ACTION IN THE SOCIALLY JUSTIFIED INTEREST VERSUS DEFAMATION IN THE PRESS STATEMENT[1]

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I Analysis of lawlessness as a reason for providing publicity rights protection by the norms of civil law belongs to a particularly intensive research area within the science of private law and is intensely exploited by the judicature. There is also a lively debate over the justified interest as a circumstance excluding the possibility of recognising conduct of a publicity rights violator as an illegal act. The issue is broad so my reflections are limited to the sphere of civil law and only to problems occurring in case a perpetrator is charged with defamation that is based on facts. I support a thesis that in such cases the profession of the defamer is not important and action "with due diligence" in order to protect a socially justified interest may exclude lawlessness of their conduct only if the charge is genuine.

The conditions for the use of non-pecuniary measures of publicity rights protection are laid in Article 24 § 1 CC, in the first and second sentence of the provision. The use of pecuniary claims, according to the third sentence of Article 24 § 1 CC, may require that other conditions be met, as prescribed in the Code. The provision of Article 24 § 1 CC protects the aggrieved party against unlawful infringement (or threat of infringement) of publicity rights. The legislator wants to provide the aggrieved party with strong protection, which is reflected in two solutions adopted in this provision. Firstly, it does not require that a defamer be imputed guilt. Secondly, although the injured person must prove that he demands that his publicity rights be protected as they were threatened or infringed by the defamer's conduct, the legislator makes the plaintiff exempt from a burden of proof of a commission of an unlawful act or a defamer's negligence. This feature of the act is presumed. Thus, a court will provide protection for the aggrieved party if he proves the infringement of his publicity rights and the defendant does not

[1] The article is a bit different version of the text I developed in Professor Jacek Sobczak's jubilee book.

prove that his action was not lawless[2]. This means that the issue of lawlessness is of primary importance to the discussed matter.

Lawlessness constitutes a classical condition for liability and the legislator decided that defining it is not necessary. Analysis of lawlessness is usually carried out in connection with the issue of guilt. It is due to the fact that a stand developed under the influence of French law has dominated for years. It indicates two elements of guilt: an objective one consisting in the recognition of conduct that does not comply with legal provisions or established moral rules as the perpetrator's fault, and a subjective one treating acts committed by parties causing harm intentionally and because of negligence as being their fault. However, more and more often at present, in relation to the conception developed in criminal jurisprudence, an opinion on two features of an act is propagated, in the form of subjective and objective inappropriateness of the proceeding. I approve of the opinion limiting the concept of guilt to an element classifying conduct causing harm based on the features of the perpetrator only[3]. This way, lawlessness (inappropriateness) constituting a condition for recognising the conduct as being a fault may be analysed independently at a lower risk of treating it subjectively.

Polish legal system does not contain a common, general duty to refrain from causing harm[4]. In order to recognise a party's conduct as lawless, it is necessary to classify their act as banned under the binding legal norms. Responsibility for establishing the scope of lawlessness lies with jurisprudence and court judgements. As a result, a very broad range has been set because it was rightly assumed that it is necessary to strive for assuring a remedy for harm if it results from acts that are commonly recognised as blameworthy. This way, acts banned by legal regulations in Poland, irrespective of their sources, and conduct inconsistent with the principles of social coexistence and good mores are classified as lawless. Legal norms banning such acts must be abstract in character imposing a common duty to behave in a certain way.

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[2] For more about liability for publicity rights infringement, compare J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016; commentary on Article 24 and M. Pazdan, [in:] *System Prawa Prywatnego [Private law system]*, vol. 1, Warszawa 2012, p. 1272 and subsequent ones and the judicature and literature cited therein.

[3] Also compare Z. Banaszczyk, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) K. Pietrzykowski, Warszawa 2011, vol. I, Article 415, Nb 15 and 16; G. Bieniek, [in:] *Komentarz [Commentary]*, book III, vol. I, Warszawa 2006, p. 247 and subsequent ones; W. Dubis, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) E. Gniewek i P. Machnikowski, Warszawa 2016, Article 415, Nb 6–8; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna [Liabilities – general issues]*, Warszawa 2014, Nb 470; M. Sośniak, *Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyny niedozwolone [Lawlessness of conduct as a condition for civil liability for forbidden acts]*, Kraków 1959, p. 78 and subsequent ones; A. Szpunar, *Nadużycie prawa podmiotowego [Abuse of rights]*, Kraków 1947, p. 112 and subsequent ones.

[4] Compare W. Czachórski, [in:] *System prawa cywilnego [Civil law system]*, vol. III, Part 1, (ed.) Z. Radwański, p. 534, also compare M. Wilejczyk, Dlaczego nie należy chodzić w tłumie ze szpilką wystającą z rękawa? Naruszenie obowiązku ostrożności jako przesłanka odpowiedzialności deliktowej za czyn własny [Why shouldn't you walk in the crowd with a needle sticking out of a sleeve? Infringement of the duty to be careful as a premise of tort liability], *Studia Prawa Prywatnego* 2013, no. 1, p. 56 and subsequent ones.

Protection of publicity rights by civil law is also common in character and that is why the conduct that infringes personal rights protecting them is lawless[5]. Only objective criteria decide whether a perpetrator's action is lawless[6]. However, in some situations, in spite of the violation of a common ban or compulsion established by legal or moral norms, a party's conduct cannot be classified as lawless because of some special circumstances making it impossible. They are called circumstances excluding lawlessness. According to the judicature and legal literature, they include: (1) the aggrieved party's consent, (2) acting based on a legal norm entitling to the infringement of publicity rights, (3) exercising rights and (4) acting in order to defend a justified social or private interest. And this last circumstance will be the subject matter of the considerations that follow.

II Justified social interest, because of the contents of some legal regulations, may constitute a circumstance reversing admissibility of recognising lawlessness of the infringement of publicity rights. The conclusion may be formulated based on some legal regulations, e.g. the Act on the protection of personal data (Article 1 (2) and Article 23), the Act on copyright and related rights (Article 81 (2.1)) or the Act on the press law (Article 14 (6))[7]. However, it does not mean approval of the stand that acting in a justified social interest or an important private interest constitutes, as a rule in the Polish legal system, a non-statutory circumstance reversing lawlessness of an act. Quite the contrary, civil law does not recognise an act in the justified interest as a general condition for limiting the contents of rights. On the other hand, one must share a view that a legislator may limit the laws protecting publicity rights as well as other rights, also with the use of general clauses that aim at protecting certain interests of supra-individual importance[8]. This means that action in a socially justified interest can be considered as a circumstance reversing lawlessness of publicity rights infringement.

There are many reasons why the use of that instrument should be limited to absolutely extraordinary cases and requires meeting a series of conditions with regard to its interpretation and application. To a great extent, I agree with that standpoint presented by A. Pązik indicating "directives on interpretation of social interest as civil

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[5] Compare the ruling of the Supreme Court of 28 February 2007 (V CSK 431/06, Orzecznictwo Sądu Najwyższego Izba Cywilna 2008, no. 1, item 13) and of 1 December 2006 r. (I CSK 315/06, Orzecznictwo Sądu Najwyższegi Izba Cywilna 2007, no. 11, item 169), also: Z. Banaszczyk, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) K. Pietrzykowski, Warszawa 2011, vol. I, Article 415, Nb 25; G. Bieniek, [in:] *Komentarz [Commentary]*, book III, vol. I, Warszawa 2006, p. 248; W. Czachórski, [in:] *System prawa cywilnego [Civil law system]*, vol. III, Part 1, (ed.) Z. Radwański, p. 534; W. Dubis, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) E. Gniewek and P. Machnikowski, Warszawa 2016, Article 415, Nb 8; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna [Liabilities – general issues]*, Warszawa 2014, Nb 472.

[6] Compare Z. Radwański, gloss on the ruling of the Supreme Court of 14 May 2003, I CKN 463/01.

[7] Compare J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Ciil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

[8] Compare Z. Radwański, Koncepcja praw podmiotowych osobistych [Concept of personal rights], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1988, vol. 2, p. 8 and subsequent ones; similarly, J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

law justification"[9]. He believes that "both social (group) and individual (private) interests may be subject to this justification". But the latter only when it has a social dimension (apart from one's own interest, it also protects a value that is commonly respected). It refers to a particular and non-abstract social interest. Infringement of publicity rights is assessed as obligatory and maintaining the requirement of proportionality, with respect to both the content and the form (protection of socially high value cannot be achieved in another, less bothersome way). At the same time, "the existence of social interest should be assessed from an objective point of view"[10].

Over the last several years, one can observe that the Polish legislator consistently strives to strengthen civil law protection of publicity rights. Preference of the solutions efficiently protecting publicity rights may be also found in jurisprudence and the judicature. At the same time, such a general clause admitting exclusion of lawlessness as a result of solving the collision between personal and social interests obviously meant substantial weakening of publicity rights protection[11].

This means that there is a need for particularly thorough research into situations in which a more or less general stand is formulated that a justified interest is a circumstance excluding lawlessness of conduct of a perpetrator of publicity rights infringement. This is the case we deal with when the assessment concerns defamation, which consists in dissemination of false information about the aggrieved party, and the perpetrator of the infringement, often a journalist, refers to acting in the socially justified interest and supports it with professional diligence. Beside the stand that the insult based on false information cannot be recognised as lawful because it would lead to depriving the aggrieved party of the protection under Article 24 CC[12], there is another opinion that

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[9] A. Pązik, *Wyłączenie bezprawności naruszenia dobra osobistego na podstawie interesu społecznego [Exclusion of lawlessness of publicity rights infringement due to public interest]*, Warszawa 2014, p. 326 and subsequent ones.

[10] A. Pązik, *Wyłączenie bezprawności... [Exclusion of lawlessness...]*, p. 335; also compare J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

[11] Compare M. Pazdan, [in:] *System Prawa Prywatnego [Private law system]*, vol. 1, (ed.) M. Safjan, Warszawa 2012, p. 1280; Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna [Civil law – general issues]*, Warszawa 2015, p. 174.

[12] Compare B. Kordasiewicz, *Jednostka wobec środków masowego przekazu [Individual versus mass media]*, Wrocław 1991, p. 15 and subsequent ones; *ibid*., review of a monograph, J. Wierciński, Niemajątkowa ochrona czci [Non-pecuniary protection of dignity], *Państwo i Prawo* 2004, vol. 12, p. 103; P. Machnikowski, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) E. Gniewek i P. Machnikowski, Warszawa 2016, Article 24, Nb 19; J. Panowicz-Lipska, [in:] Kodeks cywilny. Komentarz [Civil Code: Commentary], *op. cit*.; M. Pazdan, [in:] *System Prawa Prywatnego [Private law system]*, *op. cit*., pp. 1240–1241; Z. Radwański, gloss on the ruling of the Supreme Court of do 14 May 2003, I CKN 463/01, Orzecznictwo Sądów Polskich 2004, vol. 2, item 22; *ibid*., gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sadów Polskich 2005, vol. 9, item 110; S. Rudnicki, Wybrane problemy z zakresu ochrony dóbr osobistych na tle orzecznictwa Sądu Najwyższego [Selected issues of publicity rights protection against the background of the Supreme Court judgements], [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana profesorowi Stanisławowi Sołtysińskiemu [Private law of the transformation times. Professor Stanisław Sołtysiński's commemorative book]*, Poznań 2005, p. 271; J. Sieńczyło-Chlabicz, gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, *Państwo i Prawo* 2005, vol. 7, p. 113 and subsequent ones; P. Sobolewski, gloss on the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądów Polskich 2005, vol. 12, item 144.

publication of press material infringing publicity rights cannot be recognised as lawless if it turns out that it contains false information if a journalist acting to protect a justified public interest, maintained due diligence while collecting and processing that material[13].

A. Pązik points out the non-statutory source of using this circumstance to waive lawlessness of an act, stating that public interest may be applied to lawsuits concerning insult based on customary law developed following court judgements[14]. He also thinks that the "application of Article 213 § 1 and 2 of the Criminal Code in connection with Article 24 § 1 of the Civil Code to protect publicity rights allows for exclusion of lawlessness only in case of genuine charges"[15]. At the same time, he indicates the different line of civil courts' judgements. In general, accepting the possibility of public interest existence that waives protection of insulted honour by publishing false information, he rightly notices that it leads to privileging journalists[16]. Thus, does the result of the interpretation have grounds in the binding legal system and hierarchy of values attributed to the legislator? The latter part of the question is of great importance because it is right to say that the shape of a legal institution is more or less strongly connected with the system of values assumed by the legislator. In the area of publicity rights, this relationship is especially strong. It is not easy to realise the hierarchy of values that constitute the foundation of a given set of regulations but it is absolutely necessary to know it to establish legal norms to be coded in statutes. In the discussed case, it is necessary to remember that publicity rights are defined as values that the legal system not only acknowledges but also appreciates.

III First of all, it must be emphasised that the assessment refers only to standpoints formulated with regard to lawlessness of the insult of honour by false statements. Thus, it is necessary to establish the significance of acting in the public interest only in case of dissemination of defamatory information based on false facts, i.e. such that have the form of sentences in the sense of logic because only then it is possible to adjudicate whether they are true or false[17]. Sometimes, before the assessment, it is necessary to

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[13] Especially compare the ruling of the Supreme Court of 14 May 2003, I CKN 463/01, Orzecznictwo S*ądów* Polskich 2004, vol. 2, item 22 and the resolutions of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114. Also compare: J. Barta, R. Markiewicz, Bezprawność naruszenia dobra osobistego wobec rozpowszechnienia w prasie nieprawdziwych informacji [Lawlessness of publicity rights infringement versus dissemination of untrue information in the press], [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana [Legal studies. Professor Maksymilian Pazdan's commemorative book]*, (ed.) L. Ogiegło, W. Popiołek and M. Szpunar, Kraków 2005, p. 796 and subsequent ones; P. Księżak, [in:] *Kodeks cywilny. Część ogólna. Komentarz [Civil Code: General issues. Commentary]*, (ed.) M. Pyziak-Szafnicka and P. Księżak, Warszawa 2014, pp. 332–333; K. Święcka, *Okoliczności wyłączające bezprawność naruszenia dóbr osobistych przez prasę [Circumstances excluding lawlessness of publicity rights infringement by the press]*, Warszawa 2010, p. 161 and subsequent ones; J. Wierciński, Niemajątkowa ochrona [Non-pecuniary protection], *op. cit*., p. 137 and subsequent one.

[14] Compare A. Pązik, Wyłączenie bezprawności [Exclusion of lawlessness], p. 303 and subsequent ones.

[15] A. Pązik, *Wyłączenie bezprawności... [Exclusion of lawlessness...]*, p. 303 and subsequent ones.

[16] *Ibidem*, pp. 163 and 333.

[17] In Article 41 of the Press law, appropriately, the compulsion of truthfulness concerns information on facts (reports on organs' meetings) and not already published assessment. Thus, it is hard to approve of the argument raised in the resolution of the Supreme Court (7) of 18 February 2005 (III CZP

analyse a statement composed of descriptive and evaluative elements in order to select sentences that can be judged to be true or false. If a statement is evaluative, its truthfulness cannot be tested. As a result, the thesis of lawlessness of honour insult refers only to the charges of defamation the falseness of which can be established because they are not based on true facts. Commonly, it is rightly assumed that dissemination of false information about a person is lawless because it impairs dignity and is defamatory. In such a situation, in order to classify an action in public interest as a circumstance excluding lawlessness, it is necessary to find grounds for a thesis that there is a situation in which it is in public interest to disseminate information that turns out to be false, and the aggrieved party is not entitled to protection of his publicity rights under Article 24 CC.

It must be noticed that, in the judicature and the opinions of jurisprudence that approve of admissibility of excluding lawlessness of a published statement in case of defamation by false accusation, the biggest importance is attributed to two arguments for the rightfulness of the interpretation adopted. First, the adopted solution aims to ensure the freedom of speech in connection with the role of the press in the implementation of that value. Second, it waives the threat of troublesome, stigmatising sanction imposed on the perpetrator, a journalist.

In case of the first argument, one must consider consequences of the constitutional right to freedom to express opinions, to acquire and to disseminate information (Article 54 (1) of the Constitution) in the light of constitutionally ensured freedom of the press and other means of social communication (Article 14 of the Constitution). If they allow for public formulation of false and untrue sentences, they can constitute grounds for excluding lawlessness of instances of propagating untruth.

The right to publicly express one's opinions, inter alia via the means of social communication, and freedom of the press are also protected by international agreements (Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 19 of the Universal Declaration of Human Rights, Articles 17 and 19 of the International Covenant on Civil and Political Rights) and statutes (Article 24 CC and Articles 1, 6 and 41 of the Press law). Legal literature and the judicature often present arguments indicating that the freedom of speech is also anchored in the need for ensuring possibly best conditions for the exercise of citizens' rights to "being provided with reliable information, public life openness and social control and criticism" (Article 1 of the Press law). Similarly, the judgements of the European Court of Human Rights protect, under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone's right to freedom of expression, including freedom to hold opinions and to receive and import information and ideas without interference by public authority and regardless of frontiers, which constitutes a guarantee of a democratic society[18].

53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114), that the provision "uses a concept of diligence, not truthfulness of criticism concerning publishing negative assessment of (inter alia) public activities". Journalistic diligence cannot be placed in opposition to the compulsion of publishing truthful information on facts and the legislator does not do so in Article 41 of the Press law.

[18] Compare especially the ruling of the Supreme Court of 14 May 2003, I CKN 463/01, Orzecznictwo Sądów Polskich 2004, vol. 2, item 22 and the resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114, and

Undoubtedly, the implementation of this law should not impair dignity, honour and good name of a man, i.e. values that are not less important, which the above-mentioned acts also ensure (Articles 30 and 47 of the Constitution, Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 19 of the Universal Declaration of Human Rights, Articles 17 and 19 of the International Covenant on Civil and Political Rights, Article 24 CC and Article 12 od the Press law). This means that it is in the public interest to exclude the provision of such a right to freedom of expression the implementation of which does not infringe fundamental publicity rights. Legal system notices this borderline also when in the Press law imposes an obligation "to present discussed phenomena truthfully" (Article 6 (1) of the Press law). "The term 'phenomena' should be understood as everything that is subject to mental perception, all empiric facts, events, situations, accidents, processes… Obligation to present phenomena truthfully is an order to show facts in accordance with reality"[19].

Thus, in my opinion, a thesis that in every situation it is necessary to consider which legally protected value, freedom of expression on the one hand, and dignity, honour and good name on the other hand, should be preferred by the legal system if statements have been untruthful. In any case, legal norms should not allow for recognising untruthful statements as lawful and legalise them.

Thus, a question arises why the significance and functions of the press are so strongly emphasised, but when assessing its statements it is accepted that the results of that assessment are determined only by the criteria for checking professional conduct of the perpetrator of publicity rights infringement and the consequences of their untruthful statements are not taken into account. Most often it is said that: "unconditional demand that a journalist prove truthfulness of an accusation means that he is requested to meet unrealistic requirements of detailed establishment of facts comparable to those that can be met in the proceeding conducted by state organs appointed and authorised to do this, and this would mean "the end of freedom of speech" or substantially restrict implementation of the function by the press"[20].

The Supreme Court rightly believes that "the obligation of the press (a journalist) to truthfully present phenomena should not be identified with unconditionally understood requirement of proving the truthfulness of accusation", although one cannot agree with the next statement that "the condition for truthfulness of transferred information should be referred to truthfulness of sources, i.e. their diligent selection, check and presentation"[21].

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also J. Barta, R. Markiewicz, Bezprawność naruszenia dobra osobistego wobec rozpowszechnienia w prasie nieprawdziwych informacji [Lawlessness of publicity rights infringement versus dissemination of untrue information in the press], [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana [Legal studies. Professor Maksymilian Pazdan's commemorative book]*, (ed.) L. Ogiegło, W. Popiołek and M. Szpunar, Kraków 2005, p. 796 and subsequent ones, and J. Panowicz-Lipska, [in:] *Kodeks cywilny. Komentarz [Civil Code: Commentary]*, (ed.) M. Gutowski, vol. I, Warszawa 2016, commentary on Article 24, Nb 13.

[19] J. Sobczak, *Ustawa Prawo prasowe. Komentarz [Act on the Press law: Commentary]*, Warszawa 1999, p. 100.

[20] Resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114.

[21] *Ibid*.

Undoubtedly, the role of journalists is not only to inform about facts that can be proved truthful. An unconditional order to refrain from disseminating information until its truthfulness is established must not be formulated. The significance of the media and the freedom of speech is the reason why it is necessary to allow for quickly providing the public with the information the truthfulness of which the provider is not able to prove. However, in such a case, as far as a statement infringing publicity rights is concerned, a provider of the information takes the risk of legal liability and I think that this is the biggest risk among those that journalists have to accept. At the same time, the analysed sphere refers to the risk of liability for the consequences of the perpetrator's conduct[22]. These may be more troublesome than the consequences of the publication for the aggrieved party.

I do not agree with the statements that it means "gagging" or introducing censorship. I do not share an opinion that this interpretation causes that there is an "axiological fracture" between "ethical and professional obligation to publish and recognition of this action as lawless"[23]. The ethical and professional obligation to publish certainly refers to truthful material including information that is essential for public life. This construction finds grounds not only in legal provisions (especially Article 6 of the Press law), but also in professional ethical codes. I think, however, that this professional ethical code does not enclose a journalistic obligation to publish information the truthfulness of which cannot be proved. In the same way as in case of anybody who decides to exercise the freedom of speech, the smaller the probability that his information is truthful, the bigger the risk a journalist takes[24].

However, it is necessary to consider a call that in such a case "there should be a statutory exclusion of the possibility to rule (especially within proceeding securing claims) a ban on publication of journalistic material that infringes publicity rights by making statements the truthfulness of which cannot be established"[25]. It seems to be justified that a court should have grounds for annulling such an injunction if a defendant, in a given time limit, presents circumstances that make the accusation highly probable. If the information is then disseminated, the author of the publication will face the consequences of publicity rights infringement unless he can prove the truthfulness of the information.

Another argument that the sanction on the defamer is flagrantly hard is not convincing, either. The above-mentioned resolution of the Supreme Court characterises its hardship as follows: the consequences of recognising a journalist liable shall not be underestimated because the obligation to make a statement and apologise is for a journalist "a hard sanction and concerns an important sphere such as professional

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[22] In this vivid and right way: J. Sadomski, *Naruszenia dóbr osobistych przez media [Infringement of publicity rights by the media]*, Warszawa 2003, p. 60, although it is worth mentioning that involving liability always refers to consequences of conduct, even if there is a necessity to assess operant behaviour among premises of assigning liability (with liability based on fault).

[23] J. Barta, R. Markiewicz, Bezprawność naruszenia... [Lawlessness of publicity rights infringement...], p. 803.

[24] It must be remembered that lawless publicity rights infringement can also occur as disclosure of true information.

[25] J. Barta, R. Markiewicz, Bezprawność naruszenia... [Lawlessness of publicity rights infringement...], p. 802.

repute, which also belongs to publicity rights. The fact that in case of no guilt on the part of a journalist there is only non-pecuniary liability, does not lessen the significance and consequences of accepting liability by a journalist as it is strictly connected with challenging the compliance of his conduct with the rules of social co-existence"[26].

The Supreme Court treats "challenging the compliance of his [i.e. a journalist's – A.O.] conduct with the rules of social co-existence" to be a particularly hard sanction while, in fact, it concerns only the establishment of an actual and legal state. A sanction consists in an obligation to retract a statement and apologise. Unlike the Supreme Court, I believe that publication of untruthful accusation is not in accordance with moral norms commonly adopted and approved of in our society. It violates them.

I share the belief that public dissemination of information performed several times and sometimes under the pressure of time is not exempt from a possibility of making errors in the course of assessing the truthfulness of some facts. Any regimes of particularly diligent conduct formulated with regard to a professionally performed journalistic job are to minimise this risk, protecting both a potential aggrieved party and a defamer, i.e. a journalist, against dissemination of untruthful information. If, however, an event takes place, the legal consequence in the form of an obligation to retract the statement infringing publicity rights of the aggrieved party cannot be treated as "gagging". This would mean that, except journalists, all the members of the society, all the parties that are subject to civil law, are gagged by the civil law protection of dignity.

Assessing the proportionality of sanctions, it is necessary to take into account the hardship caused for the aggrieved party. The harm caused by dissemination of a statement impairing dignity, honour and good name of a man requires that the defamer not only publicise true information but also apologise to the aggrieved party. Does meeting this requirement mean harm to a journalist's professional repute? Quite the contrary, a lack of his reaction is dangerous for his repute of a diligent professional.

Assessment of each sanction is relative in character and if there are sometimes statements that a defamer is **only** or **solely** obliged to publish a retraction, it is not underestimating the hardship of the sanction, but an indication of the proportion to the consequences of the caused harm. Obligation to retract a statement and apologise, i.e. the consequence that a journalist diligently performing his job may have to face, will be fully proportional to the harm experienced by the aggrieved party.

IV The criterion for being professionally diligent is not the main subject matter of this article. However, due to its importance in one of the presented solutions, I will highlight that I do not share a standpoint that diligence is a criterion for assessing lawlessness of conduct. It is not convincing to state that "when all requirements that a journalist must meet are taken into consideration in order to efficiently refer to action in a justified public interest and maintaining particular carefulness and diligence, it is not possible to accuse a journalist who respected all the rules of a fair objective and appropriate conduct of infringing the rules of social co-existence. The action of a journalist meeting this kind of requirements does not deserve being considered to infringe the rules of

[26] Resolution of the Supreme Court (7) of 18 February 2005, III CZP 53/04, Orzecznictwo Sądu Najwyższego Izba Cywilna 2005, no. 7–8, item 114.

social coexistence and should not be stigmatised as lawless"[27]. The opinion cannot be approved of because in order to deny a defamer's lawlessness, it transfers considerations into the sphere of performance assessment, i.e. the maintenance of diligence in performing duties, and indicates the threat of stigmatising a defamer in case his conduct is recognised as unlawful. However, it does not concern stigmatisation of a journalist. It is the aggrieved party who is stigmatised by a press publication, which is often forgotten, and it is his right to damages that we analyse. The legal system does not assume that the aggrieved party is satisfied only when an innocent defamer is stigmatised.

On the other hand, in order to appropriately interpret the norms of the current legal system, it is necessary to draw attention to the fact that it does not matter whether a journalist deserves or does not deserve to be considered as one who violated the law but it concerns the establishment of a fact whether he did it. What he deserves is another issue and it concerns whether he may be charged with failing to fulfil his professional duties (intentionally or because of negligence), infringement of the rules of carefulness, diligence, in other words if he may be found guilty.

Unlike some try to state, statutory construction of civil law protection of publicity rights does not strengthen arguments justifying the opinion on classification of due diligence as a criterion for the assessment of conduct lawlessness. It seems that in private law, there has not been one single commonly accepted standpoint regarding an overall legal interpretation of a lawless act, which to a great extent results from the tradition of constructing a two-element concept of guilt also covering objective inappropriateness of conduct (lawlessness). This means a possibility of formulating various criteria for assessing lawlessness of conduct depending on the category or type of rights that the instrument is to protect.

Here, it is not possible to indicate and analyse the overall consequences resulting from the adoption to the legal system of an opinion that due diligence constitutes a criterion for the assessment of lawlessness of conduct and is not structurally connected with fault. However, formulating such a thesis in the area of publicity rights protection[28] is particularly groundless and has encountered the right criticism[29], because it leads to substantial weakening of the protection provided. The evolution of the system of publicity rights protection, especially in the area of non-pecuniary protection, has consisted so far in the strengthening of securing the aggrieved party's interests by a departure from the principles of tort-related regime, especially a withdrawal from the necessity of charging a tortfeasor with intentional or at least negligent, neglectful conduct. As a result, an efficient instrument in the form of unconditional rights protecting the aggrieved party against infringement of their publicity rights has been created. The effectiveness of this instrument should not be limited, but quite the contrary – it should be strengthened.

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[27] *Ibidem*.

[28] Compare J. Wierciński, *Niemajątkowa ochrona czci [Non-pecuniary protection of dignity]*, Warszawa 2002, p. 137 and subsequent ones.

[29] Compare Z. Radwański, gloss on the resolution of the Supreme Court of 18 February 2005, III CZP 53/04, Orzecznictwo Sądów Polskich 2005, vol. 9, item 110; B. Kordasiewicz, review of a monograph, J. Wierciński, Niemajątkowa ochrona czci [Non-pecuniary protection of dignity], *Państwo i Prawo* 2004, vol. 12.

V The burden of proof of the truthfulness of information lies on the defendant in a lawsuit concerning publicity rights infringement only when the plaintiff files a complaint claiming loss resulting from untruthful information. A court will examine it based on the overall evidence collected and factual and legal presumptions. Undoubtedly "the role of the press does not consist in just providing information, its role often is to present facts in order to trigger a discussion, make a reader develop their own opinion and to signal the existence of particular threats. Factual and truthful presentation of matters makes it possible to fulfil the tasks of the press and, at the same time, allows for classifying this conduct within the limits of the freedom of speech"[30]. However, the role of the press is never to present untruthful information, communicate it as events and facts that have taken place.

A thesis that the proposed modification of the rules of liability for defamatory dissemination of untruthful information is totally exceptional is not convincing. It is indicated that the modification applies only to journalists (finds grounds for them in the provisions of the Press law) and only for those who meet the requirements of the rules of the highest diligence, which does not undermine the general principle of providing the aggrieved party with efficient legal protection if they have faced false accusations. If, in order to justify the interpretation criticised here, one takes into consideration a thesis of assessing diligence of a perpetrator's conduct as a criterion for establishing lawlessness of an act, I think it is groundless to limit the consequences of that move to the journalistic profession. By the way, the problem does not consist in the scale of exemptions from liability for dignity impairment. Thus, it does not mean that overruling liability, against the commonly binding principle of truthfulness of statements, is a very restrictive exception, because it applies to "journalists only", and only those who are particularly diligent[31] when recognising untruthful information. The problem consists in a lack of legal and axiological justification for a withdrawal from the principle that untruthful press statements are never in the public interest. However, if they occur (may that happen as rarely as possible), a person incurring the harm should be provided with full protection of their dignity. And this should be done with the use of non-pecuniary measures (when a journalist-defamer maintained due diligence) or pecuniary measures (when he was at fault).

At the time of dynamic development in the field of communication, growth in technical means making it possible to almost immediately disseminate information, the stand privileging one professional group in the field of publicity rights protection is doubtful. If a defamer is not a journalist but another person who formulated false accusation based on diligently checked, reliable sources, the possibility of exercising the exemption from liability should be applicable also to them. The role played by the media in public life is especially valuable. The press, thanks to the freedom of speech,

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[30] Resolution of the Supreme Court (7) of 18 February 2005..., *op. cit*.

[31] A. Pązik, *Wyłączenie bezprawności... [Exclusion of lawlessness...]*, p. 163. *Nota bene*, I believe that special diligence required by the Press law (Article 12 (1(1)) is, in the light of Article 355 CC, due diligence, which is laid down in the second paragraph of the provision prescribing consideration of professionalism of the obliged, thus, in case of a journalist's conduct, the assessment should take into account a pattern that includes the knowledge and conscientiousness required in this profession in the given circumstances (for more on this topic, compare J. Sobczak, *Ustawa Prawo prasowe... [Act on the Press law...]*, p. 153 and subsequent ones).

is rightly assigned the role to implement "the citizens' right to reliable information, openness of public life and social control and criticism" (Article 1 of the Press law). However, I am convinced that it does not make grounds for modifying the rules of liability in case of publicity rights infringement. I am omitting the issue concerning definitions of the press and a journalist although it is not irrelevant here. But I am paying most attention to the thesis that identical rules of liability for formulating false accusations should be applied to everybody who disseminates that information regardless of their professional status. Special duties in the area of information collection and dissemination imposed on journalists cannot be a sufficient condition for a withdrawal from general rules of liability.

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ACTION IN THE SOCIALLY JUSTIFIED INTEREST VERSUS DEFAMATION IN THE PRESS STATEMENT

Summary

A perpetrator's action in the socially justified interest is sometimes perceived as a circumstance excluding lawlessness of his conduct. It also applies to a person infringing publicity rights. The topic is broad and triggers a widespread debate. The article focuses on an analysis of civil law issues of publicity rights protection and only the problems that occur in case a perpetrator of publicity rights infringement is charged with defamation, which is based on facts (not opinions). The author supports the thesis that in such cases a defamer's profession is not important, and what can exclude lawlessness of his conduct and only when the accusation is true is an action with "due diligence" within the protection of socially justified interest. Social significance of the press and imposition of special duties in the field of information collection and dissemination on a journalist by the Act on the Press law do not constitute sufficient grounds for modifying the

general rules of liability for dignity impairment only for the representatives of this profession. False press statements are not in the public interest and the aggrieved party should have the right to demand apology also from a journalist who maintained due diligence in his faulty action.

Key words: *justified public interest*, *publicity rights*, *impairment of dignity*, *lawlessness*, *the press*, *untruthful information*, *due diligence*, *apology*

DZIAŁANIE W SPOŁECZNIE UZASADNIONYM INTERESIE A NARUSZENIE CZCI WYPOWIEDZIĄ PRASOWĄ

Streszczenie

Działanie sprawcy szkody w społecznie uzasadnionym interesie jest niekiedy postrzegane jako okoliczność wyłączająca bezprawność jego zachowania. Dotyczy to także zachowania osoby naruszającej dobra osobiste. Zagadnienie jest bardzo obszerne i budzi szeroką dyskusję. Opracowanie ogranicza się do analizy zagadnień cywilnoprawnej ochrony dóbr osobistych oraz wyłącznie do problemów, jakie pojawiają się w razie postawienia sprawcy naruszenia dobra osobistego zarzutu zniesławiającego, który oparty jest na faktach (nie dotyczy opinii). Autor broni tezy, że w tych przypadkach nie jest istotna profesja sprawcy zarzutu, a działanie „z należytą starannością" w obronie społecznie uzasadnionego interesu może wyłączyć bezprawność jego zachowania tylko wówczas, gdy zarzut jest prawdziwy. Społeczne znaczenie prasy i nałożenie na dziennikarza przez ustawę Prawo prasowe szczególnych obowiązków w zakresie zbierania i przekazywania informacji nie stanowią wystarczającej podstawy do modyfikowania tylko dla reprezentantów tej profesji ogólnych reguł odpowiedzialności za naruszenie czci. W interesie społecznym nie leżą nieprawdziwe wypowiedzi prasowe, a pokrzywdzony nieprawdziwą informacją powinien mieć prawo żądać przeproszenia także przez dziennikarza, który dochował należytej staranności w swoich krzywdzących działaniach.

Słowa kluczowe: *społecznie uzasadniony interes*, *dobra osobiste*, *naruszenie czci*, *bezprawność*, *prasa*, *nieprawdziwa informacja*, *należyta staranność*, *przeproszenie*