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NON-PECUNIARY DAMAGE DONE THROUGH SOCIAL NETWORKS AND LOCAL JURISDICTION OF THE COURT

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Abstract: *In this paper, analysis of the challenges of non-pecuniary damage done through social media networks and local jurisdiction of the court is performed, while using the method of analysis, the historical method and the inductive-deductive method. The appearance of social media and other internet platforms has significant importance for exchanging data and connecting people, but also the development of the information technology have caused many problems. The goal of many social networks is to share information between the users and to expand the number of users who have received that information. Unfortunately, that sharing of information occurs without checking the truth of that information. The existence of social networks make it very easier to become a target of defamation, but filing a libel lawsuit and demanding a non-pecuniary damage might still be a challenge. Main challenges are identifying the person that made defamatory statement, defining the way to compensate caused non-pecuniary damage and determination of the local jurisdiction of the court.*

Keywords: *social media, non-pecuniary damage, court jurisdiction, defamation.*

INTRODUCTION

Although social media has similarities to traditional means of communication, yet social media has certain characteristics that make it different from traditional mediums for expression and communication. ” Social media is a platform comprising of “a group of internet-based applications ... that allow the creation and exchange of user-generated content.” [Kaplan, A., Haenlein, M., 2010]. The freedom of expression on social media and the speed of spreading the information on the virtual space, sometimes can be abused and directed to the third parties. As a result of that, the last few years the number of filed lawsuits for defamation has increased. Also, in every filed lawsuit for defamation, the party that initiated the procedure has also claim for compensation for non-pecuniary damaged caused as a result of defamation. One of the most problematic questions is the question regarding the determination of the local court jurisdiction.

This paper will first examine the defamation as a legal problem, its characteristics and will examine the defamation on a social media. Also, in the first part of this paper we will try to elaborate the specifics of the defamation on social networks, and the challenges of defamation on virtual space. In the second part of this paper we will examine the non-pecuniary damage made on social networks as a result of claim for defamation. In this part we will also elaborate the manner of regulating the non-pecuniary damage in the Serbian Law on obligation. In the last part of this paper we will examine the determination of local court jurisdiction in cases of defamation on social networks and we will try to explain all the challenges and difficulties in that process.

1. DEFAMATION IN DIGITAL AGE

In the modern world and in the democratic societies, free speech and expression of thoughts is considered as a fundamental right, guaranteed with the Constitutional Act. This fundamental right is not considered as an absolute right and is almost always subject to certain reasonable restrictions. One of the restrictions is defamation. According to Black's Law Dictionary, defamation means the offence of injuring a person's character, fame, or reputation by false and malicious statements [Black's Law Dictionary, 2nd edition, 2021]. This term covers both libel (written defamation) and slander (verbal defamation). Also, "defamation can be defined as publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him." [W.E. Peel, J. Goudkamp, 2014]. Defamation requires that the proclamation be false and made without any consent of the defamed person. Injury of feelings can not be considered as defamation. Internet defamation can lead to harm to an individual's image and reputation – and to a potential substantial damages. "The subjective feeling of the passive subject (the one who is offended) is not that much relevant for the existence of the defamation, but relevant is the question of whenever certain behaviour has an offensive character according to the perceptions of the environment in which the act was committed, and whether such behaviours are in line with generally accepted social behaviour." [Shivi, 2016]. A defamation suit can be filled because of comments, posts, videos, pictures, inaccurate statements or false reporting, that are capable of harming a person's reputation. The term defamation has two categories: libel and slander. Development of information technology made blurred line between these two categories. When a potentially defamatory statement is made through social media networks that involves the written i.e. posted words, it can be considered as a libel. But if the potentially defamatory statement is made online, through platforms for making and sharing videos (such as YouTube, Tik tok etc.) it can be considered as a slander. "While some web sites screen posts for inflammatory or illegal content, the screening systems are

not geared to examine every post for defamatory content, and so many defamatory postings end up online.” [D.Goguen, 2021]. Recognition of defamatory statement on social media can be very tricky. It is not always clear if one statement is made intentionally or is made due to negligence. When expressing an opinion online, while using the phrases, “I think”, or “I believe”, also can be considered as a defamatory statement, and it does not automatically protect user from defamation claim. Even that, expresses of opinion are excluded from libel suits, expresses of opinion may be considered as expression of facts. One question that should be mentioned is what make defamation on social network different? The answer is not simple, but unlike the traditional media, Internet users can post information to the web immediately. ”As well, such content is easily and widely accessible, and has the potential to be taken at face value. So, Internet defamation has the potential to be more damaging to an individual’s or corporation’s reputation.” [E.Oikawa, 2021]. The fact that the given statement, comment or post online, remains permanent on the network is complicating the situation even more. Also, we cannot ignore the power of social media and the speed with which certain information are spreading and finding its way to huge number of social media users.

2. NON-PECUNIARY DAMAGE AND ITS COMPENSATION

The purpose of the compensation for damage is the eventual elimination of the harmful effect of the action that cause the damage. Also, it is very important the compensation of the damage to be determined accordingly. Interesting question that arises while researching the non-pecuniary damage is how the compensation for damage caused by the violation of a individual right can be made. While the material damage can be repaired, in the case of non-pecuniary damage restoring the previous state is not possible. Therefore, in legal theory and in court practice the compensation of non-pecuniary damage is often arguable. According to one group of authors, non-pecuniary damage cannot be valued in money, because moral values cannot be reduced to money. The ruled monetary compensation represent commercialization of moral values, since the harmful consequences caused by the violation cannot be eliminated by monetary payment. According to this, the ruled compensation represents a sanction for the violation of the law, and does not represents compensation for the damage. According to the second opinion, compensation for non-pecuniary damage in monetary amount does not represents a fine, because it does not have to be ruled in every case and is not determined in advance in some strict amount, but the judge determinates it at its discretion in each case [A.Radovanov, 2010]. Today, the existence of the right to compensation for non-pecuniary damage is no longer disputed in legal theory or case law, but are still remaining few open questions regarding the criteria for determination the

compensation amount. The non-pecuniary damage is caused by the violation of non-property goods, i.e. the non-pecuniary damage is manifested as hurting a person by causing mental or emotional pain.

Non-pecuniary damage is defined in the Article 155 of Serbian Law on Obligations as an inflicting physical or mental pain or fear on one person to another, so it stipulates that the court, if it finds that the circumstances of the case justify it (especially the intensity of pain and fear, and their duration), will rule fair monetary compensation for: suffered physical pain, suffered mental pain, due to diminished life activity, disability, violation of reputation, violation of freedom or rights of the person, and the death of a loved one; and caused fear [Law on Obligation, Official Gazette of SFRJ, no. 29/78, 39/85, 45/89 - decision and 57/89, "Sl. list SRJ", br. 31/93, "Official Gazette SCG", no. 1/2003 – Constitutional Charter and "Official Gazette RS", no. 18/2020]. In Article 199 of Serbian Law on Obligations is determined that in case of violation of individual rights, the court may order, at the expense of the pest, publication of a verdict, or correction, or to order the pest to withdraw the statement by which the violation was committed, or anything else that can help achieving the purpose. According to this Article, the court has a discretion right to decide in every case separately which solution will satisfy and restore the mental balance of the injured party. In addition to non-monetary compensation for non-pecuniary damage, the Law on Obligation also provides monetary compensation, which is determined as fair monetary compensation. This monetary compensation can be ruled regardless of the compensation for material damage as well as in its absence. "The monetary compensation for non-pecuniary damage is not for the purpose of reparation for what the injured party has lost, but is possibility for the injured party with the ruled monetary amount to obtain the satisfaction that enables him to restore the disturbed mental balance in the best way." [M.Becirovic-Alic, A.Ahmatovic-Ljalic, 2018].

In Article 200 of Serbian Law on Obligations is determined non-pecuniary damage for defamation. The court has a discretion right to decide the type and amount of compensation for non-pecuniary damage for defamation made on social media networks. In the Serbian Law on Obligations are not strictly defined criteria for determination of fair monetary compensation for non-pecuniary damage for defamation made on social media networks. Because of this, it is very difficult for the court to determinate the fair amount of compensation that is necessary and sufficient to restore the disturbed mental balance of the injured party by obtaining appropriate satisfaction in the amount of money. As a result of the fact that there are no clearly defined criteria for determination the amount of compensation for non-pecuniary damage, we have uneven court practice where can be observed very differently acting of the judges, especially in first instance courts when determining fair monetary

compensation for non-pecuniary damage. When deciding about the amount of the compensation for non-pecuniary damage for defamation made on social media networks, courts should take into account that defamatory comments, posts, pictured etc. are permanently archived on the network, even when they are deleted and also should be taken into account the speed of spreading the defamatory statement online.

3. DETERMINATION OF JURISDICTION OF COURT FOR NON-PECUNIARY DAMAGE FOR DEFAMATION MADE ON SOCIAL MEDIA NETWORKS

First step before filing a defamation lawsuit made on social media networks is to find out which court has the jurisdiction to decide in such case. Questions that arises are which court has the jurisdiction, is it the Court where the plaintiff has residence or the Court where the defendant lives? Or perhaps it's the Court in the place where the physical servers that contain the defamatory statements exist? Which Court has a jurisdiction, the Primary court or the Higher court? Unfortunately, there is no simple and unique answer to these questions. As we know, the jurisdiction of the Court depend on a number of factors, such as the constitutional and legal regulation of the state. Explanation of that which Court has jurisdiction when there is conflict of jurisdiction between the Courts, in Serbia is contained in the Sentence from the decision of the Supreme Court of Cassation. In the Sentence from the decision of the Supreme Court of Cassation R1 627/2016 of 21.12.2016 is determined that in disputes for compensation of non-pecuniary damage due to damage for defamation committed through the so-called "Social networks", The Higher Court in Belgrade has no local jurisdiction for deciding. According to the explanation of the Sentence from the Supreme Court of Cassation, the plaintiff filed a lawsuit against the defendant for compensation of non-pecuniary damage due to defamation statement made on defendant's Facebook profile. The local court in Pozarevac brought first instance verdict against the defendant and according to the verdict the defendant has the obligation to pay certain compensation to the plaintiff for made non-pecuniary damage. The first-instance verdict was revoked by the higher court in Pozarevac, due to the fact that the claim was decided by a court with no jurisdiction to decide in such cases. After the revocation of the first-instance verdict in the repeated procedure, the first-instance court declared that has no local jurisdiction, and that decision was confirmed by the second-instance court. The second instance court considers that the Higher Court in Belgrade has jurisdiction to decide, because the defendant on her Facebook profile, in an accessible and unprotected way, wrote and published the incriminated words, and in that particular case the matter is about a dispute for damage that is "in connection with the disclosure of information". This legal opinion of the second instance Court in Pozarevac is because of the Article 23 Of the Law on Organization of Courts, that states that higher court in first instance, has jurisdiction,

among other things, in disputes over the publication of correction of information and response to information due to violation of the prohibition of hate speech, protection of the right to privacy, i.e. the right to personal record, failure to publish information and damages related to publishing information [Law on Organization of the Courts, "Official Gazette RS", no. 116/2008, 104/2009, 101/2010, 31/2011 – state law, 78/2011 – other law, 101/2011, 101/2013, 106/2015, 40/2015 – state law, 13/2016, 108/2016, 113/2017, 65/2018 - decision CC, 87/2018 and 88/2018 - decision CC] . The Supreme Court of Cassation considers that the Higher Court in Belgrade has no jurisdiction, because defamation text published on the social network does not represent information, because the social network is not a media in accordance with the articles of the Law on Public Information and Media. Also, the Supreme Court considers that given the fact that the so-called "Internet Facebook profile" is not a medium, the defamation in this case can be likened to daily unwanted personal communication between people. For the reasons stated above, the Supreme Court of Cassation considers that the Primary Court has jurisdiction to rule in such cases according to the rules on general local jurisdiction.

CONCLUSION

The modern world of the Internet has changed significantly with the development of social media networks. In the modern world, social media networks are a way for connecting people from different parts of the world. Regardless of the countless positive aspects that the Internet and social networks are providing, it should be noted that there has been an increase in abuse related to the use of virtual space and an increase in legal procedures for defamation made on social media networks. Unfortunately, users are posting everything online and often non formal and non precise expression of speech can be considered as opinion preferably than a fact. Taking into account the fact that one statement posted online can be spread around the world by reposting, retweeting in a few seconds after posting and also the fact that Internet has permanent memory, the defamation statement made online can be even more damaging than the traditional form of defamation. When the defamation is made online, almost always the injured party has suffered non-pecuniary damage. When determining the amount for compensation of non-pecuniary damage made on social media, the Court is having troubles to determinate the fair amount of compensation that is necessary and sufficient to restore the disturbed mental balance of the injured party by obtaining appropriate satisfaction in the monetary amount. The authors of this paper consider that in the Law on obligations should be accepted general criteria for determining the monetary amount of non-pecuniary damage, in order to avoid inconsistent conduct of the courts in court proceedings for determining non-pecuniary damage made on social media networks. Another difficulty that arises when defamation and non-pecuniary damage

made on social media network are in question, is the jurisdiction of the Court. The court jurisdiction depends on a number of factors, as we stated before, and a party should consider a lot before taking any legal action before the court over a potentially defamatory statement made on social media networks.

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