COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 2 March 2004

Restricted
CDL(2004)015
Or. Engl.

Opinion no. 289/2004

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT *AMICUS CURIAE* OPINION ON THE RELATIONSHIP BETWEEN THE FREEDOM OF EXPRESSION AND DEFAMATION WITH RESPECT TO UNPROVEN DEFAMATORY ALLEGATIONS OF FACT AS REQUESTED BY THE CONSTITUTIONAL COURT OF GEORGIA

On the basis of comments by

Mr. Georg NOLTE
(Substitute Member, Germany)

1. On 4 February 2004, the Constitutional Court of Georgia asked the Venice Commission via its liaison officer, Mr. Bodzashvili, to give an opinion on the relationship between the freedom of expression and defamation (Articles 19.2 of the Constitution of Georgia and Article 18.2 of the Civil Code respectively). The Commission understands the request of the Constitutional Court of Georgia to mean that it should give an assessment of the abstract legal question which has been brought before the Court in the light of European standards, but not to attempt to provide an interpretation of the specific provisions of Georgian law.

2. The Commission invited Mr. Nolte to prepare the comments below on this issue. The present amicus curiae opinion has been adopted by the Venice Commission on ... at its ... Plenary Session.

I. The Request

3. The Constitutional Court of Georgia has approached the Venice Commission to give an opinion relating to Article 19.2 of the Constitution of Georgia. This provision reads:

> 1. Every individual has the right to freedom of speech, thought, conscience, religion and belief.
> 2. The persecution of an individual for their thought, beliefs or religion is prohibited as is also the compulsion to express opinions about them.
> 3. These rights may not be restricted unless the exercise of these rights infringes upon the rights of other individuals.

4. In a case pending before the Constitutional Court of Georgia the applicant alleges that Article 18 (2) of the Civil Code of Georgia is unconstitutional, namely that it violates Article 19 (2) of the Constitution of Georgia. Article 18 par.2 of the Civil Code reads as follows:

> "A person is entitled to demand in court the retraction of information that defames his honour, dignity, privacy, personal inviolability or business reputation unless the person who disseminated such information can prove that it corresponds to the true state of affairs. The same rule applies to the incomplete dissemination of facts, if such dissemination defames the honour, dignity or business reputation of a person."

II. Opinion

5. The request by the Constitutional Court of Georgia concerns a question under the law of Georgia. This question, however, also raises a more general problem which has been dealt with by Courts in other Member States of the Council of Europe, and the European Court of Human Rights.

6. It is necessary to state at the outset that the question of the Constitutional Court of Georgia does not seem to raise the general question of the relationship between the freedom of expression and defamation in its entirety. Rather, the question of the Constitutional Court of Georgia is limited to the issue of how to deal with defamatory assertions of fact. This is because Article 18 (2) of the Civil Code of Georgia speaks of "information" and of "burden of proof". Both are concepts which presuppose an assertion of fact. Therefore, the question of how far defamatory value judgements are protected by the freedom of expression is not at issue in the present opinion.

7. It is also necessary to note that the Constitutional Court of Georgia raises an abstract question, that of the compatibility of a norm of ordinary legislation (Article 18 (2) of the Civil Code) with the constitution (Article 19 (2)). The Venice Commission has not been made aware of the specific circumstances of the case which the Constitutional Court of Georgia is called upon to decide and expressed no opinion in this respect.

8. The question of the compatibility of a norm of ordinary legislation with the constitution cannot always be clearly decided. It is possible that a norm is constitutional if it is applied to certain factual situations but that the same norm is unconstitutional if it is applied to other factual situations. In such cases the norm must either be narrowly interpreted (in order to cover only such situations in which it can be applied without violating the constitution) or be declared to be partially unconstitutional.

9. The experience of other Courts in Europe which have dealt with a similar question as the one which is posed by the Constitutional Court of Georgia suggests that the norm in question (Article 18 (2) of the Civil Code) should be narrowly interpreted so that it applies only in situations in which it is compatible with the freedom of expression (Art. 19 (2) of the Constitution of Georgia and Art. 10 of the European Convention of Human Rights):

10. The experience of other European Courts in dealing with the question of whether or under which circumstances a person must prove the truth of his or her defamatory factual allegations is dealt with extensively in the judgement of the Highest Court of the United Kingdom, the House of Lords, in the case of *Reynolds v. Times Newspapers Limited* of 28 October 1999[1]. This judgement contains not only a detailed exposition of the general legal considerations involved, but also an overview of the jurisprudence of the most important jurisdictions of the English-speaking world and the pertinent judgements of the European Court of Human Rights. The most important parts of this judgement are reproduced in the Annex to this opinion. In addition, key parts of the judgement of the European Court of Human Rights of 20 May 1999 in the case of *Bladet Tromsø* and Stensaas V. Norway[2] are reproduced in the Annex, as well as the leading judgement by the German *Bundesverfassungsgericht* (Federal Constitutional Court), in the Böll case.[3]

11. In short, all the decisions reproduced in the Annex, as well as many other decisions by European Highest Courts[4], express the following common European principles of how to deal with the question raised by the Constitutional Court of Georgia: As a general rule, the principle that the person who makes defamatory assertions of fact must prove that these assertions are true, is acceptable. This is because the reputation of others is a legitimate limitation to the freedom of expression. There are, however, a number of situations in which either the speaker, or his audience have a legitimate interest that assertions may be put forward even if the speaker cannot prove that they are true. The most important of such situations is when the speaker makes a statement of public concern. Here, the freedom of expression requires that issues can be made subject to public debate even if full accuracy cannot be guaranteed. This does not mean, however, that doubtful assertions on issues of public concern may always be expressed freely. It rather depends on a balancing of a number of possible considerations whether, in the specific case, freedom of expression takes precedence over reputational interests. Much depends, in particular, whether the speaker has acted *bona fide* and whether he or she has observed the appropriate duty of care when assessing the veracity of the allegation.

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[1] Available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm.

[2] Application no. 21980/93, available at http://hudoc.echr.coe.int.

[3] Decisions of the Bundesverfassungsgericht, Federal Constitutional Court, Federal Republic of Germany / publ. by the members of the Court, Baden-Baden (Nomos), 1992, Vol. 2. Freedom of speech : (freedom of opinion and artistic expression, broadcasting freedom and communication freedom of the press, freedom of assembly) 1958 – 1995, 1st ed. 1998, pp. 189-198). It should be noted, however, that the Böll case concerns the rather specific issue of false quotations. The pertinent part of the judgment can be found on p. 196 sub a).

[4] Constitutional Court of the Czech Republic, decision I. US 156/99 of 8.2.2000, CODICES: CZE-2000-1-005; Federal Constitutional Court of Germany, decision 1 BvR 1531/96 of 10.11.1998, CODICES: GER-1999-1-005; Supreme Court of Norway, decision 2001/19 of 20.11.2001, CODICES: NOR-2001-3-007; Constitutional Court of Spain, decision 144/1998 of 30.6.1998, CODICES: ESP-1998-2-014 and decision 28/1996 of 6.2.1996, CODICES: ESP-1996-1-005.

12. All the judgements which are reproduced in the Annex provide examples of how other European Courts deal with this balancing of all factors in a specific case in order to determine whether a person who has made a defamatory factual allegation which he or she cannot prove to be true nevertheless is free to do so. Attention is drawn in particular to the list of factors in the Reynolds decision by the British House of Lords (in the Annex at the end of the opinion by Lord Nicholls of Birkenhead):

> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
> 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
> 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
> 4. The steps taken to verify the information.
> 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
> 6. The urgency of the matter. News is often a perishable commodity.
> 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
> 8. Whether the article contained the gist of the plaintiff's side of the story.
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
> 10. The circumstances of the publication, including the timing.

13. A separate comment on the second sentence of Article 18 (2) of the Civil Code of Georgia may be in order. This sentence reads: "The same rule applies to the incomplete dissemination of facts, if such dissemination defames the honour, dignity or business reputation of a person." It should be noted that this sentence must be interpreted with particular care. It would violate the freedom of expression if it would mean that every person who makes a defamatory allegation can be subjected to sanctions if he or she fails to mention every conceivable aspect of a particular situation. Art. 18 (2) should therefore be limited to situations in which the incompleteness of the disseminated facts constitutes an essential element of the defamatory nature of the allegation.

III. Conclusion

14. The decisions taken by the European Court of Human Rights, the British House of Lords and the German *Bundesverfassungsgericht*, as well as those of many other European Courts, all reflect the same generally recognised principle. The main difficulty does not lie in establishing that the principle exists, but to apply it correctly to a particular case. It is the task of the Georgian Constitutional Court to properly interpret Art. 18 (2) of the Georgian Civil Code in the light of the freedom of expression (Art. 19 (2) of the Constitution of Georgia as well as Article 10 of the European Convention of Human Rights. Such a proper interpretation may in a number of cases lead to the conclusion that Art. 18 (2) of the Civil Code must be understood narrowly and cannot be applied. This is true in particular in certain cases where the allegation in question raises issues of public concern.

III. Annex

EUROPEAN COURT OF HUMAN RIGHTS
CASE OF *BLADET TROMSØ* AND STENSAAS v. NORWAY
(Application no. 21980/93)
JUDGEMENT, 20 May 1999

In the case of *Bladet Tromsø* and Stensaas v. Norway,
The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11 and the relevant provision of the Rules of the Court as a Grand Chamber composed of the following judges: Mr L. Wildhaber, *President*, Mrs E. Palm, Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr R. Türmen, Mr J.-P. Costa, Mrs F. Tulkens, Mrs. Strážnická, Mr W. Fuhrmann, Mr M. Fischbach, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste, Mrs S. Botoucharova,

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B. The Court's assessment

1. General principles

58. According to the Court's well-established case-law, the test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times* (no. 1) v. the United Kingdom judgement of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.

59. One factor of particular importance for the Court's determination in the present case is the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see the Jersild v. Denmark judgement of 23 September 1994, Series A no. 298, p. 23, § 31; and the De Haes and Gijsels v. Belgium judgement of 24 February 1997, *Reports of Judgements and Decisions* 1997-I, pp. 233-34, § 37). In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see the Prager and Oberschlick v. Austria judgement of 26 April 1995, Series A no. 313, p. 19, § 38). In cases such as the present one the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern (see the Goodwin v. the United Kingdom judgement of 27 March 1996, *Reports* 1996-II, p. 500, § 39).

60. In sum, the Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

2. Application of those principles to the present case

61. In the instant case the Nord-Troms District Court found that two statements published by *Bladet Tromsø* on 15 July 1988 and four statements published on 20 July were defamatory, "unlawful" and not proved to be true. One statement – "Seals skinned alive" – was deemed to mean that the seal hunters had committed acts of cruelty to the animals. Another was understood to imply that seal hunters had committed criminal assault on and threat against the seal hunting inspector. The remaining statements were seen to suggest that some (unnamed) seal hunters had killed four harp seals, the hunting of which was illegal in 1988. The District Court declared the statements null and void and, considering that the newspaper had acted negligently, ordered the applicants to pay compensation to the seventeen plaintiffs (see paragraph 35 above).

The Court finds that the reasons relied on by the District Court were relevant to the legitimate aim of protecting the reputation or rights of the crew members.

62. As to the sufficiency of those reasons for the purposes of Article 10 of the Convention, the Court must take account of the overall background against which the statements in question were made. Thus, the contents of the impugned articles cannot be looked at in isolation of the controversy that seal hunting represented at the time in Norway and in Tromsø, the centre of the trade in Norway. It should further be recalled that Article 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population (see the Handyside v. the United Kingdom judgement of 7 December 1976, Series A no. 24, p. 23, § 49). Moreover, whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Consequently, in order to determine whether the interference was based on sufficient reasons which rendered it "necessary", regard must be had to the public-interest aspect of the case.

63. In this connection the Court has noted the argument, relied on by the District Court (see paragraph 35 above), that *Bladet Tromsø*'s manner of presentation, in particular in the article of 15 July 1988 (see paragraph 12 above), suggested that the primary aim, rather than being the promotion of a serious debate, was to focus in a sensationalist fashion on specific allegations of crime and to be the first paper to print the story. In the Court's view, however, the manner of reporting in question should not be considered solely by reference to the disputed articles in *Bladet Tromsø* on 15 and 20 July 1988 but in the wider context of the newspaper's coverage of the seal hunting issue (see paragraphs 8-9, 12-19, 21-24 above). During the period from 15 to 23 July 1988 *Bladet Tromsø,* which was a local newspaper with – presumably – a relatively stable readership, published almost on a daily basis the different points of views, including the newspaper's own comments, those of the Ministry of Fisheries, the Norwegian Sailors' Federation, Greenpeace and, above all, the seal hunters (see paragraphs 12-19, 21-24 above). Although the latter were not published simultaneously with the contested articles, there was a high degree of proximity in time, giving an overall picture of balanced news reporting. This approach was not too different from that followed three months earlier in the first series of articles on Mr Lindberg's initial accusations and no criticism appears to have been made against the newspaper in respect of those articles. As the Court observed in a previous judgement, the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists (see the Jersild judgement cited above, p. 23, § 31).

Against this background, it appears that the thrust of the impugned articles was not primarily to accuse certain individuals of committing offences against the seal hunting regulations or of cruelty to animals.

On the contrary, the call by the paper on 18 July 1988 (see paragraph 16 above) for the fisheries authorities to make a "constructive use" of the findings in the Lindberg report in order to improve the reputation of seal hunting can reasonably be seen as an aim underlying the various articles published on the subject by *Bladet Tromsø*. The impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported.

64. The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see the Jersild judgement cited above, pp. 25-26, § 35).

65. Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the "rights of others". As pointed out by the Government, the seal hunters' right to protection of their honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty. By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see the Goodwin judgement cited above, p. 500, § 39, and *Fressoz and Roire* cited above, § 54).

66. The Court notes that the expressions in question consisted of factual statements, not value-judgements (cf., for instance, the Lingens v. Austria judgement of 8 July 1986, Series A no. 103, p. 28, § 46). They did not emanate from the newspaper itself but were based on or were directly quoting from the Lindberg report, which the newpaper had not verified by independent research (see the Jersild judgement cited above, pp. 23 and 25-26, §§ 31 and 35). It must therefore be examined whether there were any special grounds in the present case for dispensing the newspaper from its ordinary obligation to verify factual statements that were defamatory of private individuals. In the Court's view, this depends in particular on the nature and degree of the defamation at hand and the extent to which the newspaper could reasonably regard the Lindberg report as reliable with respect to the allegations in question. The latter issue must be determined in the light of the situation as it presented itself to *Bladet Tromsø* at the material time (see paragraphs 7-19, 25-26 above), rather than with the benefit of hindsight, on the basis of the findings of fact made by the Commission of Inquiry a long time thereafter (see paragraph 31 above).

67. As regards the nature and degree of the defamation, the Court observes that the four statements (items 1.1, 1.2, 1.3 and 1.6) to the effect that certain sealers had killed female harp seals were found defamatory, not because they implied that the hunters had committed acts of cruelty to the animals, but because the hunting of such seals was illegal in 1988, unlike the year before (see paragraphs 13 and 35 above). According to the District Court, "the statements [did] not differ from allegations of illegal hunting in general" (see paragraph 35 above). Whilst these allegations implied reprehensible conduct, they were not particularly serious.

The other two allegations – that seals had been skinned alive and that furious hunters had beaten up Mr Lindberg and threatened to hit him with a gaff (items 2.1 and 2.2) – were more serious but were

expressed in rather broad terms and could be understood by readers as having been presented with a degree of exaggeration (see paragraph 12 above).

More importantly, while *Bladet Tromsø* publicised the names of the ten crew members whom Mr Lindberg had exonerated, it named none of those accused of having committed the reprehensible acts (see paragraphs 13 and 18 above). Before the District Court each plaintiff pleaded his case on the basis of the same facts and the District Court apparently considered each of them to have been exposed to the same degree of defamation, as is reflected in the fact that an equal award was made to each of them (see paragraph 35 above).

Thus, while some of the accusations were relatively serious, the potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated by several factors. In particular, the criticism was not an attack against all the crew members or any specific crew member (see the Thorgeir Thorgeirson v. Iceland judgement of 25 June 1992, Series A no. 239, p. 28, § 66).

68. As regards the second issue, the trustworthiness of the Lindberg report, it should be observed that the report had been drawn up by Mr Lindberg in an official capacity as an inspector appointed by the Ministry of Fisheries to monitor the seal hunt performed by the crew of the *Harmoni* during the 1988 season (see paragraph 7 above). In the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined (see, *mutatis mutandis,* the Goodwin judgement cited above, p. 500, § 39).

69. The Court does not attach significance to any discrepancies, pointed to by the Government, between the report and the publications made by Mr Lindberg in *Bladet Tromsø* one year before in quite a different capacity, namely as a freelance journalist and an author.

70. The newspaper was, it is true, already aware from the reactions to Mr Lindberg's statements in April 1988 that the crew disputed his competence and the truth of any allegations of "beastly killing methods" (see paragraph 9 above). It must have been evident to the paper that the Lindberg report was liable to be controverted by the crew members. Taken on its own, this cannot be considered decisive for whether the newspaper had a duty to verify the truth of the critical factual statements contained in the report before it could exercise its freedom of expression under Article 10 of the Convention.

71. Far more material for this purpose was the attitude of the Ministry of Fisheries, which had appointed Mr Lindberg to carry out the inspection and to report back (see paragraph 7 above). As at 15 July 1988 *Bladet Tromsø* was aware of the fact that the Ministry had decided to exempt the report from public disclosure with reference to the nature of the allegations – criminal conduct – and to the need to give the persons named in the report an opportunity to comment (see paragraph 11 above). It has not been suggested that, by publishing the relevant information, the newspaper was acting in breach of the law on confidentiality. Nor does it appear that, prior to the contested publication on 15 July 1988, the Ministry had publicly expressed a doubt as to the possible truth of the criticism or questioned Mr Lindberg's competence. Rather, according to a bulletin of the same date by the Norwegian News Agency, the Ministry had stated that it was possible that illegal hunting had occurred (see paragraph 25 above).

On 18 July 1988 the Norwegian News Agency reported the Ministry as having stated that veterinary experts would consider the controversial Lindberg report and that the Ministry would issue information of the outcome and possibly also of the circumstances of Mr Lindberg's recruitment as inspector; and, moreover, that the Ministry would not comment any further until it had collected more information (see paragraph 26 above). On 19 July the News Agency reported that the Ministry had believed, on the

basis of information provided by Mr Lindberg himself, that his research background was far more extensive than it was in reality. It was on 20 July, the same date as the last of the disputed publications, that the Ministry expressed doubts as to Mr Lindberg's competence and the quality of the report (see paragraph 20 above).

In the Court's opinion, the attitude expressed by the Ministry before 20 July 1988 does not constitute a ground for considering that it was unreasonable for the newspaper to regard as reliable the information contained in the report, including the four statements published on 20 July to the effect that specific but unnamed seal hunters had killed female harp seals (see paragraph 13 above). In fact, the District Court later found that one such allegation (item 1.5) had been proved true (see paragraph 35 above).

72. Having regard to the various factors limiting the likely harm to the individual seal hunters' reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.

73. On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest. In short, the reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic society".

Notwithstanding the national authorities' margin of appreciation, the Court considers that there was no reasonable relationship of proportionality between the restrictions placed the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly, the Court holds that there has been a violation of Article 10 of the Convention.

HOUSE OF LORDS, UNITED KINGDOM
Lord Nicholls of Birkenhead, Lord Steyn, Lord Cooke of Thorndon,Lord Hope of Craighead, Lord Hobhouse of Woodborough

OPINIONS OF THE LORDS OF APPEAL FOR JUDGEMENT IN THE CAUSE

REYNOLDS (RESPONDENT)
v.
TIMES NEWSPAPERS LIMITED AND OTHERS (APPELLANTS)

on 28 OCTOBER 1999
http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm

LORD NICHOLLS OF BIRKENHEAD

My Lords,
This appeal concerns the interaction between two fundamental rights: freedom of expression and protection of reputation. The context is newspaper discussion of a matter of political importance. Stated in its simplest form, the newspaper's contention is that a libellous statement of fact made in the course of political discussion is free from liability if published in good faith. Liability arises only if the writer knew the statement was not true or if he made the statement recklessly, not caring whether it was true or false, or if he was actuated by personal spite or some other improper motive. Mr. Reynolds' contention, on the other hand, is that liability may also arise if, having regard to the source of the information and all the circumstances, it was not in the public interest for the newspaper to have published the information as it did. Under the newspaper's contention the safeguard for those who are defamed is exclusively subjective: the state of mind of the journalist. Under Mr. Reynolds' formulation, there is also an objective element of protection.

…

The jury verdict took the form of answers to questions. The jury decided that the defamatory allegation of which Mr. Reynolds complained was not true. So the defence of justification failed. The jury decided that Mr. Ruddock was not acting maliciously in writing and publishing the words complained of, nor was Mr. Witherow. So, if the occasion was privileged, and that was a question for the judge, the defence of qualified privilege would succeed.

….

Defamation and truth

The defence of qualified privilege must be seen in its overall setting in the law of defamation. Historically the common law has set much store by protection of reputation. Publication of a statement adversely affecting a person's reputation is actionable. The plaintiff is not required to prove that the words are false. Nor, in the case of publication in a written or permanent form, is he required to prove he has been damaged. But, as Littledale J. said in *McPherson v. Daniels* (1829) 10 B. & C. 263, 272, 'the law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess'. Truth is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification. With the minor exception of proceedings to which the Rehabilitation of Offenders Act 1974 applies, this defence is of universal application in civil proceedings. It avails a defendant even if he was acting spitefully.

The common law has long recognised the 'chilling' effect of this rigorous, reputation protective principle. There must be exceptions. At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority.

Honest comment on a matter of public interest

One established exception is the defence of comment on a matter of public interest. This defence is available to everyone, and is of particular importance to the media. The freedom of expression protected by this defence has long been regarded by the common law as a basic right, long before the emergence of human rights conventions. In 1863 Crompton J. observed in *Campbell v. Spottiswoode* (1863) 3 B. & S. 769, 779, that 'it is the right of all the Queen's subjects to discuss public matters'. The defence is wide in its scope. Public interest has never been defined, but in *London Artists Ltd. v. Littler* [1969] 2 Q.B. 375, 391, Lord Denning M.R. rightly said that it is not to be confined within narrow limits. He continued:

> 'Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.'

….

It is important to keep in mind that this defence is concerned with the protection of comment, not imputations of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere. …

Privilege: factual inaccuracies

The defence of honest comment on a matter of public interest, then, does not cover defamatory statements of fact. But there are circumstances, in the famous words of Parke B. in *Toogood v. Spyring* (1834) 1 C.M. & R. 181, 193, when the 'common convenience and welfare of society' call for frank communication on questions of fact. In *Davies v. Snead* (1870) L.R. 5 Q.B. 608, 611, Blackburn J. spoke of circumstances where a person is so situated that it 'becomes right in the interests of society' that he should tell certain facts to another. There are occasions when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true. When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged.

Sometimes the need for uninhibited expression is of such a high order that the occasion attracts absolute privilege, as with statements made by judges or advocates or witnesses in the course of judicial proceedings. More usually, the privilege is qualified in that it can be defeated if the plaintiff proves the defendant was actuated by malice.

The classic exposition of malice in this context is that of Lord Diplock in *Horrocks v. Lowe* [1975] A.C. 135, 149. If the defendant used the occasion for some reason other than the reason for which the occasion was privileged he loses the privilege. Thus, the motive with which the statement was made is crucial. If desire to injure was the dominant motive the privilege is lost. Similarly, if the maker of the statement did not believe the statement to be true, or if he made the statement recklessly, without considering or caring whether it was true or not. Lord Diplock. at p. 150, emphasised that indifference to truth is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true:

> 'In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of

> its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more.'

Over the years the courts have held that many common form situations are privileged. Classic instances are employment references, and complaints made or information given to the police or appropriate authorities regarding suspected crimes. The courts have always emphasised that the categories established by the authorities are not exhaustive. The list is not closed. The established categories are no more than applications, in particular circumstances, of the underlying principle of public policy. The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication. Lord Atkinson's dictum, in *Adam v. Ward* [1917] A.C. 309, 334, is much quoted:

> '. . . a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential'.

The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end. Thus the court has to assess whether, in the public interest, the publication should be protected in the absence of malice.

In determining whether an occasion is regarded as privileged the court has regard to all the circumstances: see, for example, the explicit statement of Lord Buckmaster L.C.in *London Association for Protection of Trade v. Greenlands Ltd.* [1916] 2 A.C. 15, 23 ('every circumstance associated with the origin and publication of the defamatory matter'). And circumstances must be viewed with today's eyes. The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.

Privilege and publication to the world at large

Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognised there are occasions when the public interest requires that publication to the world at large should be privileged. In *Cox v. Feeney* (1863) 4 F. & F. 13, 19, Cockburn C.J. approved an earlier statement by Lord Tenterden C.J. that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know'. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of

sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice. ….

In other countries

Before turning to the issues raised by this appeal mention must be made, necessarily briefly, of the solutions adopted in certain other countries. As is to be expected, the solutions are not uniform. As also to be expected, the chosen solutions have not lacked critics in their own countries.

In the United States the leading authority is the well-known case of *New York Times Co. v. Sullivan* 376 U.S. 254. Founding itself on the first and fourteenth amendments to the United States Constitution, the Supreme Court held that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves, with convincing clarity, that the statement was made with knowledge of its falsity or with reckless disregard of whether it was false or not. This principle has since been applied to public figures generally.

In Canada the Supreme Court, in *Hill v. Church of Scientology of Toronto* (1995) 126 D.L.R. (4th) 129, rejected a *Sullivan* style defence, although that case did not concern political discussion. The Supreme Court has not had occasion to consider this issue in relation to political discussion.

In India the Supreme Court, in *Rajagopal v. State of Tamil Nadu* (1994) 6 S.C.C. 632, 650, held that a public official has no remedy in damages for defamation in matters relating to his official duties unless he proves the publication was made with reckless disregard of the truth or out of personal animosity. Where malice is alleged it is sufficient for the defendant to prove he acted after a reasonable verification of the facts.

In Australia the leading case is *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520. The High Court held unanimously that qualified privilege exists for the dissemination of information, opinions and arguments concerning government and political matters affecting the people of Australia, subject to the publisher proving reasonableness of conduct. The High Court regarded its decision as an extension of the categories of qualified privilege, and considered that the reasonableness requirement was appropriate having regard to the greater damage done by mass dissemination compared with the limited publication normally involved on occasions of common law qualified privilege. As a general rule a defendant's conduct in publishing material giving rise to a defamatory imputation would not be reasonable unless the defendant had reasonable grounds for believing the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Further, the defendant's conduct would not be reasonable unless the defendant sought a response from the person defamed and published the response, except where this was not practicable or was unnecessary.

In South Africa the issue has not been considered by the Constitutional Court. In *National Media Ltd. v. Bogoshi* 1998 (4) S.A. 1196, 1212 the Supreme Court of Appeal broadly followed the approach of the Court of Appeal in the present case and the Australian High Court in the *Lange* case. Press publication of defamatory statements of fact will not be regarded as unlawful if, upon consideration of all the circumstances, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication account must be taken of the nature, extent and tone of the allegations. Greater latitude is usually to be allowed in respect of political discussion.

In New Zealand the leading case is the Court of Appeal decision in *Lange v. Atkinson* [1998] 3 N.Z.L.R. 424. The Court of Appeal held that members of the public have a proper interest in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament

and those seeking election. General publication of such statements may therefore attract a defence of qualified privilege. The exercise of reasonable care by the defendant is not a requirement of this defence. This decision is currently under appeal to the Privy Council. The Judicial Committee heard this appeal shortly before the Appellate Committee of your Lordships' House, similarly constituted, heard the parties' submissions on the present appeal.

A new category of privileged subject-matter?

I turn to the appellants' submissions. The newspaper seeks the incremental development of the common law by the creation of a new category of occasion when privilege derives from the subject-matter alone: political information. Political information can be broadly defined, borrowing the language used by the High Court of Australia in the *Lange* case, as information, opinion and arguments concerning government and political matters that affect the people of the United Kingdom. Malice apart, publication of political information should be privileged regardless of the status and source of the material and the circumstances of the publication. The newspaper submitted that the contrary view requires the court to assess the public interest value of a publication, taking these matters into account. Such an approach would involve an unpredictable outcome. Moreover, it would put the judge in a position which in a free society ought to be occupied by the editor. Such paternalism would effectively give the court an undesirable and invidious role as a censor or licensing body.

These are powerful arguments, but I do not accept the conclusion for which the newspaper contended. My reasons appear from what is set out below.

My starting point is freedom of expression. The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in this case. At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions. …. Under section 12 of the Human Rights Act 1998, expected to come into force in October 2000, the court is required, in relevant cases, to have particular regard to the importance of the right to freedom of expression. The common law is to be developed and applied in a manner consistent with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Cmd. 8969), and the court must take into account relevant decisions of the European Court of Human Rights (sections 6 and 2). To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.

Likewise, there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.

Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there

is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.

The crux of this appeal, therefore, lies in identifying the restrictions which are fairly and reasonably necessary for the protection of reputation. ….

In the case of statements of opinion on matters of public interest, that is the limit of what is necessary for protection of reputation. Readers and viewers and listeners can make up their own minds on whether they agree or disagree with defamatory statements which are recognisable as comment and which, expressly or implicitly, indicate in general terms the facts on which they are based.

With defamatory imputations of fact the position is different and more difficult. Those who read or hear such allegations are unlikely to have any means of knowing whether they are true or not. In respect of such imputations, a plaintiff's ability to obtain a remedy if he can prove malice is not normally a sufficient safeguard. Malice is notoriously difficult to prove. If a newspaper is understandably unwilling to disclose its sources, a plaintiff can be deprived of the material necessary to prove, or even allege, that the newspaper acted recklessly in publishing as it did without further verification. Thus, in the absence of any additional safeguard for reputation, a newspaper, anxious to be first with a 'scoop', would in practice be free to publish seriously defamatory misstatements of fact based on the slenderest of materials. Unless the paper chose later to withdraw the allegations, the politician thus defamed would have no means of clearing his name, and the public would have no means of knowing where the truth lay. Some further protection for reputation is needed if this can be achieved without a disproportionate incursion into freedom of expression.

This is a difficult problem. No answer is perfect. Every solution has its own advantages and disadvantages. Depending on local conditions, such as legal procedures and the traditions and power of the press, the solution preferred in one country may not be best suited to another country. The appellant newspaper commends reliance upon the ethics of professional journalism. The decision should be left to the editor of the newspaper. Unfortunately, in the United Kingdom this would not generally be thought to provide a sufficient safeguard. In saying this I am not referring to mistaken decisions. From time to time mistakes are bound to occur, even in the best regulated circles.. Making every allowance for this, the sad reality is that the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence.

As high-lighted by the Court of Appeal judgement in the present case, the common law solution is for the court to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public. Its value to the public depends upon its quality as well as its subject-matter. This solution has the merit of elasticity. As observed by the Court of Appeal, this principle can be applied appropriately to the particular circumstances of individual cases in their infinite variety. It can be applied appropriately to all information published by a newspaper, whatever its source or origin.

Hand in hand with this advantage goes the disadvantage of an element of unpredictability and uncertainty. The outcome of a court decision, it was suggested, cannot always be predicted with certainty when the newspaper is deciding whether to publish a story. To an extent this is a valid criticism. A degree of uncertainty in borderline cases is inevitable. This uncertainty, coupled with the

expense of court proceedings, may 'chill' the publication of true statements of fact as well as those which are untrue. The chill factor is perhaps felt more keenly by the regional press, book publishers and broadcasters than the national press. However, the extent of this uncertainty should not be exaggerated. With the enunciation of some guidelines by the court, any practical problems should be manageable. The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse. An incursion into press freedom which goes no further than this would not seem to be excessive or disproportionate. The investigative journalist has adequate protection. The contrary approach, which would involve no objective check on the media, drew a pertinent comment from Tipping J. in Lange v. Atkinson [1998] 3 N.Z.L.R. 424, 477:

> 'It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media.'

The common law approach does mean that it is an outside body, that is, some one other than the newspaper itself, which decides whether an occasion is privileged. This is bound to be so, if the decision of the press itself is not to be determinative of the propriety of publishing the particular material. The court has the advantage of being impartial, independent of government, and accustomed to deciding disputed issues of fact and whether an occasion is privileged. No one has suggested that some other institution would be better suited for this task.

For the newspaper, Lord Lester's fall-back position was that qualified privilege should be available for political discussion unless the plaintiff proved the newspaper failed to exercise reasonable care. One difficulty with this suggestion is that it would seem to leave a newspaper open to publish a serious allegation which it had been wholly unable to verify. Depending on the circumstances, that might be most unsatisfactory. This difficulty would be removed if, as also canvassed by Lord Lester, the suggested limitation was stated more broadly, and qualified privilege was excluded if the plaintiff proved that the newspaper's conduct in making the publication was unreasonable. Whether this test would differ substantially from the common law test is a moot point. There seems to be no significant practical difference between looking at all the circumstances to decide if a publication attracts privilege, and looking at all the circumstances to see if an acknowledged privilege is defeated.

I have been more troubled by Lord Lester's suggested shift in the burden of proof. Placing the burden of proof on the plaintiff would be a reminder that the starting point today is freedom of expression and limitations on this freedom are exceptions. That has attraction. But if this shift of the onus were applied generally, it would turn the law of qualified privilege upside down. The repercussions of such a far-reaching change were not canvassed before your Lordships. If this change were applied only to political information, the distinction would lack a coherent rationale. There are other subjects of serious public concern. On balance I favour leaving the onus in its traditional place, on him who asserts the privilege, for two practical reasons. A newspaper will know much more of the facts leading up to publication. The burden of proof will seldom, if ever, be decisive on this issue. ….

Human rights jurisprudence

The common law approach accords with the present state of the human rights jurisprudence. The immensely influential judgement in Lingens v. Austria (1986) 8 E.H.R.R. 407 concerned expressions of opinion, not statements of fact. Mr. Lingens was fined for publishing in his magazine in Vienna comments about the behaviour of the Federal Chancellor, Mr. Kreisky: 'basest opportunism', 'immoral'

and 'undignified'. Under the Austrian criminal code the only defence was proof of the truth of these statements. Mr. Lingens could not prove the truth of these value judgements, because Mr. Kreisky's behaviour was capable of more than one interpretation. In a passage, often overlooked, at pp. 420-1, in para. 46 of its judgement, the European Court of Human Rights stated that a careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value judgements is not susceptible of proof. The facts on which Mr. Lingens founded his value judgements were undisputed, as was his good faith. Since it was impossible to prove the truth of value judgements, the requirement of the relevant provisions of the Austrian criminal code was impossible of fulfilment and infringed article 10 of the Convention. The court has subsequently reiterated the distinction between facts and value judgements in De Haes and Gijsels v. Belgium (1997) 25 E.H.R.R. 1, 54 at para. 42.

In Fressoz and Roire v. France (unreported), 21 January 1999, Case No. 29183/95, paragraph 54, the court adverted to the need for accuracy on matters of fact. Article 10 protects the right of journalists to divulge information on issues of general interest provided they are acting in good faith and on 'an accurate factual basis' and supply reliable and precise information in accordance with the ethics of journalism. But a journalist is not required to guarantee the accuracy of his facts. Bladet Tromso and Stensaas v. Norway (unreported), 20 May 1999, Case No. 21980/93 involved newspaper allegations of fact: cruelty by seal hunters. The Court of Human Rights considered whether the newspaper had a reasonable basis for its factual allegations. Similarly, in Thorgeirson v. Iceland (1992) 14 E.H.R.R. 843 two newspaper articles reported widespread rumours of brutality by the Reykjavik police. These rumours had some substantiation in fact: a policeman had been convicted recently. The purpose of the articles was to promote an investigation by an independent body. The court held that although the articles were framed in particularly strong terms, they bore on a matter of serious public concern. It was unreasonable to require the writer to prove that unspecified members of the Reykjavik police force had committed acts of serious assault resulting in disablement.

None of these three latter cases involved political discussion, but for this purpose no distinction is to be drawn between political discussion and discussion of other matters of public concern: see the Thorgeirson case, at pp. 863-4, 865 para. 61, 64.

Conclusion

My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop 'political information' as a new 'subject-matter' category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgement than by a jury. Over time, a valuable corpus of case law will be built up.

Bundesverfassungsgericht, Federal Constitutional Court, Germany
decided 3 June 1980 – 1 BvR 797/78 – Böll case (extract)

a) Misquotations are not protected by Article 5(1) Basic Law. It cannot be seen that the constitutionally guaranteed freedom of opinion requires such protection. To the extent that value judgements are at issue in the public clash of opinion, in the interest of the process of public opinion-formation the presumption must be in favour of the admissibility of free speech, without regard to the content of the judgement (BVerfGE 7, 198 [212] - Lüth, and invariable case law). This does not apply in the same way to false factual assertions.' Wrong information is not an object deserving of protection from the viewpoint of freedom 'of opinion, since it cannot promote the constitutionally intended objective pf proper formation of opinion (cf. BVerfGE 12, 113 [130] - Schmid-Spiegel); the point can only be not, to set the requirements on the duty of truth so tightly 'that the function of freedom of opinion is endangered or suffers thereby. An exaggeration of the obligation to truth and the concomitant sometimes heavy penalties could lead to restriction and crippling, particularly of the media; these could no longer catty out their tasks, in particular that of providing a public check, if they were to be subjected. to disproportionate risk (cf. BGH, NJW 1977, p.1288 [1289] - bribery of parliamentarians). Neither public opinion-formation nor democratic checks can accordingly be made to suffer under the requirement to quote accurately. The task of information set in the interest of public opinion-formation would be missed were this not so, and the circumstances have nothing to do' with public checks. Nor do time pressure or difficulties of verification play a part, as 'may be the case with other factual communications. Those presenting an utterance are not having any essential or even unacceptable difficulties or risks, imposed if they are obliged to quote correctly. If, then, the presentation adversely affects the general personality right of the person whose statement is quoted, this interference is not covered by Article 5(1) Basic Law.. Otherwise it would be permitted for the media in particular. to be lax with the truth and leave rights of the person concerned out of account without there being any occasion, still less need, to do so.