the court in the sense that it must not exceed the amount of financial compensation required in the action.¹¹

The High Court in Olomouc¹² determining the amount of adequate satisfaction was considering the following aspects: *“In case of the scope of non-material loss the court of appeal believes that the nature of this loss does not allow its quantification and therefore the form and the amount of adequate satisfaction should be determined with due regard to the fact that conduct of the defendant had a long-term character and was motivated by gainful intention.”*¹³

In decisions of the Supreme Court of the Slovak Republic considering the amount of compensation for non-material loss criteria such as the length and voluntary abandonment of unlawful conduct play an important role.

Although objective as well as subjective criteria play rather secondary role, they should be taken into account, because the provision of financial compensation as well as determination of its form and amount are assessed on a case-by-case basis. As regards the amount of financial compensation, the plaintiff is not required to determine the exact cash equivalent of non-material loss caused to him; on the other hand, he cannot merely make a general allegation that he suffered a loss. In case of material damage the law provides for two means of compensation: compensation for damage and recovery of unjust enrichment. It is therefore inadmissible for the eligible party to solve suffered material damage by means of the claim for compensation of non-material loss.

The primary principle is adequacy of compensation for non-material loss in terms of its purpose. For proper and just imposition of a sanction it is necessary to also observe the principles of legality and individualization of a sanction.¹⁴ The principle of legality of a sanction consists in fulfilment of the legal conditions for its imposition. The principle

¹¹ According to Article 153 paragraph 2 of CPC: „The court may exceed the proposals of the parties and award them more than they require only when the proceedings could have been initiated also without a proposal or when a legal regulation prescribes a certain method of mutual settlement of the parties.“

¹² Decision of the High Court in Olomouc, file no. 4 Cmo 162/2007.

¹³ According to the opinion of legal theory and legal practice the court determining the amount of financial satisfaction the court will also consider whether the initiator of unauthorised intervention intervened into the personality of natural person by negligence (carelessness), or whether the unauthorised intervention and resulting serious negative consequence are attributable to his intention or even wicked intention and motive (judgment of the Supreme Court No. k. 1 Cdo 1/93 of 30. 11. 1993).

¹⁴ ONDREJOVÁ, D. *Legal Means of Protection Against Unfair Competition*. Prague: Wolters Kluwer, 2010, pp. 111.

of individualization of a sanction means that the type, combination and intensity of sanctions in a particular case must be determined so that they correspond to all circumstances and specific characteristics of the particular case.¹⁵

The final amount of adequate compensation for non-material loss will be determined by the court after consideration of individual circumstances of the particular case. However, when using their discretion to determine the amount of awarded compensation, the courts should always take care that awarded satisfaction is not too low and does not “motivate” to unlawful conduct or, on the other hand, does not constitute unjust enrichment. On the other hand, the courts should eschew the second extreme – awarding of unreasonably high amounts to the public figures for alleged harm caused to their honour and dignity, which is contrary to the currently valid European standards. Such decision-making of some Slovak courts namely has a strong “chilling effect” on the media, journalists and other persons wishing to inform the public about the acts of the public figures and to openly express opinions of their activities.

As regards the scope (amount) of compensation for non-material loss, it can be stated that unlike the order for compensation for damage sought by the plaintiff, where awarded compensation covers all the damage caused by infringement, provided satisfaction will compensate for caused non-material loss damage only adequately.

4. Extinctive prescription of the right to claim compensation for non-material loss

In connection with financial compensation for non-material loss the question arises whether this right is or is not subject to prescription. Discussions on this issue started after adoption of the Act no. 87/1990 Coll. that introduced into the civil law the possibility to award to the affected person the right to require financial compensation.¹⁶

Some legal theorists believed that the right to compensation of non-material loss is subject to prescription in the same manner as compensation for damage. They admitted that subjective personal rights arising to the affected person by infringement of his/her personal rights were – unlike the material rights to compensation for damage – not subject to prescription, but the legal situation of the right to compensation according to the provision of Article 13 paragraph 2 of the Civil Code was allegedly different. They reasoned that the right to financial compensation as a right, which by its satisfying function of cash resembles the reparative function of the material right, i.e. right to compensation for damage, was not subject to prescription like any other material right.¹⁷

On the other hand, another article points out that financial compensation for non-material loss does not affect compensation for damage caused by infringement of the right to protection of personality (Article 16 of the Civil Code). Both these financial

¹⁵ See also e.g. Judgment of the Regional Court in Brno, file no. 57 Ca 49/2006.

¹⁶ This Act amended and completed the Civil Code by the provision of Article 13 of CC with validity from 29 March 1990.

¹⁷ KNAP, K., ŠVESTKA, J. Means of Civil-Law Protection of Personality of Citizens. In *Právo a zákonnost*, 1991, No. 6, p. 342.

claims stand next to each other, side by side, but they differ in the regime of prescription. According to Article 100 paragraph 2 of the Civil Code the material rights are subject to prescription, i.e. also the right to compensation for damage is subject to prescription. However, the right to protection of personality is not subject to prescription, therefore the right to financial compensation for non-material damage under Article 13 of the Civil Code is not subject to prescription either.¹⁸

The incongruous opinions of the issue of prescriptibility or imprescriptibility of the rights and of financial compensation for non-material loss had manifested themselves almost to these days. The prescriptibility of this right is alleged in the publication "Protection of personality according to civil law".¹⁹ The opposite opinion, i.e. that the right was imprescriptible, appeared in the comment to the Czech Civil Code.²⁰

In 2007 the Supreme Court of the Czech Republic stated: *"It is necessary to take into consideration that the valid wording of Article 13 of the Civil Code contains an independent and autonomous regulation of special means of the civil-law protection of an individual, including the right to financial compensation for non-material loss. As in this case we talk about subjective personal rights that arise to the affected individual due to unauthorised intervention into his or her personality, as non-material rights they are not subject to prescription."*

*The factual exclusion (if any) of the institute of compensation for non-material loss according to the provision of Article 13 paragraph 2 of the Civil Code from the group of subjective non-material personality (and hence imprescriptible) rights would considerably limit the possibility to exercise the right to protection of personality of individuals".*²¹

The board of appeal, the Supreme Court of SR, takes the opposite viewpoint. The right to financial compensation for non-material loss, as one of the relatively independent means of protection of an individual, is a right of material nature which is prescriptible.²² For justification of this conclusion the Supreme Court of SR said that, unlike other means of protection of personality, the right to this satisfaction had a distinct material character; it is financial compensation for non-material loss in the form of sanction. It is a financial claim (reparation claim) which, like other similar rights to financial compensation based on non-material level, such as the right to compensation for injuries and suffering, is subject to the regime of prescription. The Supreme Court further stated: *"In this context one cannot overlook that although the rights to financial compensation for non-material loss according to Article 13 paragraph 2 and 3 of the Civil Code and the rights to compensation for injuries and suffering according to the Civil Code are very dissimilar, in the practice, and in particular in actions for protection of personality and for protection of life and health*

¹⁸ KAMLACH, M. Some remarks to amendment of Article 13 of the Civil Code. In *Právo a zákonnost*, 1991, No. 3, p. 163.

¹⁹ KNAP, K., ŠVESTKA, J., JEHLIČKA, O., PAVLÍK, P., PLECITÝ, V. *Protection of personality according to civil law*. 4th revised and completed edition. Prague : Linde, 2004, p. 198 and p. 199.

²⁰ HOLUB, M. et al. *Civil Code: Comment*. Prague : Linde, 2002, p. 88 and p. 89.

²¹ Judgment of the Supreme Court of CR, file no. 30 Cdo 997/2007. For completeness it must be said that judgment of the High Court in Olomouc of 17 February 2004, file no. 1 Co 63/2003 took the opposite viewpoint.

²² Judgment of the Supreme Court of SR, file no. 2 Cdo 278/2007.

they supplement each other and compete with each other by their meaning, which might have negative consequences consisting in the unequal position of the affected individuals.” The Supreme Court of CR supported the view of the court of appeal and added: *“The right to financial compensation for non-material damage, although being one of the means of protection of the personal (personality) rights that are not subject to the regime of prescription, by its nature is clearly distinguished from these personal (personality) rights.*” “ The comment to the Slovak Civil Code²³ also refers to this legal opinion.

Finally the Czech courts supported this opinion as well. On 12 November 2008 the Grand Chamber of Civil and Commercial College of the Supreme Court of the Czech Republic decided that the right to compensation for non-material loss according to Article 13 paragraph 2 of the Civil Code was a material right, which lapsed within the general period of prescription.²⁴ The Constitutional Court of CR in its finding in the case no. II. ÚS 635/09 emphasised that it did not intend to challenge the legal conclusion of the Supreme Court of CR in the decision of its Grand Chamber, according to which the right to financial compensation for non-material damage was a prescriptible right.²⁵

5. Role of the courts in determination of the amount of compensation for non-material loss

The protection of personality is primarily a matter of the judge-made law. This fact has been emphasised repeatedly and today is widely known. In case of claims for compensation for non-material damage the judicial decisions are twice as important as usually. The determination of the amount of adequate compensation for non-material damage causes the biggest problems to the courts, which expect legal regulations as precise as possible in this area. These expectations of the judicial practice are sometimes inadequate. Even if legal regulations were much more specific they would never cover the whole range of legal proceedings to be brought by the practical application of law and creativity of entrepreneurs.²⁶ The courts will therefore not avoid the need to mold the law.²⁷ Concrete compensation for non-material damage in cases of unfair competition cannot be determined using the scales of tariffs, as is usual for compensation for injuries.²⁸ Each unique case remains in the hands of a judge and depends on his legal consideration.

²³ FEKETE, I. *Civil Code: Extensive Comment. Volume 1*. Bratislava : Eurocode, 2011, p. 145.

²⁴ Judgment of the Supreme Court of CR, file no. 31 Cdo 3161/2008

²⁵ This opinion was repeatedly indicated in the finding of the Constitutional Court of CR of 5 September 2012, file no. II. ÚS 3/2010

²⁶ Professor I. Telec even created a method to ensure that the judge’s consideration is as reviewable and predictable as possible (not surprising). TELEČ, I. Test of Adequacy of Satisfaction for Non-Material Loss. In *Právní rozhledy*, 2010, No. 4, pp. 147–152.

²⁷ In our opinion it is not „creation of law“ within the meaning of the Anglo-American law, therefore this activity can be better described as „molding of law“.

²⁸ See the Act No. 437/2004 Coll. on compensation for pain and compensation for deteriorated social and work capacity and on amendments to the Act of the National Council of the Slovak Republic No. 273/1994 Coll. on health insurance, financing of health insurance and establishment of Všeobecná zdravotná poisťovňa and departmental, sectoral, corporate and civil health insurance companies, as amended.

The molding of law by judicial decisions not only puts stress on their predictability; the application of law in accordance with its meaning and purpose is expected as well. The court must take into account mutual relations of individual arguments coming into consideration and to balance their role in a particular case with regard to the specific characteristics of the case, instead of mechanically applying these criteria. Such approach is also an approach of modern case-law, which gradually replaces the formal legalist view of law by an attitude, where a judge tries to provide the best reasoned answer to legal and factual questions, that the parties to a dispute have submitted to him.²⁹ Although the Civil Code does not define the rules for determination of adequacy of satisfaction, it does not mean that the court may not determine its amount without indicating the facts and considerations on which it relied.

From the published Slovak and Czech literature we can draw several conclusions for awarding of compensation for non-material damage:

- The burden of proof rests with the plaintiff;
- The proposal for compensation for non-material loss does not need to contain evidence, as regards the amount of adequate satisfaction, but it should contain convincing reasons demonstrating the conclusion, that it corresponds to the nature of the case;
- The objective criteria are, among others, the seriousness and intensity of unlawful conduct, its range (size of the media market affected by the conduct) and duration;
- Although the objective liability is indisputable, subjective factors or even intentional conduct with knowledge that an individual would be discredited, are also important.

6. The amount of compensation for non-material loss and test of proportionality

Protection of personality rights in the media is closely related to the freedom of expression and this legal regulation should be construed in conformity with the Constitution of the Slovak Republic. The decision-making practice of the general courts has not established its case-law in the area of the amount of compensation for non-material loss. Some decisions have been overcome and it is necessary to criticise their wrong application. For example the judgment of the Supreme Court of SR, no. 4 Cdo 15/03 provides that, as regards expression of the degree in which the intervention decreased dignity and respect of an individual in society, it is necessary to take into account the following reaction triggered by such intervention in the family, working or other environment of the individual. According to the Supreme Court of SR this degree should be determined on the basis of evidence and assessed on the basis of knowledge and evaluation of this reaction. This decision caused that the court heard the testimony of relatives or colleagues, who, after reading an article, usually in a tabloid, had ceased to think well of him, due to which the individual lost respect and dignity in their eyes. When we know our close person well, can a single article in the media change our overall opinion of this person, built for many years? Certainly not. This decision should be

²⁹ Finding of the Constitutional Court of SR, file no. I. ÚS 243/07.

applied in the sense that it may find certain reflection and have certain consequences on the family and working environment. However, it is not a necessary, or even single condition of the award of financial compensation for non-material damage. Important is the question whether a mere statement is objectively able to cause an individual to lose respect and dignity in the eyes of an average reader.

Another wrong stereotype in the decision-making practice of the courts is presumption of integrity and dignity of an individual in society. According to previous behaviour and life of the affected person the court should decide whether honour, respect and dignity of an individual can be decreased at all.

The non-uniform practice of the general courts, and in particular unreasonably high compensations for non-material loss awarded to some executive and judicial officials, do not pass the test of constitutionality. The Constitutional Court of SR clearly stated that from the “*constitutional aspect it is not acceptable that the general courts deciding on the amount of compensation for non-material loss privilege public officials over other (common) citizens with reasoning that in case of these officials the loss is (automatically) more serious*”.³⁰

In case of the conflict of the right to protection of personality and the freedom of expression according to the Constitutional Court of SR it is necessary to examine WHO says WHAT ABOUT WHOM, WHERE, WHEN and HOW, and on the basis of answers to the questions using the test of proportionality to decide, which freedom should be given priority.³¹

The test of proportionality is based on the following three steps:

The first step (A) is the test of a sufficiently important objective, i.e. test of suitability – whether intervention pursues an objective that is important enough to justify the intervention; and test of rational relation between the intervention and the objective of intervention – whether an acceptable objective (protection of respect and dignity of an individual) can be achieved by the respective means (limitation of the freedom of expression).

The second step (B) is the test of necessity (test of necessity to use the respective means – intervention), i.e. whether less harsh or softer intervention could not be used instead.

Finally, the third step (C) is the test of proportionality in a narrower sense of the word, which comprises (C1) practical concordance, i.e. test of safeguarding of a maximum of both fundamental rights, and (C2) so-called Alexy’s Weight Formula.

The degree to which the right for protection of personality of the plaintiff can be satisfied will result from the answers to the test with questions who said what about whom, where, when and how.

³⁰ Finding of the Constitutional Court of SR, file no. IV. ÚS 492/2012-67.

³¹ Finding of the Constitutional Court of SR, file no. II. ÚS 152/08.

Conclusion

The amount of compensation for non-material loss is influenced by several factors. From the form of published article and intensity of false or misleading information the judge alone will deduce what importance an average reader will assign to the article and whether “dignity of an individual or his respect in society were significantly decreased”, relying on the following conclusions:

- It is not necessary that dignity of the affected person is decreased in the eyes of all persons who read the article; the ability of the article to decrease respect and dignity of an individual in society is sufficient.
- A reader cannot be required to study the individual articles word by word, or even to use methods of legal interpretation.
- It is assumed that a reader perceives information in the media in a standard, often casual manner

The courts should take into account the following circumstances:

- Duration of unlawful conduct;
- Reaction to the warnings and requirements of the affected person;
- Voluntary abandonment of the conduct and attempt at remedy;
- Scandalizing an individual;
- Repetition and increase of intensity of the unlawful conduct;
- Intention motivated by the effort to make profit or to discredit an individual;
- Degree of aggression of published articles;
- Readability or traceability of the media.