IV. Croatia

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1. Presuda Županijskog Suda u Varaždinu (Judgment of the County Court in Varaždin) No Gž 2587/2021-10 of 16 January 2014[1]

In this case, for the first time in Croatia, the State was found liable for damage caused by passing the law.

After the Croatian Parliament repealed the Public Enforcers Act, a number of individuals appointed as public enforcers based on this Act filed a constitutional claim requesting that the Constitutional Court of the Republic of Croatia (CCRC) proclaim the Act on Cessation of Applicability of the Public Enforcers Act as unconstitutional. The CCRC dismissed the request but, however, confirmed that all those who had been appointed public enforcers based on the Public Enforcers Act are entitled to claim compensation for damage sustained as a result of passing the Act on Cessation of Applicability of the Public Enforcers Act.

Based on the said findings of the CCRC, the County Court in Varaždin affirmed the first instance court's interim judgment in which the Republic of Croatia was found liable for damage sustained by the victim (a person appointed a public enforcer). The County Court in Varaždin confirmed Parliament's prerogative to regulate social affairs as it sees fit, but also reminded that every parliamentary act must be in line with the basic constitutional values, a justifiable balance between public interests and private interests of those affected by a particular act, being one of them. In this respect, the County Court in Varaždin reminded that, when enacting a particular act, the Parliament must consider the justifiable expectations of the individuals affected by that particular act.

In Croatian legal doctrine, it was well-established that the State can be held liable for improper work of its bodies. However, this is only true with respect to the wrongdoings of administrative bodies and the judiciary, whereas the legislative bodies enjoyed de facto immunity from civil liability. A common justification for this stance suggested that the lawmaker cannot be held liable for damage sustained by passing laws

[1] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2014 (2015) 88, nos 24–35.

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since passing laws represents the constitutionally guaranteed prerogative of the lawmaker, and consequently, passing laws cannot be regarded as a wrongful act.

This decision of the County Court in Varaždin, however, offers a new reading of the dogma of the lawmaker's immunity from liability for passing laws. According to this Court, in exercising its lawmaking powers, lawmakers have to act within constitutionally imposed boundaries, including the principle of justifiable expectations of those affected by the law in question and the principle of the justifiable balance between public and private interests. Should these constitutional principles be breached in the course of enacting a law, the State could be held liable for the damage thereby caused. Hence, this decision undoubtedly sets new, more sophisticated standards of due care in lawmaking.

Even though the Supreme Court of the Republic of Croatia (SCRC) subsequently quashed the decision of the County Court in Varaždin, its relevance remained unchallenged. In its decision No Rev-1532/14-3 of 28 January 2018, the SCRC quashed a judgment of the County Court in Varaždin for insufficient reasoning, but at the same time it explicitly confirmed that the County Court was right in taking the position that the State can be found liable for damage caused by the non-observance of constitutional principles in the course of adopting laws, such as the principle of justifiable expectations and the justifiable balance between public and private interests.

In the years that followed, a number of decisions were reached based on the Varaždin County Court's argumentation from this case, in which the courts found the State liable for damage caused by the non-observance of constitutional principles while passing laws.[2] Hence, this decision set a new trend in treating the State's liability for damage, which was readily accepted by other courts. Moreover, subsequent decisions reached by other Croatian courts on the basis of this decision have further developed and refined the County Court in Varaždin's position on State liability, by adding clarity to the question as to the scope of liability in cases where damage is inflicted by passing a law.

Finally, it is worth noting that this case clearly demonstrates the ever-growing trend of the 'constitutionalisation' of tort law, consisting in

[2] See judgment and decision of the County Court in Varaždin No Gž 397/2019-2 of 28 May 2019, commented by *M Baretić* in: E Karner/BC Steininger (eds), ETL 2019 (2020) 71, nos 42–47 and judgment and decision of the County Court in Velika Gorica No Gž 2587/2021-10 of 28 February 2023, commented by *M Baretić* in: E Karner/BC Steininger (eds), ETL 2023 (2024) 87, nos 21–38.

interpreting basic concepts of tort law in accordance with principles of the Constitution and international conventions.

2. Presuda Županijskog Suda u Zagrebu (Judgment of the County Court in Zagreb) No 71 Gžn-1778/2 of 2 September 2014[3]

This judgment represents the first case in which Croatian courts awarded compensation for non-material damage to a legal person.

The case involved an action brought by the Croatian Composers' Society against a distributor of recording and blank data storage devices. Based on the relevant EU directives, the Copyright Act provided for the so-called blank tape levy, an author's remuneration for the use of a private copy of the author's work, which had to be paid by producers and/or importers of sound/video/phono/data recording devices, data carriers, blank data storage and similar devices. Based on the Copyright Act, the Croatian Composers' Society is authorised to collect a private copy levy on behalf of music composers represented by the Society. The tortfeasor launched an advertising campaign in which it accused the Croatian Composers' Society of robbery and warned potential buyers of recording and blank data storage devices that, by imposing and collecting a private copy levy on behalf of musical composers, the Croatian Composers' Society is robbing them.

The County Court in Zagreb awarded the Croatian Composers' Society an amount of HRK 50,000 (approx € 6,527) as compensation for violation of its non-material right to dignity, thus representing the first case in Croatia in which this type of compensation was awarded to a legal person.

The former Croatian Civil Obligations Act (COA) of 1978, which was taken over from the former Socialist Federal Republic of Yugoslavia, accepted the subjective concept of non-material damage, according to which this type of damage is defined as the infliction of physical or mental pain and/or fear to another person. An obvious consequence of such a concept of non-material damage was that legal persons cannot obtain compensation for non-material damage, as they are incapable of experiencing physical or mental pain or fear. Such an understanding of the concept of non-material damage was frequently criticised by legal doctrine for being unjust and discriminatory.

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[3] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2015 (2016) 76 no 60 f.

Obviously enlightened by these doctrinal considerations, with the new COA of 2006, the legislator decided to accept the objective concept of non-material damage, according to which non-material damage is defined as a violation of personality rights. Moreover, the COA explicitly recognised that legal persons can also have personality rights. This new legislative framework clearly created a possibility for legal persons to claim just pecuniary compensation for a violation of their personality rights.

However, it was almost ten years before the first case of liability for non-material damage sustained by a legal person was heard. This case merits mention, not only for being the first case in which compensation for non-material damage was awarded to a legal person, but also for setting out criteria to determine whether a threshold of gravity of violation of the personality rights of a legal person is reached and for defining the approximate amount of just pecuniary compensation which legal persons can expect when claiming compensation for a violation of their personality rights.

Pursuant to the COA of 2006, just pecuniary compensation can only be awarded if justified by the gravity of violation of the victim's personality rights. Hence, not every violation, but only 'serious' violations of a person's personality rights, will justify pecuniary compensation. How and on what criteria to measure the 'seriousness' of a violation of the personality right of a legal person was unknown territory before this judgment.

The first instance court, for instance, concluded that, even though the victim's right to dignity was violated, it nonetheless dismissed the claim, holding that the violation in this particular case did not reach the threshold of a 'serious' violation. The County Court in Zagreb disagreed. This court reasoned that in determining whether a violation of the legal person's right to dignity reached the required threshold of 'seriousness', the same criteria should apply as in cases of violation of the right to dignity of a natural person. In this respect, the County Court in Zagreb confirmed that the number of persons confronted with the defaming statements and the duration of such exposure should be decisive. Measured against these criteria, the violation of the victim's right to dignity in this case was assessed serious enough to justify pecuniary compensation.

Finally, this decision is rather informative as to the amount of compensation a legal person whose right to dignity is infringed can expect. When it comes to non-material damage, the extent of damage cannot be assessed precisely since there is no appropriate measurement for determining a pecuniary value of the infringed personality rights. Moreover, as regards the personality rights of legal persons, not even the Orientation Criteria for determining the amount of just pecuniary compensation for

non-material damage, issued by the SCRC, are of any assistance, since they provide criteria to determine the amount of compensation with respect to natural persons only. By awarding an amount of approximately € 6,500, the County Court in Zagreb has defined what could be considered an approximate amount which legal persons can expect in the case of a violation of their right to dignity committed by defamation in the media with nationwide coverage.

3. Presuda i Rješenje Županijskog Suda u Varaždinu (Judgment and Decision of the County Court in Varaždin) No 15 Gž-2529/15-2 of 30 March 2016[4]

This decision is one of those that marks a stark departure from the way in which Croatian courts normally approached the issue of legal costs awarded in the case of partial success in tort law cases.

The case concerned a public servant who was unlawfully discharged from service. The Public Servants Court ordered the employer to re-hire the victim, which the employer failed to do. The victim addressed the issue to the civil court, claiming compensation for non-material damage for violation of his right to mental health and dignity. The first instance court upheld the victim's claim as to the merits, but awarded him only a portion of the compensation sought. Based on the fact that the victim was only partially successful in his claim, the court of first instance ordered each party to bear their own legal costs.

The County Court in Varaždin reversed the first instance court's decision as to the legal costs and ordered the tortfeasor to reimburse the victim his legal costs in full. This court reasoned that the notion of 'partial success' should not be assessed exclusively from a quantitative, but also from a qualitative perspective. In this regard, this court opined that, in reaching a decision on legal costs, the courts should not only be concerned with the issue of whether a plaintiff was successful in obtaining the compensation in the exact amount as sought, but whether a plaintiff was successful in proving that his claim was well-founded as to the merits.

As far as the legal costs are concerned, in Croatian civil procedure, as in many other national legal systems, the principle of the 'loser pays' is applied. According to this principle, a losing party has to compensate a successful party for their legal costs. In the case of partial success, according to this rule, a party will be able to recover its legal costs only

[4] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2016 (2017) 80, nos 44–54.

partially. For a number of years, Croatian courts have predominantly understood the notion of 'partial success' as to imply that the success in litigation should exclusively be measured based on the percentage of the amount sought that was actually awarded to the party. Where a court finds that a claim for damages is well-founded as to the merits, but excessive in quantum, it will normally order the tortfeasor to compensate the victim for the damage and, at the same time, it will order the victim to pay the tortfeasor's legal costs in proportion to the percentage of the claim that was dismissed.

Such an, admittedly questionable understanding of the notion of 'partial success' has resulted in particularly adverse affects for victims who claim compensation for non-material damage. Non-material damage is inherently difficult to assess. Therefore, it occasionally happens that victims set the compensation sought too high. Taken to the extreme (which is not merely hypothetical, but rather a realistic scenario), a party who was successful in proving a violation of their personality right but who set the quantum of damages too high might actually be ordered to reimburse the other party's legal costs in an amount exceeding what it obtained in damages.

This controversial understanding of the 'loser pays' principle was brought to the attention of the European Court of Human Rights (ECtHR), which, in 2013 in the case *Klauz v Croatia,*[5] found such a practice to violate the European Convention on Human Rights (ECHR). In this case, the ECtHR observed that, although the 'loser pays' principle generally pursues a legitimate goal as it discourages ill-founded and excessive claims, Croatian courts applied that principle mechanically, without having sufficient regard to the specific circumstances of each victim's case, thus violating basic human rights.

The County Court in Varaždin's decision on costs in this case obviously echoes the ECtHR's position in the *Klauz* case, thus marking a stark shift from the previous controversial application of the 'loser pays' principle to cases of partial success. The County Court in Varaždin refused to apportion legal costs solely based on the victim's success as to the quantum, but engaged instead in a rather substantiated analysis of all the circumstances of the given case.

As is evident from this case, the new reading of the 'loser pays' principle, inspired by the ECtHR's decision in the *Klauz* case, has quickly taken roots in Croatian case law. Many Croatian courts embraced it in the same way that the Country Court in Varaždin did in this case. In fact, this

[5] ECtHR *Klauz v Croatia*, 18.7.2013, no 28963/10.

newly developed practice prompted the Croatian Parliament, in 2019, to amend the Civil Procedure Act with a view to adapting its provisions on bearing legal costs to this new understanding of the 'loser pays' principle. Although this new understanding of the 'loser pays' principle has general application, its importance is particularly evident in tort law cases, especially those relating to compensation for non-material damage.

Finally, this case not only represents a good example of the evolution of procedural rules applicable in tort law cases, but the fact that the County Court in Varaždin's decision on costs in this case was inspired by the ECtHR's decision in *Klauz v Croatia* also clearly demonstrates the benefits international justice brings domestically.

4. Odluka Ustavnog Suda Republike Hrvatske (Decision of the Constitutional Court of the Republic of Croatia) No U-III-1095/2017 of 21 September 2017[6]

This case clearly demonstrates the importance of the CCRC in protecting basic human rights in tort-related cases.

The case involved a 12-year-old boy who was unjustifiably and unlawfully detained and searched by a private security officer in a shopping centre. In the civil proceedings initiated by the victim for violation of his personality right to honour and dignity, two expert witnesses in the field of psychology established that a sense of personal honour and dignity is not yet developed with a 12-year-old, which implied that the victim suffered no non-material damage. Notwithstanding such finding, the first instance court sustained the claim, opining that a child's honour and dignity must be protected throughout their life, irrespective of the child's personal perception. The County Court in Karlovac, acting as an appellate court, reversed the first instance decision and denied the victim compensation for non-material damage, arguing that the first instance court inappropriately dismissed the expert witnesses' opinion. The SCRC declined the victim's petition for revision, reasoning that the question posed was not relevant for the harmonised application of law.

The victim lodged a constitutional claim before the CCRC for protection of his constitutional right to honour and dignity. The CCRC accepted the claim, revoked the County Court's and SCRC's decisions and remitted the case for re-examination. Citing the Charter of Fundamental Rights of the European Union, the Convention of the Rights of the Child

[6] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2017 (2018) 73, nos 68–78.

and the Constitution of the Republic of Croatia, the CCRC concluded that the child's right to honour and dignity is unconditional. In other words, it cannot be conditional on the child's cognitive capabilities and the child's personal perception of their own identity.

Although the concept of basic human rights has been known for decades, judging from the decisions of the County Court in Karlovac and the SCRC in this case, it seems that a basic understanding of this concept occasionally poses a serious problem for Croatian courts. Luckily, the CCRC is obviously ready and willing to restore to the right path the understanding of human rights in Croatia.

The CCRC thus justifiably reminded the courts in Croatia that human rights are of universal applicability; they equally apply to any person, irrespective of race, colour, gender, language, religion, political and other conviction, national or social, origin, property, birth, education, social status or any other characteristics. In short, every person has equal human rights and no-one can be discriminated against for their personal characteristics when the enjoyment and/or respect of human rights is concerned. In this respect, the CCRC clearly established that the concept of human rights is an objective one: every person has equal human rights regardless of whether they are aware of, and capable of, perceiving their human rights. In this respect, human rights of those not capable of perceiving their identity or their rights, such as minors or mentally handicapped persons, must be equally protected. Accordingly, as clearly reminded by the CCRC in the case at hand, every serious violation of basic human rights entails liability for non-material damage, regardless of whether or not a victim is capable of perceiving their rights.

Indeed, this CCRC decision particularly resonates in these times of questioning some of the basic values on which our democratic societies are founded.

5. Rješenje Vrhovnog Suda Republike Hrvatske (Decision of the Supreme Court of the Republic of Croatia) No REV 2008/15-2 of 23 February 2016[7]

This SCRC decision could best be described as a sign of the final transition of Croatian tort law from the subjective to the objective concept of non-material damage.

The victims claimed compensation for non-material damage due to a violation of their personality right to honour and dignity, committed

[7] See in more detail in *Baretić* (fn 4) nos 67–79.

through an article published in a magazine in which they were unfoundedly connected to drug smuggling. The first instance court partly accepted the victims' claim and awarded them compensation for non-material damage, even though no medical expertise was conducted in the course of proceedings with the aim of establishing the existence of any pain and/or fear suffered by the victims. Since the second instance court upheld the first instance decision, the tortfeasor lodged a request for extraordinary revision before the SCRC, requesting that this court issues its general legal position regarding the question of whether a court can, in the case of an alleged violation of a personality right, establish the gravity of that violation and award just pecuniary compensation without establishing the gravity and duration of the victim's mental pain, ie without a report conducted by a medical expert.

The SCRC dismissed the request for revision as inadmissible. This decision was based on the SCRC's understanding that physical and mental pain and fear, although important, are not the only criteria to be taken into consideration when deciding on the quantum of just pecuniary compensation. In this respect, the SCRC clearly suggested that under the new, objective concept of non-material damage adopted in the COA 2006, it is not necessary to call on a medical expert in order to establish the existence of non-material damage.

As already explained, the old COA of 1978 accepted the so-called subjective concept of non-material damage, according to which this type of damage was defined as the infliction of physical or mental pain and/or fear to another. Under this concept of non-material damage, it was absolutely crucial in every single case of non-material damage to precisely determine the existence, gravity and duration of the physical and/or mental pain and fear, for an obvious reason: the law itself defined non-material damage as the infliction of pain and fear on another. In other words, in the absence of any pain or fear, no non-material damage could have been established. It goes without saying that determining the existence, gravity and duration of pain and fear could only be established with the assistance of a medical expert. This implied that, pursuant to the COA of 1978, in every single case concerning non-material damage, medical experts had to be called in in order to establish the existence of this type of damage.

The COA of 2006 marked a significant shift in this regard. Pursuant to the COA of 2006, a mere violation of a personality right, even without establishing any pain or fear sustained therefrom, represents non-material damage.

Notwithstanding the rather clear wording of provisions of the COA of 2006 concerning non-material damage, the fact is that Croatian courts

have had a rather difficult time grasping the new, objective concept of non-material damage introduced by this Law and that for a number of years after this novel concept was introduced, the courts in Croatia continued to award compensation for the infliction of pain and fear, and not for violations of personality rights.[8] Consequently, Croatian courts routinely insisted on reports from medical experts in order to confirm the existence of pain and/or fear before determining the existence of non-material damage. In many instances, this was entirely redundant and unnecessary. Old habits, however, die hard.

The approach of the first and second instance courts in this case clearly suggests that Croatian courts have gradually started to understand and accept the novel concept of non-material damage introduced by the COA of 2006. What was needed was the approval of this new practice from the SCRC, as the highest court in the country, and this approval came with this decision. Dismissing the tortfeasor's request for revision, the SCRC explicitly confirmed that, under the COA of 2006, non-material damage can arise even in the absence of pain and/or fear. Hence, calling on medical experts in order to establish the existence of non-material damage is no longer necessary. In this respect, it might be argued that, with this SCRC decision, the new concept of non-material damage has fully come to life in Croatian case law.

However, even though the conclusions of the courts in this case perfectly resonate with the objective concept of non-material damage, they should not be understood as to imply that, in cases involving non-material damage, expert statements regarding pain and fear are obsolete altogether. As provided for in art 1100 para 2 of the COA 2006, and as established by the SCRC in the case at hand, pain and fear are still relevant for establishing the quantum of just pecuniary compensation for non-material damage. Hence, whenever the quantum of damages depends on the existence and gravity of pain and fear, statements from medical experts will be needed.

[8] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2013 (2014) 93, nos 115–120.