

Institute of Comparative Law, Association for Tort Law, Judicial Academy



XXVII International Scientific Conference

# CAUSATION OF DAMAGE, DAMAGE COMPENSATION AND INSURANCE

Proceedings from XXVII International Scientific Conference

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Belgrade, Valjevo, 2024

CAUSATION OF DAMAGE, DAMAGE COMPENSATION AND INSURANCE  
– XXVII International scientific conference –

**Publisher:**

Institute of Comparative Law, Terazije 41, Belgrade, Serbia

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**Working Languages of the Conference:**

English and German

**Translator:**

Miloš Baltić

**Prepress:**

Branimir Trošić

**Printed by:**

Birograf Comp d.o.o., Beograd

**Circulation:**

150 copies

**ISBN 978-86-82582-21-2**

**DOI: 10.56461/ZR\_24.ONS**

The organization of this conference was supported by Ministry of Science, Technological Development and Innovation.

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**MONETARY COMPENSATION FOR NON-MATERIAL DAMAGE  
CAUSED BY VIOLATION OF THE PRESUMPTION OF INNOCENCE  
IN MEDIA REPORTING\*\***

*Summary*

*The Criminal Procedure Code contains the norm by which it is prescribed the public information media are among the entities that are obliged to respect the presumption of innocence. Although the legislator sought to ensure the presumption of innocence as a guarantee of the procedural rights of the accused, lawmaker did not prescribe the consequences of its immediate violation. The author deals with the question of whether an individual has the right to compensation for non-material damages if that right is violated. In the first part of the paper, the author concludes that the presumption of innocence can be considered a personal right, which enjoys civil protection. In the further part of the paper, the author emphasizes that the violation of the presumption of innocence is not a sufficient condition for individuals to realize the right to monetary compensation for non-material damage. In accordance with the accepted subjective concept of non-material damage, it is necessary that there is a violation of the right to the presumption of innocence, that the person must suffer psychological stress of sufficient intensity and that there is a causal connection. The author, with examples from court practice, points to the inconsistent acceptance of this concept of non-material damage in procedures for compensation for damages due to the violation of the presumption of innocence by means of public communication. In the second part of the paper, the author analyzes the criteria for determining the*

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\*\* This paper is a result of the research conducted at the Institute of Comparative Law financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia under the Contract on realisation and financing of scientific research of SRO in 2024 registered under No. 451-03-66/2024-03/200049.

*amount of monetary compensation. Since the legal standards are set by law, the author tends to illustrate how judicial practice specifies these criteria in cases concerning the compensation of non-material damages caused by the violation of the presumption of innocence by the public information media. The author criticizes the entrenched depersonalized approach in determining the compensation amount in these cases, considering it does not fully correspond to the harm suffered by the person sustaining damage.*

**Keywords:** *Presumption of Innocence Violation, Personality Rights, Non-material Damage, Media, Public Communication Means.*

## 1. Introduction

The criminal procedure is regulated by law the undertaking of criminal procedural actions by the subjects of criminal proceedings with the aim of reaching a court decision regarding the criminal offense, the responsibility of the perpetrator, criminal sanctions, and other procedural relationships related to the criminal offense, requiring the participation and decisions of the court.<sup>1</sup> Depending on the stage of this procedure, there needs to be a specified degree of suspicion that a criminal offense has been committed and that a certain individual is the perpetrator of the criminal offense. Suspicion represents the content of consciousness in the thought process where knowledge of specific facts may be considered incomplete and insufficiently known.<sup>2</sup> As suspicion does not imply an unquestionable conclusion that a person has committed a criminal offense, all individuals against whom proceedings are conducted must be provided with adequate legal and procedural protection of their personal rights. Protecting the position of the accused in criminal proceedings also involves defining the responsibilities of subjects who may jeopardize or violate personal rights during the proceedings.

In the introductory articles of the Criminal Procedure Code<sup>3</sup> (hereinafter referred to as CPC), the right to presumption of innocence is prescribed, as well as which subjects have a legal obligation to respect it. The presumption

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<sup>1</sup> S. Bejatović, *Krivično procesno pravo*, Službeni glasnik, Beograd 2018, 45.

<sup>2</sup> G. Ilić, M. Majić, V. Beljanski, A. Trešnjev, *Komentar Zakonika o krivičnom postupku*, Službeni glasnik, Beograd 2018, 42.

<sup>3</sup> *Official Gazette of the RS*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – decision of Constitutional Court and 62/2021- decision of Constitutional Court.

of innocence is the right of every individual to be considered innocent until their guilt for a criminal offense is legally determined by a final court decision (Art 3, para CPC). According to the provisions of the CPC (Art. 3, para 2), the obligation to respect the presumption of innocence applies to: public and other authorities and organisations, the public information media, associations and public figures. However, when expressing the obligation for these subjects to respect the presumption of innocence, the lawmaker has omitted to specify the consequences if this duty is breached. In this regard, the question arises: what rights do individuals have when the aforementioned subjects violate their obligation? In this paper, we analyze whether in the case of a violation of the presumption of innocence by public communication means, individuals can claim the right to monetary compensation for non-material damage. Determination that in this paper we deal with the liability of the media in case of violation of the presumptions arising from the previous positions presented in the doctrine, which indicates the statements of the members of the court that makes decisions in the procedure, that is, the effectiveness of the procedure.<sup>4</sup> Research conducted by domestic authors indicates that the majority of citizens in the Republic of Serbia believe that the media often prejudice the guilt of individuals through their reporting,<sup>5</sup> which can indicate where public information media means violate their duty in reporting are not uncommon. In domestic legal doctrine, the significance of public information media in respecting the presumption of innocence has been the subject of multiple studies.<sup>6</sup> However, these studies have generally not extensively analyzed the possibility for individuals affected by the media's violation of the presumption of innocence to claim compensation for non-pecuniary damage (non-material in serbian law). The thematic restriction to the aspect of non-material damage arises from

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<sup>4</sup> S. Bejatović, „Mediji i efikasnost krivičnog postupka“, in: *Pravosuđe i mediji* (eds. Ivana Stevanović, Olivera Pavićević), Palić 2017, 349.

<sup>5</sup> V. Turanjanin, M. Turkalj, „Percepcija građana o medijskom izveštavanju o kriminalitetu i uticaju medija na rad pravosuđa“, in: *Mediji, kazneno pravo i pravosuđe* (eds. Jelena Kostić, Marina Matić Bošković), Beograd 2024, 364.

<sup>6</sup> See M. Kolaković Bojović, „Mediji i pretpostavka nevinost“, *Zbornik radova Pravnog fakulteta u Nišu* 61/2012, 555–571; I. Ilić, „Pretpostavka nevinosti okrivljenog i pravo na javno informisanje“, *Zbornik radova Pravnog fakulteta u Nišu* 61/2012, 571–586; V. Bajović, „Pretpostavka nevinosti i sloboda štampe“, *Anali Pravnog fakulteta u Beogradu* 1/2008, 194–210; M. Škulić, „Medijska suđenja, „suđenja“ u medijima, načelo javnosti“, in: *Mediji, kazneno pravo i pravosuđe* (eds. Jelena Kostić, Marina Matić Bošković), Beograd 2024, 11–53; V. Delibašić, „Pretpostavka nevinosti i mediji“, *Kultura polisa* 2018, 141–151.

the circumstance that prosecutors very rarely seek compensation for material damage in judicial practice. This reluctance may stem from the difficulty in proving a causal link between harmful information and simple loss or profit lost.<sup>7</sup> In this study, we will provide answers to questions such as whether individuals affected by public communication means violating the presumption of innocence can claim financial compensation for non-material damage, and how the amount of such compensation should be determined if the answer to the first question is positive. To address these questions, the research will utilize doctrinal, normative, and methods analysis of final judgment court decisions. By employing the latter method, we aim to understand how judicial practice applies the relevant norms that are crucial to the subject of this research.

## 2. Legal Consequences of Violation of the Presumption of Innocence

The presumption of innocence is regarded in domestic doctrine as a guideline for how to treat the accused, a procedural principle, or a universal human right.<sup>8</sup> A correct understanding of the legal nature of the presumption of innocence is crucial for understanding how it can be protected and for analyzing the consequences of its violation. If it could be accepted in any of the previously mentioned ways, it would be important to consider whether legal protection can be realized only when procedural rights defined in accordance with the presumption of innocence principle are violated, or if it can also be realized when the presumption of innocence itself is directly violated and the consequences of this violation are not specifically provided for.

In the Constitution of the Republic of Serbia,<sup>9</sup> the European Convention on Human Rights<sup>10</sup> and other regional conventions protecting human rights,<sup>11</sup>

<sup>7</sup> A. Radolović, „Odnos prava osobnosti i medijskog prava“, *Zbornik Pravnog fakulteta sveučilišta u Rijeci* 1/2006, 301.

<sup>8</sup> S. Nenadić, *Pretpostavka nevinosti kao ljudsko pravo sa posebnim osvrtom na praksu Evropskog suda za ljudska prava*, doctoral dissertation, Pravni fakultet Univerziteta u Beogradu, Beograd 2019, 6; T. Bugarski, „Pretpostavka nevinosti (sadržina, obim i dejstvo u krivičnom postupku)“, *Revija za kriminologiju i krivično pravo* 1/2017, 52; Đ. Lazin, „Sadržina i pravna priroda pretpostavke nevinosti“, *Anali Pravnog fakulteta Univerziteta u Beogradu* 5-6/1981, 311–326.

<sup>9</sup> Art. 34, para. 3 of the Constitution of the Republic of Serbia, *Official Gazette of the RS*, No. 98/2006 and 115/2021.

<sup>10</sup> Art. 6, para. 2. European Convention on Human Rights and Fundamental Freedoms, Rome, 4. november 1950. Available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf), last visited 20. 7. 2024.

<sup>11</sup> R. Murray, *The African charter on human and people rights a comentary*, Oxford

the presumption of innocence is defined as a human right. In the CPC, the presumption of innocence is regulated in the introductory provisions, which also prescribe principles such as *ne bis in idem*, officiality of criminal prosecution, legality, and protection of personal freedom. Many individual rights of the accused in criminal proceedings are defined in a manner that guarantees respect for the presumption of innocence until a legally binding guilty court verdict is reached. In this sense, the legislator specifies consequences if any of these rights are violated. For example, in accordance with the presumption of innocence principle, there is an obligation to exercise particular caution when deciding on pretrial detention.<sup>12</sup> If a person is unjustifiably deprived of their liberty, they have the right to claim financial compensation for non-material damage.<sup>13</sup> This provides civil law protection both to the personal right to freedom and indirectly contributes to achieving the goals of criminal proceedings based on the principle of respecting the presumption of innocence. Unlike these situations, the Criminal Procedure Code (CPC) does not specify immediate consequences for the violation of the presumption of innocence. By examining some earlier provisions of criminal legislation, it's noted that consequences were prescribed both in substantive and procedural provisions. During amendments and additions to the Criminal Code in 2009, the act of making public statements in the media during the duration of legal proceedings with the intention to undermine the presumption of innocence and the independence of the court was criminalized. However, this offense was soon decriminalized.<sup>14</sup> This regulation (Art 3 CPC) requires that in cases where the duty to respect the presumption of innocence was seriously breached, especially if it was evident from all circumstances that this was done to influence the court and other competent authorities, or to cause serious consequences for the accused, damaged party, or other participants in the criminal proceedings, a natural person could be fined up to 150,000 dinars, and a legal entity up to 1,500,000 dinars, with a public warning.

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University press, Oxford 2019, 223; L. Hennebel, H. Tigroudja, *The American convention on human rights a comentary*, Oxford University press, Oxford 2022, 344.

<sup>12</sup> M. Stanić, „Neophodnost određivanja pritvora i naknada štete u praksi Evropskog suda za ljudska prava-smernice za Srbiju“, in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović), Valjevo 2019, 280.

<sup>13</sup> See M. Grubač, *Naknada štete za neopravdanu osudu i neosnovano lišenje slobode*, Savremena administracija, Beograd 1979.

<sup>14</sup> Law on making amendments and supplements Criminal Code, *Official Gazette of the RS*, No. 72/2009.



Current criminal legislation does not prescribe consequences for the violation of the presumption of innocence in the manner previously outlined in those acts. Some authors argue that the breach of the presumption of innocence, due to the absence of sanctions, represents merely a moral rather than a legal obligation.<sup>15</sup> Other authors believe that the obligation to respect the presumption of innocence has been reduced to a “wishlist”, implying it has only instructional value.<sup>16</sup> What we can agree on is that criminal legislation has indeed failed to foresee consequences for breaching the presumption of innocence. To answer whether appropriate consequences arise in the event of a breach of the presumption of innocence, it is necessary to consider other potential forms of protection.

### ***2.1. Civil Law Consequences of Violation of the Presumption of Innocence***

Accepting the presumption of innocence as a personal right would mean that it could be protected as a civil subjective right. According to the rules of the Law of Contract and Torts,<sup>17</sup> in the event of a violation of personal rights, the individual has available preventive and reactive protection.<sup>18</sup> The most significant forms of reactive protection include the right to compensation for material and non-material damage. This type of protection of personal rights is characterized by the fact that the injured person has the means of protection at their disposal and it depends on them whether and to what extent they will use them. To discuss these rights of individuals whose presumption of innocence has been violated, it is necessary to answer the question of whether the presumption of innocence can be considered one of the personal rights. If this were the case, regarding the topic of our research, the question arises whether the violation of the presumption of innocence is sufficient for individuals to claim the right to compensation for non-material damage.

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<sup>15</sup> V. Bajović, 200.

<sup>16</sup> M. Škulić (2024), 39.

<sup>17</sup> The Law of Contract and Torts, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89, 57/89, *Official Gazette of the FR Yugoslavia*, No. 31/93, *Official Gazette of the RS*, No. 18/20.

<sup>18</sup> I. Simonović, M. Lazić, „Građanskopravna zaštita prava ličnosti“, *Zbornik radova Pravnog fakulteta u Nišu* 3/2014, 273.

### 2.1.1. Is the Presumption of Innocence One of the Personal Rights?

Defining the right to personality has been a challenge for legal doctrine.<sup>19</sup> Some authors define the right to personality as the right of a legal subject to demand and realize respect and development of their own personality from all others, in accordance with psycho-social development.<sup>20</sup> Others define the right to personality through the objects of rights, as a subjective right over personal goods.<sup>21</sup> Regarding the basic characteristics of the right to personality, it is emphasized that they are non-transferable, binding on all persons to respect them (*erga omnes*), and acquired by birth and terminated by death.<sup>22</sup> Despite efforts in legal doctrine to define the right to personality and outline its fundamental characteristics, there is no positive legal provision in the Republic of Serbia that defines the concept of the right to personality. In legal doctrine, there are opinions suggesting that this should have been done in the general part of the Civil Code, which is still not enacted in Serbia.<sup>23</sup> Even in its draft form, the Civil Code does not define the right to personality; instead, it states that all personality rights derive from the right to dignity. In terms of doctrinal definitions and the positions taken in the draft of the Civil Code, the question arises whether the presumption of innocence can be considered a right of personality. In support of the view that this is a right of personality, there are authors' opinions indicating that the normative establishment of the presumption of innocence creates an obligation for the public prosecutor to respect the dignity of the accused during criminal proceedings.<sup>24</sup> We can also highlight its social dimension, according to the presumption that all citizens refrain from behavior prescribed as punishable. By violating the presumption of innocence, an individual is stigmatized as a

<sup>19</sup> A. Radolović, „Pravo osobnosti u novom Zakonu o obveznim odnosima”, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 1/2006, 129–170; V. Vodinić, „Lično pravno kao nastavno-naučna disciplina“, *Analiza Pravnog fakulteta u Beogradu* 4/1989, 321–335; R. Jotanović, „Naknada materijalne štete zbog povrede prava ličnosti“, *Godišnjak Pravnog fakulteta Univerziteta u Banjoj Luci* 2013, 35–37.

<sup>20</sup> A. Radolović (2006), 133.

<sup>21</sup> V. Vodinić, *Uvod u građansko pravo i opšti deo građanskog prava*, Pravni fakultet Univerziteta Union i Službeni glasnik, Beograd 2023, 258.

<sup>22</sup> Zdravko Petrović, *Naknada nematerijalne štete zbog povrede prava ličnosti*, Vojna knjiga, Beograd 1996, 45.

<sup>23</sup> B. Pajtić, S. Radovanović, A. Dudaš, *Obligaciono pravo*, Pravni fakultet u Novom Sadu, Novi Sad 2018, 547.

<sup>24</sup> S. Nenadić, „Pretpostavka nevinosti i dostojanstvo ličnosti“, *Studia Iuridica Montenegro* 1/2022, 32.

perpetrator before a legally binding court decision is made on the matter. If the violation is committed by means of public communication, a legally binding acquittal in court proceedings will rarely lead to a change in the formed public opinion.<sup>25</sup> By infringing on the right to presumption of innocence, a person's moral values are challenged. In these situations, there is both a violation of human rights and an impediment to the free development and normal life in the community.

A counter-argument to the claim that the presumption of innocence is a right of personality could be that listing specific subjects obligated to respect the presumption of innocence contradicts the characteristic of a right of personality, which implies that everyone must respect it. Under the previous CPC other individuals were also obliged to respect the presumption of innocence.<sup>26</sup> For example, the current Croatian CPC similarly states that all individuals must respect the presumption of innocence.<sup>27</sup> The mentioned amendment in domestic legislation aimed to protect freedom of expression while obligating those who could influence the course of criminal proceedings. We consider this change is not in line with the nature of the presumption of innocence and complicates its protection. We hold the view that its legal nature cannot be altered by the content of the provision, especially considering other sources of law in Serbia, notably the Constitution of the Republic of Serbia, which doesn't include such restrictions.

We believe that the presumption of innocence can be considered as a right of personality, and therefore, in case of its violation, it can be subject to protection in civil court proceedings. The rights of the accused in criminal proceedings, including the presumption of innocence, are designed with the intention of protecting human dignity as a fundamental principle of criminal proceedings.<sup>28</sup> Legal consequences of a criminal conviction can only occur after a legally binding court decision. Until then, everyone is obliged to respect the presumption of innocence. If this presumption is violated by

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<sup>25</sup> A. Ilić, *Mediji i kriminalitet - Kriminološki aspekt*, Pravni fakultet Univerziteta u Beogradu, Beograd 2017, 204.

<sup>26</sup> Art. 3, para. 2. Criminal Procedure Code, *Official Gazette of the SRY*, No. 70/2001 and 68/2002 and *Official Gazette of the RS*, No. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009.

<sup>27</sup> Art. 3, para. 1. Criminal Procedure Act Republica Croatia, *Official Gazette of the Republic Croatia*, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, 36/24.

<sup>28</sup> R. Lippke, „Fundamental values of criminal procedure“, in: *The Oxford Handbook of criminal process* (eds. Darryl Brown, Jenia Turner, Bettina Weisser), Oxford 2016, 27.

media outlets, the consequences can create an impression of guilt before the issuance of a legally binding court judgment. Such published information can negatively affect relationships with family members, business associates, or other individuals with whom the person interacts. The individual may suffer emotional distress because unauthorized reporting portrays them as a perpetrator of a crime. The fact that the legislature holds the view that the presumption of innocence is a right of personality can be indicated by provisions in the Law on Public Information and Media, which stipulates that no one through the media should be labeled as a perpetrator of a criminal offense before the court decision becomes legally effective. This law aims to protect human dignity.<sup>29</sup> Additionally, in domestic judicial practice, in cases where lawsuits are filed due to the violation of the presumption of innocence by media outlets, the view has been accepted that the presumption of innocence is one of the rights of personality stemming from the right to dignity.<sup>30</sup>

### *2.1.2. Acquiring the Right to Monetary Compensation for Non-material Damage caused in Violation of the Presumption of Innocence*

Although the right to presumption of innocence is considered one of the rights of personality, the conclusion provided does not address whether every instance where the presumption of innocence is violated (as a right of personality) automatically entitles the individual to claim non-pecuniary damages. Indeed, the question here revolves around whether the violation of personality right under domestic legislation constitutes non-pecuniary damage *per se*. The answer to this question depends on the concept of non-pecuniary damage accepted by the domestic Law of Contract and Torts. According to the subjective concept, non-pecuniary damage involves causing physical or mental pain and suffering to another person. According to this conception, non-pecuniary damage does not consist in the violation of a right of personality itself, but in the intimate suffering that may result from the violation of a right of personality.<sup>31</sup> In accordance with the objective concept,

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<sup>29</sup> Art. 84, Law on Public Information and Media, *Official Gazette of the RS*, No. 92/2023.

<sup>30</sup> Judgment, Supreme Court of Cassation, No. Rev 7773/2021, from 12. 1. 2022; Judgment, Hight Court in Belgrade, No. P3-518/19, from 4. 11. 2021; Judgment, Hight court in Belgrade, No. P3-438/18, from 01. 6. 2022.

<sup>31</sup> M. Karanikić Mirić, *Obligaciono pravo*, Službeni glasnik, Beograd 2024, 522; A. Dudaš, „The concept of moral (non-material) damage in Serbian, Croatian and Slovenian law”, *Journal for the International and European Law, Economics and Market*

non-pecuniary damage arises from the mere violation of a personality right.<sup>32</sup> The significance of answering the question lies also in the procedural position of the plaintiff (the person whose right to presumption of innocence has been violated). In the case of accepting the subjective concept, the plaintiff would need to prove the existence of the violation of the presumption of innocence, the consequences of which consist of intimate loss, and the causal connection. According to the objective concept, the plaintiff would need to prove that their right to presumption of innocence has been violated.

The current provision in the Law of Contract and Torts states that compensation for non-pecuniary damage can be awarded if the content of the information violates the presumption of innocence, causing the affected person to suffer mental anguish of an appropriate intensity.<sup>33</sup> According to the concept of non-pecuniary damage accepted in the legislation of the Republic of Serbia, in determining the existence, duration, and intensity of mental anguish, the court may rely on expert testimony from forensic medicine. It is notable that in cases involving compensation for non-pecuniary damage caused by the violation of the presumption of innocence, expert evaluations of mental anguish are rarely conducted. Some authors believe that such expert opinions are not necessary if the violation of personal rights occurred through the publication of information in the mass media, unless the special circumstances of the case indicate this.<sup>34</sup> In practice, courts determine the existence, duration, and intensity of mental anguish through hearings with the affected party or other individuals. This approach by the courts is not contrary to the provisions of the Law of Contract and Torts, which arises from the fact that damage, when understood as mental or psychological pain,

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*Integrations* 1/2024, 264; T. Đurđić, „Neka pitanja nematerijalne štete u zakonodavstvima pojedinih zemalja bivše Jugoslavije”, in: *Pravo zemalja u regionu* (ed. Vladimir Čolović), Beograd 2010, 502; M. Karanić Mirić, “Subjektivna koncepcija neimovinske štete”, in: *Liber amicorum Aldo Radolović: zbornik radova u čast prof.dr.sc Aldu Radoloviću* (eds. Zvonimir Slakoper, Maja Bukovac Puvača, Gabrijela Mihelčić), Rijeka 2018, 395–413; O. Stanković, *Naknada štete* (reprint) Nomos, Beograd 1998, 150.

<sup>32</sup> M. Karanić Mirić, “Objektivizovanje moralne štete”, *Zbornik Matice srpske za društvene nauke* 3/2015, 490; M. Baretić, „Pojam i funkcije neimovinske štete prema novom Zakonu o obveznim odnosima”, *Zbornik Pravnog fakulteta u Zagrebu*, 2006, 464.

<sup>33</sup> M. Vukotić, *Nasledivost prava na naknadu neimovinske štete*, Pravni fakultet Univerziteta u Beogradu, Beograd 2020, 79.

<sup>34</sup> S. Andrejević, Lj. Mitrović, Z. Petrović, „Naknada nematerijalne štete: nove tendencije”, in: *Naknada nematerijalne štete, Izbor radova sa savetovanja Udruženja za odštetno pravo* (eds. Zdravko Petrović, Nataša Mrvić-Petrović), Beograd 2009, 105.

is a legal and not a medical category.<sup>35</sup> In part of the domestic judicial practice, the subjective conception non-pecuniary damage is not accepted damage that is accepted by the Law of Contract and Torts. In order to point out the danger that arises from this approach to court practice, we will present different positions of the first and second-instance courts, in a case conducted for non-material compensation damages caused by violation of the right to the presumption of innocence. Previously, we will present the factual situation on the basis of which the judgment was passed.

The daily newspaper published on its front page the headline “Series of Juvenile Violence in Serbia” and subtitle “Children Have Never Been More Aggressive! Why?” with the subheading “Three Boys in Custody for Beating and Raping a Girl (12) for Hours.” In the main text, they published the title “Juvenile Rapists Sent to Prison”. The first-instance court determined that the text had violated the presumption of innocence, but assessed whether the individuals mentioned were entitled to non-pecuniary damages.<sup>36</sup> The court concluded that without hearing from the prosecutor, the amount of non-pecuniary damages could not be determined based on the evidence presented. The appellate court overturned the decision of the Higher Court and granted the plaintiff’s request for compensation for non-pecuniary damages. In its decision, the appellate court stated:

*“Compensation for non-pecuniary damages in this case can be awarded for the violation of the presumption of innocence independently of damages for harm to honor and reputation. Therefore, in this specific case and without hearing from the prosecutor, it is not necessary to assess the intensity and duration of the pain suffered by the plaintiff due to the publication of false, incomplete, or otherwise prohibited information.” The court in this judgment indicates that in cases of violation of personal rights, the so-called objective concept of compensation for damages is applied<sup>37</sup>.”*

The Supreme Court of the Republic of Serbia, in the procedure for the declared revision, assessed the position of the second-instance court as correct.<sup>38</sup>

It seems that the explanation provided by the appellate court is not in line with the concept of non-pecuniary damages accepted in the current Law of Contract and Torts. Moral, or non-pecuniary, damage is not constituted

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<sup>35</sup> M. Karanikić Mirić (2015), 495.

<sup>36</sup> Judgment, High court in Belgrade, No. P3-324/20, from 25. 3. 2021.

<sup>37</sup> Judgment, Court of Appeal in Belgrade, No. Gž3-238/21, from 15. 7. 2021.

<sup>38</sup> Judgment, Supreme Court, No. Rev1280/2020, from 8. 7. 2020.

solely by the violation of personal rights or the object of some non-pecuniary right, but rather by pain or fear, the infringement of the intimate sphere which disrupts the psychological balance of the injured party.<sup>39</sup> The appellate court decided to award monetary compensation for non-pecuniary damages without considering the obligation to establish the existence, duration, and intensity of mental suffering. This example from case law illustrates that the subjective concept of non-pecuniary damages is not consistently applied in judicial practice. It appears that this is not an isolated case, as evidenced by judgments where it is not clear from the reasoning under what circumstances the existence of emotional distress was established, but rather the conclusion was drawn simply based on the violation of the presumption of innocence.<sup>40</sup>

Through such judgments, it seems that the domestic legal system is introducing a concept of non-pecuniary damage that has not been accepted by legislators. Even in cases where the existence of mental suffering is stated, it is often unclear on what basis the court makes such an assessment. In essence, the primary issue in these proceedings seems to be whether the presumption of innocence was violated by the published information. The inconsistency in the application of the subjective concept of non-pecuniary damages can create uncertainty for parties during legal proceedings. Parties cannot be certain which concept of non-pecuniary damages the court will apply when delivering a judgment. Even the Supreme Court contributes to legal uncertainty by accepting the objective concept of non-pecuniary damages in some judgments.<sup>41</sup> To resolve this dilemma, we consider it necessary to contemplate a change in the concept of non-pecuniary damages and for legislators to adopt a consistent stance thereafter. In our opinion, the objective concept of non-pecuniary damages, where only the violation of personality rights needs to be established, would be a better solution than the current subjective concept. This opinion stems from our examination of the research subject, where it is evident that courts struggle to determine whether individuals whose presumption of innocence has been violated suffer mental anguish due to the publication of such information. It also appears that domestic doctrine increasingly supports the need for a change in the concept of non-pecuniary damages. Until such legislative changes occur, courts should work towards aligning judicial practice in accordance with the existing provisions of the

<sup>39</sup> O. Stanković, 150.

<sup>40</sup> Judgment, Court of Appeal in Belgrade, No Gž3-74/20, from 13. 5. 2020.

<sup>41</sup> S. Andonović, „Naknada nematerijalne štete zbog povrede prava ličnosti-između zakona i prakse” in: *Prouzrokovanje štete, naknada štete i osiguranje* (eds. Zdravko Petrović, Vladimir Čolović), Institut za uporedno pravo, Valjevo 2019, 216.

Law of Contract and Torts, thereby eliminating any form of uncertainty that parties in disputes may face.

### **3. Determining the Amount of Monetary Compensation**

The Law of Contract and Torts contains several criteria that the court must adhere to when determining the amount of non-pecuniary damages. According to these criteria from Art. 200 para. 1 of the Law of Contract and Torts, the court is obligated to award monetary compensation if the circumstances of the case and the intensity of pain and suffering justify it. The court must also consider the importance of the infringed right, the purpose of awarding non-pecuniary damages, and ensure that the awarded amount does not cater to interests that contradict its nature and social purpose (Art. 200, para. 2 Law of Contract and Torts). Additionally, the Law on Public Information and Media specifies criteria that the court particularly values if the harm arises from information published in the media. In such situations, the court should specifically assess whether the plaintiff attempted to mitigate the harm using other legal remedies provided by this law, and whether the defendant prevented the plaintiff from mitigating the harm by publishing a response, correction, or other information based on a court decision (Art. 128, Law on Public Information and Media). It's notable that these criteria provided in the Law of Contract and Torts are set as legal standards and their application depends on the circumstances of each case. To illustrate how these criteria are applied in cases involving the violation of the presumption of innocence through media outlets, we will present conclusions drawn from our examination of legally binding court judgments.

Excellent observations highlight the court's effort to standardize the amount of monetary compensation for non-pecuniary damages. In one judgment, the first-instance court noted that the awarded amount was determined within the range of orientation values typically awarded in similar situations.<sup>42</sup> Regarding specific case circumstances considered by the court, notable aspects include whether the information sparked curiosity among people in private or professional settings,<sup>43</sup> caused negative changes within families, led to unpleasant experiences at work, hindered employment opportunities in the place of residence,<sup>44</sup> or increased readership of the defendant's public publication.<sup>45</sup> Despite some judgments mentioning

<sup>42</sup> Judgment, Court of Appeal in Belgrade, No Gž3-333/22, from 30. 11. 2022.

<sup>43</sup> Judgment, Court of Appeal in Belgrade, No. Gž3 333/22, from 30. 11. 2022.

<sup>44</sup> Judgment, Hight court in Belgrade, No. P3 515/19, from 11. 2. 2022.

<sup>45</sup> Judgment, Court of Appeal in Belgrade, No. Gž3 416/22, from 8. 2. 2023.



circumstances significant for determining the amount of compensation, many others fail to specify any such factors. Courts often do not elaborate on how they arrived at a specific compensation amount, merely stating it aligns with criteria outlined in the Law of Contract and Torts. Regarding criteria from the Law on Public Information and Media (hereinafter LPIM), courts notably assess whether the harmed party attempted to mitigate the damage through legal means, such as the right to reply. The court values this circumstance by considering whether the plaintiff attempted to reduce the harm caused by the published information.<sup>46</sup> It is our view that current judicial practice does not strive to individualize the amount of compensation in these cases. Some authors argue that awarding pecuniary compensation for mental suffering necessarily becomes depersonalized in practice.<sup>47</sup> We agree that exact determination of compensation amount is impractical, as the primary goal remains satisfaction, given that complete restoration to the previous state is impossible. However, completely excluding subjective case circumstances would favor the perpetrator, who could anticipate the compensation amount beforehand. In terms of our research subject, media outlets could calculate whether it is financially viable to pay such standardized compensation amounts, aiming to attract greater readership through sensationalist reporting. Additionally, courts seldom grant the portion of the claim requesting a share of profits derived from publishing unauthorized information (Art. 130, Law on Public Information and Media).

We believe that it is necessary for courts to consider all circumstances of the specific case and to clearly indicate in the reasoning of judgments how each of these circumstances affects the amount of awarded compensation. As we have seen, some judgments do take this into account, although even then, these circumstances are often mentioned in a very brief manner. Such conduct by the courts could lead to the incorrect application of substantive legal provisions<sup>48</sup> and hinder the adequate review of the determined amount of damages by appellate courts. In addition to the circumstances we have already mentioned that courts take into account when determining the compensation amount, we consider it important to also take into consideration the nature of the criminal offense for which the individual was found guilty in terms of violating the presumption of innocence, whether the person

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<sup>46</sup> Judgment, Court of Appeal in Belgrade, No. Gž3 42/22, from 5. 5. 2022.

<sup>47</sup> M. Karanikić Mirić (2024), 672.

<sup>48</sup> D. Veljković, *Komentar Zakona o obligacionim odnosima*, Nova consulting, Beograd 2020, 655.

affected is an adult or a minor. For example, in cases involving serious criminal offenses against life and body or sexual freedom, the awarded compensation amount could be higher. Conversely, it is known that domestic media often highlight injustices when individuals are held accountable for criminal offenses in self-defense.<sup>49</sup> In this sense, such circumstances should lead to the determination of a lower amount of monetary compensation. Special attention should be paid when the presumption of innocence is violated in cases involving minors. Particularly intense public reactions are triggered in situations where a male minor commits a criminal offense involving elements of violence against a girl.<sup>50</sup> In the example we provided earlier in this paper, as an instance of a judgment where the court applies an objective concept of non-pecuniary damages, the court determined a monetary compensation amount of 50,000.00 dinars. The court stated in its reasoning that this amount was determined in accordance with all the circumstances of the case and in line with current judicial practice.<sup>51</sup> It seems to us that the court overlooked the specific aspect that through the media text, the minor was characterized as the perpetrator of a rape offense against a girl, and thus did not fully consider the consequences that arose for him due to the publication of such information.

Regarding the criteria provided by the LPIM we believe that a stance cannot be automatically adopted that not using certain legal means by the injured party aimed at reducing the damage implies negligence. In order to take a stance on whether the individual attempted to mitigate the damage by not using such means, it would be necessary to consider whether the damage for a person whose presumption of innocence has been violated can be eliminated or at least reduced by means such as correction or response to the published information. Some authors emphasize that by applying such means, readers are given the opportunity to read harmful information three times: first when it is provided by the media, second when the injured party requests correction of the information, and third when the media provides its comment on the correction. Other authors believe that the institution of correction of information should always be applied to provide an opportunity for a

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<sup>49</sup> M. Škulić, „Anglosaksonska doktrina „odbrane zamka“ u krivičnom pravu SAD i njene moguće refleksije na nužnu odbranu u srpskom krivičnom zakonodavstvu“, in: *Kaznena reakcija u Srbiji VII deo* (ed. Đorđe Ignjatović), Beograd 2017, 72.

<sup>50</sup> A. Ilić, „Medijska slika maloletničke delikvencije“ in: *Mediji, kazneno pravo i pravosuđe* (eds. Jelena Kostić, Marina Matić Bošković), Beograd 2024, 182.

<sup>51</sup> Judgment, Court of Appeal in Belgrade, No. Gž3-238/21, from 15. 7. 2021.

valid interpretation of the created fiction about an event.<sup>52</sup> We are on the opinion that the court should not be obligated to consider non-use of other means as a negative circumstance when determining monetary compensation. There may be situations where information is published at a time when the person is in custody or in another sensitive procedural moment. It is conceivable that these individuals are not informed about the content of the published information during the period when they are in custody, as their attention is primarily focused on exercising their right to defense. In this regard, it is necessary to consider the reasons why the person did not use the means available to them.

#### 4. Conclusion

The right to presumption of innocence is a personal right that, in case of violation by media outlets, can be subject to protection through litigation. Violation of personal rights can lead to the right to monetary compensation for non-material damage. According to the doctrinal interpretation accepted under the Law of Contract and Torts, monetary compensation for non-material damage can only be awarded if the person suffers psychological pain of a certain intensity as a consequence of the violation of their personal rights. By presenting the court's positions taken in proceedings aimed at compensating for non-material damage caused by the violation of the right to presumption of innocence, we have pointed out inconsistencies in accepting the subjective concept of non-material damage. Such judicial behavior is not limited to cases involving the presumption of innocence as a personal right, indicating the need for standardization of judicial practice in line with the provisions of the Law of Contract and Torts. Furthermore, it is necessary to consider a change in the concept of non-material damage. In the case of violation of the right to presumption of innocence, the difficulty of proving that the person suffers psychological pain due to the violation of their personal rights becomes evident. In this regard, we agree with a portion of doctrine suggesting the introduction of an objective concept of non-material damage. According to this perspective, it would be sufficient for there to be a violation of personal rights for the claim of non-material damage.

When assessing the monetary compensation for non-material damage caused by the violation of the presumption of innocence, the court should take into account the significance of the harmed interest and the purpose served by

<sup>52</sup> V. Hebrang, „Ostvarivanje prava na ispravak medijske objave“, *MediAnali: međunarodni znanstveni časopis za pitanja medija, novinarstva, masovnog komuniciranja i odnosa s javnostima* 4/2010, 53.

such compensation. It is crucial that this compensation does not cater to tendencies that are incompatible with the nature and social purpose of such compensation. It is noticeable that courts approximate the amount of compensation for non-material damage caused by the violation of the presumption of innocence. In their reasoning, courts either do not specify or do so in a very superficial manner regarding the specifics of each case. This indicates that courts do not strive to individualize monetary compensation. Such court behavior not only contradicts material legal norms but is also detrimental to the plaintiff, who cannot exercise the right to compensation for non-material damage tailored to the specific circumstances of the case and the severity of the harm to their psychological well-being caused by such violation.

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**NOVČANA NAKNADA NEMATERIJALNE ŠTETE PROUZROKOVANE  
POVREDOM PRAVA NA PRETPOSTAVKU NEVINOSTI  
U MEDIJSKOM IZVEŠTAVANJU**

*Apstrakt*

Zakonikom o krivičnom postupku propisano je da su sredstva javnog obaveštavanja jedan od subjekata koji su dužni da poštuju pravo na pretpostavku nevinosti. Iako je zakonodavac nastojao da garancijom procesnih prava okrivljenog zaštiti pretpostavku nevinosti, u krivičnom zakonodavstvu je izostalo propisivanje posledica njenog neposrednog kršenja. Autor u radu odgovora na pitanje, da li lice u slučaju da mu je ovo pravo povređeno, ima pravo na naknadu nematerijalne štete. Autor u prvom delu rada, zaključuje da se pretpostavka nevinosti može smatrati pravom ličnosti, pa da shodno tome, uživa građanskopravnu zaštitu. U sledećem delu rada, autor naglašava, da povreda prava na pretpostavku nevinosti nije dovoljan uslov, da bi lice imalo pravo na novčanu naknadu nematerijalne štete. Shodno prihvaćenoj subjektivnoj koncepciji nematerijalne štete, neophodno je da dođe do povrede prava na pretpostavku nevinosti, da lice trpi duševne bolove dovoljnog intenziteta, kao i da postoji uzročna posledična veza. Autor ukazuje, primerima iz sudske prakse, na nedosledno prihvatanje ove koncepcije nematerijalne štete u postupcima koji se vode radi naknade iste zbog povrede prava

na pretpostavku nevinosti od strane sredstava javnog obaveštavanja. U drugom delu rada, autor analizira kriterijume za odmeravanje visine novčane naknade. Kako su zakonom postavljeni kriterijumi dati u vidu pravnih standarda, autor nastoji da prikaže način na koji sudska praksa iste konkretizuje u predmetima koji se vode radi naknade nematerijalne štete prouzrokovane povredom prava na pretpostavku nevinosti od strane sredstava javnog obaveštavanja. Autor kritikuje ustaljeni depersonalizovan pristup prilikom odmeravanja visine naknade u ovim predmetima, smatrajući da on u potpunosti odgovara štetniku.

**Ključne reči:** povreda pretpostavke nevinosti, pravo ličnosti, nematerijalna šteta, mediji, sredstva javnog obaveštavanja.

CIP - Каталогизација у публикацији  
Народна библиотека Србије, Београд

347.426(082)

368(082)

347.51(082)

**МЕЂУНАРОДНА научна конференција Prouzrokovanje štete, naknada štete i osiguranje (27 ; 2024 ; Valjevo)**

Causation of damage, damage compensation and insurance : proceedings from XXVII International Scientific Conference, Belgrade, Valjevo, 2024 / [organized by] Institute of Comparative Law, Association for Tort Law, Judicial Academy ; editors Mirjana Glintić, Dragan Obradović. - Belgrade : Institute of comparative law, 2024 (Beograd : Birograf comp). - 451 str. : ilustr. ; 21 cm

Tiraž 150. - Napomene i bibliografske reference uz tekst. - Apstrakti.

ISBN 978-86-82582-21-2

а) Накнада штете -- Зборници б) Одговорност за штету -- Зборници в)  
Осигурање -- Зборници

COBISS.SR-ID 151825161