

# Defamation and privacy law and procedure in England, Germany and France



A practical overview



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## Foreword

London is known as the libel capital of the world. France has one of the most claimant-friendly privacy jurisdictions. In Germany, it is relatively easy for a claimant to obtain an interim injunction to prevent allegations from being repeated. More and more U.S. publishers and broadcasters are being sued and held liable for defamation and privacy in Europe over the content of their on-line and other publications and broadcasts. The European Union courts are often willing to seize jurisdiction even if only a small number of people have read or seen the allegations in the relevant country. A judgment of an E.U. court awarding damages is enforceable throughout all 25 E.U. Member States against assets in those jurisdictions belonging to a U.S. defendant and in addition can be enforced in some states, e.g. Germany, France, England and Wales, against debts owed to them by third parties.

The laws and procedures in each European country differ significantly. Moreover, these standards often differ considerably from those in the U.S. Content which meets U.S. standards of legality for libel and privacy can still expose a U.S. media organisation to the risk of being successfully sued for defamation and privacy. U.S. claimant lawyers increasingly appreciate that they have a choice of the jurisdiction in which to sue first and so aim to achieve a quick favourable outcome in Europe before continuing their claim in the U.S. They will then be armed with a successful judgment, admission of liability against and/or an apology by the U.S. media organisation which they aim to put before the U.S. jury.

This publication is aimed at providing a practical overview to assist in-house and external media lawyers in understanding the law and procedure in three key European jurisdictions: England, Germany and France. It not only states the basic legal provisions and procedure, but also explains how much it can cost to defend actions in these countries. In England, for example, general damages for libel are unlikely to exceed \$350,000<sup>1</sup>. However, losing a libel or privacy case could also result in the media defendant paying as much as \$3,500,000 in lawyers' fees (or even more).

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<sup>1</sup> All figures are for guidance only and based on a UK Sterling/U.S. Dollar exchange rate of about 1.74. Actual amounts may vary.

# England and Wales - Defamation

## Introduction to English defamation and privacy law and procedure

In England and Wales, separate laws cover defamation and privacy. Apart from legal proceedings, a claimant can make a complaint to the self-regulatory Press Complaints Commission ([www.pcc.org.uk](http://www.pcc.org.uk)) in relation to hard copy or online newspaper or magazine publications or to Ofcom ([www.ofcom.org.uk](http://www.ofcom.org.uk)), the UK's television and radio broadcast regulator.

### Defamation law

The libel jurisdiction of England and Wales ('England') is one of the most claimant friendly. This is because a claimant only needs to show:

- the publication of a statement to a third party in England,
- which identifies the claimant (who does not need to be expressly named), and
- the meaning of which is defamatory.

After that, the burden is on the publisher or broadcaster to establish a defence.

This contrasts with the U.S. position where the claimant bears the burden of proving falsity and fault ('actual malice' for statements about public officials or public figures and, generally, negligence for statements about private individuals).

### Defamatory meaning

Meaning is one of the most important aspects of defamation law. The test is what the ordinary reasonable reader would think the article or programme means after reading, seeing or listening to the whole thing once. Meaning is determined by a jury. However, a case can be struck out by a judge if the article or programme is not capable of bearing the meaning alleged by a claimant.

If the meaning would make ordinary people think the worse of the claimant or if it would lower his or her reputation, then the publication or broadcast is defamatory. The English courts have recognised three levels of defamatory meaning - in order of seriousness they are:

1. guilt,
2. reasonable grounds for suspicion, and
3. grounds for an investigation.

### Publication

In general, the English courts will deal with any "publication" (which includes broadcasts) within the jurisdiction.

Publication in England and Wales occurs if the allegedly defamatory material is read, heard, accessed or seen there. Thus, an Internet publication will be published in England if someone accesses the website in England (whether or not the website is specifically directed to people in England).

### Responsibility

Everyone involved in the publication or broadcast is potentially liable, e.g. the publisher, broadcaster, editor and journalist.

### Limitation

The limitation period is one year. Unlike in the U.S., there is no single publication rule. Every time defamatory material on the Internet is accessed in England, a new tort is committed and the one year limitation period recommences.

### Defences

#### Justification

The main defence is justification or truth. In contrast to the U.S., the burden of proving the truth of the allegation in England is on the publisher/broadcaster. Justification is normally judged by the jury. If a defendant claims that the allegations are justified but loses at trial, the mere fact of relying on this defence will aggravate damages. Thus, it is advisable to make a speedy decision on whether to justify.

Publishers/broadcasters must take into account the 'repetition rule' which states that the sentence "X said that Y is a thief" means that "Y is a thief", not that X said it. Therefore it is not enough to prove that another person has previously made the same allegation.

A further difficulty for publishers / broadcasters is the 'conduct rule'. If the meaning is at level 2 (reasonable grounds to suspect), then justification must generally be by reference to the claimant's conduct which gave rise to the suspicion at the time of the publication. The fact that someone else, e.g. the police or the FBI, has made the allegation is not relevant.

Evidence acquired after the time of publication can be used to justify a level 1 meaning.

### Fair comment

For statements of opinion, a publisher/broadcaster will have a defence if the opinion is:

- honestly held,
- based on true facts, and
- concerns a matter of public importance.

The defence is defeated by the claimant showing that the publisher/broadcaster was malicious, i.e. the defendant wished to injure the claimant or was reckless as to the truth of the allegation.

### Qualified privilege

There is a public interest defence called qualified privilege. This is useful not only if the publisher/broadcaster cannot prove the allegation is true but also where the allegation is false. However, to succeed the publisher / broadcaster must show that it had a duty to publish the information and the recipient had a reciprocal duty or interest to receive it. In the context of the media, journalists must show that they had reached the court's standard of responsible journalism. The court will take into account all the circumstances at the time of publication/broadcast, including:

- The seriousness of the allegations,
- The steps taken to verify the story,
- The quality, independence and number of sources,
- The steps taken to contact the claimant and put the allegations to him for comment,
- Whether the article contains the gist of the claimant's side of the story,
- The tone and balance of the story,
- The necessity to publish/broadcast at the time.

Qualified privilege is assessed by the judge (although any relevant findings of fact are

## England and Wales - Defamation (Cont.)

determined by the jury). It is generally difficult to establish qualified privilege unless the publisher / broadcaster has met a relatively high standard in relation to the above factors. Qualified privilege is defeated by malice.

### Offer of amends

If a defendant is unable to defend the claim, e.g. because it made an innocent mistake in the publication or broadcast, then it can make an offer of amends. This must be done before serving a defence and so the defendant must act quickly. If the offer is accepted, the claimant may not bring or continue with the action, save for the purpose of assessing damages. The offer must be in writing, expressed as being pursuant to section 2 of the Defamation Act 1996 and offer to:

- make a suitable correction and apology,
- publish a correction and apology, and
- pay the aggrieved party compensation (if any), and such costs as may be agreed or determined.

If the offer is not accepted, it is a defence (unless the defendant knew or had reason to believe the statement was false and defamatory of the claimant).

### Jurisdiction

If the defamatory material is published not only in England and Wales but also in a contracting state of the "Brussels" Regulation 44/2001 (i.e. E.U. member states) and the defendant is domiciled in a contracting state, then the defendant can generally be sued in its place of domicile or where the publication occurred.

If the publication is in the U.S., for example, as well as in England and the claimant wishes to sue in England, then the English court will decide if it is the appropriate forum. Generally, the greater the connection which the claimant has to England, the more likely the English court will seize jurisdiction. Thus, if the claimant is an English citizen or has a significant reputation in England, it is likely that the court will refuse to stay the proceedings, even if the publisher is based in the U.S. and most of the readers are in the U.S.

Where, however, the number of publications in England is so insignificant that there was no real or substantial tort,

the English court is likely to strike out the claim as an abuse of process. In the leading case on this issue, there were only five online subscribers to the defendant's publication in the jurisdiction and the court struck out the claim as the litigation would have been out of all proportion to any damage which might have been suffered by the claimant.

### Procedure

#### Interim injunctions

The claimant can in principle apply for a court order preventing publication or broadcast of the allegations pending the resolution of the matter at trial. If the claimant applies to court to try to prevent a publication/broadcast going ahead, then he should give notice to the publisher / broadcaster. In England, so long as the publisher / broadcaster credibly claims he will rely on a substantive defence e.g. justification, the courts will not stifle freedom of expression and will not grant an interim injunction but will instead order that the matter should proceed to trial. The position is different in relation to claims for breach of confidentiality/privacy (see below). If a claimant applies for an interim injunction, whatever the outcome of that application, he must start a normal action (see below for the procedure) unless agreement can be reached on the question of costs.

#### Normal action

The first step in a defamation case is usually when the claimant sends a cease and desist letter to the publisher / broadcaster. There is a pre-action protocol in the court rules which states that the letter should identify the words complained of, explain the claimant's case and set out what remedies are sought. Usually, the claimant asks for an undertaking:

- not to repeat the allegations,
- to pay damages and costs, and
- to have an apology published and also read out in open court.

The publisher / broadcaster should respond as soon as reasonably possible and say whether, or the extent to which, the claim is accepted or rejected and explain why.

If proceedings are started, they begin by the claimant issuing a claim form and sending

particulars of claim which must address the issues of publication, meaning and identification. A defendant usually has 28 days in which to file its defence. This should respond to the particulars of claim and, where appropriate, advance a defence such as justification, fair comment or privilege.

The claimant can file a reply to the defence. After that there is disclosure. This is less extensive than discovery in the U.S. It is usually restricted to documents:

- on which a party relies,
- which adversely affect his own or another party's case, and
- which support another party's case.

The exchange of witness statements follows disclosure. The trial usually takes place about 9-12 months after the claim form has been issued, depending on the complexity of the claim and the state of the court list.

### Remedies

If the claimant is successful at trial, he will generally be granted an injunction preventing the allegations being repeated. He will also be awarded damages which are determined by the jury. 'General damages' are to:

- compensate a claimant due to his lowered reputation,
- vindicate him, and
- compensate him or her for injury to feelings.

Corporate claimants cannot claim this third element. For the most serious allegations (e.g. sexual interference with children), it is unlikely that general damages will exceed \$350,000. This can be contrasted with the position in the U.S. where defamation damages awards frequently exceed \$1,000,000.

If the defamatory allegation has caused the claimant reasonably foreseeable financial loss (e.g. loss of a contract), he can claim 'special damages'.

#### Costs (lawyers' fees)

The losing party usually pays a proportion (60%-90%) of the winner's costs (i.e. lawyers' fees). Costs usually far exceed

## England and Wales - Defamation (Cont.)

damages in libel actions. They can run into the hundreds of thousands of dollars and sometimes millions.

If a claimant's lawyer has entered into a conditional fee agreement, called a "CFA" (roughly, 'no win, no fee'), then the financial stakes are very high for the

publisher. CFAs are different from contingency fees. Under a contingency fee arrangement in the U.S., the attorney's fees are a percentage of the damages awarded. Under a CFA, the claimant's lawyer can claim from the defendant up to a 100% uplift on his normal fees if the claimant wins at trial. If the claimant loses, he may

not have any money with which to pay the publisher's / broadcaster's costs. In such a case, the financial cost-benefit analysis often points away from defending a libel claim. Therefore, defendants must act particularly swiftly and decisively in CFA cases.

# England and Wales - Privacy

## Breach of confidentiality / privacy

The law preventing the misuse of private information is part of the action for breach of confidence. It has been developing rapidly in the UK since the enactment of the Human Rights Act 1998. The right of privacy takes force from Article 8 of the European Convention on Human Rights, which states that "everyone has the right to respect for his private and family life, his home and correspondence". This is often in tension with the right of freedom of expression guaranteed by Article 10 of the Convention, which states that "this right shall include freedom to hold opinions and to receive and impart information and ideas...". Both rights are qualified by one another and neither takes precedence over the other.

## Private information

Private information is information about which the claimant has a reasonable expectation of privacy. Usually this is obvious, for example in the field of health, bereavement personal relationships and finances. In unclear cases, the court may ask if a person of ordinary sensibilities, in the shoes of the claimant, would find the publication or broadcast of the information to be highly offensive.

## Balancing Articles 8 and 10

If the claimant has a reasonable expectation that his privacy would be respected, then the court must balance the competing rights of privacy and freedom of expression. The court will ask whether the benefit of publication outweighs the damage done by the invasion of privacy. In doing so, the court will take into account all the circumstances including the following:

### Categories of information

The courts are much less likely to prohibit disclosure of information of a political nature than trivial tittle-tattle published

merely for commercial gain or public gossip. Between these two extremes, the publication of educational and, to some extent, artistic information are also valued in a democratic society. If the information contributes to a public debate which is necessary in a democratic society, then the right of freedom of expression is more likely to prevail over the individual's right of privacy.

Photographs are viewed by the court as particularly intrusive. So publication of a verbal description of an event may be legal, whereas a photograph of it may go too far.

### The type of claimant

If the claimant is a celebrity or notorious, the privacy claim will be scrutinised more than that of an ordinary citizen. Politicians are the most open to public scrutiny. However, those in the public eye still retain a right of privacy. If they have courted publicity over a certain aspect of their life, then they will receive less sympathy when that aspect is covered by the press. In contrast, they have not put that or any aspect of their life into the public domain, then they are more likely to be treated like an ordinary individual.

### Relationships

The courts will give greater protection to information about a long-term and stable relationship than to a brief fling. In a kiss and tell situation, the right of freedom of expression of the person wishing to reveal their story must be taken into account.

### Public interest

If the claimant has misled the public about their private life, then the press is normally entitled to set the record straight. Similarly, it may be that the revelation of private information is necessary in the public interest in order to disclose a wrong-doing, provided that the disclosure is proportionate and to an appropriate person. In deciding what is proportionate, the

publisher/broadcaster may be justified in disclosing some of the information, but not all of it.

## Jurisdiction, procedure, remedies and costs

In contrast to defamation actions, privacy trials are tried by a single judge, the limitation period is six years and truth is no defence. The rules on jurisdiction are generally the same as those for defamation.

A claimant who finds out that his or her privacy is likely to be invaded can apply for an interim injunction. To date, the courts have often been reluctant to grant such injunctions unless the information is particularly intrusive. However, the law seems to be developing in a way that suggests that pre-publication/pre-broadcast injunctions will more readily be granted in privacy cases since in many cases damages are not an adequate remedy. Time is of the essence when a claimant is applying for an interim injunction. Delay will often defeat such an application. If the claimant applies for an interim injunction, he or she must also issue a claim form to start a normal action.

The main remedies are an injunction and damages. So far, damages awards in the leading celebrity privacy cases have been relatively low (under \$17,000). However, a claimant can elect to have an account of the defendant's profits derived from the disclosure of the private information instead of damages. The costs regime and procedure is similar to that of defamation (see above).

# Germany - False and defamatory statements

## Introduction to German media law and procedure

The main differences between German and English press law are:

- In Germany, the same law and procedure apply to the publication or broadcast of false, defamatory and private statements. In England, defamation, malicious falsehood and privacy are independent and distinct causes of action.
- It is relatively straightforward for a claimant to get an interim injunction from the German courts. However, this is not a pre-publication / pre-broadcast injunction but merely an interim injunction pending trial preventing the publisher or broadcaster from repeating the allegation. Pre-publication/pre-broadcast interim injunctions are rare.
- To obtain an interim injunction, the claimant has to persuade the court that on the balance of probabilities, the statement is false, defamatory or relates to his private life. The defendant usually does not have a chance to challenge the claimant's evidence until after the injunction has been granted. As most cases are dealt with at the interim stage, the procedure is explained in more detail below.
- All German media cases are heard by a judge, whereas in England, libel trials are usually decided by a jury.
- Litigation in Germany costs much less than in England. Damages are rarely awarded in media cases because most cases are determined at the interim injunction stage. Legal fees for challenging an interim injunction could be about \$4,000<sup>2</sup> or so. Taking most cases to trial could cost a publisher or broadcaster less than \$30,000 in legal fees.
- The lawyers' fees which the loser pays to the winner are determined by statute. For a trial, it is usually less than \$12,000. Conditional fee agreements and contingency fees are not allowed.

### False and defamatory statements

As the same law and procedure applies to false, defamatory and private statements, the procedure is dealt with after dealing with the law on these issues.

#### Publication

Publication in Germany generally occurs if the allegedly false and/or defamatory material is read, heard, accessed or seen there. A single instance of publication in Germany may in theory be sufficient to bring a case. However, in practice, the German courts may not seize jurisdiction if, for example, only one or two copies of a magazine are sold in Germany.

#### Responsibility

Like in England and France, everyone involved in the communication of the allegations complained of is potentially liable.

#### Limitation

In general, a claimant must start a normal action within three years from the end of the year of the publication or broadcast complained of and the year in which the claimant became aware of the circumstances giving rise to the claim and the identity of the defendant. Claims in relation to online articles can in theory continue forever since the limitation period

can start each time the article is accessed. Thus, there is no single publication rule. However, in practice, if the claimant waits too long after becoming aware of the claim, his rights will be forfeited.

An interim injunction application cannot be granted unless the matter is urgent. There are regional differences as to what this means. The Munich court, for example, regards the limitation period as being one month after the claimant became aware of the publication or broadcast; other courts may still grant an interim injunction 2-3 months after the claimant becomes aware of the claim.

#### Meaning

The German courts ask what the ordinary reasonable reader would think the article or programme means after reading/viewing the whole thing once. The statement complained of may simply be false. It may also be defamatory. If the meaning would make ordinary people think the worse of the claimant or if it would lower his or her reputation, then the publication or broadcast is defamatory. Unlike in England, German jurisprudence does not systematically differentiate between levels of meaning or have the 'conduct rule'. Also, German courts do not have an equivalent to the English procedure for striking out a claim on the basis that the article is not capable of bearing a defamatory meaning.

The claimant does not have to be expressly named in the publication or broadcast in order to be identified.

#### Statements of fact

The German courts treat statements of fact differently from statements of opinion. A claimant can take action in Germany against a publisher or broadcaster who has made a false statement about him. The main defence is truth. In the ordinary case, the claimant must prove the falsity of the statement. However, in cases of defamatory statements, the burden of proof is shifted and the publisher / broadcaster has to prove the truth of the defamatory facts stated. As in England, there is a repetition rule (although accurate and attributed quotations in the public interest may be subject to the public interest defence (see below). However, unlike in England, reliance on the defence of truth does not generally aggravate damages.

#### Opinions

A publisher / broadcaster may have a defence if the statement is opinion and not fact. Factual assertions are where the truth of the statements can be verified. Expressions of opinion, in contrast, are subjective valuations where "right" or "wrong" cannot be proved. For example, the statement "The artist's show lasted only 40 minutes" is a verifiable factual statement, whereas the phrase "The artist

<sup>2</sup> All figures are for guidance only and based on a Euro/U.S. Dollar exchange rate of about 1.2. Actual amounts may vary.

## Germany - False and defamatory statements (Cont.)

didn't make an effort; his show was very short" would qualify as a subjective valuation and thus opinion. To succeed on an opinion defence, the defendant must prove that:

- the statement is an opinion, rather than fact, and
- it is not primarily an insult, in contrast to a mere criticism (which is a difficult distinction to make in practice).

### The public interest defence

For the press to be able properly to fulfil its functions and report about misconduct and abuse that has not yet been finally proven, special standards apply to press coverage based on suspicions ("Verdachtsberichterstattung"). Provided there is a public interest in being informed about the subject, it is permissible to report investigations that have not yet been concluded or alleged misconduct that has not yet been definitely proven. However, it is not permitted to "rush to judgment" in such circumstances: the media has to make it clear that the matter is still under

investigation. In particular, it is important to not only present the incriminating evidence but also the exculpatory circumstances and to give the subject - where possible - a chance to comment on the affair. Further, the journalist must have based his story on reliable sources and done checks to verify the information.

The more a person is part of public life (and tolerates this), the more criticism he has to put up with. The claimant's notoriety is therefore important.

The public interest defence can sometimes succeed even if the statement is false but the publisher or broadcaster will be expected to have carried out a thorough investigation.

### Jurisdiction

Internet publications are considered published in Germany if someone accesses the website in Germany and the website in question is directed at Germany. Whether the website is directed at Germany is a question of fact, and the fact that the

website is in English is only one factor. If the defamatory material is published not only in Germany but also in a contracting state of the Brussels Regulation (E.U. member states) and the defendant is domiciled in a contracting state, then the defendant can be sued in its place of domicile or where the publication occurred. The position under the Brussels Regulation applies to all member states of the E.U.

If the publication is in the U.S., for example, as well as in Germany and the claimant wishes to sue in Germany, then the German court will decide if it is the appropriate forum. Generally, the greater the connection which the claimant has to Germany, the more likely the German court will seize jurisdiction. Thus, if the claimant is a German citizen or has a significant reputation in Germany, it is likely that the court will accept jurisdiction, even if the publisher is based in the U.S. and most of the readers are in the U.S.

# Germany - Privacy

## Privacy law

Privacy law in Germany is designed to protect a person's personality rights.

### Private information

The law and procedure for complaints about the publication and broadcast of private information is the same as for false and defamatory statements (see below). In a privacy claim, the publisher/broadcaster can defend the case, not on the grounds of truth, but on the grounds that the disclosure of the private material was in the public interest.

### The type of claimant

German law provides an exception for so-called public figures of relative and absolute current interest. Public figures of absolute current interest are those who are known because of their prominent position in public life, independent from any specific context (e.g. politicians and actors). Public figures of relative current interest are those who are not abstractly recognized by the public but have achieved a certain degree of recognition in connection with a specific event (e.g. the winner of a competition in a specific sports discipline).

Public figures of relative current interest may generally be depicted in connection with reports about the event which has made them known (e.g. the winner of a competition shown on the winner's rostrum). Public figures of absolute current interest in contrast may be depicted independently from any specific event. However, this excludes very private areas of their life; for example, nude pictures of them may not be published without the person's consent.

The more a person seeks publicity about a particular area of their life, the less privacy protection that person will have in that area.

### Photographs

As a rule, publications of photographs always require the consent of the individuals depicted. However, the subject's interest in keeping his or her private life confidential must be weighed against the need of the public to be informed. German courts have developed a detailed, balanced practice in this respect, according to which, for example, pictures taken in a secluded

location or showing children and their parents is not permitted. In contrast, pictures from the "ordinary" private life of celebrities (e.g. shopping or doing sports) had usually been permitted. In 2004, however, the European Court of Human Rights ruled in the Princess Caroline case that the German public figure defence was too wide. It held that German courts should decide if the claimant has been depicted in public in connection with the activity that has made them famous. Furthermore, the disclosure of photographs of someone's private life can only be justified if the photographs contribute to a matter of public debate.

Thus, photographs depicting the private life of ordinary people will almost always require consent and similar photographs of celebrities will often require consent. If the photographs are of a politician, then it seems more likely that the publisher/broadcaster can justify the publication of the photographs.

## Procedure and remedies

### Interim injunctions

The first step in a press complaint is usually when the claimant writes to the publisher/broadcaster and demands (a) an undertaking not to repeat the allegation and (b) a right of reply (i.e. the publication or broadcast of a reasonably prominent counterstatement setting out the claimant's version of events). If these demands are not met, the claimant may apply to court (the Landgericht) for an interim injunction and a right of reply. The case will be heard by three judges but a single judgment will be given. If the claimant dispenses with the first step of sending a warning letter, he bears the risk of having to pay the costs of the proceeding if the publisher immediately accepts the interim injunction issued by the court.

Sometimes the claimant will not send a cease and desist letter. This is because he or she does not wish to put the publisher on notice of the application for an interim injunction. There are two main reasons for this approach: first, the publisher does not have an opportunity to give submissions to the court before the interim injunction is granted; second, if the court does not grant the interim injunction, the defendant will

not find out that the application had even been made. So if the case is not clear-cut, the claimant may prefer not to send a cease and desist letter prior to applying for an interim injunction.

Depending on the court, the application for an injunction normally has to be filed in court within 1-3 months of the alleged infringement. If the complaint relates to a defamatory statement or an invasion of his privacy, the application must state this. If the complaint concerns the truth of the facts stated in the article or broadcast, then the claimant must also file an affidavit from a person who has relevant knowledge of the facts showing that they are false. Provided that the court believes the claimant on the balance of probabilities, it will grant the injunction (often without the publisher having had the opportunity to comment). No reasons are given by the court at this stage.

If the interim injunction is granted, the claimant must officially serve the court order on the defendant within one month. If this is not done, the order will be invalid.

The publisher can file an opposition against the interim injunction, in which case the court will schedule an inter partes hearing to discuss the facts of the case and either set aside the interim injunction or confirm it with a reasoned judgment. This judgment sometimes takes up to a week to be delivered. It can be appealed to a court of second instance (the Oberlandesgericht). To appeal, a party has one month from when the judgment is served to file the appeal to the Oberlandesgericht and two months from the service of the judgment to provide written reasons why the judgment was wrong.

After the interim injunction has been upheld by the court, the claimant will invite the publisher to acknowledge the injunction as a final and binding decision. If the publisher refuses, the dispute has to be fought in a normal court action, the so-called proceeding on the merits, so as to obtain a final decision. However, in most cases in Germany, media complaints are dealt with at the interim injunction stage. It is not a necessity to start a normal action after the interim injunction stage.

## Germany - Privacy (Cont.)

Interim injunctions are to prevent a publisher or broadcaster from repeating the allegations. Such injunctions are not usually significant obstacles to the business of a news organisation as the newspaper will already have been published or the news programme will already have been broadcast. However, an interim injunction could have serious consequences for book and magazine publishers since the book/magazine may have to be pulled from the shelves. Having said that, the vast majority of interim injunctions in Germany concern newspaper reports or broadcasts.

It is important to understand that at the interim injunction stage, no damages can be awarded. However, breach of an interim injunction can lead to a fine of up to about \$300,000 but, in most cases, fines would be less than \$12,000.

### Normal action

If the claimant requires an order for a correction (as opposed to a right of reply) to be published and/or monetary compensation, he must start a normal action as these remedies cannot be obtained by way of interim injunction proceedings. Normal actions are usually started in the place where claimant lives. However, in media cases, claimants often choose to bring their disputes (including interim injunction applications) in the Landgericht of Hamburg, Munich or Berlin as these courts are more experienced in this field. The first step in an ordinary action is when the claimant sets out in writing what his complaint is, a list of his or her witnesses and the documents on which he or she will rely. The defendant must then file a similar document setting out its defence and documents relied on.

It can take about 4-9 months from start of the claim to the trial. It is rare that court hearings last more than one or two hours. In most cases, the hearing takes about 30 minutes. Sometimes, there will be a second hearing for witness cross-examination. Although the claimant and witnesses can be cross-examined, the judges and lawyers put a lot of emphasis on the written documents in the case. In fact, in most cases the court has usually made up its mind before the hearing and listens to the advocates and witnesses to confirm its view of the case. There will be three judges hearing the case. The court will give a written judgement within about two months of the trial. This can be appealed to a higher court, the Oberlandesgericht (also comprising three judges).

### Trial remedies

If the claimant is successful at trial, he will generally be granted a final injunction preventing the allegations being repeated. The claimant also usually asks for a correction or at least a right of reply (see above). Damages are only awarded in German media cases in exceptional circumstances. The maximum awarded was \$92,000 in 2004. This was for a privacy complaint by Princess Caroline's youngest daughter relating to publications in 1999 and 2000. The judgment is under appeal to the constitutional court.

### Costs (lawyers' fees)

There are two aspects of costs which need to be considered. First, lawyers will agree the amount of costs they will charge their own client. In many cases, costs are

assessed by hourly rates. The costs of a publisher or broadcaster in a contested interim injunction hearing could be about \$4,000 or so.

The costs of defending a media case to trial (including an interim injunction hearing) on behalf of a publisher or broadcaster can often be in the region of \$18,000-\$55,000 and sometimes more. Conditional fee agreements and contingency fees are not allowed.

The second aspect concerns costs orders as a result of litigation as between parties. The costs regime in Germany is governed by statute. The losing party will normally have to pay the winning party's costs. However, unlike in the UK, the costs which must be reimbursed are regulated by a table. The amount of costs which the loser must pay to the winner depends on the size of the claim. For these purposes, as a rule of thumb, the amount in dispute is usually deemed to be about \$18,000 per prohibited statement or photograph. Based on a complaint about three statements and two pictures, the amount taken into account therefore might be about \$90,000 (5 x \$18,000). According to the table, the recoverable costs for an interim injunction application would be about \$2,100. If an opposition is filed and a contested interim injunction hearing takes place, the recoverable costs would be about \$3,600. If the interim decision of the Landgericht is challenged in the Oberlandesgericht, the recoverable costs may be about \$4,800. For a trial, the recoverable costs would not normally exceed \$12,000.

# France - Defamation

## Introduction to French defamation and privacy law and procedure

The privacy jurisdiction France is more claimant-friendly than in England and the U.S.

The starting point in a French defamation claim is the right of freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. In contrast to the French law of privacy, the libel jurisdiction is generally more defendant friendly. This is due to the numerous procedural formalities which must be followed by the claimant. For example, there is a limitation period of three months, and a defamation claim must be notified to the Public Prosecutor, failing which it is void.

### Defamation law

Defamation law in France is made up of a combination of statute and case law. According to the Act of 29 July 1881, known in France as "le droit de la presse" ("the press law"), defamation is defined as "any allegation or imputation of an act affecting the honour or reputation of the person or body against whom it is made". As under English and German law, the person or body does not need to be expressly named in order for a claimant to bring a defamation claim; it is enough if the claimant is clearly identifiable.

In a libel action, the claimant has to prove:

- the publication of a statement to a third party in France,
- which refers to the claimant, and
- the meaning of which is defamatory.

In every case, the claimant must not only precisely identify the words alleged to be defamatory but must also explain exactly why he or she believes the words are defamatory of him or her. Moreover, the words complained of and legal sanctions sought have to be expressly quoted in the writ, otherwise the claim will be void.

Unlike in England, there is no set procedure in France for striking out a claim which is not capable of bearing a defamatory meaning, no special differentiation of levels of meaning and no conduct rule.

### Insults

Defamation relates to factual statements or opinions. If, in contrast, the statement complained of is a bare insult (which is not capable of substantiation by a defendant), then the defendant has a much more limited opportunity to defend the claim. According to the Act of 29 July 1881, "insult" is defined as "any offensive

expression, term of scorn or invective not involving the imputing of any action". Thus, the defendant will be liable for mere use of any term recognized as insulting unless the defendant can successfully plea that the insult was the result of provocation by the claimant, in which case the author of the insult can be exonerated from liability.

If the claimant wrongly categorises the claim as a defamation rather than an insult (or vice versa), then his claim will be rendered void.

### Publication

Publication occurs if the allegedly defamatory material is read, heard, accessed or seen in France. Thus, Internet publications will be published in France if someone accesses the website in France. A single instance of publication in France is sufficient to bring an action whether or not a website or hard copy publication is directed at France.

### Responsibility

Everyone involved in the publication or broadcast is potentially liable, e.g. the publisher / broadcaster / editor, as well as the author / journalist.

### Limitation

The claim must be lodged at the court within a period of three months starting from the date of first publication or broadcast. Once this period of three months has expired, no legal action can be taken. Like in the U.S., but in contrast to position in England and Germany, there is a single publication rule in relation to Internet publications. The limitation period starts once the publication is made for the first time. Only if the publication is re-released in modified form can the limitation period start again.

### Defences

There are two main defences to a defamation claim: truth and good faith. Unlike in the UK and Germany, there is no separate defence for statements of opinion. The opinion must either be proven to be true or fall within the defence of good faith.

#### Truth

Truth is a defence. However, it is not possible to justify an allegation if the facts relied on:

- are more than ten years old,
- relate to a matter on which there has been a political amnesty, or
- relate to a person whose criminal offence has been rehabilitated.

The burden of proving the truth of the allegation is on the publisher/broadcaster and the author. Unlike in the UK, the truth is judged by three judges, and not by a jury.

As in the UK, publishers and broadcasters must take into account the 'repetition rule' which states that the sentence "X said that Y is a thief" means that "Y is a thief", not that X said it. Therefore it is not enough to prove that another person has previously made the same allegation.

#### Good faith

Defendants who are unable to establish truth can present evidence of good faith, such as belief in the truth of the statement, deadline pressures, desire to inform the public, and the use of the word "allegedly".

A publisher/broadcaster/journalist/author could have a defence based on good faith if he can prove all of the following:

- the statement is based on a serious investigation,

## France - Defamation (Cont.)

- the statement concerns a matter of public importance,
- the tone and balance of the statement is measured and objective, and
- there is no trace of personal hostility in the statement.

A defence based on good faith is defeated by the claimant showing that the publisher or broadcaster was malicious, i.e. they wished to injure the claimant or were reckless as to the truth of the allegation.

### Jurisdiction

#### National jurisdiction

In general, French courts will have jurisdiction if there is any publication in France. If the publication is in the UK, for example, as well as in France, and the claimant wishes to sue in France, then the French court will have no choice but to accept the case. However, if the number of publications in France is so low that there was only a slight tort, the French court is likely to reflect this in the remedies it orders (which may be no more than symbolic). If there is no tort at all, the court can strike out the claim as an abuse of process.

#### Criminal and civil jurisdictions

The claimant can choose whether to bring his claim before the civil court or the criminal division of the Tribunal de Grande Instance (county court). If the Public Prosecutor brings an action himself, the person named in the article or programme would normally take part in the proceedings. From a procedural standpoint, there is no difference between a civil and criminal defamation action - the criminal procedure applies.

In both cases the Public Prosecutor must be notified of the claim before the first hearing, otherwise the claim will be rendered void. In all cases, the Public Prosecutor attends the first pleadings hearing. He makes submissions after the claimant's lawyer but before the defendant's lawyer. The Public Prosecutor will make a recommendation to the court whether to take criminal action or not. He bases his decision on whether or not the claim has a matter of public interest which warrants criminal action. If the case has a racial, political or historical dimension, the

Public Prosecutor is likely to bring a criminal prosecution against the defendant. In about 70% of cases, the Public Prosecutor does not recommend criminal action and the matter is dealt with as a civil action.

If the court agrees that the criminal prosecution is valid, it can order criminal sanctions. The remedies ordered in a criminal action are more onerous than in a civil action due to the possibility of criminal penalties being ordered against the defendant. If a criminal action is taken, the defendant faces both the payment of an amount to compensate the damage suffered by the claimant, and the payment of a fine to the Treasury. In a typical criminal defamation case, the fine may be about \$18,000. In certain cases (such as defamations related to ethnical origin, race, religion, sexual orientation or handicap), the fine can be up to about \$54,000 and even, theoretically, include a term of imprisonment of up to one year. Damages awards are dealt with below.

#### Jurisdiction for minor infringements

The statement may also be interpreted as a private defamation to be brought before the jurisdiction of the Tribunal de Police (Police court), whose jurisdiction is limited to minor offences. This happens if the statement is released in a limited area: for example, an article may have only been sent to a certain category of people, linked by a "community of interest". In such a case, if the action were brought in front of the Tribunal de Grande Instance, whether as a criminal or as a civil action, the action could be declared void for being brought before the wrong court. If this happens, it is usually impossible to bring proceedings again in front of the appropriate jurisdiction, due to the short limitation period of three months.

### Procedure

#### Right of reply

Any person named or referred to (he or she has to be identifiable) in a newspaper article or a public document may ask to exercise his or her right of reply, i.e. to have inserted a reply of the same length in the same place and same typeface as the offending article. This right is absolute: it may be exercised even if the article does not contain any inaccuracy or defamatory

imputation. Admittedly, this provision may well conflict with the right of criticism, which must legitimately be exercised absolutely freely, especially in artistic and literary matters, provided the criticism does not contain either insults or defamatory allegations.

#### Interim injunctions

In urgent cases, the claimant can go straight to court to try to prevent a controversial publication/broadcast going ahead. Pre-broadcast or pre-publication interim injunctions are very rare in France. However, French courts can stifle freedom of expression and grant an interim injunction provided the court considers that the allegation complained of is very serious and important and that the claimant's case is very strong. The defendant will be heard at the hearing which will be conducted like a mini-trial. Unlike in the UK, if the publisher / broadcaster credibly claims and demonstrates that it will rely on a substantive defence e.g. good faith, the court can still order an interim injunction. The injunction hearing will be before one judge.

One difficulty for claimants is that defendants must be given ten days in which to decide whether or not to defend the claim on the basis of truth. Thus, the claimant will not be able to go to court to prevent a defamatory statement which is going to be published or broadcast within ten days of the claimant's claim. So if the defamatory broadcast is due to be aired the following day, the claimant can do nothing to stop it. Nonetheless, if the defendant goes ahead with the broadcast or publication knowing that the claimant has a claim and later loses at trial, the claimant will ask that damages be increased. The claimant will argue that the defendant went ahead regardless with knowledge of the claim.

The ten-day rule does not apply to privacy claims and so interim injunctions are more frequent in such cases (see below).

#### Action on the merits

Proceedings start by the claimant issuing a claim which must address the issues of publication and defamation. If the

## France - Defamation (Cont.)

defendant is going to rely on the truth of the statement, he or she must state this within ten days, starting from the service of the writ. Once this period has expired, the "exception of truth" cannot be pleaded anymore. This short period can be extended by a period of two months for foreign defendants. The parties then attend a procedural directions hearing during which a trial schedule is fixed.

When the defendant has filed its defence as well as the evidence on which it relies, the claimant can file a reply to the defence, which can be followed by a further reply by the defendant. The evidence brought by each party is usually restricted to documents on which parties rely, including witness statements. There is no discovery process, such as in the U.S. or the UK.

The trial usually takes place about nine-15 months after the claim form has been issued, depending on the complexity of the claim and the state of the court list. During the proceedings, witnesses are cross-examined by the lawyers, the court and, where relevant, the Public Prosecutor. The trial court comprises three judges.

### Remedies

If the claimant is successful at trial, he will generally be granted an injunction preventing the allegations from being repeated. He will also be awarded damages which are determined by the judges. Damages are to:

- compensate a claimant due to his lowered reputation,
- vindicate him, and
- compensate him or her for injury to feelings (corporate claimants cannot claim this third element).

Even for the most serious allegations (e.g. sexual interference with children), it is unlikely that general damages will exceed \$180,000<sup>3</sup>

If the defamatory allegation has caused the claimant reasonably foreseeable financial loss (e.g. loss of a contract), he can claim 'special damages'.

### Costs (lawyers' fees)

Unlike in the UK, costs ordered rarely exceed damages in libel actions in France. The level of the fees payable by a party to

his or her own lawyer in a defamation claim ranges from about \$18,000 up to \$60,000 or more.

At this stage, according to the lawyer's rules of ethics in France, a lawyer cannot enter into a conditional fee agreement (roughly, 'no win, no fee'). However, a lawyer can enter into a classical success fee mechanism with his or her client, providing a fixed fee and a supplementary fee for success. The success fee is calculated by a proportion of the damages awarded (if any) usually by reference to a scale. The success fee is a private matter between the lawyer and his or her client. At the time of writing, there is discussion about a fixed costs regime in France.

### Recoverable costs

The losing party usually pays a proportion of the winner's costs. The amount of recoverable costs depends on the complexity and length of the case. Case law suggests that for a two-day trial, recoverable costs will not usually be more than \$6,000, and for a week's hearing the winning party is unlikely to recover more than \$12,000 of its costs. However, winning parties should appreciate that recovering anything more than a few thousand dollars in France is fairly rare.

<sup>3</sup> All figures are for guidance only and based on a Euro/U.S. Dollar exchange rate of about 1.74. Actual amounts may vary.

# France - Privacy

## Privacy law

According to Article 9 of French Civil Code, "everyone has the right to respect for his private life". The right of privacy also takes force from Article 8 of the European Convention on Human Rights, which states that "everyone has the right to respect for his private and family life, his home and correspondence." However, this right is balanced by the right of freedom of expression, provided for by Article 10 of the European Convention, as well as Article 11 of the Declaration of Human Rights of 1789, quoted in the preamble of French Constitution of 1958.

## Private information and the public interest

The scope of privacy includes any personal information related to the field of health, religion, love life, sexuality or finance. However, the disclosure of such information will not be considered per se (automatically) as a violation of privacy. This will only be the case if:

- the information concerns intimate facts, and
- the information has been gathered thanks to a meddling in the private sphere of the defendant, who intended to keep it secret.

French courts assess, in each case, if the right to respect to private life is violated or not according to the personality of the claimant and to the context.

### The type of claimant

Protection of private and family life is granted to anyone, including public figures. However, as well as in Germany and in the UK, the limits of the protection granted to notorious claimants are less strict than to ordinary citizens. Indeed, in some cases, private life may be intimately linked to public life: the family life of a prince may be commented on, as it corresponds to a legitimate curiosity of the public; the private life of a politician may be revealed, since it may have consequences on the way the country is led. The same rule applies to photographs.

Private life of anonymous citizens may also be depicted, as far as it is in connection with reports about specific events of public

interest, in which case the right of information prevails over the right to respect for privacy.

### Agreed disclosure

The voluntary disclosure of facts related to intimate life prevents the claimant from bringing any action against a new disclosure of the same facts. But this is subject to the right of oblivion (see below). In general, the more a person seeks publicity about a particular area of his life, the less privacy protection that person will have in that area.

### Information fallen into oblivion

When intimate facts depicted are linked to events which occurred several decades ago, French courts may grant to claimants a right to oblivion, which aims at protecting the secrecy of the past and the quietness of the life of someone who decided not to dedicate himself to public affairs. This could be applicable, for example, to a claimant who was involved in a criminal case which was in the news 40 years ago. In such a case, the claimant might raise the right to oblivion, which prohibits a new disclosure of the facts.

### Limitation

From a legal standpoint, the limitation period is ten years. As a matter of fact, the more the claimant waits until he brings his action, the weaker his position will be in front of the Court to justify the importance of the damage suffered.

## Jurisdiction and procedure

In contrast to defamation action, the claimant has no choice but to act in front of the civil court, usually composed by three judges. In media cases, claimants used to bring their disputes in front of the civil court (Tribunal de Grande Instance) of Nanterre, as this court was more experienced in this field, and used to be less reluctant to order a higher amount of damages. Today, media cases often brought in front of the civil court of Paris as well as in Nanterre.

### Interim injunctions

A claimant can apply for an interim injunction. The court comprises a single judge. French courts do not hesitate to grant such injunctions when the

information is particularly intrusive. They can even grant an injunction after the private information has been published. In January 1996, nine days after President Mitterrand's death, such an injunction was granted to prevent the further release of a book written by Dr Gübler, President Mitterrand's personal doctor. In this book, entitled "Le Grand Secret" ("The Big Secret"), Dr Gübler revealed that François Mitterrand had cancer since the beginning of the 1980s, that all the medical bulletins published under his presidency - twice a year, to fulfil the undertaking of François Mitterrand when he ran for candidate - were false, and that he was unable to govern for almost a year due to his ill health at the end of his second term. 40,000 copies of the book had been sold on the first day of publication, but the court granted the injunction the following day in light of the way the information had been acquired and the potential distress to Mitterrand's family.

### Trial procedure

Depending on the procedure chosen, it can take about one month to 15 months from start of the claim to the trial. At trial, the court comprises three judges. In contrast to defamation proceedings, the procedure is purely civil and live witness evidence is not permitted. The whole case is decided on the written evidence and legal submissions of the advocates (in writing and in court).

## Remedies

The main remedies are an injunction and damages. So far, damages awarded are relatively low, rarely more than \$30,000. If the application for an interim injunction failed and the publication released, the claimant can ask that part of the judgment ordered will be quoted on the front page of the next issue of the publication.

## Costs

The costs regime is similar to that of defamation (see above).

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